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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)**

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JEREMY DALE ACKERMAN et al.,  
  
Defendants and Appellants.

3 Crim. C065484  
  
(Super.Ct.No. 09F04484)  
  
Sacramento County  
  
White, J.

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
NADINE DANIELLE KLEIN,  
  
Defendant and Appellant.

3 Crim. C067078  
  
(Super.Ct.No. 09F04484)  
  
Sacramento County  
  
White, J.

Defendants Jeremy Dale Ackerman, Johnathan Allan Baker, and Nadine Danielle Klein were involved in the brutal murder of a young man and the theft of his property

from his home. The victim had previously befriended Ackerman and Klein and they used that friendship and subterfuge to gain admission into his home to steal property.

Defendants appeal following convictions for murder (Pen. Code, § 187),<sup>1</sup> robbery (§ 211) and/or burglary (§ 459). Ackerman and Baker were found guilty by separate juries in a single trial. Robbery-murder and burglary-murder special circumstances were found true as to each. Klein's separate jury in that trial was unable to reach a verdict. After a retrial, a second jury found Klein guilty of murder and burglary. She was acquitted of robbery but found guilty of the lesser included offense of receiving stolen property. Klein's second jury found the burglary-murder special circumstance to be true, but found the robbery-murder special circumstance not true. All three defendants were sentenced to life without possibility of parole. We consolidated Klein's appeal with the appeals by Ackerman and Baker.

Ackerman contends: (1) the trial court erred by admitting his confession, because it was obtained without a valid *Miranda*<sup>2</sup> waiver and it was involuntary because the officers exploited his "severe physical pain" from kidney stones, manipulated his sleep-wake cycle to induce confusion and disorientation, made "skillful" suggestions of leniency, and fed him information to induce him to agree with the story that investigators said they would accept as the truth; (2) the trial court erred by refusing to instruct on the need for a logical nexus in the felony-murder instruction; (3) there was insufficient evidence to support the felony-murder special circumstance; and (4) the trial court erred by imposing a parole revocation restitution fine.

Baker claims: (1) the trial court erred by including the "equally guilty" language in the aiding and abetting instruction; (2) the trial court erred by refusing to instruct on

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

the need for a logical nexus in the felony-murder instruction; (3) the trial court erred by imposing a parole revocation restitution fine; and (4) the special circumstance statute, which allowed the jury to use the same facts (burglary and robbery) to establish felony murder and the “enhancing” special circumstances of murder during the commission of burglary and robbery, is unconstitutional.

Klein originally asserted: (1) the trial court erred by allowing the prosecution to admit letters she wrote Ackerman while the two of them were in jail that had sexual overtones and precluding her from introducing evidence that she and Ackerman had a child who died from sudden infant death syndrome; (2) the trial court erred by refusing to instruct on the need for a logical nexus in the felony-murder instruction; and (3) the trial court erred in imposing the parole revocation restitution fine. While this matter was on appeal, we granted Klein’s request for supplemental briefing regarding the sufficiency of the evidence on the burglary-murder special circumstance. Specifically, Klein contends the evidence was insufficient to establish that she had an intent to kill or that she was a major participant and acted in reckless indifference to human life.

We affirm the judgment against Ackerman.

We modify Baker’s judgment to include a parole revocation restitution fine (§ 1202.45), which is already included in the abstract of judgment despite the trial court’s failure to order it orally. We otherwise affirm the judgment against Baker.

We affirm the judgment against Klein.

## **THE ACKERMAN AND BAKER APPEALS**

### **FACTUAL AND PROCEDURAL BACKGROUND**

The prosecution charged defendants with the murder of James (Jim) Arthur (§ 187), burglary (§ 459), and robbery (§ 211). The information alleged two special circumstances, that the murder occurred during the commission of a burglary (§ 190.2, subd. (a)(17)(G)) and a robbery (§ 190.2, subd. (a)(17)(A)). The information further

alleged that defendants voluntarily acted in concert and entered an inhabited dwelling during commission of the robbery. (§ 213, subd. (a)(1)(A).) It was further alleged that, in committing the murder and robbery, Ackerman used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)), and Baker used a handgun and deadly and dangerous weapons -- a knife and gardening shears (§§ 12022, subd. (b)(1), 12022.53, subd. (b)).

## **PROSECUTION EVIDENCE**

### **Evidence Presented to Both Juries**

In June 2009,<sup>3</sup> the victim, age 23, was staying at his mother's house in midtown Sacramento while she was in Panama. When his mother was unable to reach the victim by telephone, she asked a neighbor to check on him. The neighbor discovered the victim's decomposing body in the basement bedroom of his mother's house on June 10.

The pathologist opined that the victim had been dead about a week by the time he was discovered. The victim, who used the basement as his bedroom, was lying on the bed, clothed, and partly covered by a blanket. An extension cord was wrapped around his ankles, looped and tied around his right elbow, and wrapped around his neck four times. Painter's tape was also wrapped around his neck. A T-shirt covered his head. Under the T-shirt were paper towels folded against his face and a sock over his nose and mouth. Bloodstains were on the pillows, floor, and doors.

When the victim's mother returned home, she determined the following items were missing from her home: the victim's white Apple MacBook laptop computer, his cell phone, two 1980's vintage bottles of wine, and a \$250 check made payable to the victim.

Klein's friend, Maegan Ruiz, testified she spent the night with the victim and the victim's boyfriend a couple of days before the victim died. The next morning, Klein

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<sup>3</sup> All dates discussed herein took place in 2009.

needed gas money, so the victim drove Ruiz to an apartment where Klein was with her boyfriend, Ackerman. Ackerman was acquainted with the victim. While Ackerman stayed behind, the victim and Ruiz drove Klein to a gas station. Klein asked if the victim wanted to “hang out” later, and the victim gave her his cell phone number.

Phone records showed phone calls and text messages between the victim’s cell phone and a cell phone shared by Ackerman and Klein (the Ackerman/Klein phone) on the days leading up to and including the day of the murder -- June 1, June 2 and June 3. As will become clear, the crimes occurred in the early morning hours of June 3.<sup>4</sup> Other phone records showed communications between the Ackerman/Klein cell phone and Baker’s cell phone during the late hours of June 2 and early morning hours of June 3, including the time when the crimes were committed.

On June 1 around noon, there were two calls from the Ackerman/Klein phone to the victim’s phone.

On June 2, at approximately 2:40 a.m., the victim received a text message (text) from the Ackerman/Klein phone. The text identified the sender as “Nadine [Klein], . . . Jeremy [Ackerman’s] girl.” The text said Ackerman and Klein were “chillin” in her car, “smokin a bowl and i just thought bout u sayin hit u up. So what good if you’re not bus.” The victim invited them over and thereafter received a text from the Ackerman/Klein phone, “I have to sell the last of this shiv [(shit)]. Lol other than my personal sack I was gonna blow wit u if u got a pipe.” The victim replied he did and said to call his cell when they arrived.

At 3:54 a.m., the victim texted to ask whether “u guys” were still coming over. The answer was yes.

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<sup>4</sup> We take judicial notice that June 3, 2009, the date of the murder, was a Wednesday. (See <<http://tinyurl.com/hnsbod7>> [as of Nov. 9, 2016]; Evid. Code § 452, subd. (h); *Hiner v. Olson* (1937) 23 Cal.App.2d 227, 235.)

At 5:10 a.m., there was a call from the Ackerman/Klein phone to the victim's phone which lasted 26 seconds.

Between 11:30 a.m. and 12:45 p.m., the victim's phone received a text from the Ackerman/Klein phone in which the victim was asked about a "bong" they left behind and, after some back and forth, said they were coming over.

At 1:18 p.m., there was a call from the Ackerman/Klein phone to the victim's phone which lasted 54 seconds, followed by a text at 1:29 p.m., asking where to park. The victim responded, "in back." About 15 minutes later, the victim received a text from the Ackerman/Klein phone stating, "Ran out of gas." The victim asked where, and if they needed help. In response, the victim received a text from the Ackerman/Klein phone stating that they were at an AM/PM and would "bum gas from old lady" but would like some help when they saw the victim. He agreed.

At 1:59 p.m., a text from the Ackerman/Klein phone stated, "Here."

At 2:54 p.m., a text from the Ackerman/Klein phone queried, "Any chance i could take a shower?"

Meanwhile, Klein had called Ruiz and said she wanted to sell some marijuana. Ruiz sent a text to the victim that Klein and Ackerman were trying to sell a "40." The victim responded he needed to save his money.

Later on June 2, at 8:21 p.m., a text from the Ackerman/Klein phone to the victim said, "I owe my connect 30 bucks and need to sell this." The victim responded he could not help, he did not know "anyone else but u and maeg who smokes," but "if i hear anything i'll let u know."

Minutes later, Ruiz texted the victim, "Hey they have 20 now wat if i paid u back wit interest on fri i get my check." The victim responded, "i'm not spending more \$," and Ruiz replied, "Ok."

At 9:20 p.m., there was a call from the Ackerman/Klein phone to the victim's phone that lasted 76 seconds.

Between 10:46 p.m. and 11:26 p.m., four calls were made between Baker's phone and the Ackerman/Klein phone, each lasting between one and five minutes. The calls made at 10:46, 10:59 and 11:10 p.m. were made from Baker to the Ackerman/ Klein phone. The call at 11:26 p.m. was made from the Ackerman/Klein phone to Baker's phone.

At 11:57 p.m., a text from the Ackerman/Klein phone to the victim's phone said, "Guess ur not givin me the money u promised." The victim texted back, "not at the moment. if games are returned, i would easily say yes."<sup>5</sup> The victim then received a text from the Ackerman/Klein phone stating, "Wow i was nothing but nice to u and I would a gave u ur games if i seen them." The victim texted back, "ask me a different day . . . tonight is not the best time right now. okay. don't take it the wrong way."

At 12:07 a.m., a text from the Ackerman/Klein phone to the victim stated, "Shiv i dropped jeremy off so i could FUKIN help u out but ur being like this." At 12:26 a.m., a text from the Ackerman/Klein phone stated, "So you gonna just spend the night alone?" That was followed by a text a minute later from the Ackerman/Klein phone asking the victim, "U okay."

At 12:28 a.m., there was a phone call from Ackerman/Klein's phone to the victim's phone that lasted four minutes 21 seconds.

Beginning at 1:33 a.m. on June 3, there was the following exchange of text messages between the Ackerman/Klein phone ([A/K]) and the victim's phone:

[A/K]: "Hey dude guess wat dont mean to bother u."

[VICTIM]: "yes whats up?"

[A/K]: "I found something."

[VICTIM]: "what did u find?"

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<sup>5</sup> As we discuss *post*, the victim accused Ackerman of stealing video games from him earlier.

[A/K]: “U should know already but DAMN im trying to be nice and make things rite.”

[VICTIM]: “thank you!”

[A/K]: “Ya i empty my hole trunk for u.”

[VICTIM]: “is there any chance i can get them 2night? i can give u extra gas money” and “i really appreciate that.”

[A/K]: “I only found 3 games.”

[VICTIM]: “3 are better than none. thank you so much.”

[A/K]: “U still home alone? I need to smoke a bowl i got a new pipe and i dont smoke alone but I know how much these games mean to u so i will.”

[VICTIM]: “i am going to an atm now, so u’ll have money in hand when u get here. yes, i’m alone.”

[A/K]: “No problem wat so ever!! U have the gas money on u already this time?” and “Cool to smoke.”

[VICTIM]: “none” and “yes.”

[A/K]: “where should i park and how long till i should head to u?”

[VICTIM]: “you can leave whenever. the atm is only 8 blocks away. park in back or in front if you want. my side of the street is vacant of cars.”

[A/K]: “Okay please dont ditch me being downtown this late at night scares me.”

[VICTIM]: “i wouldn’t ditch u, thats not something i would do. i promise.”

[A/K]: “Okay call u wen im outside or down the street okay.”

[VICTIM]: “k.”

This exchange ended at 1:50 a.m.

At 2:31 a.m., Baker’s girlfriend, Royanna Peterson, texted Baker, “Be careful and come home safe. Royanna love John B. forever and for always.” Peterson testified she and Baker were engaged at the time, and this text was a “wifely” thing she did whenever he left the house except when he went to work. At the time of trial, Peterson and Baker

were no longer a couple. Peterson sent another text message to Baker at 3:20 a.m., asking “What u doing? Royanna love John B. forever and for always.”

At 2:41 a.m., Baker made two calls to the Ackerman/Klein phone lasting 18 seconds and 59 seconds. Cell tower records indicated the two phones were not in the same location when the calls were made. At 2:41 a.m. and 2:43 a.m., the Ackerman/Klein phone made two calls to the victim’s phone lasting 25 seconds and one minute 14 seconds.

Beginning at 2:51 a.m., the following texts were sent between the Ackerman/Klein phone and Baker’s phone:

2:51 a.m. -- [A/K]: “*We’re* upstairs bak door unlocked wait in the basement.”

(Italics added.) The same message was sent a minute later.

2:54 a.m. -- [BAKER]: “You still upstairs?”

2:55 a.m. -- [A/K]: “Yes.”

2:58 a.m. -- [A/K]: “U in side yet”

2:59 a.m. -- [BAKER]: “Wa.”

3:00 a.m. -- [BAKER]: “Keep him up there”

3:00 a.m. -- [A/K]: “okay ill bring him down in a min *be ready okay.*” (Italics added.)

3:01 a.m. -- [A/K]: “Okay tell me when.”

3:01 a.m. -- [BAKER]: “Ok.”

3:09 a.m. -- [A/K]: “He wants to go downstairs rite now.”

3:11 a.m. -- [A/K]: “Okay? He dont wanna stay up here *be ready.*” (Italics added.)

Seven minutes elapsed before the next series of texts. Beginning at 3:18 a.m., the following texts were sent between Baker’s phone and the Ackerman/Klein phone:

3:18 a.m. -- [BAKER]: “Ok i guess.”

3:18 a.m. -- [A/K]: “Tryin to keep him up here.”

3:19 a.m. -- [A/K]: "*Comin now.*" (Italics added.)

3:22 a.m. -- [A/K]: "*U need to keep him quick [sic: quiet].*" (Italics added.)

3:24 a.m. -- [A/K]: "*Turn on music or something.*" (Italics added.)

3:26 a.m. -- [A/K]: "Doors locked."

3:26 a.m. -- [BAKER]: "Come here."

At 3:29 a.m., Peterson called Baker's cell phone. The call bounced off the cell tower on J Street (near the victim's location). Peterson testified that she asked what Baker was doing. He replied, "I'm downstairs." He did not say where he was downstairs. The call lasted nine seconds. Peterson said she did not hear any background noise.

At 3:30 a.m., according to the records, Baker checked his voicemail.

Beginning at the same time the following series of text messages were exchanged between the Ackerman/Klein phone and Baker.

3:30 a.m. -- [A/K]: "Send jeremy up here *to help me.*" (Italics added.)

3:31 a.m. -- [A/K]: "*Shut him the FUK up.*" (Italics added.)

At 3:52 a.m., the Ackerman/Klein phone made an 11-second call to the victim's phone.

At 3:58 a.m., Baker called Peterson.

Between 4:00 and 6:00 a.m., Ackerman made phone calls to friends Ronald Dillon and/or his girlfriend, Valine (Valerie) Contreras. Dillon testified he had trouble remembering but thought Ackerman said he had run out of gas and was in the Kaiser Hospital parking lot with nowhere to stay.

At 6:38 a.m., Baker texted his employer/uncle Kevin Baker that "I'm not coming in today. I have to take my son to the doctors to be circumcised. I'll be back to work tomorrow."

At 7:37 a.m., Baker's phone received a call from the Ackerman/Klein phone, but the call was not answered.

At 8:27 a.m., two phone calls were made from the Ackerman/Klein phone to the victim's phone; they went to voicemail.

At 9:21 a.m., Peterson called Baker. At 9:28 a.m., Peterson sent a text to Baker that "The garbage people are here. Royanna Love John B. Forever And For Always." At 9:28 a.m., Baker called the Ackerman/Klein phone but the call was not answered. Thereafter, many calls were made between Baker and the Ackerman/Klein phone, with Baker initiating most of them.

According to Dillon, on the morning of June 3, Ackerman and Klein brought a white Apple laptop computer to him. Dillon had been interested in buying a computer. They said they got it from a friend who needed money. Dillon did not buy it because he did not like Apple computers. Dillon helped Ackerman and Klein get a motel room.

Ruiz testified that she called and texted the victim during the day on June 3, but received no response.

On June 5, someone dialed \*228 twice on the victim's cell phone. Among other things, \*228 can be used to reprogram a phone with a new number.

On June 6, Ackerman sold four PlayStation 2 games -- Tekken Tag Tournament, Thrillville Off the Rails, Dance Dance Revolution, and Soulcaliber II -- to the GameStop on Arden Way and received \$5.70. The victim had owned the same games.

On June 10, the victim's body was discovered.

On June 12, police received from a citizen a plastic bag containing a towel and knife with blood and pieces of flesh, which the citizen's wife had found on the street on June 3, while she was jogging. They had put the bag in their garage while they went out of town. No fingerprints were found on the knife. Ackerman, Baker, and Klein were later excluded as sources of DNA found on the knife, but the victim was a potential source. Ackerman could not be excluded or included as a source of a DNA mixture extracted from the screws on the knife handle.

On the afternoon of June 12, police arrested Ackerman and Klein at a welfare office and impounded Klein's car. Under the front passenger seat of Klein's car, police found a check from the victim's mother to the victim for \$250, dated June 8 and bearing a signature on the back.

Police took Baker into custody around midnight on June 12. A detective interviewed Peterson (Baker's girlfriend) at the police station and told her Ackerman and Klein had also been taken into custody. She denied knowing Ackerman. Peterson said Baker had been at home after work throughout the previous week and did not leave. The detective then put Peterson in an interview room with Baker. The room was equipped with a secret recording device. Much of the audiotape of their meeting was inaudible, but the detective heard Peterson say "Jeremy and Nadine are here too," and she (Peterson) needed to review reports to "get [her] shit straight." Peterson testified that she later got her stepmother, who worked in the records department at the Sacramento Police Department, to read police reports to her about the case. Peterson also read paperwork about the case that she received from Baker's grandmother. Peterson testified she did not recall telling Baker that she needed to read the paperwork to "get [her] shit straight." She claimed she read the paperwork, which included phone and text message information, to find out what was happening, not to "get her [shit] straight."

On June 13, police searched Baker's apartment and found a loaded revolver with human blood on the muzzle and inside the barrel. DNA testing of the blood excluded Ackerman, Baker, and Klein as sources but included the victim as a potential source.

Blood found on clothing belonging to Ackerman, Baker, and Klein did not reveal any major contributors of DNA other than defendants themselves, except that a minor partial DNA sample from the front pocket of Baker's jeans was consistent with the victim's DNA and the victim was included as a possible contributor.

Klein's fingerprint was found on the interior of the basement door leading outside. A shoe impression found on art pad paper was consistent with Ackerman's shoe.

The pathologist who conducted the autopsy opined the victim died of multiple sharp force injuries, about a week before he was discovered on June 10. The body was decomposed, but the pathologist was, nevertheless, able to count 176 sharp force injuries. The victim had a minimum of 21 stab wounds to his head and an incised wound to the top of the head. He had multiple side-by-side sharp force injuries to his skull which could have been made with scissors or shears such as the gardening shears found at the scene. At least one of the injuries penetrated the interior of the victim's skull. There were numerous stab wounds around the eyes, and both eyes had ruptured. A complex fracture on the left side of the skull penetrated the skull. The victim had stab wounds all over his back, hips, buttocks, and left thigh. The pathologist counted 128 stab wounds to the back, left hip and shoulder. Stab wounds penetrated the victim's left lung, heart, diaphragm, ribs, left kidney, and left hip bone. He had numerous sharp force injuries to his hands and wrists, consistent with defensive wounds. Decomposition prevented the doctor from determining whether there was any asphyxiation. Toxicology tests showed methamphetamine, amphetamine, and marijuana in the victim's system.

#### **Ackerman's Confession Introduced in Evidence to His Jury**

Ackerman's jury saw a redacted video recording of the June 12 interrogation of Ackerman by police detectives that took place after Ackerman and Klein were arrested at the welfare office. The following evidence is from that interrogation.

Upon entering the interview room, a detective noticed Ackerman was holding his side, asked Ackerman if he was sick and handed him a bottle of water. Ackerman said he had kidney stones that were "bothering" him. The detective said, "That's pretty painful, huh? Drink some water," and said he would be back. Ackerman asked if he could talk to his girlfriend when they were done, and the detective said yes, and he would be back to "let you know what we're talking about. Couple different things. Nothing big." This exchange took place around 7:10 p.m.

At 7:19 p.m., two detectives entered the interview room. After asking for basic biographical information, one of the detectives told Ackerman they wanted to “talk about a couple of things,” but before talking he wanted to read Ackerman his rights and asked, “Okay?” Ackerman replied, “Okay.” At 7:20 p.m., the detective read Ackerman each of the *Miranda* rights, one at a time, and asked Ackerman if he understood after each right. Ackerman replied, “Yes” and gave an affirmative head nod each time. The detective asked, “Why do you keep holding your side?” Ackerman said, “Because it hurts,” “my kidney stones haven’t passed.”<sup>6</sup>

The detective asked how long Klein had been Ackerman’s girlfriend. He said about three years.

The detective asked if Ackerman had any friends downtown. Ackerman said he had a friend, “Jim,” who lived downtown, but he did not know whether Jim still lived there, because Jim was going to school in the Oakland area. He said he had known Jim “[p]robably a few years.” Ackerman said he last saw Jim the week before. When asked to talk “about that,” Ackerman asked, “Is there a reason for all these questions?”<sup>7</sup> The detective said they would get to it, and they were there to talk about the truth. Ackerman said he understood but then added, “I’d just like to know the reason for all your questions.” The detective said they were doing an investigation, and he believed Ackerman knew the reason. The detective added, “And I mean things could be better. Things could be worse. Okay? But the truth is what we’re after.” Ackerman responded,

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<sup>6</sup> The portion of the interrogation between the reading of the rights and this question and answer was redacted. This question and answer came approximately two minutes after the *Miranda* rights.

<sup>7</sup> The transcript says, “Is there a reason for all *this conversation*?” (Italics added.) The parties say the same in their briefing. In our review of the recording, it is clear Ackerman asks, “Is there a reason for all *these questions*?” (Italics added.) Thereafter, he followed up by saying, “I’d just like to know the reason for all your questions.”

“Okay.” The detective then said, “let’s talk about the last time you saw Jim” and asked, “What happened that night?” Ackerman said it was “hard” for him to talk about the last time he saw Jim, because he was “scared that these people would come after me.” The detective said, “We’re here to help, too. Okay? That’s what the police are for. All right? If there’s some kind of protection that you’re going to need or relocation or assistance, we understand that. We can help you with that.” The detective also said, “we’re not here to get you into any kind of harm. All we’re asking for is the truth. Tell us what happened out there.”

Ackerman said he, his girlfriend (Klein), and an old high school friend “John” (Baker), whose last name Ackerman claimed he did not know, were “hanging out” at Jim’s place, and the three males were smoking methamphetamine. Ackerman said Baker “went crazy. And he just started stabbing [Jim]. Then he kept pointing the gun at me.” Ackerman knew Baker had a gun but did not know Baker had the gun with him that night.

Ackerman said he thought Baker was set off by learning that Jim was gay. Ackerman explained that the topic of Jim’s sexual orientation came out in conversation while the three were visiting with Jim, and a little while later is when “he [(Baker)] did that.”

Baker grabbed an electrical cord that was in the room, pointed it at Ackerman, and told him to tie up Jim. Ackerman said he “did what he wanted me to. I didn’t want to die.” Baker made Ackerman put a sock in Jim’s mouth. Baker told Ackerman to hand him a roll of tape that was on the floor. Baker then wrapped the tape around Jim’s face while holding the gun. As Baker put a pillowcase over Jim’s head, Ackerman tried to back away, but Baker pointed the gun at him and said, “come here and help me with this.” Ackerman “did what he told me to” and pulled the pillowcase over Jim’s shoulders. Ackerman then backed away and Baker started stabbing Jim.

Ackerman said he went to the bathroom upstairs, then came back downstairs because “I didn’t want him to shoot me because he still had a gun in his hand. And I was just so scared.”

Baker was stabbing Jim with a folding knife that belonged to Ackerman. Ackerman said he had misplaced the knife and figured he must have left it at Jim’s place on a prior visit. He said Baker must have happened upon it.

Ackerman stood by the bed while Baker stabbed Jim a couple of hundred times. Baker “was asking [Jim] if he liked it. And he kicked him and he said [to Ackerman], do anything and you’ll be next.” Ackerman said Baker “had a gun to me. And I was trying not to watch it. [¶] . . . [¶] I was looking away. [Jim] was a good friend of mine.”

Ackerman looked away when he saw Baker was going to stab Jim with gardening shears. Baker threw the shears under the bed. Ackerman said Klein was in the room, then went upstairs for a while, then came back down. When asked again why he did not run away, Ackerman said, “I was scared because he said that they were going to come after me.” When asked about being able to go to the bathroom upstairs but not leaving, Ackerman said Baker was upstairs when Ackerman went upstairs to the bathroom.

Ackerman said Baker “stole things” from Jim after the stabbing. Later, Baker took Jim’s laptop computer, PlayStation, and video games. Ackerman admitted he also took some of Jim’s video games. They also took “a big huge stack” of CD’s and wine, which they placed in a duffel bag. Ackerman said he carried the duffel bag out at gunpoint.

After leaving, they drove to Baker’s apartment. As they drove, they saw a police car. Baker threw the knife out the car window on Engle Street. They brought the stolen items into Baker’s home. Baker’s girlfriend was there and saw them unloading things they had taken. She did not ask about the stolen items. Ackerman and Klein left with some of the stolen items to sell. Ackerman said Baker let him and Klein leave because they told Baker they would not say anything. Ackerman said Baker made them take the

laptop, which Ackerman and Klein sold on the street. Ackerman said Baker later kept calling asking for his “cut.”

Ackerman said he did not call the police because he was scared of Baker because Baker was in the Aryan Brothers.<sup>8</sup> He said he was still scared.

The detective asked Ackerman if he had stabbed Jim and Ackerman denied having done so, but then he admitted he stabbed the bound victim but said Baker made him do it. Ackerman could only stab Jim twice. Thereafter, he dropped the knife, and Baker picked it up.

Ackerman admitted he stole two video games from Jim when he and Klein had visited earlier. He also said he had taken a couple other games prior to that. Jim confronted Ackerman about the stolen games, and he denied it. Ackerman told police he had intended to return the games but admitted he already sold the games he had taken earlier to a GameStop store.

Ackerman said that sometime after dark on the Tuesday before the murder, he went to Baker’s apartment. There, they smoked crack.

Ackerman told the detectives Jim knew that Ackerman and Baker were coming over that night. Ackerman said he was “out of it,” so he had Klein send Jim a text that Ackerman was returning two games he had taken earlier. Ackerman said he was not expecting any money from Jim, not even gas money, and did not intend to rob Jim when they visited Jim later. Ackerman denied telling Klein to text that she was coming alone. Originally, Klein was planning to go alone, but then they talked to Jim on the phone and told him that all three were coming. They asked Jim if he would be alone because Ackerman did not want to see Jim’s friend, Ruiz. Ackerman said he had cheated on Klein with Ruiz.

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<sup>8</sup> A detective testified the Aryan Brotherhood is a violent, White supremacist group.

Klein was present in the room during some of the assault. She was also “upstairs for quite a while.” Baker told Ackerman to clean up the blood.

Ackerman first said he had not seen Baker since the night of the murder but later admitted he and Klein had seen Baker. Ackerman said Baker had Jim’s cell phone and Ackerman had not used it. Ackerman said he and Klein were too scared to call the police after leaving Baker’s apartment.

At approximately 12:37 a.m., the interrogation resumed after a break. The detective asked Ackerman if he had been sleeping. Ackerman said he could not sleep because he was too upset about decisions he had made.<sup>9</sup> The detective confronted Ackerman with statements they said had been obtained from Klein.

The detective told Ackerman, “All right. Listen, we’re getting a little bit different version of what led up to this from [Klein]. Okay? A little bit different. Okay? And you know, I want to give you the benefit of the doubt. Okay? I want to believe what you’re telling us. But when we have [Klein] telling us a different version, and the phone calls and the text messages telling us a different version, I tend to believe her version over your version. Okay? [¶] . . . [¶] . . . And I’ll tell you what her version is. Okay? That you guys may have gone over to see Jim, maybe to play video games and hang out. But the ultimate goal was to rob him. And that you and [Baker], in fact, talked about it before you went to see Jim. And I don’t think she’s lying about that. Is she telling the truth? Ackerman replied, “Yes.”

Ackerman said he told Baker that Jim would be an easy target. To Ackerman’s knowledge, Baker did not know Jim. The detective said he was thinking Ackerman knew Baker went there with a gun but Ackerman denied it, saying, “I didn’t think he was going to bring it.” Ackerman continued to say Baker forced him to tie up Jim at gunpoint.

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<sup>9</sup> We discuss the sequence of breaks as well as this part of the statement in more detail in the discussion related to the admissibility of Ackerman’s statement.

Ackerman said before they went over to Jim's house, they talked about "possibly" tying Jim up "if they had to," but there was really no plan. Ackerman said he did not think "anything like this" would happen. He said, "I just [wanted to] take a few things . . . when he wasn't looking kind of thing." Ackerman said he got scared when Baker pulled out the gun. Ackerman said, "I never wanted to rob him like that."

Ackerman repeated that he thought Jim got stabbed because he was gay. He had told Baker about Jim's sexual orientation before they went to his house, but it did not seem to bother him. The topic came up later during conversation while they were at Jim's house, and Baker's mood changed. The mood change was not a "sudden change. It was like a slow reaction to it . . . ."

Ackerman stated he "just figured . . . we can make a few dollars on like a couple games." When asked how he thought he would get away with it without killing Jim since Jim knew Ackerman, Ackerman said he did not know. "I wasn't thinking about that part." He said he did not want to tie the victim up or "rob somebody like that."

By this time it was 12:52 a.m. The detective left the room, but returned three minutes later.

When the detective returned, Ackerman immediately told him, "we didn't go over there to rob him, rob him." "We were going over there to like hang out with him. [¶] . . . [¶] And you know see if there's anything that we could take. But we weren't going to like rob him. Like I don't know -- like anything like that." When they had talked about tying Jim up before going to his house, they had only talked about it "jokingly."

When asked why he thought Baker stabbed Jim so many times, Ackerman said he thought it was because Jim was gay. Ackerman said Baker seemed to enjoy stabbing Jim, asked Jim if he liked it, and called him "faggot" multiple times.

Thereafter, the detective again stepped out of the room. As the detective was leaving, Ackerman told the detective “I’m being honest with you. I want you to know that. [¶] I want you to know that I’m scared.” It was 12:59 a.m. at that point.

At 2:18 a.m., the interrogation resumed with the detective confronting Ackerman with more information. The detective told Ackerman “those people say they don’t know you. John [Baker].” He then asked a series of questions regarding Ackerman’s relationship with Baker. Ackerman said recently, he had seen Baker a week before the murder at a Burger King, then on the street and then “that night.” Ackerman claimed Baker called them that night and asked if they wanted to smoke. At some point after he and Klein arrived at Baker’s apartment, Ackerman and Baker went to buy some dope and then returned.

After another break, the interrogation resumed at 2:42 a.m. The detectives confronted Ackerman with additional information explaining that they had brought more people to the police station and talked to them.<sup>10</sup> The detectives told Ackerman they now thought Klein had entered the residence by herself. Ackerman interrupted and said “No. We all went in there.” The detectives then explained they had looked at the text messages and it was clear to them what was going to happen. When the detective mentioned the text messages Ackerman looked down, sat back and then looked back at the detective. One of the detectives said, “You need to help yourself out. [¶] . . . [¶] . . . And you’re not right now. He again explained they had been talking to other people “and it ain’t looking good for you right now. I’ll be honest with you. Unless you can tell me what happened and why it happened.” Ackerman responded, “What do you mean it’s not looking good for me? I don’t understand how everything all of the sudden’s changed. And you’re bringing people in.” The detective explained, “We’re bringing in as many

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<sup>10</sup> By this point in time, police had brought in Baker and Peterson and found the gun in Baker’s apartment.

people as we can to find out what the truth is because I don't believe you're being truthful with us right now. The way you lay things out I don't think are the way things happened that -- or that early morning on June 3rd." Ackerman insisted he had told them what happened.

The other detective again referenced the text messages. He told Ackerman, "You guys were sending text messages to Jim, two of them, making sure that he's going to be home alone before you show up. Okay? [Klein] tells Jim that she just dropped you off. So Jim thinks [Klein] is coming by herself. Okay? [¶] . . . [¶] [A]nd then we hear stories from a different person that's down here right now telling us that, in fact, [Klein] walked to the basement and took Jim upstairs of the house. I don't know to do what. But took him upstairs. That's when you and [Baker] entered the back door of the basement." The detective then asked Ackerman, "Is that true" and Ackerman responded, "Yeah" and nodded affirmatively.

Ackerman said he and Baker were going in to grab things and then leave. Klein took Jim upstairs "so he wouldn't see us," to "distract him." They were hoping to go in and grab some games and leave before Klein and Jim came back down. One of the detectives asked Ackerman what happened when Jim came downstairs and said, "What happened on the stairs?" "Something happened. The physical evidence doesn't lie." Ackerman hesitated and said, "[Jim] got knocked down." The detective asked, "By who?" Ackerman replied, "By me." The detective asked with what Ackerman hit the victim; Ackerman hesitated and said he did not remember. The detective asked whether Ackerman used a baseball bat, Ackerman said he had not. The detective then asked whether he had used a skateboard, and Ackerman said that was what he had used to hit the victim, causing him to fall down. Just before hitting Jim, Ackerman had been putting items in a duffle bag they found there. After Jim was knocked down, Baker pulled out the gun and put the gun in Jim's mouth. Baker then walked Jim to the bed. Ackerman tied Jim up at Baker's direction.

Ackerman said Klein was upstairs but he did not know what she was doing. Klein then entered the basement during the stabbing. Baker looked like he was enjoying stabbing Jim and called him a “faggot.” Baker went upstairs, returned and stabbed Jim with gardening shears, smiling as he did so. Ackerman said he did not leave when Baker went upstairs because he was scared.

When asked why they got together with Baker that night, Ackerman said Baker had called them out of the blue. Ackerman said Baker just wanted to talk. Ackerman thought they received this call when he and Klein were leaving Jim’s house earlier.

Ackerman said that while they were at Baker’s apartment earlier, he and Baker went for a walk to get some meth and discussed taking Jim’s property at that time. Ackerman told Baker they would just “go in and go out,” “just grab the games and whatever we could grab and leave.” They also talked about having Klein distract Jim. At one point while they were at Baker’s apartment, Baker brought out his gun from his room, but then went back into the room with it. Ackerman said he did not think Baker was going to bring the gun with him to Jim’s house.

Ackerman explained that after they arrived at Jim’s house, Baker text messaged Klein while they were waiting downstairs and asked if she was upstairs.

Ackerman denied that Baker was the muscle for the robbery. He said they brought Baker for “more hands” and because Baker said he needed money.

The redacted version of the interrogation played to the jury concluded at 3:25 a.m.

The detective testified that, after the interrogation, he allowed Ackerman and Klein to visit together alone in the interview room, but they spoke in whispers unintelligible on the recording.

### **Baker’s Confessions Introduced in Evidence to His Jury**

A few hours after his arrest on June 12, Baker asked the patrol officer who was transporting him if he was a religious man. The officer said he went to church when he

could and tried to do right, and “if that doesn’t get me in, then I’m out of luck.” Baker responded, “I guess I kind of sealed my fate now.”

Before his arrest, Baker made incriminating statements to people he knew. Baker’s cousin, Tyler Chalais, testified that Baker said he committed a robbery with Ackerman, whom Chalais knew and considered to be “shady.” Baker said the victim was named Jim and lived downtown. Chalais realized Baker was talking about Jim Arthur. Chalais had been to Jim’s home a few times, knew he was gay, and described him as a “cool dude.” Baker told Chalais that Klein had gone into the home first, left the door unlocked, and led Jim upstairs. Baker and Ackerman then entered. When Jim came downstairs, Ackerman hit him in the face with a skateboard. Baker pointed a gun at Jim and told him not to move. They tied him up. Ackerman stabbed him a couple of times with a knife. Baker said Ackerman was not doing it right, so Baker took the knife and repeatedly stabbed Jim. They also stabbed him with gardening shears they found in the basement. They stabbed Jim a lot, and his body was “pretty messed up.” While they stabbed Jim, Klein grabbed Jim’s phone, laptop, and PlayStation, and then they left. They threw the knife out of the car. Baker threw his clothes into a dumpster. Baker said Ackerman and Klein got the property, and Baker “didn’t see a dime from any of it.” Chalais saw a couple of bottles of old wine in Baker’s home. Chalais looked at them; they were from the 1980’s. Baker did not give a reason for the robbery, but Chalais heard elsewhere that Jim had accused Ackerman of stealing some video games.

Baker also made admissions to his neighbor, Tim Nelson, whose ex-wife knew Peterson, Baker’s girlfriend. One day, Baker asked to borrow some PlayStation games and said he was meeting someone and they were going to rob someone downtown. Nelson gave him some video games. The next morning, Baker returned the video games to Nelson and said he had just needed the games to get in the door of the place he went to rob. Nelson was “pretty doped up” on methamphetamine and did not remember exactly when Baker returned. Baker said the robbery “went bad,” and he killed someone.

Nelson did not believe it, because Baker sometimes exaggerated stories. During their later conversations, Baker said he committed the robbery with “Jeremy and Nadine,” and they robbed a “gay guy” who was supposed to have “like 25,000 in a bank account or something.” Baker wanted money to help support his baby. Klein watched the door during the robbery, and they took a PlayStation 2. Baker said they “tried to torture the guy into his money,” but they went too far, and he died. They stabbed the victim, removed his eyes, and used gardening shears to cut his spine. Baker said they stabbed the victim “[t]o make him talk,” but “the reason why he was dead [was] because he was gay.” When a story about the murder came on the television news, Baker said “that was the place.” Nelson still did not want to believe his friend Baker was involved. Baker said he later became paranoid about being arrested and threw the PlayStation into the trash. He said the people with whom he committed the murder had “ratted him out.”

Nelson did not contact the police until a week or so before his testimony. He testified he came forward because of his conscience.<sup>11</sup>

Baker’s uncle, Kevin Baker, testified that Baker worked for him as a laborer. He was speaking to Baker about absenteeism from his job when Baker said “he was involved in a robbery gone bad.” Baker explained it happened downtown; a man and a woman were also involved; and the victim had been tied up, hit with a skateboard, stabbed, covered up, and “the body wouldn’t be found.” Baker said gardening shears were used. The victim was stabbed because he “would not shut up.” Baker said they left no fingerprints, and there was nothing to tie him to the crime. Baker said Peterson saw blood on his face when he got home. The uncle did not believe the story because Baker was always exaggerating and making up stories.

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<sup>11</sup> When asked on cross-examination, Nelson denied being romantically involved with Peterson after Baker went to jail. But he admitted he did have sex with her one time. He also said that on some days he has trouble remembering things because he is an epileptic.

After Baker's arrest, the uncle talked to Peterson, who said she had asked Baker not to go to the robbery. Peterson told the uncle she was getting information about the case from her stepmother, who worked at the sheriff's department, and her uncle, who was a CSI on the case.

A detective testified Peterson's "source" was a records clerk in the sheriff's department who was not supposed to have access to police records but could access them.

## **DEFENSE EVIDENCE<sup>12</sup>**

### **Defense Evidence Heard by Both Ackerman's and Baker's Juries -- Testimony of Defendant Klein**

Klein testified in her own defense in front of Ackerman's and Baker's juries as well as her first jury. She was 20 years old at the time of the murder. She was Ackerman's girlfriend and had known him "[a] long time." Klein and Ackerman shared a cell phone registered to Ackerman, though Klein also had a different phone.

Klein was friends with Ruiz. The two began smoking crystal methamphetamine together in 2008, and Klein became addicted. Klein was unemployed. She received money from her parents, but to support her expensive drug habit, she sold methamphetamine for Ron Dillon's fiancée, Valine Contreras, and shoplifted.

Klein said Ruiz introduced her to Baker. Klein testified that she had only seen Baker one time before the murder and on that occasion, he bought drugs from Klein.

Klein resided at her mother's home, but was always with Ackerman. They had no home and sometimes slept in her car. The victim let them spend time, use drugs, take showers, and use his computer at his house.

Klein testified that Ruiz had introduced her to the victim in mid-January. Ackerman had met the victim about a year earlier. Ruiz suggested they go to the victim's

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<sup>12</sup> Neither Ackerman nor Baker testified.

home to smoke methamphetamine because the victim “had money to do it.” The victim paid for the drugs that Ruiz smoked, and Klein became the victim’s supplier. Klein acknowledged she and Ackerman benefited from their relationship with the victim, because he bought drugs from them, which enabled them to get more for themselves; he gave them gas money; and he let them hang out and smoke at his home and use his shower and computer. Klein and Ackerman both liked the victim and had no issue with his sexual orientation.

On Sunday, May 31, Klein went with the victim and Ruiz to a motel, where the victim gave Klein \$60 and she bought methamphetamine for them from Contreras. The victim drove Klein back to a friend’s apartment. Klein asked if they wanted to get together later. Ruiz had to work, but the victim was interested and gave Klein his cell phone number, which she entered into her cell phone.

In the early morning hours of Tuesday, June 2, Klein texted the victim to see if he wanted to hang out. This is the text that started with “Nadine, you know, Jeremy[’s] girl.” He agreed, and Klein and Ackerman eventually drove to the victim’s place sometime in the early morning hours of June 2, where they stayed for a few hours, smoking drugs, eating pizza, and playing video games. Klein and Ackerman left, went to buy more meth from Contreras, and went to the mall.

Klein testified she did not recall texting the victim between 11:30 a.m. and 2:45 p.m. on June 2. She said Ackerman had the phone during that time or it was in the car.

Later, while she was driving, Klein asked Ackerman to see if the victim wanted to smoke a “bong.” Klein later drove to the victim’s house, where she and Ackerman stayed for a few hours, took showers, watched movies, played video games, and used the laptop. Ackerman stepped outside to take an incoming call from Baker while they were at the victim’s house. Klein testified she did not send any texts after leaving the victim’s home on this occasion.

Klein and Ackerman went to Baker's apartment, arriving about one to two hours after he called. While they were there, Ackerman was getting a lot of phone calls and she asked him why. Ackerman told Klein that the victim had accused him of stealing video games. Klein testified Ackerman seemed annoyed, "but that's just how he is when he smokes." They smoked meth with Baker and Peterson. Around midnight, Ackerman and Baker left the apartment for about 30 minutes. Klein said Ackerman had the phone and she was unaware of any texts or calls. She denied sending the texts that said, "Guess you're not giving me the money you promised" at 12:01 a.m.; "I dropped Jeremy off so I could help you out, but you're being like this" at 12:07 a.m.; "So you're just going to spend the night alone?"<sup>13</sup> and "You Okay" at 12:26 a.m. ; the text exchange ending with the text from their phone, "Only found three games" between 1:33 a.m. and 1:50 a.m.; and "Call you when outside or down the street" at 1:50 a.m. Ackerman and Baker returned to Baker's apartment at some point.

While driving around, Ackerman suggested they go back and hang out at the victim's place. Klein testified that she did not really want to go because she and Ackerman had been awake for five days, and she was tired, but she agreed to go because she did not want to argue with Ackerman. Baker did not have a car and Ackerman did not have a license, so Klein drove Ackerman and Baker to the victim's place. Ackerman had the phone. The drive is about 30 minutes from Baker's apartment in Carmichael to the victim's home. On the way to the victim's house, Ackerman and Baker commented that the only nice things the victim had were his laptop and PlayStation, but Klein said she did not think they intended to steal from the victim. She thought they were just going to hang out.

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<sup>13</sup> On cross-examination, Klein admitted she had told the detectives Ackerman told her to write this text. She claimed that statement was not true.

Klein parked behind the victim's place. The victim was outside smoking a cigarette. He looked annoyed and gave Klein money, which she believed was for gas. Klein testified that all four of them went into the basement and smoked. The victim and Ackerman, and possibly Baker, were playing video games. The victim accused Ackerman and Klein of stealing his games. Ackerman and Baker kept calling the victim "fag." The victim asked them to leave. Baker left. Thereafter, Klein, Ackerman, and the victim went upstairs. Klein went to the kitchen area. Ackerman texted on the phone and plugged the charger into an outlet. Klein testified the two phone calls from Baker around 2:41 a.m. occurred after Baker had left. Ackerman told her Baker was calling but did not answer. The victim wanted to make prank calls, and Klein gave him Contreras's phone number.

The victim went downstairs to the basement. Ackerman went to the front of the house and then walked back toward Klein and went downstairs. He left the phone upstairs, still charging. Klein denied sending the 3:18 and 3:19 a.m. texts about keeping the victim upstairs.

After Ackerman went downstairs, Klein heard the victim screaming and pleading, "sorry" and "please stop." Klein heard "guys' voices," which she could not distinguish at that time, "[j]ust screaming and then just like the guys cussing and calling Jim a fag and stuff." Klein testified she "was scared" and "wanted to know what was going on." She testified she texted Baker "something about sending [Ackerman] up there." The text actually reads, "Send jeremy up here to help me." She said she texted Baker "[b]ecause [she] heard his voice." She did not explain what she meant by "help me." According to Klein, her phone indicated Baker did not open the text. The yelling continued for five minutes. The victim was screaming loud enough that Klein thought the neighbors might hear. Klein said she was not sure whether she texted Baker's phone "U need to keep him [quiet]." She denied texting Baker, "Turn on music or something" and "Doors locked." Klein admitted she texted, "Shut him the fuck up." She claimed to have done that

because there was a lot of methamphetamine in the house, and she was afraid someone would call the police.

While she was upstairs, Klein heard someone say someone was “not doing it right,” but she did not know if it was Baker or Ackerman. She testified that she heard Baker threaten Ackerman during the assault, but when asked what kind of threats, Klein testified she could not remember.

Klein went downstairs, but when she got to the basement door, Ackerman told her to stop. At that point, she could still hear “a little bit” of screaming. She saw the victim on the bed and thought he might be dead. After the screaming and yelling stopped, Ackerman took the victim’s duffel bag that was in the basement and filled it with the laptop, PlayStation, video games, and wine. Eventually, all three of them left in Klein’s car.

Klein said she did not know who stabbed the victim. She testified she previously gave false statements to the police that she saw Baker carrying a bloody knife, raising gardening shears over his head, and bringing them down in a stabbing motion. Klein testified she saw Ackerman kick gardening shears, which were on the floor, toward the bed. Ackerman later told Klein he had hit the victim with the skateboard.

On the way back to Baker’s apartment, Baker threw a bag containing the knife out the car window and said something about being afraid they might get stopped for littering. At Baker’s home, the laptop and PlayStation were taken out of the duffel bag and left in Klein’s car. The duffel bag went into Baker’s apartment. Baker put his clothes in a plastic bag in his closet and took a shower. They stayed at Baker’s home until about 5:00 a.m.

Klein denied later exchanging texts with Baker about the laptop or money. She testified that she and Ackerman took the laptop to Dillon’s house but did not try to sell or trade it. She denied knowing that Dillon was interested in buying a laptop. She claimed a man named Mike was “holding on to” the laptop and PlayStation, but he did not buy

them from her and Ackerman. Mike was “looking through the hard drive.” Klein denied knowledge of anyone trying to reprogram the victim’s cell phone. She denied seeing or using the victim’s cell phone after the murder.

Klein said she called 911 twice but hung up because Ackerman argued with her, and she was afraid to report the crimes. Ackerman told her Baker had threatened him. She knew the victim was dead when they left his place. She was scared that Ackerman and Baker would get in trouble. When asked whether she was scared about getting herself in trouble, Klein replied, “A little bit.”

Klein testified she was under the influence of methamphetamine when she was interviewed by detectives after her arrest. She saw a recording of the interview; the drugs made her more talkative than normal. She tried to protect Ackerman and blame Baker. She did the same when she spoke to her mother a few days later, because she did not want her mother to think Ackerman was a killer. She said she did not see who killed the victim.

On cross-examination by the prosecutor, Klein said she lied when she told detectives: That Baker hit the victim with a skateboard after learning he was gay; that the victim fought back with Baker; that Klein left Baker at the victim’s home during the assault; and that she did not go inside Baker’s apartment after they left the victim’s house. When asked whether her version of the events changed after the detectives confronted her with the text messages, Klein testified, “possibly.” She stated her trial testimony was the truth. She did not see the assault. Her statement to police was what Ackerman had told her to say after they were arrested at the welfare office, specifically that she should say Baker had a gun and pointed it at her, forcing her to do things.<sup>14</sup>

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<sup>14</sup> Klein testified that after they were arrested at the welfare office by sheriff’s deputies, she and Ackerman were kept together in a room for 30 minutes and talked about what to tell the police about the murder.

Klein admitted making other incriminating statements to the police, but also recanted those statements during her testimony. She had said she told Ackerman she did not want Baker to come along because she did not trust Baker and he gave her a bad feeling. When asked why she made that statement to the detectives, Klein replied, "I just did." She was then asked, "So no particular reason for that lie, you just lied?" Her response was she did it to shift blame from Ackerman. She told detectives she sent the 12:07 a.m. text on June 3 to the victim about dropping off Ackerman, but testified that she also lied about that because she did not want Ackerman to take all the blame. She admitted she told detectives that she sent the 12:26 a.m. text to the victim asking if he was alone at Ackerman's direction, but claimed that was also a lie. She had told the detectives that they planned to use three of her games as an excuse to visit the victim, but that was a lie. She admitted she told detectives that the victim had accused Ackerman of stealing video games, and Ackerman was tired of being accused, and for that reason wanted to bring Baker. But she testified she had lied about that because Ackerman had told her to tell the police that story when they were arrested at the welfare office.

Klein claimed to have lied when she told police that Ackerman and Baker spoke about wanting to take the victim's laptop and PlayStation on the drive from Baker's apartment to the victim's place. She told the police she had become aware Ackerman was setting the victim up to be robbed on the way to the victim's house, but said that was also a lie; she claimed she said this to the police only because she was "trying to cover for them." When asked how telling the police Ackerman was setting the victim up to be robbed covered for Ackerman, Klein said, "I don't know."

Klein testified she lied when she told detectives that Baker put a gun in the victim's mouth and told Ackerman to get rope. Klein said she never saw a gun before the murder, she never saw anyone with a gun in the basement and the first time she saw the gun was in the courtroom. She denied that Baker's ownership of a gun was the reason for bringing him along with them.

### **Defense Evidence Heard Only by Ackerman's Jury -- Klein's Statements to the Police, Methamphetamine Use Evidence and Evidence About Baker**

Ackerman's jury heard Klein testify that, after the preliminary hearing, Baker gave her a "dirty look" when they were being transported within the courthouse. Baker called Klein a "bitch," and she called him a "bitch." Baker told Klein she would be "taken care of" in prison, which she took as a threat.

Ackerman's jury also heard recordings of Klein's two interviews with police, in which she told multiple versions about what had happened to the victim. Her first statement was made in a patrol car outside the welfare office where she was arrested. After being told she was in custody on minor warrants and being advised of her rights, she said she had been waiting to talk to the city police about the "murder on 22nd Street." She gave two versions, both centered around Baker attacking the victim because he learned the victim was gay. Klein told the police Baker "found out Jim was gay" and "flipped out" and said, "What, were you checking me out all night?" She said Baker and the victim got in a fistfight and then Baker hit the victim with a skateboard. Ackerman was in the bathroom at the time. Klein said she got scared, so she left and then she saw it on television the day before her arrest.

In Klein's first version of the story she gave at the police station, she said she drove Ackerman and Baker to the victim's home. They were all "getting high on meth," but she had been "clean." Baker got into a fistfight with the victim and hit the victim with a skateboard. Klein said she was in the bathroom at the time. Klein became scared and made Ackerman leave with her. Ackerman went back inside to break up the fight but returned to the car and said Baker had a gun and the victim was dead. Baker took some property to make it look like a burglary. Klein went back to the victim's house and picked up Baker. He had a PlayStation and laptop in a duffel bag. He removed his clothes, put them in a plastic bag, and took them to his apartment. He did not have "that much blood" on him. He threw a knife out the car window.

The second version began with the detective's question about whether she was actually there "when this all happened?" She said she was. She said she tried to run out the door and Baker ordered her to "get back in here" at gunpoint. She stood in the laundry room. Baker pointed the gun at Ackerman's head and made Ackerman tie up the victim. Ackerman was crying. She heard the victim screaming. She was crying and asked Baker to stop. He told her to shut up. She said she felt bad for introducing them.

Klein said after the victim said he was gay, Baker "flipped out" and they got in a fistfight. Baker hit the victim in the head with a skateboard. The victim said, "Wait, I didn't mean it." Klein said she thought "Jim might have liked [Baker], but Jim never did anything, not even hit on him or nothing." Klein said she did not want Baker around, because he gave her a "bad feeling," but the victim and Ackerman wanted to hang out with him because Baker had drugs.

Baker put his gun inside the victim's mouth. Baker pointed the gun at Ackerman and Klein and said, "Stop being chicken and you need to help me. This is your fault too. You were here. You'll get in trouble too." Klein said Ackerman did not have the knife and did not stab the victim but he had touched the knife to break up the methamphetamine. When Ackerman tied the victim, Baker told Ackerman that he was "doing it all wrong" and grabbed what was used to tie the victim.

Klein told the detectives that she, Ackerman, and Baker had been hanging out when the victim called around 11:30 p.m. looking for drugs. Baker had drugs but she and Ackerman did not. The victim had never met Baker before but asked Ackerman to bring Baker to the victim's place. When told they had no gas money, the victim said he would give Klein \$20 for gas. The victim gave her the gas money after they arrived.

The victim, Ackerman, and Baker smoked methamphetamine and played video games. The victim said he wanted to buy an eight ball (one-eighth ounce or 3.5 grams) but did not have the cash and would go to the bank. Instead, they stayed and played Guitar Hero while Klein used the victim's laptop.

In discussion it came up that the victim was gay. Baker stopped, had a weird look in his eye, looked at the victim for a while, grabbed the victim's skateboard, said "You've been lookin at me all night," and struck the victim in the head with it. Baker removed a gun from his waistband, pointed it at the victim, and accused the victim of looking at him in a sexual manner. Klein said she did not know Baker had brought his gun with him. Klein tried to leave, but Baker pointed the gun at her and said, "Stop. Don't even think about going outside." She stayed. Baker pointed the gun at Ackerman with orders to get something to tie up the victim. The victim sat on the bed saying he was sorry, but Baker said, "I don't want to hear your bullshit."

Ackerman was shaking. He found a cord and started to tie the victim, but Baker grabbed the cord and said Ackerman was doing it wrong. While Baker finished tying the victim, Klein moved to the laundry area, closer to the door. Baker pointed the gun at her and said, "You're in this too. You're here. Don't even think about leaving." Klein heard the victim screaming and pleading but could not see what was happening from her location in the laundry room. She could see that Ackerman was crying. She was crying and did not leave because she was scared and thought Baker would probably kill Ackerman if she tried to leave.

Baker picked up a duffel bag from the floor, threw it to Ackerman, and told him to "Get all the shit." Ackerman put a PlayStation 2, laptop, video game, and wine in the bag.

Klein knew Baker had stabbed the victim because she saw Baker walk around holding a bloody knife. From her vantage point in the laundry room, she could only see the victim's legs, which were not moving. Baker grabbed gardening shears from the laundry room and raised them over the victim. Klein retreated further into the laundry room out of view. She then heard Baker say, "Now the job is definitely done."

Klein estimated the amount of time that elapsed between the time the victim was hit with the skateboard and the time they left the victim's house was 30 minutes. She

said the victim “screamed for his life for about” 10 minutes and then was silent. Klein assumed the victim was dead but did not go look. She thought the neighbors would have heard his screams.

In this version, Klein told the detectives she took no part in the stabbing and knew Ackerman did not either. Though she could not see him at all times, she knew Ackerman would not do that, and there was no blood on his clothes. Baker called for her to come and help but she did not.

Baker had Klein drive to his home. He said, “If I go down for this, so will you guys, because you were [t]here.” A police car drove behind them. Baker threw a folding knife out the window, then worried the police would stop them for littering. At Baker’s home, they left the PlayStation 2 and laptop in Klein’s car and took the other items in the duffel bag up to his apartment. Baker said he would burn the bag. Peterson was there. Baker took a shower. Baker did not have much blood on his clothes, just spots on his pants and sweatshirt sleeve. He put his clothes in a plastic bag and put it in the back of his closet with the gun. He said he was going to burn the clothes.

Around 4:30 a.m., Baker let Klein and Ackerman leave. Klein did not tell anyone about the murder because she was scared Baker would find out.

Klein told detectives she thought the victim was killed because he was gay and because Baker wanted to rob him. “[E]verything went bad” after the victim said he was gay. Klein said she and Ackerman already knew but she did not tell Baker because she did not think it mattered. Klein said she had only known the victim a couple of months. Ackerman knew him for a few years but the victim had been away at college. Ackerman met the victim through Maegan Ruiz and “Craig,” who were “crystal dealers.” Klein said she warned Ruiz to be scared of Baker because he killed somebody, but she did not say who. Ruiz did not believe it and told Baker what Klein said.

Regarding the text messages, Klein told the police the exchange about owing money and returning video games was between Ackerman and the victim, in part because the victim accused Ackerman of taking his video games.

Klein told detectives she texted the victim about having dropped off Ackerman. The victim had asked her as she was leaving to come back alone to help look for the video games. She asked if the victim was alone because he had called her earlier and said his boyfriend was coming over. Klein said she “guess[ed]” the texts about finding something and asking if the victim was okay were from Ackerman. Ackerman emptied her trunk. Klein first told detectives she did not know who sent the text about finding three games; she later told them Ackerman wrote the message. Though Ackerman did not take the victim’s games, he gave the victim some of Klein’s games after the victim complained his games were missing.

Klein also said they texted the question about whether the victim was home alone because he did not smoke when his mother was home and she was due to return that day. Later, she said Ackerman made her write that text.

Klein said she wrote the texts about where to park and not being “ditched.”

Klein denied there was a plan to rob the victim and denied knowing that Ackerman and Baker had planned to rob him. When the detectives later asked why Ackerman had “set this up,” Klein said, “I don’t think he meant for him to get killed.” Later, Klein said she thought Ackerman and Baker had “set it up,” but she did not know Baker had a gun with him. She said she did not realize they were setting the victim up for a robbery “until we were already on our way there.” As they drove to the victim’s place, Klein heard Ackerman and Baker talking about “wanting” the victim’s PlayStation and laptop. Klein admitted that they went to the victim’s house with the intent of taking the victim’s PlayStation, laptop, and money. Klein claimed she “really didn’t think they were gonna take anything.” She also told the detectives they were going to use her video games as an excuse to visit the victim.

Klein told detectives that Ackerman “took the stuff” and Baker did all the stabbing. She did not know about any check.

When Baker hit the victim in the head with a skateboard, Ackerman was yelling at the victim for accusing him of stealing. Baker did not know the victim was gay before that night. During the assault, Baker called the victim “faggot” and accused the victim of “looking at” him. Klein told detectives that Ackerman did not tell her about his part in the assault. He told her he “didn’t want [her] to know.”

Ackerman’s jury also heard testimony from criminalist Kristen Burke as an expert on the effects of methamphetamine and other drugs on the system. She testified Ackerman’s blood, drawn shortly after his police interrogation, revealed 0.30 milligrams per liter of methamphetamine -- an average level for a methamphetamine user -- and 0.06 milligrams per liter of amphetamine. The latter is a metabolite of methamphetamine. Burke could make no determination whether Ackerman was impaired based solely on the blood levels, but someone with those levels could exhibit irrational behavior, diminished mental capacity, hallucinations, sleepiness, and problems with speech, coordination, and processing information. The effects of intoxication vary, depending on the individual’s pattern of use and drug tolerance.

Burke also testified the victim’s liver tissue tested positive for methamphetamine and a level of amphetamine consistent with it being a metabolite of methamphetamine. Burke could draw no conclusions from this test, other than concluding the victim used methamphetamine at some point before his death.

Ackerman’s jury (and Klein’s jury) also heard testimony from Tim Nelson that he was good friends with Baker before Baker’s arrest. They saw each other every day and smoked methamphetamine most of the time they were together. About a week before his arrest, Baker borrowed four PlayStation 2 games from Nelson and returned them later that night or the next morning. On both visits, Baker and Nelson smoked an eight ball of

methamphetamine, which was about double their usual amount. Baker was “Real wiry. Real jittery.”

Ackerman called as a witness the patrol officer who transported Baker to jail and was asked by Baker if he was religious. The officer answered and asked Baker the same question. Baker said, “Well, I have 666 tattooed on my neck. So that should tell you something.” After a pause, Baker added, “besides, I guess I kind of sealed my fate now.”

Ackerman’s jury also heard that Baker had tattooed on his fingers “S-W-P [Supreme White Power]-4-L-I-F-E.” SWP is a White supremacist group. Baker’s other tattoos were “Pain 4 glory” on his chest and “666 at the top within a circle,” a star, and some sort of animal head on his neck. A backpack seized from Baker’s apartment contained a Satanic Bible.

#### **Defense Evidence Heard Only by Baker’s Jury**

Klein testified that Ackerman had been physically and mentally abusive toward her. They argued about going back to the victim’s place, and her decision to go was influenced by Ackerman’s abusive behavior. She wanted to call 911 after the murder, but Ackerman stopped her. When Ackerman discovered her calling the police, they fought, and he hit her. Klein testified that from 2008 to June 2009, Ackerman “punched” her “a lot,” causing bruises. She said she required medical attention in 2008 when he punched her, grabbed her arm, and threw her off the bed, which “re-broke” her arm. Klein lied to medical personnel at the time, saying she fell. Ackerman accidentally burned Klein with a cigarette during a fight. He yelled, called her “all kinds of bitches and everything,” and told her “nobody else would want [her].” He made decisions for her and restricted where she could go and what she could do. Klein’s mother contacted the police about Ackerman’s abuse, but Klein lied to police and denied that he hit her because she was afraid of him.

## **VERDICTS AND SENTENCING**

### **Ackerman**

Ackerman's jury returned verdicts finding him guilty of first degree murder, burglary, and robbery. On the murder count, the jury found true the allegation that Ackerman personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)) and the felony-murder special circumstances allegations that Ackerman committed the murder while engaged in the commission of robbery and burglary (§ 190.2, subd. (a)(17)(A)/(G)).

The trial court sentenced Ackerman to life in state prison without possibility of parole for the first degree special-circumstance murder. The court imposed and stayed sentence on the remaining counts and allegations.

### **Baker**

Baker's jury found him guilty of first degree murder, burglary, and robbery. On the murder count, the jury found true the allegations that, in the commission of the murder, Baker personally used a firearm (§ 12022.53, subd. (b)), and personally used two deadly and dangerous weapons--a knife and gardening shears (§ 12022, subd. (b)(1)). The jury found true the felony-murder special-circumstance allegations that Baker committed the murder while engaged in commission of robbery and burglary (§ 190.2, subd. (a)(17)(A)/(G)). On the robbery count, the jury found true the allegations that Baker voluntarily acted in concert and entered a structure (§ 213, subd. (a)(1)(A)), personally used a firearm (§ 12022.53, subd. (b)), and personally used deadly and dangerous weapons, a knife and gardening shears (§ 12022, subd. (b)(1)).

The trial court initially sentenced Baker to life in state prison without possibility of parole for first degree murder, plus a total determinate term of 12 years for the enhancements alleged as to murder -- 10 years for the firearm, one year for the gardening

shears, and one year for the knife. The court imposed and stayed sentence on the remaining counts and allegations.

While this appeal was pending, and after the Department of Corrections and Rehabilitation brought to the trial court's attention that the sentence improperly imposed multiple enhancements, the trial court vacated imposition of sentence on the enhancements attached to murder and robbery and reimposed sentence on Baker, imposing a determinate term of 10 years for firearm use (designated as the principle term, to be served consecutively to the indeterminate sentence), but imposing and *staying* sentence on the other two enhancements for personal use of knife and gardening shears, and imposing and staying sentence on the weapon use enhancements attached to the robbery. The court entered an amended abstract of judgment.

### **Klein**

Klein's jury was unable to reach a verdict, and the trial court declared a mistrial.

## **DISCUSSION**

### **I. Ackerman's Contentions**

#### **A. *Miranda*/Voluntariness**

Ackerman argues: (1) he did not waive his *Miranda* rights, and (2) the detectives coerced his confession by exploiting his "severe physical pain" from kidney stones, manipulating his sleep-wake cycle to induce confusion and disorientation, making "skillful" suggestions of leniency, and "feeding information to induce [him] to agree with the story that investigators said they would accept as the truth." Ackerman acknowledges he did not challenge the admissibility of his statement in the trial court on the same voluntariness grounds he advances on appeal, but he argues the issues are related and we should exercise discretion to review his coercion contention, or find that he received ineffective assistance of counsel.

Ackerman did not argue in the trial court that his statement was coerced or that it was involuntary because the police manipulated his sleep-wake cycle, suggested leniency, or the police fed him information to induce him to agree with the story they would accept as the truth. Thus, he has forfeited these coercion theories. (*People v. Williams* (2010) 49 Cal.4th 405, 435 (*Williams*) [a defendant ordinarily forfeits elements of a voluntariness claim that were not raised in the trial court].) Because the People had no incentive to introduce evidence to rebut these theories, the failure to assert these theories of coercion in the trial court deprived the People of the opportunity to develop the record on the matter. Additionally, the trial court has been deprived of the opportunity to resolve material factual disputes and make any necessary factual findings on these theories. (*People v. Ray* (1996) 13 Cal.4th 313, 339 (*Ray*).)

Nevertheless, because of Ackerman's ineffective assistance of counsel claim, we will address the merits of his new theories based on the record before us. We reject his *Miranda* claim and all claims of coercion.

## **1. Background**

As noted, Ackerman filed in the trial court a motion to exclude evidence of his June 12 police interrogation, which was introduced at trial.<sup>15</sup> Ackerman contended that he never waived his *Miranda* rights and any implied *Miranda* waiver was involuntary because he was under the influence of methamphetamine, was in physical pain that the detectives were aware of and ignored, and the detectives "steamroll[ed]" over his desire to remain silent, which he purportedly expressed by saying, "I'd just like to know the reason for all your questions."<sup>16</sup> He also contended in his written in limine motion that

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<sup>15</sup> He also moved to exclude a second interview conducted a couple of days after his arrest, but the prosecution did not seek to admit those statements.

<sup>16</sup> Although defense counsel had contended in his written in limine motion that defendant invoked his right to remain silent, he specifically told the court he was not

the statement was the product of pre-*Miranda* softening up<sup>17</sup> and that his statement was involuntary for the same reasons that the *Miranda* waiver was involuntary.

The trial court held an Evidence Code section 402 hearing, which included evidence of Ackerman's medical history, methamphetamine use, and prior experiences with law enforcement. The only witnesses were Ackerman and his grandfather, Joseph Tyler. The parties later stipulated that the trial court could consider as evidence a 2008 crime report of one of Ackerman's prior contacts with law enforcement in which he indicated he understood his rights and invoked them without making any statements.

The grandfather testified that Ackerman complained of kidney pain during two visits to the grandfather's home, one in early February and the other in late May. Regarding the February episode, Ackerman testified, "I was in a lot of pain. I was bent over. I couldn't move. I couldn't walk." He added, "I couldn't function. I couldn't do anything. I wouldn't be able to have this conversation with you right now." The grandfather took him to Kaiser, where Ackerman received Vicodin, a pain killer, which helped for about two weeks. The second time, the pain was worse, and Ackerman collapsed in the shower and was taken to the hospital by ambulance. A doctor gave him painkillers and told him to drink lots of fluids to help pass the kidney stone. Ackerman did not say what type of pain killers he was given on this occasion but he said they did not last very long. Ackerman was still in a pain at a follow-up visit a week later. Around June 1, Ackerman went to the emergency room for radiator burns. He was still having kidney pain and was taking unspecified painkillers.

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arguing that defendant's statement about wanting to "know the reason for all these questions" was an invocation of his right to remain silent, but rather an indication that defendant never waived his rights.

<sup>17</sup> Defendant does not argue on appeal that the implied waiver was the product of pre-*Miranda* softening up. Consequently, we need not address that contention.

Ackerman testified that his pain level at the time of the murder was a 5 or 6 out of 10, but he did not remember if the pain debilitated him. He said his pain level at the time of his arrest was “about an 8,” about the same as the pain that sent him to the hospital. He claimed that he thought if he answered the detectives’ questions quickly, then maybe they would get him medical assistance. However, he admitted the detectives did not condition the provision of medical treatment on his providing a statement.

Ackerman submitted his medical records, which showed he was examined in the emergency room on February 18 for shortness of breath. He was released but later returned complaining of abdominal pain. Among the findings were: “The kidneys have a normal appearance.” He got a prescription for Vicodin. On March 6, a doctor prescribed pain medication for his complaint of low back pain. On April 8, an ambulance brought him to the hospital for a complaint of sudden, severe right flank pain. The records state, “Differential includes kidney stone, kidney infection, lung process, i.e. Pneumonia though doubt. Plan for labs, pain control.” The records also state, “note hematuria and this is consistent with kidney stone. [¶] . . . [¶] Unable to visualize kidney stone on KUB. . . . No kidney stone noted on recent CT, though the patient had IV contrast which may obscure a small stone.” The doctor diagnosed this as “[a]cute renal colic,” prescribed pain medication, and gave Ackerman instructions regarding kidney stones. On May 29, defendant received emergency room treatment for second degree burns to the forehead and cheeks from a radiator and right flank pain. The medical records state, “The kidneys have a normal appearance.” He received pain medication.

The jail medical records contain a June 19 entry (seven days after Ackerman’s arrest) that Ackerman complained of “kidney stones” for which he had been treated at Kaiser before he went to jail. Thereafter, defendant complained to jail staff of various problems including chronic back pain, for which he received medication such as Ibuprofen.

Ackerman admitted on cross-examination that he had three prior unrelated contacts with law enforcement, which occurred in February 2004, May 2005, and February 2008. He remembered being read his rights in 2004 and 2008. In the 2008 instance, he invoked his right to an attorney, and the officers stopped asking him questions. Ackerman testified that the 2008 incident was different because he was in his own home when he asked to talk with a lawyer, but the parties later stipulated to a 2008 police report which said the officers contacted Ackerman at his home, had a conversation with him, then took him to the police station where they advised him of his *Miranda* rights and he invoked his right to counsel. Ackerman also testified that this time was different, because he was locked in a small room, was in physical pain, and was under the influence of methamphetamine, having smoked “close to a gram” of methamphetamine that day. He did not know what effect the drug had on him, but he had been confused and did not understand why he was arrested. He did not say anything about pain while being transported to the police station, though he was in pain. During the interrogation, he was in pain and told the detectives he had kidney stones, but said “[t]hey didn’t seem to care that I was in pain.” He said he was more concerned about his pain than what was being asked by the detectives.

Ackerman testified he did not understand he really had a right not to talk to the detectives. He thought reading the rights was just something the detectives had to do and did not think he really had those rights. He claimed he thought he had to talk to the detectives. He claimed he did not understand that anything he said could be used against him in court and did not understand what having a lawyer meant. He said he did not understand the rights on the prior occasion when they were read to him. He “kind of” understood but was thinking about other things due to the influence of methamphetamine. He did not explain what these other things were.

Ackerman testified that he asked about the reason for all of the questions after he was asked to talk about the last time he saw the victim because he “didn’t understand

why I was being asked all of these questions.” He said he did not want to talk at that point, but he felt like he did not have an option. When asked about the purpose of his question to the detectives, Ackerman said he was “[t]rying to find out why they were asking all the -- what they’re asking, because of” the threats he mentioned on the next page of the transcript. He felt intimidated by the detective’s body language and “pressured to meet their demands.” When asked why he felt pressured to meet their demands, Ackerman said, “Because they kept asking me questions. When I tried to ask them questions, they just asked me more questions.” When he was asked to tell the detectives about the last time he saw the victim, he did not feel free to refuse to answer, “[b]ecause I was in that room. He made me feel like I had to answer the question.”

Ackerman said he felt he could not refuse to talk about last seeing the victim because the detective talked about providing protection and that they were not there to get him “in any kind of harm,” but they were just asking for the truth. But Ackerman did not explain why that statement made him feel that way.

Ackerman was asked, “Other than the kidney pain and methamphetamine use, was there anything going on with you, either physically or mentally, that you think might have played a role in your talking with detectives that day?” Ackerman’s response was limited to his emotional state. He said, “Emotionally, I was having a lot of problems, but that might have played a role in it.” He said he had received threats on his life and the lives of people close to him from Baker and he was worried about that. He “was more worried about those threats than what was going on in the conversation, what they were asking me.”

Later, Ackerman was again asked, “And other than what we have talked about in court this morning and briefly this afternoon, was there anything else working on you in terms of your willingness to cooperate with the officers by answering their questions that day?” Ackerman’s response was, “Not that I can think of.” Ackerman never mentioned

fatigue, deprivation of sleep or anything related to sleep. Nor did he say that he talked to the officers because of promises made to him.

On cross-examination by the prosecutor, Ackerman denied that he went to the hospital just to try to get prescription drugs. He denied selling prescription drugs, but had offered them for free to people who wanted them. He admitted writing a letter to Klein while she was in jail that read, “I only got one pills [*sic*] with your letters so don’t send them through those guys anymore” and “Just bring what you want to give me to court. Thank you. I need to know the name of the pill so I can sell them.” He claimed he told Klein he was going to sell the pills because he did not want her to know he needed them for himself.

He denied being told his kidneys appeared normal; he said he was told there was “something, but it wasn’t that large.” While in jail, Ackerman complained about ankle pain, acid reflux, shoulder pain from a childhood injury, and whiplash from an early 2009 car accident. He was given muscle relaxers and Ibuprofen for back pain.

At the Evidence Code section 402 hearing, defense counsel argued Ackerman was coerced into talking and the detectives should have stopped the interrogation when Ackerman “began to express doubt” by asking, “Is there a reason for all this conversation?” and “I’d just like to know the reason for all these questions.” Counsel argued the detectives “pressured” Ackerman to “Tell us what happened,” indicating he was not free to refuse to talk to them.

In argument, the prosecutor questioned whether Ackerman really had kidney stones, as opposed to a penchant for prescription drugs and sympathy, but even if he was in pain, the pain did not prevent a knowing and intelligent *Miranda* waiver. The prosecutor argued Ackerman asked why he was being questioned because he wanted to find out what the police knew, and he calculated that if his story was going to be that he was an innocent bystander forced at gunpoint to witness a murder, he had better tell the police the story at that time.

After reviewing the video-recorded interrogation and considering the police report from the 2008 arrest, the trial court concluded the *Miranda* warnings here were legally satisfactory, that Ackerman understood his rights and that Ackerman's acquiescence to questioning was an implied waiver of his *Miranda* rights. The court disbelieved Ackerman's testimony that he did not understand his rights were real and noted Ackerman had previously received the *Miranda* advisements on multiple occasions and had even invoked his rights on one of those occasions. The court concluded that Ackerman voluntarily participated in the interrogation and that his queries about why the police were asking him questions did not constitute an invocation of the right to remain silent. The trial court observed it was unclear whether Ackerman was actually in pain or actually had kidney stones, or whether he simply invented complaints to get drugs. The court nevertheless found that, whether Ackerman was in pain or not, he "plainly understood, he was lucid -- this also goes to the drug issue. Absolutely lucid and responsive and coherent and clear in his conduct. While he did complain of pain and indeed may have been suffering pain, as I indicated it's hard to know, it was certainly not any pain that rendered him without free will or unaware of the circumstances or unable to exercise his rights. None of that is evidenced." Based on these findings, the trial court denied the motion to exclude the evidence.

The edited version of the 10-hour video recording of Ackerman's jail interview was shown to Ackerman's jury only. A transcript was available but was not admitted into evidence. We have reviewed the unedited video recording reviewed by the trial court for the Evidence Code section 402 hearing. We note that at no point did Ackerman say he did not want to talk with the detectives, indicate he wanted to stop the interrogation, or say he wanted an attorney. Nor did he say he was in too much pain to proceed or that he wanted to stop the interrogation for reasons related to pain. Nor did he request medical attention.

We conclude the trial court did not err by admitting the defendant's statement.

## 2. Implied *Miranda* waiver

To establish a valid waiver of *Miranda* rights, the prosecution must show by a preponderance of evidence that the waiver was knowing, intelligent, and voluntary. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384 [176 L.Ed.2d 1098, 1112] (*Berghuis*); *People v. Nelson* (2012) 53 Cal.4th 367, 374-375.) There are two distinct dimensions to this requirement: (1) The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; and (2) the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. (*Berghuis, supra*, 560 U.S. at pp. 382-383.)<sup>18</sup>

However, the waiver need not be express. (*Berghuis, supra*, 560 U.S. at p. 384; *North Carolina v. Butler* (1979) 441 U.S. 369, 370-371) Where the prosecution shows that a *Miranda* warning was given and it was understood by the defendant, a defendant's uncoerced statement establishes an implied waiver. (*Berghuis*, at p. 384; *North Carolina v. Butler*, at pp. 370-371.)

Here, Ackerman did not expressly waive his *Miranda* rights but spoke with the detectives after being informed of and expressly indicating his understanding of his *Miranda* rights.

On appeal, Ackerman argues the prosecution did not meet its "heavy burden" to overcome the presumption against waiver of constitutional rights. We disagree. The court in *Berghuis* discussed the applicable presumption and explained earlier references the high court made to the prosecution's "heavy burden": "Some language in *Miranda*

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<sup>18</sup> We note that Ackerman cited *Berghuis* for this proposition, but instead of discussing the other important aspects of *Berghuis*, Ackerman never mentioned that case again in his opening brief. He mentioned it only once in his reply brief and that was for the general proposition that a *Miranda* waiver must be made with the full awareness of the rights being relinquished. As we next discuss, *Berghuis* has other application here.

could be read to indicate that waivers are difficult to establish absent an explicit written waiver or a formal, express oral statement. *Miranda* said, ‘a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.’ [Citations.] In addition, the *Miranda* Court stated that ‘a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.’ [Citation.]

“The course of decisions since *Miranda*, informed by the application of *Miranda* warnings in the whole course of law enforcement, demonstrates that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered. [Citation.] The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. [Citations.] Thus, ‘[i]f anything, . . . subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case-in-chief.’ ” (*Berghuis, supra*, 560 U.S. at p. 383.)

The government’s “ ‘heavy burden’ ” is “not more than the burden to establish waiver by a preponderance of the evidence.” (*Berghuis, supra*, 560 U.S. at p. 384.) “As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.” (*Id.* at p. 385.)

Here, the video recording shows Ackerman was read his rights, affirmed his understanding of each right individually with a both a verbal “yes” and an affirmative nod of the head, and acknowledged he had been in trouble with the law before and had received *Miranda* warnings on past occasions. Although Ackerman testified at the hearing that he did not understand his rights this time and thought he had to talk to the

police, the trial court did not find him credible and noted Ackerman admitted he was advised of his *Miranda* rights on previous occasions and had even invoked his rights on one of those occasions.

Our review of the video recording confirms the trial court's ruling. Ackerman was alert, attentive, and immediately responsive when asked if he understood each of the rights and if he understood them collectively. The way he simultaneously responded "yes" and gave an affirmative head nod immediately after the questions as to whether he understood each of the rights portrayed confidence and self-assurance, not hesitance or equivocation. There was nothing about defendant's demeanor or response to the questions as to each right that would suggest he did not understand. We accept the trial court's evaluation, supported by the evidence, that Ackerman lied about not understanding the *Miranda* advisements. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 88.) This lie and his lie about the circumstances under which he invoked his rights in 2008 also diminishes Ackerman's credibility in other particulars.

After *Berghuis*, the rules related to implied *Miranda* waivers must be regarded as settled. "The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease." (*Berghuis*, *supra*, 560 U.S. at pp. 387-388.) Here, after acknowledging that he understood his rights, defendant spoke with the officers. As the court observed in *Berghuis*, "had [defendant] wanted to remain silent, he could have said nothing in response to [the officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." (*Id.* at p. 386.) Ackerman did neither.

Even assuming Ackerman really was in physical pain (as we discuss *post*) and/or under the influence of methamphetamine, our viewing of the video recording satisfies us

that these circumstances did not interfere with a *Miranda* waiver. Throughout the interrogation, he was alert, responsive to questions, and calculating in his responses. He gave no indication that he was in such pain as to require medical attention or a cessation of the interrogation.

Ackerman impliedly waived his *Miranda* rights and, as we shall explain next, he never invoked those rights.

### **3. Purported *Miranda* invocation**

For the first time, Ackerman argues on appeal that he invoked his right to remain silent by asking the reason for the questioning, asking to use the restroom, and asking to see Klein. We disagree.

An accused who wants to invoke his right to remain silent must do so unambiguously. (*Berghuis, supra*, 560 U.S. at pp. 381-382; *People v. Tom* (2014) 59 Cal.4th 1210, 1225-1227; *People v. Scott* (2011) 52 Cal.4th 452, 481-482.) Here, as in *Scott*, “[a]t no time did defendant decline to speak, ask to end the interview, or seek counsel.” (*Scott, supra*, 52 Cal.4th at p. 482.)

Whether a suspect has invoked his *Miranda* rights is an objective inquiry; the suspect must articulate his or her desire to cease the questioning or to obtain counsel sufficiently clearly that *a reasonable police officer in the circumstances* would understand the statement to be a request to stop the questioning or a request for an attorney. (*Davis v. United States* (1994) 512 U.S. 452, 459 [129 L.Ed.2d 362, 371]; *People v. Villasenor* (2015) 242 Cal.App.4th 42, 61.)

Near the beginning of the interrogation when Ackerman was asked to talk about the last time he had seen the victim, he asked, “Is there a reason for all these

questions?”<sup>19</sup> The detective answered by saying they would get to it, but that they were there to talk about the truth. Defendant said he understood, and then repeated, “I’d just like to know the reason for all your questions.” The detective responded by explaining the reasons for the questions: “Okay. We’re doing an investigation right now. Okay? I think you have a very good idea why we’re asking these questions. In fact, I know you know why we’re asking these questions. Okay? All right. And I mean things could be better. Things could be worse. Okay? But the truth is what we’re after.” To that response, Ackerman responded, “Okay.” The detective then said, “Okay? So let’s talk about the last time you saw Jim. Tell us about that day and that night because that’s what we want to know about. Okay?” To that Ackerman said, “Okay.” The detective said, “And be truthful. Be honest.” Ackerman said, “Okay.” The detective said, “That’s all we ask because we’re being up front with you. All right?” Ackerman responded, “Yes, sir. I understand.” The detective then asked again, “What happened that night?” At that point, Ackerman said it was hard for him to talk about it because he was scared, but he continued talking with the detectives.

No reasonable officer could have concluded Ackerman had invoked his *Miranda* rights from that exchange. Rather, it reasonably appeared that Ackerman was attempting to find out what the detectives knew. Indeed, when asked about the purpose of the questions at the Evidence Code section 402 hearing, Ackerman gave a vague answer about “trying to find out why they were asking all the -- what they’re asking” because of his fears about Baker’s threats, which he had not yet mentioned. He did not testify he was trying to cut off the questioning or otherwise invoke his rights by his questions about the reasons for the detectives’ inquiry. In any event, from a reasonable officer’s

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<sup>19</sup> As noted, there is a discrepancy between what can be heard in the recording and what appears in the transcript. (See *ante*, fn. 7.) The transcript reads, “Is there a reason for all this conversation?” For purposes of our analysis, we see no substantive difference.

perspective, Ackerman's questions at most indicated trepidation about discussing something that was "hard" for him. And when one of the detectives explained the reason for the questions by saying they were doing an investigation, Ackerman indicated he understood and instead of saying he did not want to talk, he continued to answer questions.

From the perspective of a reasonable officer, Ackerson's request to use the bathroom and numerous requests to see his girlfriend could not be seen as anything other than what they were -- a request to relieve himself and a request to talk to Klein. Indeed, at one point when Ackerman asked to see Klein, he told the detective, "I don't care if you guys are there. I just want to see her."

We reject Ackerman's belated and meritless argument that these statements invoked his right to remain silent. As we next explain, Ackerman's statements were voluntary.

#### **4. Purported coercion**

"The Fourteenth Amendment of the federal Constitution and article I, section 7 of the California Constitution make "inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion." [Citation.] The prosecution must prove by a preponderance of the evidence that a defendant freely and voluntarily gave police statements before the statements can be admitted. [Citation.] "Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.'" [Citation.] The test considers several factors, including any element of police coercion, the length of the interrogation and its location and continuity, and the defendant's maturity, education, and physical and mental health." (*People v. Peoples* (2016) 62 Cal.4th 718, 740 (*Peoples*); accord, *People v. Williams* (1997) 16 Cal.4th 635, 660 [rejecting the view that an offer of leniency necessarily renders a statement involuntary].) Other factors include a defendant's

sophistication and prior experience with law enforcement. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1404; *People v. Vasila* (1995) 38 Cal.App.4th 865, 876 (*Vasila*); *In re Shawn D.* (1993) 20 Cal.App.4th 200, 209 (*Shawn D.*)). The determinative question is “ “whether defendant’s choice to confess was not ‘essentially free’ because his will was overborne.” ’ ” (*Peoples, supra*, 62 Cal.4th at p. 740.)

“[A]ny factual findings by the trial court as to the circumstances surrounding an admission or confession, including ‘ “the characteristics of the accused and the details of the interrogation” [citation],’ are subject to review under the deferential substantial evidence standard.” (*People v. Williams, supra*, 16 Cal.4th at p. 660.) However, “ “ “[w]hen, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court’s determination of voluntariness.” ’ ” (*Peoples, supra*, 62 Cal.4th at p. 740.)

“Coercive police tactics by themselves do not render a defendant’s statements involuntary if the defendant’s free will was not in fact overborne by the coercion and his decision to speak instead was based upon some other consideration.” (*People v. Rundle* (2008) 43 Cal.4th 76, 114, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In other words, “ ‘[a]lthough coercive police activity is a necessary predicate to establish an involuntary confession, it “does not itself compel a finding that a resulting confession is involuntary.” [Citation.] The statement and the inducement must be causally linked.’ ” (*People v. McWhorter* (2009) 47 Cal.4th 318, 347, accord *Williams, supra*, 49 Cal.4th at p. 437 [“A confession is not involuntary unless the coercive police conduct and the defendant’s statement are causally related.”])

Advice or exhortation by the police to “ “ “tell the truth” ’ ” or that “ “ “it would be better to tell the truth,” ’ ” unaccompanied by threat or promise, does not render a subsequent confession involuntary. (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

### **a. Ackerman's characteristics and the details of the interrogation**

Before discussing defendant's theories, we first identify factors related to " "characteristics of the accused and the details of the interrogation" " that cut against a finding of involuntariness. (*Vasila, supra*, 38 Cal.App.4th at p. 873; *Shawn D., supra*, 20 Cal.App.4th at p. 209.) At the time of the interrogation, Ackerman was almost 21 years old. He is a high school graduate. His use of words and manner of presentation during the interrogation did not suggest intellectual impairment. Additionally, as previously noted, Ackerman had prior contacts with law enforcement where he had been *Mirandized* and on one occasion showed enough sophistication to invoke his rights and refuse to talk to the police.

Ackerman was in the interview room for approximately 10 hours. However, by our calculation, he was interrogated for approximately six hours 30 minutes. The video starts at 6:09 p.m. with Ackerman sitting alone in the interview room. Slightly more than an hour went by before the interrogation started. After the interrogation began, there were two long breaks, one spanning three hours 25 minutes and the other spanning two hours 19 minutes. During those breaks Ackerman had an opportunity to sleep and, as we discuss *post*, it appears he did sleep during some of that time period. There were also several other shorter breaks.

Just before the longest break (9:11 p.m. to 12:36 a.m.), the detectives asked Ackerman what he wanted to eat and offered him options. He was provided the food of his choice at 9:57 p.m. when a detective brought in what appears to be a burger, fries, and water. He was also provided water throughout the interrogation.

### **b. Physical pain**

Ackerman argues the detectives exploited his "severe physical pain." Based on our review of the interrogation, we saw no evidence that the officers "exploited" Ackerman's condition. We further conclude that even if Ackerman was in physical pain, neither his pain, nor anything the detectives did rendered his statements involuntary.

During the hour before the interrogation began, Ackerman sat quietly, often with his head resting on the table. He showed no signs of discomfort until around 6:56 p.m., when he touched his side, crossed his arms, leaned forward, then at 6:57, he sat with his back to the camera. Just prior to leaning forward, he looked in the direction of the camera and we detect no expression of pain on his face. It appears that he is simply unable to get comfortable while sitting and laying with his head on the desk. However, between 7:01 and 7:06 p.m., he wrapped his left arm around his waist, touched his side and back, bent forward at the waist, and took deep breaths. At this time, he had an expression of discomfort on his face. At 7:06 p.m., still alone, he said, "Please help" and "oh my God;" apparently writhed and continued to hold his side. By 7:08 p.m., he was more relaxed and rested his head on his arms on top of the table. Between 7:09 and 7:10 p.m., he again held his side, breathed loudly, and sat bent over at the waist.

At 7:10 p.m., a detective entered the room, gave Ackerman a bottle of water, and asked if he was sick. Ackerman touched his left side and said he had kidney stones. The detective said, "That's pretty painful, huh?" and told Ackerman to drink some water. Ackerman did not ask for medical assistance or medication. He only asked whether he could talk to Klein. After the detective left, Ackerman wrapped his arms around his waist and rested his head on the table.

Between 7:11 p.m. and 7:19 p.m., Ackerman continued to have one or both arms wrapped around his waist and periodically laid his head on the table or rested it on his hand. He briefly stood and pulled up his pants. He otherwise remained seated, moving around in the seat and intermittently sighing loudly.

At 7:19 p.m., two detectives entered. Ackerman sat up in his chair. One detective asked, "How are you doing, man?" Ackerman nodded but any verbal response is unclear. However, he did not ask for medical assistance or to be taken to the hospital, and he answered preliminary questions with no mention of pain. At 7:20 p.m., a detective advised Ackerman of his *Miranda* rights.

During the *Miranda* advisements, Ackerman had one arm around his waist with his hand holding his side. But he looked at the detective and after each of the rights was separately read to him, simultaneously answered “yes” and nodded affirmatively that he understood. The detective then asked Ackerman whether he had been given the *Miranda* warnings before and whether he had been in trouble before and Ackerman answered affirmatively to both questions. The detective asked Ackerman where he went to high school and Ackerman said he went to several schools and graduated from an adult education school.

At 7:22 p.m., one of the detectives asked why Ackerman kept holding his side. Ackerman said, “because it hurts” and said he had kidney stones that had not passed. Again, he did not ask to stop the interview, request medical attention or ask to be taken to a hospital.

Ackerman cites three specific portions of the interrogation as evidence of pain. Because he cites these as examples, we discuss our view of those instances.

Ackerman cites the portion of his interview between 7:44 and 7:54 p.m. as evidence of pain. By that time, Ackerman had already told his first version about what had happened at the victim’s house. During the cited time, he mostly had one arm wrapped around his waist and occasionally held his side with the other hand. But he did not complain of pain or ask to stop.

At 7:45 p.m., Ackerman spoke about selling the laptop to some “random person” at the 99 Cent Store in Del Paso Heights,<sup>20</sup> and he claimed Baker was with them at that time. Later he said he and Klein had already separated from Baker by the time they sold the laptop.

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<sup>20</sup> The transcript says “I was passing lines,” and one of the detectives makes reference to “Folsom Heights,” but on our review of the recording it is clear he and the detectives are saying Del Paso Heights regarding the location of the 99 Cent Store.

At 7:45 p.m., the detectives told Ackerman that they had talked to people Ackerman had called from the victim's cell phone. With a puzzled look and a shrug of the shoulders, Ackerman denied making any such calls, even though the detectives told him it would look like he was lying if he left out details to fairly simple questions.

Although he held his side, during this time period, Ackerman responded to some of the questions with demonstrative use of his arms and hands, to emphasize his bad memory and to show the approximate route they took to Baker's residence after leaving the victim's house and the location where Baker threw the knife out of the car. He also answered questions as to what happened at the victim's house before the victim was killed, events about which he changed his story later when confronted by the detectives with evidence. For example, he said he, Baker and the victim smoked dope together and played video games.

Ackerman also directs our attention to 8:20 to 8:26 p.m. Our review of the video recording reveals that Ackerman's face was red and he was emotional during this time period. He had just finished describing Baker's gun, again using his hands for demonstrative purposes. In our view, it appears that he was crying because of the subject matter under discussion, not necessarily because he was in pain. He began to cry after the detectives asked him why he did not go to the police after dropping Baker off and he said he had been afraid to report the crime because he was scared of Baker. He became more tearful when the detective asked, "You realize how it looks right now?" He continued to keep his arm wrapped around his waist with his hand holding his side. However, even though he was emotional, he responded to the questions, did not complain of pain, and did not ask to stop the interview.

Even before the 8:20 to 8:26 p.m. period Ackerman cites as an example of pain, he had appeared on the verge of tears. At 8:07 p.m., he appeared as if he was about to cry after he identified Baker and was asked to put his initials on Baker's photograph. He was again on the verge of tears between 8:14 and 8:15 p.m. when he explained that Baker told

them not to say anything about what happened during the drive to his apartment and explained that he is scared of Baker and the people Baker knows. Ackerman again started to cry at 8:24 p.m. when he said Baker kept calling for his “cut” of the sale of the computer and was asked if they had planned this crime. And at 8:27 p.m., Ackerman again began to cry when he talked about his having put a cord around the victim’s neck, Baker taking the cord, pulling it tighter and then putting a sock in the victim’s mouth after Baker had cinched the cord. He continued to cry when he talked about his handing tape to Baker and Baker wrapping the tape around the victim’s face. Again, it appears that Ackerman’s emotional state had to do with the subject matter under discussion, not pain.

Ackerman also cites evidence of pain around 9:00 p.m. He had asked and was allowed to use the restroom at 8:53 p.m. This was the first of several breaks during the interrogation. He was returned to the room at 8:55 p.m. and asked about what he wanted to eat. Before leaving, one of the detectives asked him if he was going to be all right in the room and Ackerman said he did not know. He said it was “hard talking about it.” He did not say he would not be all right because of the pain, otherwise complain of pain, or ask for medical attention. At 8:57 p.m., right after the detectives left, Ackerman’s face was noticeably red and he began crying and repeating, “I’m sorry, Jim.” Crying loudly, Ackerman sat sideways rocking and crying and repeating, “I just want to see my baby, my baby girl [(presumably Klein)]” or variations of that. During this time, he did not complain of pain.

By 9:01 p.m., he had calmed down. He walked around the room, fidgeted with his hands in his pockets, pulled his pants up, stood up straight, drank water, picked at his fingernails, sat down, and fidgeted with something from his pants pocket. During this time, he does not appear in physical pain.

At 9:03 p.m., one of the detectives reentered the room and asked Ackerman questions about a phone. Ackerman was standing at the time. When the detective asked

if he could look through the phone, Ackerman said the phone was new, it was under Klein's name and to ask Klein. Ackerman did not hold his side during this time, but he did fidget with his fingernails. After the detective left the room at 9:05 p.m., Ackerman moved in and out of the camera's view, but can be heard sobbing and repeating, "I just want to see her." Again, he did not complain of pain. At 9:06 p.m., a detective reentered the room and asked about whether they have other phones in the car, asked about Baker's involvement and whether Ackerman and Klein made up the story about what Baker did. The detective also went over some type of depiction of Baker's apartment complex and the location of Baker's apartment, and asked about Ackerman's contacts with Meagan Ruiz. During this time, Ackerman did not hold his side and gestured with his hands.

In our view, the 9:00 p.m. episode Ackerman cites reflects emotional angst, not physical pain.

Between 9:11 and 9:15 p.m., Ackerman got up and walked out of camera view. While out of view, he said, "please baby." At 9:12 p.m., he walked back in view of the camera and was holding his side. He grabbed the bottle of water off the table and again walked out of camera view. Periodic sniffing can be heard off camera. At 9:15 p.m., the detective reentered the room and asked Ackerman more questions about Baker's apartment. Ackerman again freely used his hands and arms to demonstrate locations. He exhibited no apparent signs of pain.

After the detective left at 9:15 p.m., Ackerman was restless. He rested his head on the table for a while, walked off and on camera, again rested his head on the table, picked at his face, and sat at the edge of the table. At one point, he pulled up a chair and sat comfortably with one or both feet resting on the chair or the table, sometimes appearing to nod off. We do not see Ackerman holding his side during this time period.

At 9:39 p.m., Ackerman got up, bent over and pushed a chair away without difficulty. He then walked off and on camera and stretched. Again, Ackerman was not holding his side, and he did not appear to be in pain during this period.

At 9:47 p.m., Ackerman sat down, stared at the floor, sat up and fidgeted with his fingers. Two minutes later a sound apparently emanated from outside the room. Ackerman looked up, stood up quickly and walked off camera. When he did that, he did not hold his side or appear to be in pain.

At 9:52 p.m., a detective entered and Ackerman sat down. The detective asked Ackerman whether Baker had been wearing a hat or gloves that night. He asked Ackerman if he got blood on himself, and Ackerman said he did not think so. Ackerman explained that Baker did get blood on himself and he changed his clothes when he got back to the apartment. Baker then put his clothes in a bag.<sup>21</sup> Ackerman had his arms folded in front of him, but did not appear to be in pain during this time. After the detective left, Ackerman remained seated, rested his head on the table, sat up, and picked at his face. He did not hold his side or appear to be in pain during this period.

At 9:53 p.m., Ackerman put his head down on the desk and raised it occasionally, including at 9:57 p.m. when a detective brought in what appears to be a burger, fries and water. Thereafter, Ackerman pulled his arms out of his sleeves and put them inside his tee shirt, apparently because he was cold. He did not hold his side during this time and did not appear in pain. At 10:01 p.m., a detective asked him if he was cold. Ackerman nodded affirmatively and the detective said he would bring Ackerman a blanket, which he did.<sup>22</sup> Ackerman did not appear to be in pain and did not request medical attention.

At 10:02 p.m., Ackerman put his head on the table and began to sob and cry. He alternated eating and sobbing until he finished eating at 10:10 p.m. Shortly thereafter, he resumed sobbing and crying for a short period. Again, this appears to be emotional angst, not a reaction to pain.

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<sup>21</sup> This part of the interrogation does not appear to have been transcribed.

<sup>22</sup> This exchange does not appear in the transcript.

At 10:10 p.m., it appeared Ackerman put his head down on the table and began trying to sleep. But he soon became restless and began engaging in the same behaviors he had earlier. However, he did not hold his side or appear to be in pain.

At 10:15 p.m. he got up, retrieved the blanket that had been brought in and draped it over himself without apparent difficulty. Thereafter, he sat quietly and then appeared to sleep until 12:36 a.m. Although he changed positions several times during this time period, he did not hold his side; nor did he appear to be in pain. At 11:28 p.m., a detective woke him briefly and asked if he was all right and whether he was “hanging in there.” Ackerman responded with an affirmative head nod and said, “Yeah, I’m all right.” He did not appear to be in pain, complain of pain, or request medical assistance.

When a detective later entered the room at 12:36 a.m. and asked “How’s it goin’ man?” Ackerman did not complain of pain or say he needed medical attention. Instead, he said he was upset about the “decisions I’ve made,” a comment we discuss further, *post*. We shall discuss the sequence of events and Ackerman’s behavior during the remainder of the time he was in the interview room in our discussion of Ackerman’s sleep-wake cycle argument. Suffice it to say, we did not notice him holding his side during the rest of the interrogation; nor did he complain of pain or request medical attention.

We take a moment to note that during his testimony on his motion to suppress his statement, Ackerman described his pain during the interrogation as about an 8 on a scale of 1 to 10. According to Ackerman, this was about the same level of pain he had experienced when he was taken to the hospital in February and May. During the first incident, Ackerman testified, “I was in a lot of pain. I was bent over. I couldn’t move. I couldn’t walk.” He further testified, “I couldn’t function. I couldn’t do anything. I wouldn’t be able to have this conversation with you right now.” He said the second time he went to the hospital, the pain was worse, and he had collapsed in the shower. We see nothing in the video recording similar to what he claimed to have experienced in his prior

two hospital visits. With the exception of the period of time between 7:01pm and 7:10 p.m. just before the interrogation began, he did not appear to be in a posture one could describe as “bent over.” He moved freely and walked around the room. He could function and did not collapse or appear to be on the verge of collapsing. He was more than able to have a conversation with the detectives, including telling them lies. If he accurately described how he was feeling before he went to the hospital on the two prior occasions, we see no evidence that the pain he was purportedly experiencing during the interrogation approximated the pain he experienced on those two prior occasions.

Even assuming, as did the trial court, that defendant was in physical pain during the interrogation, there is nothing to indicate his statements were involuntary. Ackerman gave coherent responses to questions and was able to understand a depiction or map of Baker’s apartment complex and building and read a map to show the route to Baker’s apartment. Moreover, as we discuss *post*, there were numerous instances that show his will was not overborne.

We conclude that even if Ackerman was in physical pain, his statements were not rendered involuntary by that pain or by any police activity related to that pain.

### **c. Sleep-wake cycle contention**

Ackerman argues his statements were coerced by police manipulation of his sleep-wake cycle. We see no such manipulation. Nor does the evidence indicate defendant confessed because he was sleep deprived.

We first note that Ackerman did not sleep between 7:19 and 9:15 p.m., so his sleep-wake cycle claim cannot apply to the time period when he gave his first version of the events to the detectives. Second, there is a dearth of evidence as to Ackerman’s normal sleep patterns in the record, making comparison of his sleeping activity on the night of the interrogation to a norm problematic. Indeed, the only evidence of Ackerman’s sleep patterns in the record of the suppression motion is his description of

his comings and goings at all hours of the day and night, including the early predawn morning hours. Based on his own statement, it appears that Ackerman was quite accustomed to being awake in the early predawn hours. Third, and most important, when Ackerman testified at the suppression hearing, he never attributed anything related to sleep or lack thereof as playing a role in his talking to the detectives, even though he was asked two open-ended questions that gave him the opportunity to make such a claim.

Certainly, sleep deprivation can be used as a form of torture and could render a confession involuntary. (E.g., *Ashcraft v. Tennessee* (1944) 322 U.S. 143, 151, fn. 6 [88 L.Ed. 1192] (*Ashcraft*)).) But that is not what happened here. Ackerman's case does not rise to anywhere near the level of his cited authorities.

Defendant cites *Ashcraft* where the defendant, who was suspected of having his wife killed, was subjected to continuous interrogation by a relay of different officers for 36 hours, from 7:00 p.m. on a Saturday evening until 9:30 a.m. on Monday, with only a five-minute respite. (*Ashcraft, supra*, 322 U.S. at p. 149.) For the first 35 hours, the defendant denied having anything to do with his wife's death. (*Id.* at pp. 153-154.) He allegedly ultimately confessed by admitting the truth of a confession written by the hired killer. (*Id.* at p. 152.) The Supreme Court held that the circumstances there were inherently coercive. (*Id.* at p. 154.)

In *Reck v. Pate* (1961) 367 U.S. 433 [6 L.Ed.2d 948], also cited by defendant, the circumstances for finding a murder confession coerced were that the 19-year-old, developmentally disabled defendant, with no prior criminal record or experience with the police, was arrested on a Wednesday at 11:00 a.m. (on suspicion of bicycle theft) and was kept in custody for a week without a court hearing. (*Id.* at pp. 435-436, 441-442.) He did not make incriminating admissions about the murder until Saturday afternoon, when he was confronted with his accomplices who had confessed and implicated him. He then admitted he was present at the crime but said he did not strike the victim. (*Id.* at p. 438.) On Saturday evening, he participated in a "joint confession" with the other defendants.

(*Id.* at p. 439.) On Sunday afternoon, he made an individual statement reiterating the joint confession. (*Ibid.*) At that time, he had been without solid food since Friday when he had an egg sandwich. (*Ibid.*) During the four days that preceded his first confession, the defendant was subjected to daily six- or seven-hour stretches of interrogation by a variety of officers, first for a wide variety of crimes and then for the murder starting on the night of the third day. During the four days, he was shuttled between police stations and intermittently placed on “public exhibition in ‘show-ups.’ ” When he became ill, he was taken to a hospital, but then returned to the police station. There, he grew faint and vomited blood. He was then returned to the hospital where he spent the night under the influence of medications and was placed on a milk diet. He was removed from the hospital the next morning, immediately subjected to more interrogation, and signed his first confession eight hours later. (*Id.* at pp. 439, 441.)

In *United States ex. rel. Burns v. LaVallee* (2d Cir. 1970) 436 F.2d 1352 (*Burns*), another case upon which defendant relies, the accused changed his story from accidental to intentional shooting after over 18 hours of uninterrupted custodial interrogation and after he had been without sleep for 30 hours. The only food he had was a pastry approximately 12 hours before he changed his story. The detectives had not informed the defendant of the right to remain silent and the right to an attorney until about 11 hours into the interrogation, after the defendant had admitted the killing, saying it was the result of accident. (*Id.* at pp. 1354-1355.)<sup>23</sup> Given the totality of the circumstances, the circuit court held that the new story was involuntary. (*Burns*, at pp. 1355, 1356.) In so holding, the circuit court stated, “No case has come to our attention in which in recent years any federal appellate court, faced with a totality of circumstances approaching those outlined hereinabove, approved use of defendant’s confession.” (*Id.* at p. 1356.)

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<sup>23</sup> The interrogation in *Burns* took place before *Miranda* was decided. (*Burns, supra*, at p. 1356.)

Another case cited by Ackerman, *Shepherd v. Ault* (N.D. Iowa 1997) 982 F.Supp. 643, is completely off point. It held that material factual issues precluded summary judgment in a civil rights action where prisoners complained that constant illumination of disciplinary detention cells in a state prison constituted cruel and unusual punishment.

Ackerman cites *Rogers v. Richmond* (1961) 365 U.S. 534, 540-541 [5 L.Ed.2d 760] for the proposition that a confession produced by physical or psychological coercion is involuntary. That case held that the probable truth or falsity of a confession is not a proper consideration in determining voluntariness; rather, the inquiry is whether coercive police action overcame the defendant's will. Of course, we agree with this holding, but the case does not help defendant.

Ackerman's case is very different from his cited authorities. He was not questioned nonstop. He had several opportunities to rest when left alone several times. He was provided the food of his choice about two hours into the interrogation.

Ackerman argues that, during the 10 hours he was in the interview room, he was "permitted" to fall asleep only to be awakened by detectives for further questioning. At 12:36 a.m., a detective entered the room and asked, "How's it goin' man?" Ackerman sat up and started to cry. The detective asked, "You've been sleeping? No?" Ackerman shook his head no and said he had been "too upset" about "decisions I've made," which he blamed on drugs. When confronted about needing money for drugs and doing almost anything to obtain money, Ackerman said, "it's not like that" and said he could go without drugs. When asked about his sleeping the previous night, Ackerman said he had slept and added he had been sleeping a lot. For the next few minutes, Ackerman occasionally rested his head on the table or in his hand, but he continued to look at the detective and responded to questions. We disagree with Ackerman's claim on appeal that he appeared to "nod off" during questioning at 12:36 and 12:39 a.m. We do not see that in the recording.

The detective left and returned for several short periods of questioning. During these short sessions, Ackerman was awake, responsive and coherent.

On the occasion when the detective left the room at 1:57 a.m., Ackerman asked if they were able to find Klein's medicine. He said she looked like she needed it.<sup>24</sup> He did not request medical attention or medication for himself.

When the detective left the room at 2:23 a.m., Ackerman sat quietly resting his head on the table until 2:41 a.m., when two detectives entered the room. One asked, "Hey bud, still awake?" and Ackerman raised his head and said, "yeah." When the detectives confronted him with their belief Klein went into the house with the victim and without Ackerman and Baker, Ackerman insisted, "No. We all went in there." It was at that point the detectives said they had seen the text messages and those messages were very clear what was going to happen. Ackerman, who had been looking directly at the detective, looked down and then looked back up at the detective. Thereafter, Ackerman admitted Klein entered the victim's house first and took the victim upstairs to distract him while he and Baker entered the basement to "grab some things and leave," and that Ackerman hit the victim with a skateboard when the victim came downstairs. Based on our review, it appears to us that Ackerman was motivated to provide that additional information because he was confronted with the text messages and the fact that the detectives were talking to other people. (See *Stein v. New York* (1953) 346 U.S. 156, 185 [ 97 L. Ed. 1522] ["The inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which they could neither deny nor explain seems enough to account for the confessions here."].) We see nothing to suggest that anything related to sleep played a role in Ackerman's confession.

Nor do we see any evidence suggesting intentional police manipulation of the sleep-wake cycle. This was an ongoing investigation, during which the detectives were

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<sup>24</sup> This statement is not in the transcript.

pursuing multiple avenues for evidence -- including questioning not only Ackerman, but also Klein, taking Baker into custody around midnight, questioning Peterson at 1:44 a.m., conducting a search of Baker's apartment, during which they found Baker's gun, and obtaining the text messages. It was reasonable for them to question Ackerman as they received new information.

Recently, our high court has addressed a case involving a 12-hour interrogation that went well into the early morning hours and the defendant was not permitted to sleep at all. (*Peoples, supra*, 62 Cal.4th at p. 740.) In *Peoples*, the interrogation began at 4:00 p.m. (*Id.* at p. 739.) The first 10 hours of the interrogation were nonstop. During that time, the defendant "showed signs of physical and mental exhaustion: sweating, pulling out his hair, rubbing his skin, twitching his facial muscles, grinding his teeth, and at times appearing to fall asleep." (*Ibid.*) But the defendant was provided with bathroom breaks, coffee, water, sodas, and pizza. The detectives also asked the defendant if he wanted to speak with a lawyer. (*Ibid.*) After 10 hours of questioning, the detectives confronted the defendant with information they had obtained during the investigation. They confronted him with statements his wife had made to investigators after his arrest and "threatened to 'drag' her into the case and 'lean on' his stepson. They also showed pictures of his family to [the] defendant and pleaded with him not to make his family's life any more difficult than he already had." (*Ibid.*) Eventually, the defendant agreed to show the detectives where he had left the murder weapon. (*Ibid.*)

Noting that the test for voluntariness considers the totality of the circumstances, the court in *Peoples* stated that "[t]he determinative question 'is whether [the] defendant's choice to confess was not 'essentially free' because his will was overborne.' ' ' ' (*Peoples, supra*, 62 Cal.4th at p. 740.) The court acknowledged that the duration of the interrogation was substantial, at points the defendant showed signs of fatigue, and that these factors weighed against the admission of the statement. However, other factors weighed against a finding that the statement was involuntary. (*Id.* at

p. 741.) Additionally, the court observed, “We have previously found that a similarly lengthy interrogation did not amount to coercion under the ‘totality of the circumstances’ where, as here, the defendant was provided with food, drinks, and breaks upon request.” (*Ibid.*, citing *People v. Hill* (1992) 3 Cal.4th 959, 981, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

Here, Ackerman was provided food of his choice, water and bathroom breaks, and periods of time where he had the opportunity to nap. In our view, the video shows Ackerman’s statements were not the product of sleep deprivation or manipulation. He listened to the questions and gave thoughtful responses, many of which were calculated to minimize his involvement. His responses shifted when he was confronted with information the detectives had gleaned from other sources. Yet he still held his own and did not completely agree with their narrative. As we shall discuss, there are many examples showing that Ackerman’s will was not overborne.

Moreover, at 3:55 a.m. when Ackerman was left alone with Klein at the end of the interrogation, Ackerman was able to converse with her with apparent deliberation and enough self-possession to whisper, showing he was aware he was probably still being recorded. Sleep deprivation did not render Ackerman’s statements involuntary.

#### **d. Suggestions of leniency**

Ackerman argues that the detectives suggested leniency and that these statements were coercive. He cites authority that suggestions of leniency made to motivate the accused to confess render a resulting confession involuntary. (E.g., *Bram v. United States* (1897) 168 U.S. 532, 542-543 [42 L.Ed. 568], criticized in *Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed.2d 302]; *People v. Boyde* (1988) 46 Cal.3d 212, 238, criticized on other grounds in *People v. Sanders* (1990) 51 Cal.3d 471, 512.) According to Ackerman, the suggestions of leniency here were: (1) Detectives promised to protect Ackerman from Baker when Ackerman said he was afraid Baker would kill him if he

talked to police; and (2) detectives told Ackerman “[a]t various points during the interrogation” that he had to “help” himself and could do so by telling the detectives what they wanted to hear. On appeal, Ackerman does not specify what “various points” he references.

Our own review of the interrogation shows, for example, after the detective told him about the text messages, one of them said, “You need to help yourself out” and followed that with “And you’re not right now because you are not being totally honest with us.” After discussing the number of people they were interviewing, the detective said, “And it ain’t looking good for you right now. I’ll be honest with you. Unless you can tell me what happened and why it happened.” At that point, Ackerman said, “What do you mean it’s not looking good for me? I don’t understand how everything all the sudden’s changed. And you’re bringing people in.” The detective said they were bringing in as many people as they could to find out what happened. Ackerman said, “Well, I told you what happened, sir.” One of the detectives said he did not believe Ackerman. He cited the text messages making sure the victim was alone and said they were interviewing someone who said Klein took the victim upstairs, and that is when Ackerman and Baker entered the basement. It was at that point, Ackerman admitted that is what happened.

Ackerman fails to show any suggestion of leniency, much less any suggestion of leniency sufficient to render his statement involuntary. The detectives’ telling Ackerman to “help” himself is insufficient to show coercion. “In general, ‘any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law.’” [Citations.] In identifying the circumstances under which this rule applies, [the California Supreme Court has] made clear that investigating officers are not precluded from discussing any ‘advantage’ or other consequence that will ‘naturally accrue’ in the event the accused

speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.” (*Ray, supra*, 13 Cal.4th at pp. 339-340; accord, *Williams, supra*, 49 Cal.4th at p. 436.)

“ ‘[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, “[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,” the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, “if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible . . . .” ’ ” (*People v. Holloway* (2004) 33 Cal.4th 96, 115 (*Holloway*)).

In *Holloway*, the detective said “ ‘[w]e’re talking about a death penalty case here,’ ” and it could “ ‘make[] a lot of difference’ ” if the killings resulted from accident or drunken rage. (*Holloway, supra*, 33 Cal.4th at pp. 115-116.) The Supreme Court reasoned that, to the extent that the officer implied the defendant might avoid the death penalty by giving an account involving accident or blackout, “he did no more than tell [the] defendant the benefit that might ‘ ‘flow[] naturally from a truthful and honest course of conduct . . . .” ’ ” (*Id.* at p. 116.) The *Holloway* court further noted that the defendant began the interview with the intent merely to explain why he had asked someone to provide him with a false alibi. During the interview, the detectives made the defendant aware of some of the evidence they possessed against him. (*Ibid.*) By beginning the booking process, they made clear to the defendant that his complete denial would not save him from arrest and probable prosecution. (*Ibid.*) At that point, the defendant made admissions to his presence at the scene at the time of the crimes, while

laying the groundwork for mitigation. (*Ibid.*) As the trial court remarked, it appeared that the defendant was attempting to use the interview as much as the officers. (*Ibid.*)

Here, the detectives' telling Ackerman to "help" himself did not promise any lenient treatment and did not constitute coercion rendering the statement involuntary.

As for the promise made early in the interrogation to protect Ackerman from Baker, that promise did not depend on Ackerman's implicating himself. Indeed, at that point, Ackerman was portraying himself as an innocent bystander victimized by Baker. And the police merely promised to do what many expect would be done for witnesses or victims who fear retaliation.

Even if there was an improper promise, there was no causal connection to Ackerman's statements. There is no constitutional violation unless the improper promise is a motivating cause of the confession. (*Williams, supra*, 49 Cal.4th at p. 437 [a confession is not involuntary unless the police conduct and the defendant's statements are causally related]; *Ray, supra*, 13 Cal.4th at p. 339 [the promise of leniency or advantage must be a "motivating cause" of the confession].) We note that in Ackerman's own mind, there was apparently no causal connection between any perceived promises and his statements. During his suppression hearing testimony, he never mentioned any such promises. And despite the open-ended questions about anything else that "played a role" or "work[ed] on [him] in terms of [his] willingness to cooperate with the officers by answering their questions," he limited the factors contributing to his confession to pain and methamphetamine use.

**e. Purported coercion to agree with police view of the case**

Ackerman argues the detectives used coercive tactics by telling him the scenario of what they believed happened, and that he could "help" himself by providing a statement consistent with their belief. We disagree.

Again, we note that Ackerman's testimony does not support this contention. He never mentioned the detectives' overtures to help himself. Nor did he say his statements were motivated by the desire to help himself by telling the detectives what they wanted to hear. Given that Ackerman did not cite the detectives' statements to help himself as a motivating factor when given the opportunity to do so during his testimony, we infer that the detectives' statements were not causally connected to the statements Ackerman made, and thus he has failed to show the requisite causation.

Moreover, Ackerman's cited authorities are inapposite. In *People v. Lee* (2002) 95 Cal.App.4th 772, the police coerced a witness into naming the defendant as the killer by threatening to try the witness for murder unless he named the defendant as the killer. (*Id.* at p. 786.) In *People v. Esqueda* (1993) 17 Cal.App.4th 1450, the defendant asked the interrogators what they wanted him to say, and they told him that they wanted him to say he killed the victim, which they already knew, and the only way out for him was if it was an accident. The defendant then said he killed the victim accidentally. The appellate court concluded the confession was coerced under the totality of circumstances, which included a defective *Miranda* waiver, and police taking advantage of the defendant's exhaustion, emotion, and minimal education, and using lies and threats. (*Id.* at pp. 1485-1487.)

Here, there are numerous occasions where Ackerman disagreed with the version of events the detectives set forth throughout the interrogation. For example, early on the detectives said they had talked to people who said "you guys called from [the victim's] cell phone." Ackerman denied that he or Klein had used it, saying Baker had the phone. On several occasions, the detectives indicated their belief Ackerman knew Baker was bringing a gun. Ackerman denied any advance knowledge that Baker had his gun. Near the end of the interview, Ackerman disputed the detective's assertion that Baker was brought along for "muscle," instead insisting that Baker came along "Just for more hands to grab stuff." These instances of refusing to buy into the detectives' narrative not only

show Ackerman’s statements were not attempts to tell the detectives what they wanted to hear, but also that Ackerman’s will was not overborne.

**f. Totality of the circumstances**

The totality of the foregoing circumstances does not show coercion. We conclude that, even if not forfeited, Ackerman’s claims of coercion lack merit. Ackerman’s police interrogation was properly admitted into evidence at trial.

**B. CALCRIM No. 540B**

Ackerman contends the trial court erroneously refused his request to include bracketed paragraph 5 in the nonkiller felony-murder jury instruction of the version of CALCRIM No. 540B given here.<sup>25</sup> Language in that paragraph requires a “logical connection” between the act causing death and the felony underlying the felony murder. We conclude the trial court did not err by rejecting this paragraph.

**1. Background**

The prosecutor asked the court to omit bracketed paragraph 5, because it was appropriate only where the act resulting in death was completely unrelated to the underlying felony other than occurring at the same time and place. Citing *People v.*

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<sup>25</sup> Paragraph 5 of CALCRIM former No. 540B stated that, in order for the jury to find a nonkiller culpable for felony murder, the jury must find, “[AND ¶] 5. There was a logical connection between the act causing the death and the \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189> [or attempted \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189>]. The connection between the fatal act and the \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189> [or attempted \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189>] must involve more than just their occurrence at the same time and place.]” (CALCRIM No. 540B (new Jan. 2006) boldface omitted.) The direction preceding this bracketed paragraph told trial judges to “<Give element 5 if the court concludes it must instruct on causal relationship between felony and death.>” (Italics omitted.) This bracketed paragraph no longer appears in the instruction. Instead, similar language appears in the bench notes with the following direction: “If an issue about the logical nexus requirement arises, the court may give [that] language.” (Bench Notes to CALCRIM No. 540B (Feb. 2015 rev.) pp. 269-270.)

*Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*), the prosecutor said paragraph 5 was irrelevant to the case and would confuse the jury. Ackerman asked for paragraph 5. Ackerman argued the jury could conclude the parties were not jointly engaged in committing or attempting to commit robbery or burglary at the time of the homicide.

The trial court, after briefing and argument, ruled it would omit the bracketed paragraph. The court explained: “The court finds as a matter of law, on any reasonable inference from the evidence presented, that there is no issue over the causal connection between the underlying felonies and the killing. It is undisputed that James Arthur was the intended victim of the alleged burglary and robbery. It is undisputed that he was directly killed by at least one of the three codefendants, while all three codefendants were in his house. If the juries find as to their respective defendant that he or she committed the underlying burglary and/or robbery, and that Mr. Arthur was killed in the course of the crime’s/crimes’ execution, that defendant is also to be found guilty of felony murder. That is the felony-murder rule.”

On appeal, Ackerman argues that, under *Cavitt*, paragraph 5 should have been given when requested by the defense and the evidence raises an issue over the causal connection between the felony and the killing. Ackerman says there was no logical connection here, because Baker unexpectedly drew a gun at the scene, forced Ackerman to engage in conduct at gunpoint, and used the gun to prevent Ackerman from leaving while Baker stabbed Mr. Arthur.

In arguing felony murder to the jury, the prosecutor argued Ackerman could be found guilty based on his own admission that he had stabbed the victim twice, and Ackerman’s stabbing was a substantial factor in the victim’s death or, alternatively, if the jury “wanted to be careful,” it could find him guilty of felony murder as a nonkiller. Regarding the “personal use of a weapon” allegation, the prosecutor argued: “You can do it by either being responsible for it if you -- one of three things -- you display it in a

menacing manner, or hit someone with it, or you stab someone with it. By his own admission, [Ackerman] personally used that weapon.”

The defense argued to the jury that stab wounds inflicted by Ackerman were not a substantial factor in the victim’s death. But Ackerman’s trial counsel essentially admitted Ackerman committed burglary, stating, “Maybe there was a plan to have [Klein] take Mr. Arthur upstairs so Mr. Ackerman and Mr. Baker could go in there, take some things and leave, get in, get out without being seen. That, I suggest to you, is a reasonable conclusion to be drawn from all of this evidence.” Ackerman’s trial counsel also argued that maybe the victim came downstairs and interrupted the theft and “Mr. Baker or Mr. Ackerman, depending on whoever you believe, hits him hoping in this cartoonish effort, as I’ll call it, to knock him out so they won’t be detected, so they can now get out of there.” Trial counsel also argued Baker “went nuts” and forced Ackerman at gunpoint to “participate far beyond what Mr. Ackerman wanted to do and was willing to do when he went there, binding him and ultimately stabbing him twice.” Additionally, trial counsel argued, “If Mr. Ackerman entered the home with the intent to take personal property, he’s guilty of burglary. If he committed any of the other acts necessary, however, to satisfy the elements of the other crimes under duress, he’s not guilty of those crimes. [¶] Duress, I suggest to you, ended his voluntary participation in the burglary and everything else. Mr. Baker took this to a whole new level where Mr. Ackerman didn’t want to go. For that reason, I suggest to you he is not guilty of felony murder either.”

In rebuttal, the prosecutor argued to the jury that, under the theory argued by the defense, Ackerman was guilty of burglary and robbery, and the murder occurred “in the middle of this burglary, in the middle of this robbery.”

## 2. Analysis

A trial court may refuse to give a jury instruction that is unsupported by substantial evidence or confusing. (*People v. Hall* (2011) 200 Cal.App.4th 778, 782.)

The court in *Cavitt* held “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 not essential.” (*Cavitt, supra*, 33 Cal.4th at p. 196, italics added.)

Paragraph 5 of CALCRIM former No. 540B was drafted in response to *Cavitt*. (See *ante*, fn. 25.) In *Cavitt*, the defendant and his codefendant plotted with the defendant’s girlfriend to burglarize the home of the girlfriend’s stepmother and steal her jewelry and other valuables. (*Cavitt, supra*, 33 Cal.4th at p. 193.) With the assistance of the girlfriend (who was tried separately), the two defendants entered the house, threw a sheet over the stepmother’s head, bound the hooded sheet to her wrists and ankles with rope and duct tape, and escaped with jewelry, guns, and other valuables. The stepmother was beaten and left hog-tied face down on the bed. Her breathing was labored. Before leaving, the defendants made it appear that the girlfriend was a victim by pretending to tie her up as well. By the time the girlfriend untied herself and called her father to report the burglary-robbery, the stepmother had died from asphyxiation. (*Ibid.*) Defendant’s theory at trial was that the girlfriend deliberately suffocated her stepmother for reasons independent of the burglary-robbery after the defendants had escaped and reached a place of safety. (*Ibid.*) The Supreme Court found the trial court had no sua sponte duty to clarify the causal requirement for felony-murder because “the evidence . . . did not raise an issue as to the existence of a logical nexus between the burglary-robbery and the homicide . . . .” (*Id.* at p. 204.)

Referring to a hypothetical scenario posited in a law review article, the *Cavitt* court reasoned, “This is not a situation in which [the girlfriend] just happened to have shot and killed her lifelong enemy, whom she coincidentally spied through the window of the house during the burglary-robbery. [Citation.] [*The murder victim*] was the intended target of the burglary-robbery. As part of those felonies, [she] was covered in a sheet, beaten, hog-tied with rope and tape, and left facedown on the bed. Her breathing was labored at the time [the] defendants left. These acts either asphyxiated [the victim] in themselves or left her unable to resist [her stepdaughter’s] murderous impulses. Thus, on the record, one could not say that the homicide was *completely unrelated*, other than the mere coincidence of time and place, to the burglary-robbery.” (*Cavitt, supra*, 33 Cal.4th at p. 204, italics added.) The *Cavitt* court wrote, “*cases that raise a genuine issue* as to the existence of a logical nexus between the felony and the homicide ‘*are few indeed.*’ *It is 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.* Nor, other than in circumstances akin to the [law review] hypothetical, does it seem likely that a genuine dispute could arise when the victim was killed during the escape from the felony or was killed negligently or accidentally during the perpetration of the felony.” (*Ibid.*, fn. 5, italics added.)

Here, the homicide was not “completely unrelated” to the felony, because the victim was the intended target of the burglary-robbery and knew the identity of two of the perpetrators. The killing facilitated the burglary and robbery by eliminating a witness and enhancing chances of getting away with the crimes. The facilitation of the felony is relevant to establishing the nexus. (*Cavitt, supra*, 33 Cal.4th at pp. 196, 204.)

Furthermore, the *Cavitt* instruction is not required where the defendant participates in the assault. Here, by his own admission, Ackerman began the assault by hitting the victim with the skateboard. That initial blow undoubtedly rendered the victim less able to defend himself and vulnerable to further assault. Ackerman also helped bind the

victim and also admitted stabbing the victim twice. These actions helped render the victim unable to resist further attack, similar to *Cavitt*. (*Cavitt, supra*, 33 Cal.4th at p. 204.) There is simply no question as to a logical nexus here.

Ackerman's claim that he was an innocent bystander held at gunpoint to keep him from leaving does not raise a logical nexus issue. First, by Ackerman's own admission, he struck the victim with a skateboard as the victim was coming down the stairs and rendered him vulnerable to Baker's assault before Baker purportedly forced Ackerman's further participation by duress. Ackerman told the police that he had been putting items in a duffle bag before striking the victim. Second, Ackerman's claim about being a bystander held at gunpoint goes to his duress defense, which the jury rejected, not to the logical nexus issue. Even assuming Ackerman's theory related to the logical nexus issue, the jury verdict necessarily found a logical connection, because the jury specifically found true the special circumstances that the murder happened while Ackerman "was engaged in the commission of the crime[s] of" burglary and robbery. Thus, the jury rejected Ackerman's theory that he intended a burglary but was no longer "jointly engaged" at the time of the murder, because Baker drew the gun unexpectedly, forced Ackerman to participate, and prevented Ackerman from intervening or leaving. The test is not whether the defendant is jointly engaged at the time of the murder, but whether there is a logical connection or nexus between the underlying felony and the murder, and the "engaged in commission" language of the special circumstance finding satisfied the logical connection requirement. (*Cavitt, supra*, 33 Cal.4th at p. 203.) Moreover, the burglary, which Ackerman concedes was the plan, was ongoing at a minimum until all defendants reached a place of temporary safety, and where the victim remained under the control of the killer, the killing was part of a continuous transaction. (*Cavitt, supra*, 33 Cal.4th at pp. 208-209.)

We conclude the trial court properly omitted bracketed paragraph 5 of CALCRIM former No. 540B.<sup>26</sup>

### **C. Ackerman's Substantial Evidence Contention**

Ackerman argues the evidence was insufficient to convict him of murder, because the prosecution's theory was nonkiller felony murder, and "the record supports the defense theory" that his participation from the time the victim was bound to the time of death and beyond occurred under duress at gunpoint, and therefore he ceased to be engaged in the joint commission of the underlying felonies before the homicide began.<sup>27</sup> Ackerman asserts that he and Klein, "the only percipient witnesses," were not jointly engaged in burglary or robbery when the homicide occurred. Ackerman says that, before the homicide, Baker "unexpectedly drew a gun on Ackerman, forced Ackerman at gunpoint to assist in binding and the infliction of the first two knife wounds. Then, using the gun to prevent resistance or flight by Ackerman and Klein, Baker brutally butchered Mr. Arthur." Ackerman reiterates his *Cavitt* argument that there was no logical connection between Baker's killing of the victim and the underlying felonies in which Ackerman agreed to participate.

Ackerman apparently misperceives substantial evidence review. " 'When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences,

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<sup>26</sup> Since there was no error, we need not address Ackerman's arguments on prejudice.

<sup>27</sup> The People note this was not their only theory; they also argued an alternate theory that Ackerman's stabbing of the victim was a substantial factor in the victim's death.

might have reached a contrary conclusion.’ ” (*People v. Castro* (2006) 138 Cal.App.4th 137, 140, italics omitted.) We thus determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Our foregoing recitation of the evidence establishes without question that substantial evidence supports the judgment.

Moreover, the jury was not required to believe Ackerman or Klein’s fantastical testimony about Baker forcing them at gunpoint. Reasonable jurors could reasonably reject Ackerman’s claim of duress. Ackerman’s claim that Baker viciously stabbed the victim more than 100 times while pointing the gun at his cohort, Ackerman, strains credulity. To the extent Ackerman claimed he ceased to participate after hitting the victim with the skateboard because Baker unexpectedly drew a gun, Ackerman’s opening brief does not develop any argument or provide any analysis supporting a claim that he legally withdrew as an aider and abettor.<sup>28</sup>

“[I]t is no defense to felony murder that the nonkiller did not intend to kill, forbade his associates to kill, or was himself unarmed.” (*Cavitt, supra*, 33 Cal.4th at p. 198, fn. 2.)

Substantial evidence supports the verdict finding Ackerman guilty of murder.

#### **D. Parole Revocation Restitution Fine**

Ackerman argues the trial court improperly imposed an unauthorized parole revocation restitution fine of \$10,000 under section 1202.45, because he was sentenced to life in prison without possibility of parole. We disagree because Ackerman was also

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<sup>28</sup> Ackerman filed a joinder in Baker’s appellate contentions, and Baker argues withdrawal from conspiracy. However, withdrawal is unique to the individual. Moreover, Baker’s argument ignores the requirements for withdrawing as an aider and abettor, and in any event, we reject Baker’s contention, *post*.

sentenced to determinate terms on the underlying felonies, though execution of those terms was stayed under section 654.

Under section 1202.45, subdivision (a), “[i]n every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4,<sup>[29]</sup> assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.”

Determinate sentences imposed under section 1170 include a period of parole. (§ 3000, subd. (a)(1); *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*).

Here, the trial court sentenced Ackerman to life without possibility of parole for first degree special-circumstance murder, plus a determinate term of one year for personal use of a knife during commission of the murder. The court also sentenced Ackerman to determinate terms of six years for the burglary, nine years for the robbery, plus one year for personal use of the knife, but the court stayed execution of the determinate terms on the burglary, robbery and associated enhancements, under section 654. The court also imposed a \$10,000 restitution fine under section 1202.4, subdivision (b), and a \$10,000 parole revocation fine under section 1202.45, with the latter fine “suspended unless parole is revoked.”

Ackerman cites authority that a parole revocation fine may not be imposed for a term of life in prison without possibility of parole, because section 1202.45 is expressly inapplicable where there is no period of parole. (E.g., *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; *People v. Oganesyanyan* (1999) 70 Cal.App.4th 1178, 1184-1186.) However, Ackerman fails to acknowledge *Brasure*, which upheld imposition of a

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<sup>29</sup> Section 1202.4, subdivision (b) provides in part: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.”

section 1202.45 parole revocation fine where the defendant was sentenced to death *and* to determinate prison terms under section 1170. (*Brasure, supra*, 42 Cal.4th at p. 1075.) Our high court in *Brasure* acknowledged it was “unlikely” the defendant would ever serve any part of the parole period on his determinate sentence but concluded such a parole period was included in his determinate sentence by law and carried with it, also by law, a suspended parole revocation restitution fine. (*Ibid.*) The court added that the defendant was “in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked.” (*Ibid.*) The court distinguished *Oganesyan*, one of the cases Ackerman relies upon, as involving no determinate term imposed under section 1170 but rather a sentence of life without possibility of parole for first degree special-circumstance murder and an indeterminate life sentence for second degree murder. (*Brasure, supra*, 42 Cal.4th at p. 1075.)

We recognize *Brasure* is different from our case, because in *Brasure*, the aggregate sentence included determinate terms that were *not* stayed under section 654. (*Brasure, supra*, 42 Cal.4th at pp. 1044, 1046, 1049, 1075.) Nevertheless, the rationale in *Brasure* applies here, where the trial court imposed but stayed execution of determinate terms for the burglary and robbery counts. This is so because, if for some reason the murder conviction is later reversed, Ackerman could end up serving the determinate terms for burglary and robbery and could end up on parole. (See *People v. Duff* (2010) 50 Cal.4th 787, 796 [imposing and staying execution of a sentence on counts subject to section 654 ensures that the defendant will not receive a windfall of freedom from penal sanction if the conviction on the count which was not subject to section 654 is overturned].)<sup>30</sup> Moreover, section 1202.45 does not differentiate between

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<sup>30</sup> At oral argument, counsel for Ackerman pointed out that section 1202.45 provides for a parole revocation restitution fine when a defendant is “convicted of a *crime* and his or

imposed/executed sentences and imposed/stayed sentences, so we see no reason to do so. Further, here, as in *Brasure*, Ackerman “is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked.” (*Brasure, supra*, 42 Cal.4th at p. 1075.)<sup>31</sup>

We conclude the trial court properly imposed and suspended a section 1202.45 fine.

#### **E. Ackerman’s Joinder in Baker’s Claims**

Ackerman filed a cursory joinder in arguments made by Baker’s opening brief. Assuming this cursory joinder suffices (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11 [cursory joinder insufficient because defendant did not supply additional argument as applied to his unique circumstance] (*Nero*)), we reject Baker’s arguments *post*.

Ackerman’s reply brief develops a 10-page argument on one of the issues raised in Baker’s opening brief but not Ackerman’s opening brief. The issue relates to a jury instruction that an aider and abettor is “equally guilty” as the actual perpetrator. We need not address new points raised for the first time in Ackerman’s reply brief. (*People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055.) Ackerman suggests that one of his reply arguments -- that he did not forfeit his challenge to the “equally guilty” language by failing to raise it in the trial court -- merely responds to the forfeiture argument in the

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her sentence includes a period of parole” and that the enhancement carries with it no period of parole. (§ 1202.45, subd. (a).) Our holding is based on the determinate terms imposed and stayed on the robbery and burglary convictions, not the one-year enhancement for the weapons use.

<sup>31</sup> Despite the People’s citation of *Brasure*, Ackerman’s reply brief continues to ignore *Brasure*. Baker and Klein make the same argument as Ackerman about the parole revocation restitution fine. Klein’s reply brief withdraws the contention in light of *Brasure*, because she admits the fine is lawful as it applies to her conviction for receiving stolen property. Baker says the fine must be stricken unless *we* reverse the murder conviction. We disagree, because our affirmance of the murder conviction does not foreclose a reversal, e.g., on review or on a habeas corpus petition.

People’s brief. However, the forfeiture problem was anticipated and discussed in Baker’s opening brief.

## **F. Conclusion -- Ackerman’s Appeal**

We conclude Ackerman fails to show any reversible error.

### **II. Baker’s Contentions**

#### **A. CALCRIM No. 400**

Baker argues the trial court erred in instructing the jury, pursuant to CALCRIM former No. 400,<sup>32</sup> that an aider and abettor is “equally guilty” as the actual perpetrator. Although the defense did not raise the issue in the trial court and instead expressed satisfaction with the jury instructions, Baker argues on appeal that the jury may have believed that he left the victim’s home based on Klein’s testimony that he left after an argument with the victim. Thus, according to Baker, he was either not guilty of any crime or he aided and abetted the burglary by obtaining video games as the means to convince the victim to let them inside, but legally withdrew from an uncharged conspiracy when he left the house.<sup>33</sup> Baker argues that based on the instruction the jury

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<sup>32</sup> The trial court instructed the jury: “A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.” (CALCRIM former No. 400, italics added.)

<sup>33</sup> In contending he could have been found not guilty of any crime, Baker argues the jury could have believed he never borrowed the games from Tim Nelson to lure the victim into allowing them to enter, that he just came along for the ride that night not knowing of Klein’s and Ackerman’s plan, and he left the house before the assault and robbery. Baker argues the prosecutor admitted in rebuttal argument that it was possible Baker was there at the beginning, left afterwards, and participated in the division of the spoils afterwards with no participation in the crime itself, as argued by the defense. We do not read the prosecutor’s argument as the concession Baker impliedly claims. The prosecutor discussed reasonable doubt and explained it is not possible to prove any case beyond all

“had to find [him] ‘equally guilty’ as Ackerman, even if it believed [Baker] left [the victim’s] house before any assault began, and that only Ackerman was a direct perpetrator of that assault and subsequent robbery.” Baker argues the trial court, in instructing the jury on May 10, 2010, should have been aware of *People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*) and *Nero, supra*, 181 Cal.App.4th 504, and instructed sua sponte with the newly available April 2010 revised version of CALCRIM No. 400, which deleted the “equally guilty” language. (CALCRIM former No. 400 (Fall 2010 ed.) p. 143.)

Assuming the contention is not forfeited by failure to raise it in the trial court, we conclude that any error was harmless.

This court addressed the “equally guilty” language in CALCRIM former No. 400 in *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1120 (*Lopez*), disapproved on other grounds in *People v. Banks* (2015) 61 Cal.4th 788, 809, fn. 8. (*Banks*), and held the defendant forfeited the contention by failing to object to that language in the trial court. The revised instruction was not at issue in that case. (*Lopez*, at p. 1119, fn. 5.) The court in *Lopez* observed, “Generally, a person who is found to have aided another person to commit a crime *is* ‘equally guilty’ of that crime. [Citations.] [¶] However, in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator.” (*Id.* at p. 1118.) Nevertheless, “[b]ecause the instruction as given was generally accurate, but

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possible or imaginary doubt. He explained that the standard is not beyond a shadow of a doubt either. Then he said, “It is possible that somehow two other people committed this burglary/robbery. Mr. Baker was there in the beginning, left afterwards and participated in the division of the spoils afterwards with no participation in the crime itself, as [Baker’s defense counsel] posits in his closing argument. Sure, it’s possible. It’s possible all of this is a lie for that matter. The question before you is what is the reasonable interpretation of this evidence.” He then argued that Baker’s theory “makes no sense.” Moreover, as we discuss *post*, the jury found beyond a reasonable doubt that Baker *personally used* a gun, knife and gardening shears. Thus, the jury necessarily rejected Baker’s *not guilty of anything* theory.

potentially incomplete in certain cases, it was incumbent on [the defendant] to request a modification if she thought it was misleading on the facts of this case. Her failure to do so forfeits the claim of error.” (*Id.* at pp. 1118-1119.) More recently, this court applied the same reasoning in *People v. Nilsson* (2015) 242 Cal.App.4th 1, 25. (Accord, *Samaniego, supra*, 172 Cal.App.4th at p. 1163.)<sup>34</sup>

Citing *Samaniego*, our Supreme Court has recently acknowledged that “as a general matter, “ “a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” ’ ” (*People v. Johnson* (2016) 62 Cal.4th 600, 638 (*Johnson*)).) But the court went on to also observe, “defendant contends that instructing the jury with the ‘equally guilty’ language in CALCRIM former No. 400 violated his state and federal constitutional rights to due process because *it allowed the jury to convict him of first degree murder based on the mental state of the perpetrator, without considering defendant’s own mental state.* Were that argument to prevail, the error in giving CALCRIM former No. 400 arguably would have affected defendant’s substantial rights. [Citation.] This court concluded in *People v. Bryant*,

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<sup>34</sup> While defendant contended in his opening brief that the trial court should have been aware of the “equally guilty” defect in CALCRIM No. 400 after *Samaniego* and *Nero* and the publication of the new instruction, he claims in his reply brief that trial counsel should be excused from failing to object because the new instruction was published a month after the trial started and this court’s case in *Lopez* was not decided until 15 months after the trial ended. According to defendant, “trial counsel are not required to be clairvoyant or anticipate the direction in which undetermined issues in the law will move. [Citation.] Counsel ‘can[not] be held accountable for failing to raise objections which could only be sustained by reference to cases yet [decided].’ ” But, as he pointed out in his opening brief, *Samaniego* and *Nero* had been decided long before the trial. He asserts that the trial court should have been aware of those cases, but apparently trial counsel should be excused for not knowing about the same authorities. Moreover, the court in *Samaniego* had expressly found forfeiture for the same reasons this court later did in *Lopez*. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163.) Clairvoyance by trial counsel was not required here.

*Smith and Wheeler* (2014) 60 Cal.4th 335, 432 . . . that a former version of CALJIC No. 3.00, an instruction similar to the one at issue here, ‘generally stated a correct rule of law.’ We nonetheless assumed the defendants’ challenge to the ‘“equally guilty”’ language in that instruction was not forfeited for lack of objection and reached the merits of their claim, as permitted under section 1259.<sup>[35]</sup> [Citation.] We take a similar approach here.” (*Johnson*, at pp. 638-639, italics added.)

Our high court did not overrule *Samaniego* or say that the approach it took in *Johnson* must be taken in all cases. The instant case is different from *Johnson*. As noted, Baker asserts he was either not guilty of any crime or that he committed a burglary and withdrew from an uncharged conspiracy before the murder took place. Unlike the defendant in *Johnson*, a case which did not involve felony murder, Baker does not argue the instruction allowed the jury to convict him of first degree murder based on the mental state of the perpetrator, without considering his own mental state and a lesser homicide crime.

Indeed, in our view, the “equally guilty” language is a correct statement of the law in felony-murder cases where the aider and abettor intended the underlying felony instead of some lesser included offense and did not legally withdraw from the commission of the underlying felony before the killing.<sup>36</sup> As our high court has observed, “The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing

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<sup>35</sup> Section 1259 provides: “Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the *substantial rights* of the defendant were affected thereby.” (Italics added.)

<sup>36</sup> We conclude that there was insufficient evidence to support a withdrawal defense, *post*.

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.’ ” (*Cavitt, supra*, 33 Cal.4th at p. 197.) “ ‘The mental state required [for felony murder] is simply the specific intent to commit the underlying felony [citation] . . . .’ [Citation.] The actus reus requirement for an aider and abettor to first degree felony murder is aiding and abetting the underlying felony or attempted felony that results in the murder. [Citations] The mens rea for an aider and abettor to first degree felony murder is the same as that for the actual [killer] . . . .” (*People v. Clark* (2016) 63 Cal.4th 522, 615 (*Clark*).) Baker conceded in his briefing that there is evidence of his participation in the burglary. A burglary continues as long as the perpetrators have control of the victim and they have not reached a place of safety. (*People v. Wilkins* (2013) 56 Cal.4th 333, 341, 344 (*Wilkins*).)

This case is not like *Johnson*, a prosecution that did not involve felony murder. Here, the instruction did not allow the jury to convict Baker of first degree murder based on the mental state of one of the other defendants without considering Baker’s own mental state. There was no lesser homicide offense involving a different mens rea that was available for consideration here. Thus, substantial rights were not implicated as they were in *Johnson* and section 1259 does not apply.

We conclude that defendant forfeited his objection to the “equally guilty” language in CALCRIM former No. 400.

In attempting to avoid forfeiture, Baker relies on *Nero, supra*, 181 Cal.App.4th 504, but that case is distinguishable. *Nero* was not a felony-murder case. Aside from being an example of how the “equally guilty” language could result in a jury’s convicting an aider and abettor of murder based on the mental state of the perpetrator without considering the aider and abettor’s own mental state, *Nero* involves a unique procedural event not present here.

In *Nero*, the court held that an aider and abettor could be found guilty of a lesser homicide-related offense than the offense the actual perpetrator committed. (*Nero, supra*, 181 Cal.App.4th at p. 507.) Unlike here, the mens rea related to murder was at issue as to each defendant. The prosecution asserted that the aider in the case was defendant’s sister who aided the defendant by handing him a knife while he was engaged in a fight with the victim. The defendant testified that prior to the stabbing, the victim made derogatory comments to his sister about her sexual orientation and the victim challenged defendant to fight. During the altercation, the defendant stabbed the victim. (*Id.* at pp. 507-508.) The jury was instructed on first and second degree murder and voluntary manslaughter. (*Id.* at p. 510.) During deliberations, the jury asked for clarification as to whether an aider and abettor could be found guilty of a greater or a lesser homicide-related offense than the direct perpetrator. Without conferring with counsel, the trial court told the jury that principals in a crime are equally guilty. (*Id.* at pp. 510, 512, 517, fn. 13.) Both defendants were convicted of second degree murder. (*Id.* at p. 509.)

The *Nero* court noted that even if the defendant initially forfeited the issue by agreeing to the original jury instruction on aiding and abetting without seeking modification, the issue was “renewed” when the jury asked for clarification. Thus, there was no forfeiture. (*Nero, supra*, 181 Cal.App.4th at pp. 512, 517, fn. 13.) *Nero* has no application here where counsel had the opportunity to object. Baker argues, “parallel to the sister handing the brother the knife in *Nero*, was [Baker] obtaining video games from Nelson for Ackerman to use to persuade [the victim] to allow him and Klein to return to

[the victim's] house.” But the two cases are not “parallel.” The mental state for the killing here was not at issue because this was a felony-murder prosecution.

In *Lopez* and *Samaniego*, after concluding defendant had forfeited the “equally guilty” contention, both courts went on to conclude that any error was harmless beyond a reasonable doubt. (*Lopez, supra*, 198 Cal.App.4th at pp. 1119, 1120; *Samaniego, supra*, 172 Cal.App.4th at p. 1163, 1165.) We reach the same conclusion here.

There was overwhelming evidence that Baker was not outside of the house when the murder occurred. Baker confessed to several people about his participation in this horrendous crime. Text messages to his phone show he was present in the victim's house during the commission of the murder. Human blood consistent with the victim's blood was found on the barrel of his gun. Moreover, even under Klein's version that Baker left, Baker did not stay away. Baker's jury heard Klein testify that the males were playing video games when an argument started over the games; the victim told Baker to leave, and Baker left. After Baker left, Klein, Ackerman and the victim came upstairs; then the victim went downstairs; then Ackerman went downstairs; and then Klein heard “guys' voices” in the basement, which she could not distinguish at first, “[j]ust screaming and then just like the guys cussing and calling Jim a fag and stuff.” She testified that, “Because [she] heard [Baker's] voice,” she texted Baker asking him to send Ackerman upstairs.

Not only did the evidence show that Baker was present during the murder, but it is clear the jury concluded he was a direct perpetrator of the killing as well as the robbery and burglary. The jury found beyond a reasonable doubt Baker *personally* used a gun, knife, and gardening shears during the commission of these crimes.<sup>37</sup> Thus, the jury

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<sup>37</sup> At oral argument, counsel for Baker argued that the personal use findings do not necessarily show the jury found Baker was a direct perpetrator. Counsel points out that “use” includes displaying a weapon. But according to Baker's trial theory -- which was completely inconsistent with his admissions -- he was not present when the weapons

necessarily resolved the issue of his direct perpetration by other instructions. (See *Samaniego, supra*, 172 Cal.App.4th at p. 1165 [jury necessarily found defendant acted with intent to kill when it found a special circumstance true that required proof defendant intended to kill].) Any instructional error here was harmless beyond a reasonable doubt. (*Ibid.*)

### **B. Withdrawal**

The trial court instructed the jury on uncharged conspiracy and liability of conspirators. Baker argues the trial court erred in failing to instruct sua sponte with CALCRIM No. 420,<sup>38</sup> on the defense that he withdrew from an uncharged conspiracy to commit robbery (by leaving the house upon the victim’s demand) and was therefore not liable for the robbery or the killing that happened after he withdrew. According to Baker, under his withdrawal theory, he could be guilty of no more than burglary. We conclude there was no error.

Baker contends, “In this case evidence of ‘withdrawal’ was supplied by Klein’s testimony, that [the victim] ordered [Baker] to leave, and [Baker] did; and that she [(Klein)] did not see [Baker] return.” However, as we have seen, Baker’s view of the

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were used. He left before those events. Consequently, we find this parsing of the “use” element as it relates to the jury’s finding unpersuasive.

<sup>38</sup> CALCRIM No. 420 states, “The defendant is not guilty of conspiracy to commit \_\_\_\_\_ <insert target offense> if (he/she) *withdrew from the alleged conspiracy before any overt act was committed. To withdraw from a conspiracy, the defendant must truly and affirmatively reject the conspiracy and communicate that rejection, by word or by deed, to the other members of the conspiracy known to the defendant.* [¶] . . . [¶] [If you decide that the defendant withdrew from a conspiracy after an overt act was committed, the defendant is not guilty of any acts committed by remaining members of the conspiracy after (he/she) withdrew.] [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw from the conspiracy [before an overt act was committed]. If the People have not met this burden, you must find the defendant not guilty of conspiracy. [If the People have not met this burden, you must also find the defendant not guilty of the additional acts committed after (he/she) withdrew.]” (Boldface and original italics omitted; our italics added.)

record is flawed. Klein's testimony cannot be construed as evidence that Baker did not return. To the contrary, Klein testified that, after Baker left, she went upstairs and then later heard "guys' voices" in the basement, including Baker's voice, and she texted him about the noise. When she returned to the basement, Baker was there. She saw him put wine bottles in a duffel bag.

Even assuming for the sake of argument that there was evidence Baker left and did not come back, that conduct would not suffice for withdrawal, because to withdraw from a conspiracy the conspirator must withdraw before any overt act is committed. (*People v. Sconce* (1991) 228 Cal.App.3d 693, 702.) It is uncontroverted that several alleged overt acts were committed before Baker supposedly left the house, including: used a cell phone to contact the victim, got into and/or drove a vehicle to the victim's residence, and made entry into the victim's residence.<sup>39</sup> Baker's purported withdrawal occurred too late. Additionally, withdrawal requires that the conspirator affirmatively repudiate the conspiracy and communicate that repudiation, by word or by deed, to the other members of the conspiracy. (*People v. Crosby* (1962) 58 Cal.2d 713, 730; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1003.) Merely leaving does not affirmatively communicate repudiation of the conspiracy. (*Crosby, supra*, at p. 730.) In the absence of substantial evidence of withdrawal, the trial court was not required to give the instruction. (*People v. Belmontes* (1988) 45 Cal.3d 744, 793 (*Belmontes*), disapproved on other grounds in *People v. Cortez* (2016) 63 Cal.4th 101, 118 [because defendant failed to show requirements for aider and abettor withdrawal, he was not entitled to the instruction]; *People v. Ross* (1979) 92 Cal.App.3d 391, 405 (*Ross*) [conspiracy instruction not warranted because there was no evidence tending to suggest withdrawal where defendant did not communicate intent to withdraw, but merely left the apartment he had helped to burglarize before the perpetrator started the fire that killed the victim]; see *People v.*

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<sup>39</sup> These acts were among the overt acts listed in the uncharged conspiracy instruction.

*Watson* (2000) 22 Cal.4th 220, 222 [trial court required to instruct on defense of entrapment only if substantial evidence supported the defense].)

Baker argues the trial court “clearly found that evidence alone [(leaving)] was substantial enough to serve as the foundation for a withdrawal instruction, for it instructed the jury that People had the burden of proving . . . that [Baker] did not withdraw under an aiding and abetting theory.”<sup>40</sup> However, Baker cites nothing in the record that the trial court made any such finding. Rather, the record shows that during the conference on jury instructions, the court ruled the withdrawal instruction would be given to Ackerman’s and Klein’s juries. There was no discussion about including it in Baker’s instructions, so its subsequent inclusion was apparently inadvertent.

If the trial court made an affirmative finding that the evidence was sufficient for the withdrawal defense to aiding and abetting, we would disagree that there was evidence to support the instruction. Merely leaving is also insufficient to support withdrawal from aiding and abetting. Similar to conspiracy withdrawal, an aider and abettor must notify everyone he or she knows is involved in the commission of the crime that he or she is no longer participating. Further, the aider and abettor must do everything reasonably within his or her power to prevent the crime from being committed. (*Belmontes, supra*, 45 Cal.3d at p. 793; *Ross, supra*, 92 Cal.App.3d at pp. 404-405; *People v. Norton* (1958) 161 Cal.App.2d 399, 403.) There is no evidence supporting these two requirements.

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<sup>40</sup> The court instructed with CALCRIM No. 401, which stated in part: “A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things: [¶] 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime. [¶] AND [¶] 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.”

Moreover, the jury's findings that Baker personally used a gun, knife, and gardening shears, indicate the jury did not find Baker guilty as a coconspirator, but as a direct perpetrator. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1221 [no prejudice from defense counsel's failure to argue withdrawal from aiding and abetting, because jury found defendant to be direct perpetrator by finding personal use of firearm].)

We conclude Baker was not entitled to a jury instruction on withdrawal from an uncharged conspiracy.

### **C. CALCRIM No. 540B**

Baker presents his own argument and joins Ackerman's argument (to the extent consistent with Baker's position)<sup>41</sup> that the trial court erred in refusing a defense request to instruct with bracketed paragraph 5 of CALCRIM former No. 540B, requiring a logical nexus between the felony and the killing in order to convict a nonkiller for felony murder. We reject the argument for the same reasons we discussed in relation to Ackerman. We additionally reject Baker's specific arguments.

As we have discussed *ante*, there was overwhelming evidence that Baker was a direct perpetrator. Besides the overwhelming evidence that Baker was a direct perpetrator, the jury expressly found Baker personally used the stabbing weapons and gun in connection with both the murder and the robbery, making him a direct perpetrator in both the killing and the robbery. We agree with the People it is difficult to imagine how a jury could find that someone used a gun, knife, and gardening shears, while committing murder, and also used the same weapons, at the same time and place, while committing a robbery, and yet find the robbery unconnected to the murder.

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<sup>41</sup> Whereas Ackerman argues Baker stabbed the victim 170 times while holding Ackerman at gunpoint, Baker argues that Ackerman unexpectedly and inexplicably assaulted and stabbed the victim after Baker left.

Baker’s reply brief contends the jurors may have felt compelled to find Baker personally used the weapons, even if they thought it was Ackerman rather than Baker who held the weapons, because CALCRIM No. 400 said an aider and abettor (i.e., Baker) is “equally guilty” as the perpetrator. We disagree. The *equally guilty* jury instruction referred to equal guilt of a “crime.” (See *ante*, fn. 32.) The enhancement instruction said that, after finding the defendant guilty of a crime, the jury had to decide whether Baker “personally used” a weapon during that crime. There was no instruction that said an aider and abettor was equally guilty of a weapon-use enhancement. Nor did the prosecutor make any such argument to the jury. Consistent with the instructions, the prosecutor told the jury “*Someone personally uses* a dangerous or deadly weapon if *he or she* [i.e., not an accomplice] intentionally does any of the following: [¶] One, displays the weapon in a menacing manner; or, two, hits someone with the weapon; or, three, stabs someone with the weapon.” (Italics added.) Similarly, the prosecutor argued to the jury that “*Someone personally uses* a firearm if he or she intentionally does any of the following: One, displays the weapon in a menacing manner; two, hits someone with the weapon, or, three, fires the weapon.” (Italics added)

As we discussed regarding Ackerman’s CALCRIM No. 540B contentions, there was no duty to instruct under *Cavitt*. In any event, any error was harmless. Baker concedes there was evidence showing that he committed burglary. And we have concluded there is a logical nexus to killing the victim, the one witness to this burglary.

Baker argues the burglary was complete when they entered the home. However, burglary is not complete for purposes of felony-murder and burglary-murder special circumstances until the perpetrators have reached a place of temporary safety. (*Wilkins, supra*, 56 Cal.4th at pp. 341, 344.)

Baker contends his act of leaving the victim’s home “broke the logical connection.” He again relies on Klein’s testimony to support the notion that he left. However, as we have said, she clearly indicated Baker came back and actively

participated in beating and stabbing the victim to death and stealing the victim's belongings. Additionally, the logical connection focus is not on what the aider and abettor did, but rather on whether there is a connection between the killing and the underlying felony. Clearly, there was a logical connection. As we have said, the killing facilitated the burglary and robbery because it resulted in the elimination of a witness.

Baker's reply brief cites *People v. Mil* (2012) 53 Cal.4th 400 (*Mil*), which issued several weeks after the People filed their respondent's brief in this case. Baker contends *Mil* decided this exact issue, i.e., whether a trial court prejudicially erred in failing to instruct on the elements of felony-murder special circumstance for a nonkiller defendant. However, *Mil* did not involve the *logical nexus* instruction. In *Mil*, our high court concluded the trial court "clearly" erred in omitting instruction that, for a felony-murder special circumstance, a nonkiller must have personally had the intent to kill or have been a major participant in the commission of the burglary or robbery and acted with reckless indifference to human life. (*Id.* at p. 409.) The issue the court decided in *Mil* was whether the error was reversible per se or amenable to harmless error analysis. (*Ibid.*)

The *Mil* court concluded the error was not reversible per se but was prejudicial under a *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]) because a rational juror could have had a reasonable doubt whether the defendant was subjectively aware of the risk of death when he participated in the burglary and robbery. (*Mil, supra*, 53 Cal.4th at pp. 405, 409.) Baker quotes from *Mil*, which said that in deciding this issue (reversal per se or harmless error analysis): "The critical inquiry, in our view, is not the *number* of omitted elements but the *nature* of the issues removed from the jury's consideration." (*Id.* at p. 413.) Baker argues *Mil* does not make clear whether the deficient instruction was CALCRIM No. 540B or CALCRIM No. 703 ("Special Circumstances: Intent Requirement for Accomplice . . . Felony-murder"). We think it clear that *Mil* involved CALCRIM No. 703, wherein is found the language about reckless indifference. *Mil* has no bearing on this case.

We conclude Baker fails to show error regarding CALCRIM No. 540B.

#### **D. Claim of Cumulative Error**

Baker next contends the cumulative effect of the three foregoing instructional errors denied him of his constitutional rights to due process and fundamental fairness. We have reviewed the claims of error and conclude there was no cumulative error requiring reversal.

#### **E. Eighth Amendment**

Baker argues the special circumstances statute (§ 190.2) violates the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment, because the statute fails to narrow sufficiently the class of first degree murders subject to death or life in prison without possibility of parole. However, Baker was not sentenced to death, and the United States Supreme Court has said in dictum that no sentence of imprisonment would be disproportionate for a crime as serious and violent as felony murder. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1004 [115 L.Ed.2d 836].) This seems particularly true given the nature of the murder in this case and Baker's admitted involvement.

Baker concedes the California Supreme Court has “consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty.” (*People v. Pollack* (2004) 32 Cal.4th 1153, 1195.) Baker acknowledges that principles of stare decisis call for us to reject his claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He says he raises this issue now in order to preserve it for federal appeal. We have no compunction about rejecting his claim, particularly given the jury's findings that he personally used the stabbing weapons and gun in connection with the robbery, burglary and murder.

## F. Parole Revocation Restitution Fine

Like Ackerman, Baker argues the amended abstract of judgment must be amended by striking the companion section 1202.45 parole revocation restitution fine, because he has been sentenced to a base term of life without possibility of parole, and therefore is ineligible for parole.

Although the trial court pronounced a \$10,000 section 1202.4, subdivision (b) restitution fine, it indicated but did not orally pronounce the \$10,000 companion section 1202.45 parole revocation restitution fine, which is “suspended unless parole is revoked.”

Because the section 1202.45 fine was included in Baker’s amended abstract of judgment, he suggests the clerk was unauthorized to include the fine and, in any event, it was improper. We reject this argument for reasons similar to our reasoning in rejecting Ackerman’s challenge to the same fine. Under section 1202.45, subdivision (a), “[i]n every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.” In addition to the sentence of life without possibility of parole, Baker was also sentenced to determinate term sentences on the underlying felonies, which were stayed pursuant to section 654. Here, as in *Brasure*, Baker “is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked.” (*Brasure, supra*, 42 Cal.4th at p. 1075.)<sup>42</sup>

Under the circumstances, the parole revocation restitution fine was mandatory (see *ante*, fn. 30), and the trial court’s failure to pronounce it orally does not prevent us from ordering it (*People v. Smith* (2001) 24 Cal.4th 849, 852-853). We will modify the

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<sup>42</sup> Baker says the fine must be stricken unless we reverse the murder conviction. We disagree, because our affirmance of the murder conviction does not foreclose a reversal, e.g., on review or on a habeas corpus petition.

judgment to provide for the \$10,000 section 1202.45 parole revocation restitution fine, suspended unless parole is revoked. Since the amended abstract already reflects imposition of this fine, no remand is necessary.

### **G. Conclusion -- Baker's Appeal**

We modify the judgment to include the \$10,000 section 1202.45 parole revocation restitution fine. We otherwise affirm the judgment against Baker.

## **THE KLEIN APPEAL**

### **FACTUAL AND PROCEDURAL BACKGROUND**

After Klein's jury was unable to reach a verdict in the first trial, she was retried on charges of first degree murder with robbery and burglary special circumstances, first degree burglary, and first degree home invasion robbery in concert. Evidence adduced at retrial included much of the same evidence as her first trial, including the text messages, crime scene investigation, forensics evidence, testimony from Dillon about Ackerman and Klein bringing the laptop to his house, and Klein's statements to the detectives, which we have already recounted. There was additional evidence.

#### **Additional Prosecution Evidence**

Klein's toe print was found on the floor.

There was testimony about the June 3, 3:22 a.m. text from the Ackerman/Klein phone that included the word "quick" instead of "quiet" ("U need to keep him quick [*sic*: quiet])." The cell phone custodian of records explained that the texting system suggests words that can be selected for inclusion into the text. The word "quick" would be suggested once "qui" is typed in.

#### **Defense Evidence**

Klein testified again in her own defense. At the time of the murder, she had just turned 20 years old. She had a ninth grade education. She began her relationship with

Ackerman when she was 15. She was pregnant with Ackerman's child when she was arrested and gave birth while in custody in December.

Klein testified that Ackerman became physically and verbally abusive toward her in early 2008. With increasing frequency, he punched and choked her. He gave her black eyes, bruises, and a hairline fracture of her arm. He tried to control her decisions and limit her contact with her family. She stayed in the relationship and did not contact law enforcement, because she loved him and did not think she could do any better. Ackerman told her no other man would want her, because she was unattractive and unemployed.

Klein moved out of her mother's home in January. Klein and Ackerman stayed with friends, in motels, or in her car. She did most of the driving. Ackerman drove her car occasionally but did not have a driver's license. They shared two cell phones, both registered to Ackerman. However, they only had one good battery and only used one cell phone as of June 2. They used methamphetamine every day, smoking it in a glass pipe. She used heavily during the six months before the victim died.

Klein met the victim in January while smoking methamphetamine with her friend, Maegan Ruiz. Klein brokered a drug deal involving the victim on May 31. On that day, the victim typed his cell phone number into the Ackerman/Klein phone.

Klein said she and Ackerman visited the victim's house in the early morning hours of June 2 after she had contacted the victim by text between 2:39 and 3:55 a.m. to ask if he wanted to hang out. While they were there, the three of them smoked methamphetamine Klein had brought, ate pizza, played video games, and may have watched a movie. At some point, Klein and Ackerman left.

Klein testified that Ackerman sent the 11:30 a.m. text to the victim about having "left a bong there" and asking about whether the victim wanted to "kick it." She had asked Ackerman to find out whether they had left the bong there. When asked whether she recalled the later texts to the victim -- "Can we come back now?" "Okay, have your

pipe clean,” “Where do I park?” -- Klein said “I don’t believe so.” But she said she saw Ackerman texting. She also denied texting about having run out of gas, and testified they had not run out of gas. She asked Ackerman to send the text asking whether she could shower at the victim’s house.

At some point during the afternoon of June 2, they returned to the victim’s house, where they watched a movie, played dominos and Klein used the victim’s computer and took a shower. They stayed at the victim’s house a few hours. At some point while they were there, Klein answered a call on the Ackerman/Klein cell phone. The person, whose voice she did not recognize, asked for Ackerman. Ackerman later told her it was Baker who had called. By the time they left the victim’s house it was “getting dark.”

Klein and Ackerman went to visit various people. Klein denied sending the texts at 8:21 and 8:27 p.m. that started with “I owe my connect \$30 and need to sell this” and she did not recall the victim’s response about the only two people he knew who smoked was Klein and Ruiz.

At some point, they went to Baker’s apartment. They arrived at around 10:30 or 11:00 p.m. Klein had never been there before. Ackerman and Baker left for about an hour, while Klein stayed in the apartment with Baker’s girlfriend, Peterson.

Klein denied having the cell phone while they were at Baker’s apartment. She denied sending the 11:57 p.m. and 12:07 a.m. text messages to the victim.

After Ackerman and Baker returned, Klein and Ackerman remained at Baker’s apartment for an hour or two. The two men talked about going to the victim’s place to hang out. Klein testified that she was tired and did not want to go, but she did not want to start a fight with Ackerman, and she needed to drive because Baker did not have a car and Ackerman did not have a driver’s license.

Klein denied sending the text messages beginning at 11:57 p.m. She also denied being aware that those messages had been sent. She did not make the call to the victim at 12:28 a.m. and was not aware of it. She also denied knowledge of any text messages

from the victim. As they drove to the victim's house, she noticed that Ackerman was texting someone.

Klein testified she was unaware of any plan to steal anything. On the way to the victim's house, the music was turned up high. She heard Ackerman say to Baker that the only good things the victim had were the laptop and PlayStation, but Klein testified they did not discuss stealing them. She testified she did not believe they intended to steal the victim's property because Ackerman "talks about a lot of good things."

Ackerman brought three or four video games with him, which he placed on the center console during the ride to the victim's house. She did not ask about the games. Klein testified that the first time she heard that the victim thought Ackerman had stolen his games was at his house when she heard the accusation during the argument.

When they arrived, the victim was outside smoking a cigarette; he looked annoyed. Ackerman introduced Baker to the victim. Klein said she went into the basement and watched TV. At some point thereafter, the three males came in and played a video game. Klein said she did not think the victim knew Baker.

While in the basement, all four smoked methamphetamine. The three males started arguing because the victim accused Ackerman of stealing video games. Baker called the victim "fag," and the victim told Ackerman and Baker to leave. Only Baker left, exiting out the back door of the basement.

After Baker left, Klein went up to the first floor to use the bathroom and get a drink. Ackerman and the victim also went upstairs and the three of them sat in the sitting room on the first floor, where Ackerman plugged their phone into the wall to charge it. They smoked more methamphetamine in the sitting room and ate pizza.

At some point, the victim went to the bathroom. Klein said Ackerman texted Baker and then told Klein that Baker was back in the basement, waiting. She testified that she, Ackerman, and the victim continued to smoke methamphetamine and talk.

During that time, Ackerman was texting; Klein guessed he was texting Baker. Klein denied sending any of the text messages related to keeping the victim upstairs.

On cross-examination, Klein admitted she did not tell the victim that Baker was in the basement when the victim came out of the bathroom. When asked why she had not, Klein testified, "I just didn't." When the prosecutor said there had to be a reason, Klein said, "I don't know." Later, during redirect examination on another day, Klein testified the reason she did not tell the victim that Baker was in the basement was because she did not want the victim or Ackerman to get mad. Although he had been there about half an hour, she assumed Baker was just waiting.

According to Klein, the victim liked to make "prank calls." Klein agreed the calls in the phone records at 3:12 and 3:17 a.m. were the prank calls. When asked on cross-examination whether the prank calls were used to delay the victim from going downstairs, Klein said, "Could have been." Klein said she gave the victim Contreras's number, and he called it four times. When asked who gave the victim Ron Dillon's number, which was also called, Klein said she did not know. Klein said she saw Ackerman texting after they finished making prank calls.

After the prank calls, the victim said he was going to get his laptop from the basement and went downstairs. She said Ackerman was still upstairs texting. Klein heard a commotion downstairs and yelling by more than one person. Ackerman walked to the front door of the house, came back to the sitting room and texted on the phone and then went down to the basement. Klein denied having sent the text between 3:22 a.m. and 3:26 a.m. about you need to keep him "quick" and turning on the music, and "doors locked" and denied knowledge of the text from Baker's phone that said, "come here." The cell phone was left upstairs when Ackerman went downstairs.

Klein heard yelling and screaming. She did not know the victim was being attacked; she claimed she thought Baker and the victim were fighting. She felt stuck. She was scared and wanted to know what was happening, so she sent the 3:30 a.m. text,

“Send Jeremy up here to help me.” Klein did not explain what she meant by “help me.” Ackerman did not come upstairs.

Klein said she also sent the 3:31 a.m. message to Baker, which read, “Shut him the FUK up.” She sent that message because she was afraid the neighbors would hear the yelling and call the police. She testified that her phone did not indicate that anyone read those messages. Klein claimed she still thought they were just fighting at that point.

Klein testified that she went downstairs a minute or two after sending the “Shut him the FUK up” text because she wanted to see what was going on and because she was worried about Ackerman. Once at the bottom of the stairs, she stepped into the laundry room. When Ackerman saw her, he told her to stop, and she did.

She testified that before going downstairs she could not see into the basement bedroom from where she was situated. She did not see Ackerman hit the victim with a skateboard or tie up the victim. She testified she did not see Baker put the gun in the victim’s mouth, did not see any stabbing and did not see Baker even holding a knife.

Klein claimed she heard Ackerman and Baker discuss making the scene look like a burglary, and that she saw them putting the victim’s items in the duffle bag, including the laptop and the PlayStation. She claimed Baker twice told her to “Come here,” to help pack the duffel bag but she did not do so. She said she then drove the two men away from the victim’s house because she loved Ackerman and was scared of Baker. At some point after the killing, Klein figured out that Ackerman and Baker had set the victim up for stealing from him, and the conflict had not been about the victim being gay.

When they got to Baker’s apartment, Baker left the laptop and PlayStation in Klein’s car but took the duffle bag. Klein denied selling the laptop. She and Ackerman did take the laptop to Dillon’s house, but did not try to sell it. She said she was told that the laptop was left with “some guy named Mike,” who was a friend of her friend, Hillary. The laptop was in Hillary’s residence when she last saw it. Klein said she and Ackerman traded the PlayStation for another one with a DVD player. Klein denied trying to

reprogram the victim's phone. She heard Baker say he was going to burn his bloody clothing, a sweatshirt Ackerman was wearing that belonged to Baker, and the duffle bag.

On cross-examination, Klein admitted the cost for the methamphetamine she and Ackerman used was approximately \$100 per day. In addition to selling drugs, she and Ackerman shoplifted from Kohl's department store multiple times per day, returning the items for cash to pay for methamphetamine.

In further response to the prosecutor's questions, Klein said she told the detectives numerous lies. Among the things she said was a lie was the reason she texted the victim to see if the victim was going to be alone. She admitted that after the detective told her he would obtain all of the text messages, she told him that she sent that text at Ackerman's request, but that was a lie. She admitted telling the detective that Ackerman told her to pick up Baker because Ackerman was tired of the victim accusing him of stealing, but Ackerman did not tell her to do this either. Klein admitted telling the detective that Ackerman said during the car ride to the victim's house that they "wanted" the victim's laptop and PlayStation, but when asked on cross-examination whether that was the truth or a lie, she said, "I guess, a lie." She also said Ackerman and Baker never talked about "taking" the laptop and PlayStation, even though she told the detective they did. Klein admitted telling the detective she became aware of Ackerman's and Baker's intent to rob the victim on the drive to the victim's house. But that was also a lie. Klein acknowledged telling the detective that they were using her three games as an excuse to visit the victim, but that was a lie. She testified that Ackerman brought three games with them, but the games did not belong to her.

Klein explained her prior inconsistent statements to the detectives as being part of a concerted effort by her and Ackerman to place all the blame on Baker and take the blame off them. They discussed this when the two were left alone together in the welfare office after they were arrested. She also said she felt pressure from the police. For example, she told the detectives that she thought Ackerman and Baker set up the victim

because that was what they wanted to hear. She told the detectives she had been the one to send the text messages that were sent before they went to the victim's house and while they were there, "[b]ecause it looked that way, so I told him that it was me." She admitted, however, that she chose to tell numerous lies to the detectives and was thinking clearly when she did so.

On direct examination, Klein said she may have sent some of the post-crime texts to Baker. On cross-examination, she was asked about those texts.

Klein said she could have authored texts in the following June 3 text exchange between the Ackerman/Klein phone and Baker's phone at 8:44 p.m.:

[BAKER]: "What you 2 doing?"

[A/K]: "Sitting at home." "Playing bingo."

[BAKER]: "So any progress?"

[A/K]: "Got dope."

[BAKER]: "No, money?"

[A/K]: "They making the money for it."

[BAKER]: "What you mean?"

[A/K]: "I told them come up wit 2,000 or no."

Klein said she could have sent these texts, but said there was nothing worth \$2,000 so it must have been a typing error. As of the day she testified, she thought the laptop and PlayStation together were worth "\$200," but she did not know what she was thinking about the value of those items at the time.

There were additional text messages between the Ackerman/Klein and Baker phones on June 4. The following exchange occurred at 3:05.

[BAKER]: "You guys are hella funny. You know that. What that mean? You don't answer your phone. What do you think it means? Mean I'm doing something. Really? Well, you say one thing and do another."

[A/K]: "Ask anyone. I always take forever."

[BAKER]: “Yeah. Well, maybe you should answer the phone and be real with me.”

[A/K]: “I’m dealing with my shiv.<sup>[43]</sup> I need to get done like this being pregn again.”

[BAKER]: “I suggest you start being honest with me and keeping your word.”

[BAKER]: “Yeah, well, I’m done talking to you. Let me talk to your man seriously.”

[A/K]: “When he is with me I’ll let you talk to him.”

[BAKER]: “Ain’t he got a phone?”

[BAKER]: “Tell me you still have the laptop because I can have sold right now.”

Klein said she believed she sent those texts, but also said she did not remember sending them. She did remember Baker texting her at one point, “Tell me you still have the laptop because I can have it sold right now.”

On June 4, at 6:46 p.m. there was the following text exchange in which Klein thought she participated.

[BAKER]: “You still want to sell it or not?”

[A/K]: “Yes.”

[BAKER]: “You can text but not answer the phone?”

[A/K]: “My phone is on the charger and I’m with a couple PPL.”

[BAKER]: “What time do you think you are coming through? Or are you going to keep saying that you will do something and never do it?”

[A/K]: “You ain’t gonna believe me either way. I’ll have my man call you.”

We set forth additional trial evidence in our discussion of Klein’s evidentiary challenges *post*.

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<sup>43</sup> Earlier in her testimony, Klein testified that “shiv” meant “shit.”

## VERDICT AND SENTENCING

The jury found Klein guilty of first degree murder with the burglary-murder special circumstance, first degree burglary, and possession of stolen property as a lesser included offense of robbery. The jury acquitted her of robbery and found “not true” the robbery-murder special circumstance.

The trial court sentenced Klein to life in prison without possibility of parole for the murder and special circumstance, plus the upper term of three years for possession of stolen property. The court stayed imposition of sentence for burglary under section 654.

## DISCUSSION

### III. Klein’s Contentions

#### A. CALCRIM No. 540B

Klein argues the trial court erred in denying her request to include in CALCRIM No. 540B the former bracketed paragraph 5 (see *ante*, fn. 25 ) requiring a “logical connection” between the underlying felony and the killing in order to convict a nonkiller under the felony-murder rule. Klein argued in the trial court that the evidence that Baker said they should “make it look like a burglary” after the killing supported a reasonable inference that Baker killed the victim “completely independent” of the burglary or robbery. The prosecutor disagreed, stating that “after-formed intent” was adequately covered in the instruction. At defense counsel’s request, the trial court incorporated by reference in the record of Klein’s second trial the oral and written arguments of all counsel and the trial court’s ruling on this instructional request in the first trial. The trial court ruled it would not include bracketed paragraph 5, for the same reasons as the first trial.

On appeal, Klein argues that “the *only* connection between [her] accomplice activity supporting her burglary conviction and the unplanned killing is that they occurred at the same place and on the same day . . . .” According to Klein, “[t]here was no

evidence that [the victim's] death assisted [her] to escape or otherwise facilitated her participation in the crime” and, “[b]ecause Ackerman’s and Baker’s lethal attack on [the victim] was both unplanned and unnecessary, there was no causal nexus between the crime committed by [her] and [the victim’s] death.”

We reject Klein’s CALCRIM No. 540B argument for the reasons we already stated with respect to Baker and Ackerman (except those reasons related to the two men being direct perpetrators). We additionally reject Klein’s individual arguments. On appeal, Klein focuses on a connection between *her accomplice activity* and the killing, but the proper focus is the connection between the killing and the underlying felony, not the individual accomplice’s activity in committing the felony.

Klein also cites a treatise that advocates removing residential burglary as a basis for felony murder, because most burglaries are planned to avoid encountering witnesses, and if one thief unexpectedly encounters resistance and overcomes it with force, that thief becomes a robber, but his accomplices may not. (Binder, *Felony Murder (Critical Perspectives on Crime and Law)* (2012) pp. 193-194.) However, the California Legislature has identified burglary as a felony-murder felony. (§ 189.) Moreover, the burglary in this case was not planned to avoid encountering witnesses. To the contrary, Klein, Ackerman, and Baker all knew that the victim -- the intended target of the theft -- was going to be home and, therefore, even if the victim did not resist the theft, the victim would be a witness who could testify against them in a trial for burglary.

Klein argues that she had no reason to expect the theft from the victim would become violent and result in his death. But the law does not require an accomplice to a felony-murder felony to foresee or have an expectation that someone be killed before the accomplice can be liable under the felony-murder doctrine. “[T]he felony-murder rule is intended to eliminate the need to plumb the parties’ peculiar intent with respect to a killing committed during the perpetration of the felony.” (*Cavitt, supra*, 33 Cal.4th at pp. 197-198.)

We conclude the omission of bracketed paragraph 5 from CALCRIM No. 540B was not error.<sup>44</sup>

## **B. Evidentiary Rulings**

Klein argues the trial court abused its discretion by allowing evidence of sexually explicit letters she wrote to Ackerman in jail, while redacting from those letters references to the death of their first child, who died before the events in this case.<sup>45</sup> We disagree.

### **1. Background**

As in the first trial, Klein in the retrial filed a motion in limine to exclude as improper character evidence any reference to the death of her first child, whom Klein says died of sudden infant death syndrome while sleeping with Klein and Ackerman. The People did not object. Defense counsel also moved to exclude evidence of “jail mail” between Klein and Ackerman on the grounds of invasion of privacy and unlawful seizure. The trial court ruled the jail mail admissible insofar as it was relevant. The court deferred ruling regarding evidence of the child’s death at the request of defense counsel because counsel indicated the defense position might change. Defense counsel subsequently withdrew the motion to exclude evidence about the death of the first child, but the People then moved to exclude this evidence, and the trial court granted the motion without prejudice.

The prosecutor later provided the court with a copy of the jail mail he sought to admit at trial, noting that references to the first child’s death would need to be redacted. Klein opposed the redaction.

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<sup>44</sup> We therefore need not address Klein’s claim that the error was prejudicial.

<sup>45</sup> The child born while Klein was in custody is their second child.

The trial court held an Evidence Code section 402 hearing on the defense's motion to present the expert testimony of Linda Barnard, Ph.D., regarding battered women and behaviors consistent with being a victim of domestic violence. When asked to frame precisely the offer of proof, defense counsel said he was unable to do so because Klein and other witnesses had not yet testified, but he said the expert would not testify whether Klein was an abuse victim but rather would give generic testimony about behavior of abuse victims such as (1) whether they would call police if they witnessed their abuser commit homicide and whether they would stay with the abuser, (2) whether they would try to protect the abuser if police questioned them, (3) whether they would comply with the abuser's demand for a car ride even if they were tired and did not want to go, and (4) whether they would send love letters to the abuser in jail.

At the Evidence Code section 402 hearing, the expert testified on these points. She also testified that a tragedy such as losing a child tends to bring the parents together, and a subsequent pregnancy would enhance that bond. During cross-examination, the doctor said she had not been given any information about the child's death. The prosecutor asked if the doctor's testimony would change if the child had been an infant and died while sleeping in bed with the domestic violence victim and her abuser, and both parents had methamphetamine in their system. The doctor said such an event "could" change the relationship between the victim and abuser, depending on the circumstances.

The prosecutor argued to the trial court that evidence of the child's death should be excluded under Evidence Code section 352 because of its potential for arousing sympathy. The prosecutor added that, if the evidence were allowed, he would seek to introduce evidence regarding the reckless behavior of Klein and Ackerman at the time of their child's death. Defense counsel argued evidence of the death should be allowed, with an admonition to the jurors not to be swayed by sympathy. Defense counsel argued the prosecutor should not be allowed to suggest recklessness, because a full investigation

revealed no evidence that the parents' conduct contributed to the death "other than . . . they had used methamphetamine." The prosecutor said he could, for example, offer expert testimony that bringing the infant to their bed while they were on drugs could have led to the infant being smothered and that there would not necessarily be any physical evidence of smothering. The prosecutor also disagreed with defense counsel's view that the defense expert considered the child's death significant, and ultimately urged the court to deny the defense request.

The trial court ruled that evidence of the child's death was inadmissible because "It is of marginal relevance. It is cumulative to the other evidence of the IPB (intimate partner battering) and adds very little, if anything, to this case except a huge potential for prejudice, for sympathy, for factors which could and I think would get in the way of a jury being objectively capable of assessing the evidence in this case and applying the law that I give them." Defense counsel stated a continuing objection to redactions of references to the child's death.

Defense counsel asked that sexually graphic references be redacted from Klein's letters as "extremely prejudicial." The prosecutor argued it was relevant to rebut the defense characterization of Klein as a domestic abuse victim.

The trial court observed Klein's letters did not have a submissive tone but rather an aggressive quality relevant to the prosecution's case that Klein was not forced to participate in the crimes. The prosecutor said one of the sexually explicit letters was used by the expert to opine that the circumstances were consistent with domestic violence, and the jury would need to see the letters to determine the weight to give to the expert opinion and whether the expert factored comments like those in the letters into her opinion. Defense counsel said the prosecutor was "kind of talking out of both sides of his mouth," because he wanted to give the jury the total picture -- except for the infant's death, which was part of the total picture.

The trial court said the sexually explicit material in Klein's letters was extremely probative, because Klein herself was putting into play a defense of duress and making her relationship with Ackerman the central defense. The letters were "central to exploring that relationship" and "potentially very probative," and it would be unfair to prevent the prosecution from presenting this probative evidence. The court also noted the jury had heard gruesome evidence of a heinous murder, and "the sexually explicit letters should not be, in the Court's view, the kind of thing that would cause this jury or any other well-selected jury to be unable to assess evidence in a murder case, to lose their objectivity, to be swayed by prejudice or other [section] 352 of the Evidence Code concerns. I don't find that it is unduly prejudic[ial]." The court was also mindful of the prosecutor's representation that he would not "hype" those portions of the letters by displaying them on the overhead projector.

The letters were admitted into evidence, after redacting references to the infant's death. During the defense case, Klein testified that she sent the letters because she still loved Ackerman, even though he was abusive.

Dr. Barnard testified about domestic violence and said it would be consistent for a victim of domestic abuse not to report witnessing her abuser commit homicide, staying with a batterer who committed the crime, driving somewhere she did not want to go, lying to law enforcement to protect her abuser, and continuing to express to her abuser her love and desire to maintain the relationship in writing after their arrest. The expert also testified that battered women are not all the same, and some victims can be aggressive. It would not be unusual for a victim to placate her abuser by assisting him in criminal conduct he initiated.

In final instructions, the trial court told the jurors that court personnel would bring the trial exhibits into the jury deliberation room, remain while the jurors examined the exhibits, and then leave with the exhibits, but the jurors could request to view any exhibit again. The jury did not request to see the letters.

## 2. Analysis

On appeal, Klein says she recognizes the broad discretion afforded the trial courts to act as gatekeepers of the evidence under Evidence Code section 352.<sup>46</sup> (See *People v. Thomas* (2012) 53 Cal.4th 771, 806 [trial court’s exercise of discretion under Evidence Code section 352 will be upheld on appeal unless the trial court abused its discretion, i.e., exercised its discretion in an arbitrary, capricious, or patently absurd manner]; *People v. Kraft* (2000) 23 Cal.4th 978, 1035 [generally, application of ordinary rules of evidence do not constitute an infringement on constitutional rights].) However, Klein argues, “Each of the rulings challenged here would normally be unassailable individually, but operating together in the context of this case, the trial court’s decision to allow the sexually explicit letters into evidence while barring any mention of the death of [her] first child was reversible federal constitutional error.”

As noted by the People, Klein cites no authority that two individually proper evidentiary rulings can cumulatively create a constitutional violation when considered together. As aptly put by the People, “To reverse a familiar maxim, two rights do not make a wrong.”

Klein’s reply brief argues that the People miss the point. Klein argues the issue is the court’s *redaction* of the letters admitted into evidence. She says that, by admitting only those portions of the letters that showed her in a “non-sympathetic” light and redacting portions that were sympathetic, the court allowed the prosecution to make a one-sided presentation of character evidence.

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<sup>46</sup> Evidence Code section 352 provides, “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.”

However, the court did not admit *only* “non-sympathetic” portions of the letters, as Klein claims. The admitted evidence included quotes humanizing Klein, such as the following:

“I’m gonna try and slip you the ultrasound picture and a candy bar in court this time.”

“Happy Birthday. You know I’m thinking of you.”

“They searched mine a while ago and found letters from you. I was so mad when they took them.”

“Babe, I need you to know you don’t need to say sorry to me anymore, because nothing will change what happened. And in the end, if anything, I’ll still be your friend for Jo’Dee [the baby born while Klein was in custody].”

Moreover, Klein’s argument is not persuasive. She does not claim the redacted portions of the letters were necessary to make the unredacted portions understood. (See Evid. Code, § 356.) Rather, she suggests she was entitled to get sympathy for the death of her baby in order to “balance out the antipathy some jurors might feel from reading Klein’s sexually explicit descriptions in the same letters.” We disagree.

The references to her child’s death had no relevance to the case (Evid. Code, § 350 [“No evidence is admissible except relevant evidence.”]), and sympathy is an inappropriate consideration. In addition, the sexually explicit passages were unlikely to cause undue prejudice, particularly since her expert testified her letters were not inconsistent with being a domestic abuse victim. While the prosecutor mentioned the letters during closing argument, the argument did not excessively focus on the letters, and what the prosecutor did say focused on the theory that the letters indicate Ackerman did not abuse Klein. The prosecutor asked the jurors to ask themselves why “a poor victim of abuse” would write “pornographic” passages to her abuser, such as her “fantasy” that “I tore off your wife-beater and began to kiss you from your head to your toes, et cetera.” The prosecutor argued that, although “wife-beater” refers to a type of T-shirt, a true

domestic violence victim would not use that phrase. The prosecutor quoted from another “fantasy” letter in which Klein wrote, “Later, you caught me by surprise by saying, ‘Bitch, I’m gonna serve you.’ You had proceeded to throw me on the bed, tore my panties off, et cetera, et cetera.”

Even assuming for the sake of argument that there was evidentiary error, it was clearly harmless, given the extensive evidence of Klein’s guilt, as set forth above, including her self-incriminating prior inconsistent statements.

We conclude Klein fails to show evidentiary error.<sup>47</sup>

**C. Sufficiency of the Special Circumstance Evidence --  
Major Participant/Reckless Indifference<sup>48</sup>**

After the original briefing, a new attorney substituted for Klein’s original appellate counsel. New counsel asked to file supplemental briefing regarding Klein’s liability as an aider and abettor on the burglary special circumstance allegation. We granted the request.

The felony-murder special circumstance applies to aiders and abettors who are major participants and act with reckless indifference to human life. (§ 190.2, subd. (d).)<sup>49</sup> As our state Supreme Court acknowledged in *Banks*, the elements in 190.2,

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<sup>47</sup> Because we conclude the trial court did not err, we need not address Klein’s prejudice argument.

<sup>48</sup> In light of our conclusion that the evidence is sufficient to support the finding that Klein was a major participant and acted with reckless indifference, we need not address the People’s contention that she also acted with intent to kill.

<sup>49</sup> Section 190.2, subdivision (d) provides: “Notwithstanding subdivision (c) [(aider and abettor who intends to kill)], every person, not the actual killer, who, with *reckless indifference to human life* and as a *major participant*, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special

subdivision (d) come from *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127] (*Tison*). (*Banks, supra*, 61 Cal.4th at p. 798.) In *Tison*, the Court held that the death penalty cannot be constitutionally imposed on a nonkiller aider and abettor unless that person either intended to kill or was a major participant who acted with reckless indifference to life. (*Tison, supra*, at p. 158, fn. 12.) This language was codified in section 190.2, subdivision (c) and (d) by the electorate as part of Proposition 115 and it applies to both the imposition of the death penalty and life without possibility of parole. (*Banks, supra*, 61 Cal.4th at pp. 800, 797-798, 804.) As a shorthand, we will refer to the elements in section 190.2, subdivision (d) as “the *Tison* elements” and the combination of the elements as “*Tison* liability.”

In her supplemental briefing, Klein contends the evidence was insufficient to establish that she was a major participant who acted with reckless indifference. This is so, according to Klein, because there was no evidence she planned to kill the victim, was personally armed with or used a weapon, actively participated in a violent felony such as robbery, or participated in prior felonies with either of the codefendants where either codefendant killed someone. She emphasizes that she was acquitted of robbery and thus there was no intent to take the victim’s property by force or fear. We conclude there was substantial evidence she was a major participant in the burglary and acted with reckless indifference.

### **1. Standard of review and the *Tison* elements**

“When reviewing a challenge to the sufficiency of the evidence, we ask ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” [Citations.] Because the sufficiency of the evidence is ultimately a

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circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4. (*Italics added.*)

legal question, we must examine the record independently for “substantial evidence -- that is, evidence which is reasonable, credible, and of solid value” that would support a finding beyond a reasonable doubt.” (*Banks, supra*, 61 Cal.4th at p. 804.) However, we do not reweigh the evidence or reevaluate witness credibility. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) These principles are applicable regardless of whether the prosecution relies primarily on direct or circumstantial evidence; the standard of review is the same. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125; *People v. Bean* (1988) 46 Cal.3d 919, 932.) Thus, “[i]f the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant reversal of the judgment.” (*Bean, supra*, 46 Cal.3d at p. 933.) The substantial evidence standard applies to challenges to evidence underlying true findings in special circumstance cases. (*Banks, supra*, 61 Cal.4th at p. 804; *People v. Cole* (2004) 33 Cal.4th 1158, 1229; *People v. Proby* (1998) 60 Cal.App.4th 922, 928 (*Proby*)). As noted, the *Tison* elements are the defendant: (1) was a major participant and (2) acted with reckless indifference to human life. (§ 190.2, subd. (d).)

Major participation requires that a “defendant’s personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder.” (*Banks, supra*, 61 Cal.4th at p. 802.)

At oral argument,<sup>50</sup> counsel for Klein argued that an aider and abettor’s conduct relevant to determining major participation is the conduct that “contributes to the violence.” Counsel argued that Klein’s participation was “not a major contribution to the violence that occurred.” We disagree with Klein’s narrow view of major participation.

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<sup>50</sup> Because *Banks* was filed after Klein submitted her supplemental briefing on the sufficiency of the evidence of *Tison* liability, prior to oral argument, we invited counsel for Klein to address *Banks*.

In *Tison*, the high court focused on the nonkiller's participation in the underlying felony in determining major participation, not whether the nonkiller contributed to the violence inflicted upon the victim. The *Tison* court observed, "The [defendants'] own *personal involvement in the crimes* was not minor, but rather, as specifically found by the trial court, 'substantial.' Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each [defendant] was actively involved in every element of the kidnap[p]ing-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the [victims] and the subsequent flight. The Tisons' high level of participation in these crimes further implicates them in the resulting deaths." (*Tison, supra*, 481 U.S. at p. 158, italics added.) The court then concluded, "we simply hold that *major participation in the felony committed*, combined with reckless indifference to human life, is sufficient" to satisfy the Eighth Amendment. (*Ibid.*, italics added.)

In considering the concept of major participation, the court in *Banks* reviewed post-*Tison* jurisprudence. The *Banks* court noted that the only post-*Tison* United States Supreme Court guidance "comes from *Kennedy v. Louisiana* (2008) 554 U.S. 407, 421 [171 L.Ed.2d 525], where the Court in dicta characterized the governing standard as permitting the death penalty for nonkillers whose '*involvement in the events leading up to the murders* was active, recklessly indifferent, and substantial.' " (*Banks, supra*, 61 Cal.4th at p. 800.) The *Banks* court then looked to this court's opinion in *Proby, supra*, 60 Cal.App.4th 922, 933-934, "which concluded 'major participation' should be understood as the phrase is used in common parlance, as including those whose involvement is 'notable or conspicuous in effect or scope' and who are 'one of the larger or more important members . . . of a . . . group.'" ( *Banks*, at p. 800.) The *Banks* court concluded that these definitions only went so far and then looked to *Tison's* constitutional underpinnings. (*Id.* at p. 801.)

Because the constitutional imperative for individualized sentencing determinations underlies *Tison*, the *Banks* court noted “[a] sentencing body must examine the defendant’s *personal role in the crimes leading to the victim’s death* and weigh the defendant’s individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime.” (*Banks, supra*, 61 Cal.4th at p. 801, some italics added.) The *Banks* court then said *Tison* and *Enmund* establish that “a defendant’s personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder such as [Enmund].” (*Banks*, at p. 802; *Tison, supra*, 481 U.S. 137; *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140] (*Enmund*).)

At oral argument, counsel for Klein focused on the *Banks* court’s observation that a sentencing body must “weigh the defendant’s individual responsibility for the loss of life, not just his [or her] vicarious responsibility for the underlying crime” to support the contention that the nonkiller’s conduct must contribute to the violence in order to be considered a major participant. But this language does not mean that major participation requires conduct that directly contributes to the violence. In context with the rest of the sentence as quoted in the previous paragraph, it means that the weighing process measuring the nonkiller’s responsibility for the loss of life involves looking at that individual’s personal role in the *crimes leading* to the victim’s death.

Based on the discussion in *Tison* and *Banks*, it is clear that the focus for major participation is not a nonkiller’s direct involvement in or contribution to the violence, but rather the nonkiller’s involvement in the *events* and *crimes* leading to the killing. Furthermore, by identifying what a nonkiller did after lethal force was used, as a factor to consider (*Banks, supra*, 61 Cal.4th at p. 803), the *Banks* court has indicated that a nonkiller’s conduct after the killing is also relevant to the question of major participation.

The court in *Banks* went on to discuss major participation in terms of a spectrum of conduct. Near one end of the spectrum of conduct not meeting the *Tison* requirement

of “major participant” is a generic getaway driver such as in *Banks* and *Enmund*, who “did not see the [killing], did not have reason to know it was going to happen, and *could not do anything to stop the [killing] or render assistance.*” (*Banks, supra*, 61 Cal.4th at p. 807, italics added; see *Enmund, supra*, 458 U.S. at p. 786, fn. 2.) Such a participant is “the quintessential ‘minor actor.’ ”<sup>51</sup> (*Ibid.*) We shall discuss Klein’s participation *post*, with the discussion from *Banks* in mind.

As for reckless indifference, the *Banks* court observed, “[r]eckless indifference to human life ‘requires the defendant be “*subjectively* aware that his or her participation in the felony involved a grave risk of death.” ’ ” (*Banks, supra*, 61 Cal.4th at p. 807.) “Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a ‘grave risk of death’ satisfies the constitutional minimum.” (*Id.* at p. 808.) Recently, our high court adopted the Model Penal Code definition of reckless indifference, which requires that the defendant “consciously disregard[] a substantial and unjustifiable risk” of death and that the risk “be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” (*Clark, supra*, 63 Cal.4th at pp. 617, 622.) This definition recognizes that in addition to the subjective element to reckless indifference, there is also an objective element. (*Ibid.*) “[R]ecklessness is not determined merely by reference to a defendant’s subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what ‘a law-abiding person would observe in the actor’s situation.’ ” (*Id.* at p. 617.)

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<sup>51</sup> The *Banks* court was careful to say that the conduct of the getaway driver in *Enmund* does not necessarily represent “a constitutional maximum, i.e., the most culpable one can be and yet still be constitutionally ineligible for death, such that *any* variation would move one into the death-eligible zone.” (*Banks, supra*, 61 Cal.4th at p. 811.)

Whether there is substantial evidence supporting establishment of the *Tison* elements is a question that requires consideration of the totality of the circumstances. (*Banks, supra*, 61 Cal.4th at p. 802.) In *Banks*, our high court set forth a list of non-exclusive circumstances to consider: “What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used?” (*Id.* at p. 803.) The *Banks* court explained, “No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant’s participation ‘in criminal activities known to carry a grave risk of death’ [citation] was sufficiently significant to be considered ‘major.’ ” (*Ibid.*) In considering this question, we must view the evidence in the light most favorable to the judgment. (*Id.* at pp. 802, 804.)

## **2. Analysis**

Viewing the evidence in the light most favorable to the judgment, we conclude there was substantial evidence that Klein was a major participant and she acted with reckless indifference to human life. We shall organize our analysis around the *Banks* considerations, but we are mindful of our high court’s instructions that none of the listed considerations are necessary, nor is any one of them necessarily sufficient. (*Banks, supra*, 61 Cal.4th at p. 803.) We are also mindful that while the *Tison* court stated the two elements separately, it indicated that these elements “often overlap” and that major participation, while not sufficing to establish reckless indifference, can still “often provide significant support for such a finding.” (*Tison, supra*, 481 U.S. at p. 158, fn 12.;

accord, *Clark, supra*, 63 Cal.4th at pp. 614-615 [noting the “interrelationship” between the two *Tison* elements and that they often overlap]; *People v. Medina* (2016) 245 Cal.App.4th 778, 788 [noting, “These two requirements -- having a reckless disregard for human life and being a major participant -- will often overlap.”].)

In her briefing, Klein candidly acknowledges “there was evidence of participation in the burglary such as that [Klein] (1) wrote text messages arranging to meet [the victim] at his home on the evening of the burglary, (2) planned to take [the victim’s] property before entering his house, (3) drove Baker and Ackerman to [the victim’s] [house], (4) helped to take [the victim’s] property, and (5) drove them away in her car.” Accordingly, we will not recite the evidence again establishing these matters.

**a. Klein’s major participation**

Four of the *Banks* circumstances are pertinent as to Klein’s participation: Klein’s role in planning and perpetrating the criminal enterprise, her presence at the scene, her being in a position to facilitate or prevent the actual murder, and what she did after lethal force was used.

We begin with the role Klein played in this criminal enterprise that led to the death of the victim. As the trial court noted at sentencing, “[the victim] would be alive today if it weren’t for you.” “But for [your] betrayal, he would be alive.” Based on our review of the evidence, we agree with the trial court on these points.

There was evidence establishing that Klein was with Ackerman and Baker at Baker’s apartment early in the predawn hours of June 3 around the time text messages were being sent to the victim to arrange their visit to the victim’s house. As noted, Klein concedes the evidence was sufficient to establish that she “wrote text messages arranging to meet [the victim] at his home on the evening of the burglary.” A fair inference can be drawn from the events that took place thereafter that the three hatched a plan to enter the victim’s home for the purpose of taking his property. While the inferences show Klein

knew about the plan before the three left to go to the victim's house, her own admissions to the detectives establish she at least became aware of the plan as she drove Ackerman and Baker to the victim's house. Klein admitted telling the police she knew they were using video games as a subterfuge to gain entry into the victim's home. Again, Klein concedes in her briefing there was evidence she "planned to take [the victim's] property before entering his house" and she acknowledges that "[t]he jury's findings are consistent with a conclusion that [she] participated in planning and accomplishing an entry into the house for the purpose of larceny."

Klein got Ackerman and Baker into the victim's house on the ruse of returning video games Ackerman had earlier stolen from the victim. Since the victim did not know Baker, Baker could not have obtained access on his own. And since the victim was mad at Ackerman for having stolen the games, it seems doubtful he would have let Ackerman in either. Klein drove Ackerman and Baker to the victim's house after texting she had dropped off Ackerman. The text messages after she arrived show efforts were made to keep the victim upstairs. Based on Klein's own testimony, she knew Baker was downstairs, never warned the victim about that and, when initially asked on cross-examination why she had not, Klein had no explanation. Instead, she helped keep the victim upstairs by giving him phone numbers to make prank phone calls. While the victim was screaming for his life, the evidence shows text messages were sent to the Baker phone telling him to "keep him [quiet]." At that point, four minutes had gone by since the text to Baker indicating the victim was coming downstairs. Two minutes after the text stating "keep him [quiet]," a text was sent to Baker, telling him to "Turn on music or something." Six minutes later, Klein sent Baker a text message asking him to send Ackerman upstairs to help her. During her testimony, Klein never explained why she used the words "to help me" in that text. Approximately a minute later, at 3:31 a.m.,

Klein texted Baker, “Shut him the FUK up.”<sup>52</sup> These text messages show that Klein was in a position to facilitate *or* prevent the attack of the victim. Instead of preventing the attack or attempting to summon aid by using the phone she had in her hand to call 911, she chose to facilitate the attack on the victim by attempting to alert Ackerman and Baker to the need to silence the victim.

After the lethal force was used, Klein drove Baker and Ackerman away from the murder scene along with items stolen from the victim. Thereafter, there is substantial evidence indicating she participated with Ackerman in attempting to sell the items. Indeed, the postcrime text messages between Baker and Klein show Baker sought information about the status of that part of their plan directly from Klein. And when Baker challenged her on this, Klein replied to Baker, “Ask anyone. *I* always take forever.” (Italics added.) Moreover, during her testimony, Klein acknowledged Baker sent a text indicating he could sell the laptop if they still had it. When apprehended, Klein attempted to place all the blame on Baker’s purported homophobia in an apparent effort to cover up her participation as well as that of Ackerman.

We have no difficulty concluding that there is substantial evidence showing Klein’s personal involvement in the burglary was substantial, and far greater than the actions of an ordinary aider and abettor to an ordinary felony murder. (See *Banks, supra*, 61 Cal.4th at p. 802.) Viewing the evidence in “the light most favorable to the prosecution,” there is substantial evidence establishing that Klein was a major participant. (*Id.* at p. 804.)

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<sup>52</sup> Klein insists her phone showed this text message was not received, but the jury was free to disregard her self-serving testimony on this point in light of her many lies. Moreover, the phone records showed that Baker was not completely occupied with the victim around that time. At 3:26 a.m., Baker texted the Ackerman/Klein phone, “Come here.” Baker took a call from Peterson that lasted nine seconds at 3:29 a.m. and then he checked his voicemail.

**b. Klein's reckless indifference**

On this element, the pertinent *Banks* factors are Klein's awareness of the particular dangers posed by the nature of the crime and the role her actions and inactions played in the victim's death. Additionally, in *Clark*, our high court identified the duration of the crime or period of victim restraint as other factors to consider in assessing whether a defendant acted with reckless indifference. (*Clark, supra*, 63 Cal.4th at p. 620.)

Even if discovery of their plan by the victim and the potential necessity of killing the victim to avoid arrest and prosecution was not completely foreseeable, the danger posed by the nature of the crime must have become clear during its commission. In this regard, this case is similar to *People v. Smith* (2005) 135 Cal.App.4th 914, where the court concluded there was sufficient evidence the defendant acted with reckless indifference to human life in a burglary, robbery felony-murder special circumstance case. The *Smith* court observed that, "Even if [the defendant] remained outside [the victim's] room as a lookout, the jury could have found [the defendant] gained a 'subjective awareness of a grave risk to human life' during the many tumultuous minutes it would have taken for [the victim] to be stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed *through* the wall." (*Smith*, at p. 927.) Thereafter, rather than going to the victim's aid or summoning help, the defendant fled, additional evidence showing reckless indifference. (*Ibid.*)

Similar to *Smith*, it must have taken some period of time to find an extension cord, wrap it around the victim's ankles, his elbow and neck four times, wrap the painter's tape around his neck, and put a sock over his mouth and nose. Additionally, it took some amount of time to inflict the multiple stab wounds the victim sustained. The numerous defensive wounds to the victim's hands and wrists show that the victim tried to fend off the attack during this time period.

There is some evidence that provides insight into a minimum length of time during which the assault was perpetrated. Based on the timing of the text messages,

approximately 12 minutes elapsed between the text indicating the victim was going downstairs (3:19 a.m.) and the time Klein told Baker via text, “Shut him the FUK up” (3:31 a.m.) Additionally, in one version of her story, Klein told the police, the amount of time that elapsed between the time the victim was hit with the skateboard and the time they left was 30 minutes, but the victim stopped screaming after 10 minutes. Instead of using the phone she had in her hand to call 911 at any point during the assault in an attempt to prevent harm to the victim or summon the police, the evidence shows Klein used the phone to text Baker about the need to silence the victim three separate times, including the one text she admitted making, “Shut him the FUK up.” Not only did the failure to attempt to summon aid during this time period reflect reckless indifference to the victim’s life (see *Clark, supra*, 63 Cal.4th at p. 619), but Klein’s directions to silence the victim reflected reckless indifference as well. This is so because, under the circumstances, a good way to make the victim be quiet was to kill him. And that is exactly what happened. The only witness to the trio’s thievery was murdered. Thus, there is substantial evidence that Klein consciously disregarded a “substantial and unjustifiable risk” of death and that the risk was of “such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to [her], its disregard involve[d] a gross deviation from the standard of conduct that a law-abiding person would observe in [her] situation.” (*Id.* at p. 617.)

At oral argument, counsel asserted that Klein’s failure to aid the victim did not “outweigh” other factors, such as her purported lack of foreknowledge, lack of knowledge of dangerous propensities of her confederates, and the fact she did not provide weapons to anyone. However, this focus misapprehends the scope of our review. We do not weigh the factors; we review for substantial evidence and there was substantial evidence here to support a finding that Klein acted with reckless indifference.

At oral argument, counsel for Klein argued that Klein was not in a position to stop the assault, there was no evidence that Klein was in a position to hold sway over the other

defendants, she was under the influence of Ackerman who had abused her and she was in a subservient position relative to him. In our view, a focus on whether Klein could have been successful in stopping the murder misses the mark. The issue is Klein's mental state, so what is far more important is whether she tried. It is her failure to try -- for example, by secretly calling 911 while she was upstairs -- that evinces a reckless indifference for human life.

Viewing the evidence in the light most favorable to the prosecution, there is substantial evidence of both the subjective and objective components of reckless indifference here. The evidence supports a finding that Klein was subjectively aware of the risk to the victim's life during the attack, yet she was more concerned about the neighbors hearing the victim's screams and directed the two men to prevent that from happening. Ultimately, they did that by killing the victim. Objectively, Klein's conduct was a "gross deviation from the standard of conduct that a law-abiding person would observe in [her] situation." (*Clark, supra*, 63 Cal.4th at p. 617.)

We conclude there was substantial evidence Klein acted with reckless indifference to human life.

**c. Jury instruction on the *Banks* factors**

During rebuttal at oral argument, counsel for Klein suggested that *Banks* requires the jury be instructed on all of the factors enumerated therein and since that was not done here, that is "also a problem." It appears that counsel was referencing the following from *Banks*: "[I]t follows that a jury presented with this question [(*Tison* liability)] must consider the totality of the circumstances. The specific facts of the two cases [(*Enmund* and *Tison*)] illuminate the sorts of considerations that may be relevant to a jury's deliberations." (*Banks, supra*, 61 Cal.4th at p. 802.) While CALCRIM No. 703 has now been updated to include the *Banks* factors, the CALCRIM drafters noted the *Banks* court "stopped short of holding that the [trial] court has a sua sponte duty to instruct on those

factors.” (Bench Notes to CALCRIM No. 703 (Feb. 2016 rev.) p. 421.) We decline to do so as well.

**D. Parole Revocation Restitution Fine**

Klein’s opening brief challenged the imposition of a section 1202.45 parole revocation restitution fine, but her reply brief appropriately withdraws the claim.

**E. Conclusion -- Klein’s Appeal**

We conclude there is no error warranting reversal of the judgment against Klein.

**DISPOSITION**

As to Ackerman, the judgment is affirmed.

As to Baker, we modify the judgment to include a \$10,000 parole revocation restitution fine under section 1202.45, suspended unless parole is revoked, as is already reflected in the abstract of judgment. The judgment against Baker is otherwise affirmed.

As to Klein, the judgment is affirmed.

MURRAY, J.

We concur:

BUTZ, Acting P. J.

DUARTE, J.