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

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARD KRUGGERRAND REED et al.,

Defendants and Appellants.

C071276

(Super. Ct. No. 10F05764)

This case involves two robberies committed at the same North Highlands pharmacy, the second of which resulted in the death of Tania Gurskiy. The jury found defendant Kelvin Arnell Peterson guilty of the August 13, 2010, robbery of Sara Phetphayboune, a pharmacy clerk, (Pen. Code, § 211; count seven),<sup>1</sup> Peterson and defendant Bernard Kruggerrand Reed guilty of the September 2, 2010, first degree murder of Gurskiy (§ 187, subd. (a); count one) and robbery of Jessie Saechao (§ 211; count two), and Peterson alone guilty of assault upon Kelly Okimoto and Tom Okimoto

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

with a semi-automatic firearm (§ 245, subd. (b); counts three & five), attempted murder of Derrick Okimoto<sup>2</sup> (§§ 664/187, subd. (a); count 4), and possession of a firearm by a convicted felon (former § 12021, subd. (a)(1); count six).<sup>3</sup> As to both defendants, the jury found true the special-circumstance allegation that Gurskiy's murder occurred during the commission of the second robbery (§ 190.2, subd. (a)(17)(A)). As to Peterson, the jury found true allegations he intentionally and personally discharged a firearm and thereby caused Gurskiy's death during the commission of the second robbery (§ 12022.53, subds. (b), (c), & (d)), intentionally and personally discharged a firearm during the commission of the second robbery (§ 12022.53, subds. (b) & (c)), personally used a semi-automatic firearm in the commission of the assaults upon Kelly and Tom (§ 12022.5, subds. (a) & (d)), personally inflicted great bodily injury upon Kelly (§ 12022.7, subd. (a)), and personally and intentionally discharged a firearm in the commission of the attempted murder of Derrick (§ 12022.53, subd. (c)). As for Reed, the jury found true allegations he was (vicariously) armed with a firearm during the commission of the robbery/murder (§ 12022, subd. (a)(1)). At a bifurcated proceeding, the trial court found true allegations Peterson had two prior serious felony convictions within the meaning of sections 667, subdivision (a), 667, subdivisions (b)-(i), and 1170.12, and Reed had one prior serious felony conviction within the meaning of sections 667, subdivisions (b)-(i), and 1170.12.

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<sup>2</sup> To avoid confusion, hereafter, we shall refer to members of the Okimoto family by their first names. No disrespect is intended.

<sup>3</sup> Former section 12021 was subsequently repealed and reenacted without substantive change as section 29800, subdivision (a)(1). (*People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2.)

Peterson was sentenced to an aggregate term of life without the possibility of parole, a consecutive 183 years to life, and a consecutive 103 years in state prison.<sup>4</sup> Reed was sentenced to life without the possibility of parole for Gurskiy's murder (count one), plus one year for the related firearm enhancement. Defendants' sentences for the September 2, 2010, robbery (count two) were stayed pursuant to section 654.

Defendants appeal. Both contend the trial court erred in instructing the jury on accomplice liability. In addition, Reed contends the trial court erred in allowing a witness to opine that he was one of the men depicted in surveillance footage of the September 2, 2010, robbery and in refusing to redact portions of a detective's interview with Reed in which the detective told Reed that he had a video of the September 2, 2010, robbery with Reed in it. Reed further asserts that there was insufficient evidence to support the jury's robbery-murder special-circumstance finding as to him. Peterson claims the trial court erred in "impos[ing]" sentence on count 6 (felon in possession of a firearm) under section 654, and if not, his trial counsel was ineffective in failing to ask the trial court to state reasons for imposing a consecutive sentence on that count. We shall conclude that none of the contentions raised by defendants have merit and affirm the judgments.

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<sup>4</sup> Peterson's sentence consists of life without the possibility of parole for Gurskiy's murder (count one), plus a consecutive 25 years to life for the firearm enhancement; a consecutive 32 years to life for the assault on Kelly (count three), plus a consecutive 10 years for the firearm enhancement and a consecutive 3 years for the great bodily injury enhancement; 37 years to life for the attempted murder of Derrick (count four), plus a consecutive 20 years for the firearm enhancement; a consecutive 29 years to life for the assault on Tom (count five), plus a consecutive 10 years for the firearm enhancement; a consecutive 25 years to life for being a felon in possession of a firearm (count six); a consecutive 35 years to life for the August 13, 2010, robbery (count seven); 5 years for each of the two prior serious felony convictions under section 667, subdivision (a); and an additional 25 years for each of the two prior felony convictions under section 667, subdivision (e)(2)(II).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The Prosecution's Case

At approximately 5:30 p.m. on August 13, 2010, a male, later identified as Peterson, entered the North Highlands Rexall Pharmacy on Watt Avenue in Sacramento County and handed Sara Phetphayboune, a pharmacy clerk, a note that read, “[T]his is a robbery, give me all of your money and Oxycontin.” Phetphayboune passed the note to another clerk, who passed it to Tom, the store owner and primary pharmacist.<sup>5</sup> While Peterson waited for the Oxycontin, he reached across the counter and took all of the money from the cash register and threatened to start shooting if the employees did not do as he instructed. After receiving the Oxycontin, he left.

Although Peterson never produced a gun, his hand was in his pants near his belt buckle, he had a gun clip visible near his right pocket, and he repeatedly threatened to shoot store employees if they did not do as he instructed.

Three weeks later, at approximately 12:30 p.m. on September 2, 2010, two males, Peterson and a second individual, later identified as Reed, entered the same pharmacy. Kelly, a pharmacy clerk who was present during the August 13, 2010, robbery, recognized Peterson, warned two of her coworkers that the man who had robbed the pharmacy the “last time” was back, and sent her seven-year-old son to the back room.

Peterson walked up to the counter and handed Jessie Saechao, a pharmacy technician, a note that read, “We want all 800 Oxycontin. We will kill you.” Saechao handed the note to Tom, who activated the store's silent alarm. Peterson walked back to where Tom and Derrick were working, and as he did so, Kelly saw that he had a gun in his hand. Meanwhile, Reed walked around the counter, put on a pair of gloves, and removed the cash from one of the registers.

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<sup>5</sup> Tom's son, Derrick, worked as a pharmacy technician at the pharmacy, and Derrick's wife Kelly worked as a pharmacy clerk.

Peterson pointed the gun at Derrick's stomach, and ordered Derrick and Tom to give him "everything." When Tom handed Peterson the store's supply of Oxycontin, Peterson began yelling, "I want more," and pointed his gun at Tom's head. Fearing his father was about to be killed, Derrick pulled out a gun, pointed it at Peterson's back, and pulled the trigger. The gun did not fire; it only made a clicking noise. Derrick ran toward "the back pharmacy area," re-racked his gun, turned, and fired. Peterson returned fire and a gun fight ensued. Derrick eventually ran out the front door of the pharmacy. Peterson followed, and more shots were fired.

Tania Gurskiy, a pharmacy clerk, was shot in the head and died as a result. Kelly, who was eight and one-half months pregnant, was shot in the foot. Peterson was shot in the hand, and the tip of his left ring finger was found inside the pharmacy.

Police downloaded surveillance footage from the multiple surveillance cameras placed throughout the pharmacy and disseminated portions thereof to the media in an attempt to identify the perpetrators.

On the morning of September 4, 2010, Peterson showed up unannounced at the home of an acquaintance. One of his hands was bandaged, and he told the acquaintance he had "fucked up really bad." He said that "they [had] robbed the Rexall pharmacist," it turned into a shootout, and two of his fingers had been shot. The acquaintance grew uncomfortable having Peterson in her apartment and arranged to meet her son. When she told her son about the situation, he called the police and told them where to find Peterson. Peterson was arrested at the apartment. A detective searched the apartment for a gun. He did not find one, but he did recover Peterson's cell phone. Reed's cell phone number was saved as a contact on Peterson's phone, and Peterson's cell phone history listed several calls or attempted calls between his and Reed's cell phones on September 2, 2010. There were at least four separate calls or attempted calls between the two phones prior to 12:30 p.m. that day and more than twenty calls thereafter.

On September 9, 2010, Reed was taken into custody at a Reno motel. He told officers he had been in Reno since the Wednesday before the shooting, September 1, 2010. Reed's cell phone was confiscated at time of his arrest. The call history went back no further than September 3, 2010, but cell phone records revealed 132 "connections" between his and Peterson's cell phones from August 30 to September 4, 2010.<sup>6</sup> Of those 132 connections, 97 took place prior to 12:30 p.m. on September 2, 2010, and the remaining 35 were between 12:30 p.m. on September 2 and 8:01 a.m. on September 4, 2010. At 12:32 p.m. on September 2, 2010, Reed's cell phone received an incoming call utilizing a cell phone tower that is visible 200-300 yards west of the pharmacy. A search of Reed's motel room produced a laptop computer. An examination of the computer showed that it had been used to search for stories related to the September 2, 2010, robbery.

On September 10, 2010, Reed was interviewed by Detective Brian Meux of the Sacramento County Sheriff's Department. The interview was videotaped, and a portion of the video was played for the jury. During the interview, Meux told Reed that "the reason that you're under arrest is because . . . we've got video of you in the store when this event happened." Reed said that he had been in Reno since September 1, 2010, the day before the robbery. Reed was shown still photographs from the surveillance footage and denied that he was depicted in the photos. He also denied knowing Peterson.

On September 10, 2010, detectives also showed portions of the surveillance footage to Cora Brown, whose daughter was dating Reed at the time. Brown identified Reed as one of the robbers. At trial, Brown testified that she had seen Reed approximately 20 times and was familiar with the way he walked, moved, and carried himself.

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<sup>6</sup> "Connections" include hang-ups and voice mails.

Tom, Derrick, and Kelly identified Peterson as the person who committed the August 13, 2010, robbery, and Tom, Derrick, Kelly, and Saechao identified Peterson as the individual with the gun on September 2, 2010. None of the witnesses were able to positively identify Reed as the second man involved in the September 2, 2010, robbery.

#### B. The Defense

Reed testified in his own defense at trial. He told the jury that he was a drug dealer and that his girlfriend was a prostitute. He met Peterson about a month before the September 2, 2010, robbery. The only reason he contacted Peterson was to buy drugs. He denied any part in the September 2, 2010, robbery and stated that he was at home near the intersection of Greenback Lane and Auburn Boulevard in Sacramento the entire day. He did not know why his cell phone utilized a tower across the street from the pharmacy within minutes of the shooting. He admitted lying to detectives when he told them he had been in Reno since September 1, 2010, explaining that he did so because “I just didn’t want to be nowhere near this so I said I was out there longer than I was.”

Reed spoke with Peterson at 1:24 p.m. on September 2, 2010, and Peterson told him that he had been shot. Peterson said he went to get his prescription and the pharmacist shot him. Peterson did not know why the pharmacist tried to kill him and did not say where the pharmacy was located. Reed later called Peterson several times offering to help with Peterson’s injuries, and Peterson likewise called Reed requesting help. Reed realized Peterson had been involved in a robbery later that evening when he watched the news. Reed denied deleting his cell phone history because of the September 2, 2010, incident; rather, it was something he did on a regular basis.

Reed called three witnesses to testify on his behalf, his brother’s fiancée, her sister, and their friend. All three testified that they had known Reed for many years and in their opinion he was not one of the men pictured in the surveillance footage.

Peterson did not testify or offer any evidence at trial. Rather, he argued, through counsel, that the People failed to meet their burden of establishing he was the perpetrator

of the August 13, 2010, robbery. While he acknowledged his role as the shooter in the September 2, 2010, robbery, he argued the People failed to meet their burden of establishing he assaulted Kelly, intended to kill Derrick, or that the robbery and murder were logically connected as required for the robbery-murder special-circumstance finding.

## DISCUSSION

### I

#### The Trial Court Did Not Err in Instructing the Jury on Accomplice Liability

Reed contends the trial court erred in instructing the jury in the language of CALCRIM No. 707, Special Circumstances: Accomplice Testimony Must Be Corroborated--Dispute Whether Witness Is Accomplice. He claims the instruction, as given, incorrectly “told the jury that Reed appeared as a prosecution witness,” and that all of his testimony, not just that which tended to incriminate Peterson, required corroboration if the jury found he acted as an accomplice. Peterson, on the other hand, contends the trial court should have instructed the jury in the language of CALCRIM No. 334, Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice, in addition to or in place of CALCRIM No. 707 because, unlike CALCRIM No. 707, CALCRIM No. 334 pertains to the substantive crimes, not just the special-circumstance allegations. Assuming the issues raised by defendants were preserved for appeal, we discern no error.

Reed testified in his own defense at trial and denied any involvement in the September 2, 2010, robbery. As relevant here, he testified that he spoke to Peterson shortly after the robbery, and that Peterson told him that he had gone to get his prescription and “the dude at the pharmacy shot him.” Reed’s testimony tended to incriminate Peterson in that it suggested Peterson was involved in the September 2, 2010, robbery.

The jury was instructed in the language of CALCRIM No. 707 in pertinent part as follows: “In order to prove the special circumstance of murder committed by the defendants while the defendants were engaged in the commission of the crime of robbery, the People must prove that the defendants committed robbery. [¶] The People have presented the testimony of Bernard Kruggerand [sic] Reed on this issue. Before you may consider the testimony of Bernard Kruggerand [sic] Reed on the question of whether the special circumstance was proved, you must decide whether he was an accomplice.” After describing how to determine whether a person is an accomplice, the instruction directed that if the jury found that Reed was an accomplice, “then you may not find that the special circumstance of murder committed by the defendants while the defendants were engaged in the commission of the crime of robbery is true based on his testimony alone,” but only if it was supported by other independent evidence that “tends to connect the defendant to the commission of robbery.” The instruction continued: “Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the other evidence. [¶] If you decide that Bernard Kruggerand [sic] Reed was not an accomplice, you should evaluate his testimony as you would that of any other witness.”

“In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights.” (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

Reed claims that CALCRIM No. 707, as given, incorrectly “told the jury that Reed appeared as a prosecution witness, for the purpose of proving the robbery-murder special circumstance.” According to Reed, “[t]his error necessarily confused the jury as to why Reed’s testimony had been presented and how it should be used.” As Reed notes, the

instruction begins: “In order to prove the special circumstance of murder committed by the defendants while the defendants were engaged in the commission of the crime of robbery, the People must prove that the defendants committed robbery. [¶] *The People have presented the testimony of Bernard Krugger and [sic] Reed on this issue.*” (Italics added.) While it is true that Reed testified in his own defense at trial and not as a prosecution witness, we fail to see how this minor misstatement prejudiced Reed. Having sat through the entire trial, the jury was aware that Reed testified *after* the prosecution had rested. More significantly, having listened to his testimony, it would have been clear to the jury that he was *not* called to assist the prosecution. Among other things, he denied any involvement in the September 2, 2010, robbery.

Noting his status as a codefendant in the case, Reed asserts “the trial court was required to instruct the jury that an accomplice-defendant’s testimony should be viewed with distrust to the extent it tends to incriminate the codefendant.” According to Reed, the instruction left the jury with the erroneous impression that all of his testimony, including that which supported his defense, required corroboration and should be viewed with caution. Reed relies on one of the bench notes to CALCRIM No. 707 to support his claim. As relevant here, the bench note provides that “the court should instruct [the jury] that when the jury considers this testimony as it relates to the testifying codefendant’s defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the nontestifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103-106.)” (Bench Notes to CALCRIM No. 707 (2012) p. 484.)

In *Coffman and Marlow*, the court approved but did not require the giving of such an instruction. (*People v. Coffman and Marlow, supra*, 34 Cal.4th 1 at pp. 105-106 (*Coffman and Marlow*)). Instead, it observed that it had recently “prescribed a modification of the standard instruction, by which the testimony of an accomplice that is

unfavorable to the defense is to be viewed with care and caution. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)” (*Id.* at p. 105, fn. 36.) In *Guiuan*, the court concluded that the jury should be instructed as follows whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: “ ‘To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.’ ” (*Guiuan, supra*, 18 Cal.4th at p. 569.) Here, the jury was so instructed.

In addition, contrary to Reed’s assertion, it is not reasonably likely the jury would have interpreted the instruction to require that all of Reed’s testimony, including that offered in his own defense, should be viewed with suspicion. The instruction explicitly stated that it applied only to the jury’s finding on the special-circumstance allegations. Among other things, the jury was instructed: “Before you may consider the testimony of Bernard Kruggerand [*sic*] Reed on the question of whether *the special circumstance was proved*, you must decide whether he was an accomplice,” and “you may not find *the special circumstance of murder* committed by the defendants while the defendants were engaged in the commission of the crime of robbery is true based on his testimony alone.” (Italics added.) The jury also was instructed that “[a]ny testimony . . . that tends to incriminate the defendant should be viewed with caution.” The obvious implication of this instruction is that testimony that does not tend to do so, need not be viewed with caution. On this record there is no reasonable likelihood the jury viewed all of Reed’s testimony with suspicion or believed that all of his testimony must be corroborated.

Peterson argues the trial court erred in failing to instruct the jury in the language of CALCRIM No. 334 in place of or in addition to CALCRIM No. 707. As Peterson correctly points out, unlike CALCRIM No. 707, which pertains only to the

special-circumstance allegations, CALCRIM No. 334 covers the substantive crimes,<sup>7</sup> and Reed’s testimony concerning the 1:24 p.m. phone call with Peterson tended to implicate Peterson in the substantive crimes by suggesting Peterson was involved in the September 2, 2010, robbery. As we shall explain, while the trial court could have given CALCRIM No. 334, it was not required to do so. In any event, any error was harmless.

Section 1111 provides: “A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . .” Ordinarily, whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies, the jury should be instructed to the following effect: “*To the extent an accomplice gives testimony that tends to incriminate the defendant*, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.’ (*People v. Guiuan* (1998) 18 Cal.4th 558, 569, italics added.)” (*People v. Abilez* (2007) 41 Cal. 4th 472, 518, fn. 10.) The goal of instructing the jury pursuant to section 1111 is to “ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives.” (*People v. Davis* (2005) 36 Cal.4th 510, 547.) However, “when[, as here,] the testifying accomplice

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<sup>7</sup> CALCRIM No. 334 states in pertinent part: “Before you may consider the (statement/ [or] testimony) of \_\_\_\_\_ <insert name[s] of witness[es]> as evidence against (the defendant/ \_\_\_\_\_ <insert names of defendants> ) [regarding the crime[s] of \_\_\_\_\_ <insert name[s] of crime[s] if corroboration only required for some crime[s]> ], you must decide whether \_\_\_\_\_ <insert name[s] of witness[es]> ) (was/were) [an] accomplice[s] [to (that/those) crime[s]]. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if: [¶] 1. He or she personally committed the crime . . . .”

is a *codefendant*, an accomplice instruction must be given *only* ‘when requested by a defendant.’ [Citation.]” (*People v. Smith* (2005) 135 Cal.App.4th 914, 928.)

Here, Peterson did not request that the trial court instruct the jury in the language of CALCRIM No. 334. Accordingly, the trial court did not err in failing to so instruct the jury. Moreover, any error was harmless because there is overwhelming evidence connecting Peterson to the September 2, 2010, robbery and murder apart from the testimony of Reed, including but not limited to, the surveillance footage, the testimony of numerous percipient witnesses identifying him as the shooter, and the presence of his finger tip at the scene. (See *People v. Whalen* (2013) 56 Cal.4th 1, 60 [failure to instruct pursuant to section 1111 is harmless if there is sufficient corroborating evidence in the record].)

## II

### The Trial Court Did Not Err in Allowing Brown to Opine That Reed Was One of the Men Depicted in the Surveillance Footage or in Refusing to Redact Portions of Detective Meux’s Interview with Reed

Reed next contends that the trial court prejudicially erred in (1) refusing to exclude evidence that Brown identified him as one of the two suspects depicted in the surveillance footage of the September 2, 2010, robbery, and (2) refusing to redact portions of Detective Meux’s interview of Reed wherein Meux told Reed that he had a video of the September 2, 2010, robbery with Reed in it. We shall address each of these claims in turn and conclude there was no error.

Prior to trial, Reed moved to exclude any lay opinion testimony identifying him as one of the suspects depicted in the surveillance footage. As relevant here, Reed argued the presentation of such evidence “could involve an undue consumption of time . . . under Evidence Code Section 352” in that “the defense would be put in a position of offering one or more witnesses, probably multiple witnesses, who would view that same video and render opinions that it’s not Mr. Reed.” The prosecutor responded that he intended to call Brown, explaining that “Detective Meux showed her portions of the surveillance

footage. And Cora Brown said that's my daughter's piece of shit boyfriend. . . . She probably said seven or eight different times, that's him, that's Bernard, that's him. She at one point said I'll put my hand on the Bible, that's Bernard Reed. [¶] The detective said, look, I understand that it sounds like you don't like Bernard Reed. And she said, no, I don't like him. He puts his hands on my daughter. I've been knowing him about five years. I'm afraid my daughter's going to die at his hands. . . . [¶] And the detective says, well, I don't want you to identify him just because you're mad at him or you dislike him. And she says, sir, I would not do that. As much as I don't like him, I would not do that to anybody. . . . I recognize the way he walks, the way he moves." When asked by the trial court if he intended "to elicit that statement from Cora Brown," the prosecutor clarified that he did not "plan to ask her . . . about the animosity she has." Rather, he intended to ask her how long she had known Reed, whether she was familiar with his stature, the way he walks, the way he moves, and what he looks like, and based on that, whether she could identify the man in the surveillance footage. When asked what evidence, if any, he intended to elicit from law enforcement regarding the identification of the two men depicted in the surveillance footage, the prosecutor responded, "None." The trial court denied Reed's motion to exclude the lay opinion testimony of Brown, finding that the foundational issues referred to by Reed's trial counsel would be met because Brown, a "non-law enforcement" witness would identify Reed based on prior contacts. With respect to Reed's assertion that Brown should not be permitted to render an opinion that Reed was one of the men depicted in the surveillance footage absent evidence his appearance had changed, the trial court observed that his appearance had changed compared to his appearance at the time he was booked on September 10, 2010. In particular, the trial court noted that Reed's "hair is gray. It's grown out. He has . . . French braids. . . . [H]e's grown sideburns."

On appeal, Reed claims that "the trial court abused its discretion when it denied his motion to exclude Cora Brown's lay identification testimony under Evidence Code

section 352” because “[t]he probative value . . . was substantially outweighed by the probability that its admission would create substantial danger of undue prejudice.” More particularly, Reed argues that while Brown’s opinion “had limited probative value” it “was tainted by her virulent dislike of Reed.” And, “[i]n order to impeach Brown’s credibility, it would be necessary for [his] trial counsel to cross-examine Brown about her animosity toward Reed,” which “in turn, would reveal to the jury that Brown believed Reed had committed criminal acts against her daughter.”

We review a trial court’s rulings on the admissibility of evidence for abuse of discretion. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) We will not disturb the trial court’s ruling “except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

As a preliminary matter, Reed did not assert the specific ground urged on appeal as a basis for his motion below. While he did assert that the evidence was more prejudicial than probative and should be excluded under Evidence Code section 352, he argued the presentation of such evidence “could involve an undue consumption of time,” not that it would inevitably lead to the introduction of evidence Reed had committed criminal acts against Brown’s daughter. Accordingly, Reed failed to preserve the issue for appeal. (Evid. Code, § 353, subd. (a).) In any event, it is without merit.

“[L]ay opinion testimony concerning the identity of a robber portrayed in a surveillance camera photo of a robbery is admissible where the witness has personal knowledge of the defendant’s appearance at or before the time the photo was taken and his testimony aids the trier of fact in determining the crucial identity issue.” (*People v. Ingle* (1986) 178 Cal.App.3d 505, 513 (*Ingle*)). “Where the photo is unclear, or the defendant’s appearance has changed between the time the crime occurred and the time of trial, or where for any reason the surveillance photo is not conclusive on the identity issue, the opinion testimony of those persons having knowledge based upon their own

perceptions (Evid. Code, § 800, subd. (a))<sup>8</sup>] of defendant’s appearance at or before the time the crime occurred is admissible on the issue of identity, and such evidence does not usurp or improperly invade the province of the trier of fact.” (*Ingle*, at p. 513)

Here, at the time the trial court made its ruling, it had before it information that Brown had personal knowledge of Reed’s appearance and certain mannerisms prior to the time the surveillance footage was taken. Significantly, the prosecutor told the trial court that Brown had stated that: Reed was her daughter’s boyfriend; Brown had known Reed for approximately five years; and Brown was familiar with the way Reed “walks, [and] the way he moves.” The prosecutor also represented that he did not intend to ask Brown about her animosity toward Reed. Moreover, the surveillance footage was not conclusive on the identity issue. Accordingly, Brown’s opinion testimony was admissible on the issue of identity, and such evidence did not usurp or improperly invade the province of the trier of fact. (*Ingle, supra*, 178 Cal.App.3d at p. 513.)

Finally, Reed fails to cite to any authority to support his assertion that the introduction of Brown’s testimony, which itself is not prejudicial, is made prejudicial because “. . . Reed’s counsel would need to delve into the topic of domestic violence” in order to show Brown’s bias against Reed. Whether to elicit such evidence was up to Reed and his counsel; that there was a downside to doing so did not make the introduction of Brown’s opinion testimony on the issue of identity unduly prejudicial.

Turning to Detective Meux’s interview of Reed, prior to trial Reed moved to redact the following statements made by Meux during the interview: (1) “[W]e’ve got a video of you in the store when this event happened.” (2) “We’ve got a video of you.”

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<sup>8</sup> Evidence Code section 800 states: “If a witness is not testifying as an expert, h[er] testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony.”

And -- and then also -- you know, other people have called us and said, Oh, you know, look at that video. I know that's Bernard Reed, or whatever they know you as." (3) "Now what I can see from the video of you, you're in there, you know, and then this thing happens. And the next thing I know, bang, you're out the door." Reed argued the statements should be redacted because they were either misrepresentations or improper lay opinion testimony. The prosecutor opposed the motion, arguing Meux simply was trying to get information out of Reed. The prosecutor also indicated that he did not intend to ask Meux whether, in his opinion, Reed is depicted in the surveillance footage. The trial court denied Reed's motion, finding the statements were examples of Meux "trying to get the defendant to talk to him." The court also noted that "based on the jurors' view of that videotape [(the surveillance footage from the September 2, 2010, robbery)], they can determine who it was. They can determine the truth or falsity or the speculation in Detective Meux's statement."

Prior to playing the videotape of Meux's interview with Reed, and with Reed's counsel's approval, the trial court admonished the jury as follows: "Ladies and gentlemen, before we look and hear what purports to be an interview between Detective Meux and the defendant Bernard Reed, I'm just going to admonish you that the questions that the detective is asking the Defendant Reed, those questions only have relevance to the extent that the defendant Reed provides an answer to put that question in context. [¶] But the questions themselves, and what you'll find -- and I'm sure [Reed's defense counsel] will point this out during the course of cross-examination, . . . but what you'll find is that sometimes officers use what are termed a ruse. In other words, officers can sometimes lie to a suspect in questioning that suspect. [¶] The questions only have relevance to the extent that there is an answer. And so that's up to you to decide what relevance, if any, to give those answers and those questions."

Reed argues the trial court erred when it refused to redact statements made by Meux that "seemed to indicate [Meux] recognized appellant Reed as one of the two

robbers depicted on the September 2nd surveillance video.” Having reviewed the entire transcript of the interview, we conclude the trial court properly found that the challenged statements were simply examples of Meux attempting (unsuccessfully) to get Reed to acknowledge his involvement in the robbery. The statements were made at the beginning of the interview and were part of a long narrative during which Meux asked Reed to give him “an idea about what really happened” and “tell [him] the story about the other dude and kind of what led to the violence.” During the same narrative, Meux made statements that obviously were intended to get Reed to acknowledge his participation therein by minimizing the severity of the crimes involved, including: “robberies . . . are a dime a dozen”; “in this particular part of town, we know that there are a lot of people hurting”; “I don’t think that anybody went in this store that day to have this tragic clerk end up getting hurt”; and “[u]nfortunately, . . . somebody that was in that store did something, reacted in a way that caused a little bit of violence to happen, and unfortunately somebody was standing in the wrong place at the wrong time and caught a round and lost her life.” Moreover, Reed did not respond by admitting he was one of the men depicted in the surveillance footage. To the contrary, he told Meux he was in Reno at the time of the robbery and denied he was one of the men depicted in the footage after being shown still photos taken from the same. Meux did not dispute Reed’s claim; rather, he asked Reed how he knew it was not him, and Reed responded that he does not own a white hat. When considered in context, it is clear that the challenged statements were designed to get Reed to admit his involvement in the September 2, 2010, robbery and were not statements of Reed’s actual opinion.<sup>9</sup>

Indeed, the trial court admonished the jury immediately prior to playing the tape of Meux’s interview with Reed that “officers can sometimes lie to a suspect in questioning

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<sup>9</sup> Reed does not dispute that law enforcement officers may use a ruse in their interrogations.

that suspect,” and that “[t]he questions only have relevance to the extent that there is an answer.” As Reed correctly notes, we are concerned with statements, not questions. Nevertheless, we do not believe the jury would have parsed the court’s admonition as finely as Reed suggests and concluded that Meux’s statements, but not his questions, were relevant on their own absent any response by Reed. In any event, at trial, Meux acknowledged making a number of false *statements* during his interview with Reed in an effort to get Reed to talk. On this record, we conclude there is no reasonable likelihood that the jury interpreted Meux’s statements as anything other than an attempt to get Reed to talk.

Finally, Reed’s claim that the challenged statements constituted inadmissible hearsay is without merit because they were not offered for the truth of the matter asserted, namely that Reed was one of the men depicted in the surveillance footage. Indeed, in opposing Reed’s motion, the prosecutor indicated that he did not intend to ask Meux whether in his opinion Reed is depicted in the surveillance footage, and there is no evidence in the record that the prosecutor did so, or that he relied on the challenged statements as evidence Reed was one of the men depicted in the surveillance footage.

### III

#### Substantial Evidence Supports the Jury’s Finding That Reed Acted with Reckless Indifference to Human Life

Reed next contends the robbery-murder special-circumstance finding must be set aside because there is insufficient evidence he acted with reckless indifference to human life. We disagree.

“The jury in this case was instructed in the language of section 190.2(d). This provision was added to existing capital sentencing law in 1990 as a result of the passage of the initiative measure Proposition 115, which, in relevant part, eliminated the former, judicially imposed requirement that a jury find intent to kill in order to sustain a felony-murder special-circumstance allegation against a defendant who was not the actual killer.

([*People v. Purcell* [(1993)] 18 Cal.App.4th [65,] 72.) Now, pursuant to section 190.2(d), in the absence of a showing of intent to kill, an accomplice to the underlying felony who is not the actual killer, but is found to have acted with ‘reckless indifference to human life and as a major participant’ in the commission of the underlying felony, will be sentenced to death or life in prison without the possibility of parole. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 (*Tapia*); see also *People v. Neely* (1993) 6 Cal.4th 877, 898, fn. 10.)

“The portion of the statutory language of section 190.2(d) at issue here derives verbatim from the United States Supreme Court’s decision in *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127] (hereafter *Tison*). In *Tison*, the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a defendant convicted of first degree felony murder who was a ‘major participant’ in the underlying felony, and whose mental state is one of ‘reckless indifference to human life.’ (*Tison, supra*, 481 U.S. at p. 158 & fn. 12.) The incorporation of *Tison*’s rule into section 190.2(d)—in express terms—brought state capital sentencing law into conformity with prevailing Eighth Amendment doctrine. (See *Tapia, supra*, 53 Cal.3d at p. 298, fn. 16; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1753.)

“*Tison* was concerned with whether imposition of the death penalty on an accomplice to a felony murder who neither killed nor intended to kill the victim would violate the Eighth or Fourteenth Amendments. The decision itself does not stand for the proposition that imposition of a penalty less severe than death, such as life imprisonment without parole, would offend constitutional principles in the absence of proof of ‘reckless indifference to human life.’ (Cf. *Rosenberg v. Henderson* (E.D.N.Y. 1990) 733 F.Supp. 577, 578 [rule of *Tison* inapplicable to defendant sentenced to life imprisonment].) Nonetheless, *Tison* is the source of the language of section 190.2(d), and the constitutional standards set forth in that opinion are therefore applicable to *all* allegations of a felony-murder special circumstance, regardless of whether the People seek and exact

the death penalty or a sentence of life without parole. We therefore begin our inquiry into whether the import of section 190.2(d) is adequately conveyed by its express statutory terms by looking to *Tison* for the meaning of the statutory phrase ‘reckless indifference to human life.’

“The defendants in *Tison* were two brothers sentenced to death for their involvement in the roadside kidnapping, robbery, and murder of a family of four. At trial, it was established that the defendants orchestrated the prison escape of their father and his cellmate, arming themselves, a third brother, and the two convicted murderers with guns while still inside prison walls, and assisting in the escapees’ flight after the breakout. When a tire on the group’s getaway car went flat on the highway, one of the defendants flagged down a passing motorist for help. Both of the defendants participated in the kidnapping and robbery of the occupants of the stopped vehicle, and were nearby when their father and his cellmate shot and killed the four victims. (*Tison, supra*, 481 U.S. at pp. 139-141.)

“Relying on *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140], the *Tison* defendants contended that because they did not intend to kill the victims, their death sentences did not comport with the Eighth Amendment’s requirement that the death penalty be proportional to the culpability of the defendant. The high court rejected the defendants’ argument. Noting that ‘[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime’ (*Tison, supra*, 481 U.S. at p. 156), the court found that, when faced with determining the level of a defendant’s culpability for which the state may exact the death penalty, focusing solely on the question of whether the defendant intended to kill the victim was unsatisfactory. (*Id.* at p. 157.)

“In the high court’s view, ‘some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery,

utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." ' (481 U.S. at p. 157.)

"Finding support in the Model Penal Code, which equates reckless killing with intentional killing for purposes of classifying various types of homicide, the court in *Tison* concluded that 'the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state.' (481 U.S. at p. 157.) The court therefore held that 'major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.' (*Id.* at p. 158, fn. omitted.)

"*Tison* thus instructs that the culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death' (481 U.S. at p. 157), and it is this meaning that we ascribe to the statutory phrase 'reckless indifference to human life' in section 190.2(d)." (*People v. Estrada* (1995) 11 Cal.4th 568, 575-577 (*Estrada*).)

Here, the prosecution did not attempt to prove that Reed had actual intent to kill. The prosecution contended, and the jury found, that Reed acted with reckless indifference to human life as required by section 190.2, subdivision (d). Reed claims on appeal that the evidence is insufficient to support this finding because "there was no evidence prior to the September 2 robbery that would have caused [him] to believe Peterson was a person inclined to inflict bodily harm on others."<sup>10</sup> In assessing Reed's claim, we view the evidence and reasonable inferences in the light favorable to the verdict. (*People v. Proby* (1998) 60 Cal.App.4th 922, 928.)

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<sup>10</sup> The parties agree that Reed did not have an intent to kill, and Reed concedes there is sufficient evidence he was a "major participant in the robbery."

There is sufficient evidence from which the jury reasonably could infer that Reed planned to rob the pharmacy, knowing that Peterson would be armed and that employees would be present. In addition to the numerous cell phone calls between Peterson and Reed just prior to the robbery, Reed arrived at the pharmacy with a pair of gloves, which he put on prior to removing the cash from the cash register. Those facts demonstrate planning. In addition, the robbery was committed at approximately 12:30 p.m. on a Thursday, when employees were certain to be present. Reed's involvement in planning the robbery and the fact that Peterson's gun was in plain sight as he headed to the area where Tom and Derrick were working suggest Reed knew that Peterson was armed. Assuming, as Reed asserts, that the jury could infer that he knew about the prior robbery, including the facts that Peterson did not discharge his weapon and that no one was injured, the jury nevertheless could have found that Reed was aware of Peterson's willingness to do violence based on the wording of the note Peterson handed to the pharmacy technician on September 2, 2010, which stated, "We will kill you." The jury also could have found that Reed gained a "subjective awareness of the grave risk to human life" (*Estrada, supra*, 11 Cal.4th at p. 578) during the robbery when he heard (1) Peterson getting increasingly agitated, (2) Peterson threatening "to shoot" if he didn't get what he wanted, and (3) gunfire inside the pharmacy with numerous people present. Based on the above, the jury could have determined that Reed was aware of the grave risk to human life in committing such a robbery. (See, e.g., *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [An armed home invasion robbery carries a risk of resistance "and the extreme likelihood death could result"].)

Moreover, after the shooting began, Reed fled. A reckless indifference to human life has been found where a defendant knows someone has been shot or injured and flees instead of helping the victim. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1117; *Smith, supra*, 135 Cal.App.4th at p. 927; *Hodgson, supra*, 111 Cal.App.4th at p. 580.) While Reed may not have known for certain that someone had been shot, the jury could

have found that he knew it was extremely likely and that there was a grave risk of death as a result.

Substantial evidence supports the jury's finding Reed acted with reckless indifference to human life.

#### IV

#### The Trial Court Did Not Err in Failing to Stay Peterson's Sentence on Count 6

Peterson contends that “[i]mposition of sentence on count 6 for the crime of felon-in-possession was barred by Penal Code section 654 insofar as the evidence was insufficient to establish an objective for that crime independent of the objective in committing the September 2 robbery.” He is mistaken.

“Section 654 . . . ‘precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. ‘Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.’ [Citations.] ‘[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.’ [Citation.]” [Citation.] . . . [¶] Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).

When, as here, a defendant is charged as a felon in possession of a firearm and another crime in which he used the firearm, multiple punishment is improper where the evidence shows that, at most, “fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . .” (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412.) On the other hand, “section 654 is inapplicable when the

evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm.” (*Jones, supra*, 103 Cal.App.4th at p. 1145.) Where the defendant already had the firearm in his possession when he arrived at the scene of the crime, a justifiable inference may be drawn that the defendant’s possession of the weapon was not merely simultaneous with the subsequent crimes, but continued before, during, and after those crimes. (*Ratcliff*, at p. 1413.)

Here, the evidence does not demonstrate that fortuitous circumstances put the firearm in Peterson’s possession only at the instant of committing the robbery. Rather, as Peterson concedes, the only evidence is that Peterson possessed the gun when he entered the pharmacy on September 2, 2010.

*People v. Burnett* (1967) 251 Cal.App.2d 651 (*Burnett*), cited by Peterson, is distinguishable. There, the defendant was convicted of and sentenced for both armed robbery (§ 211) and two counts of possession of a concealable firearm by a felon (former § 12021). (*Burnett*, at p. 652.) The court held that section 654 barred a separate sentence for the section 12021 conviction that was based on the defendant’s use of a revolver in the robbery. (*Burnett*, at p. 658.) However, the court upheld a separate sentence for the second section 12021 count which was based on the defendant’s possession of a different weapon three weeks later. (*Burnett*, at pp. 652-653, 657-658.) *Burnett* is distinguishable in that the facts show a single robbery, and no evidence existed to support a finding that the defendant possessed the gun used in the robbery other than during the commission of that crime. Unlike *Burnett*, the facts before us show two robberies. While Peterson never produced a gun during the August 13, 2010, robbery, there was ample evidence from which the jury could have concluded that he possessed a gun during the commission of that offense. Thus, there is strong circumstantial evidence that Peterson’s gun possession on September 2, 2010, was not merely simultaneous with the corresponding robbery.

The trial court did not err in failing to stay Peterson’s sentence on count 6.

V

Peterson Was Not Prejudiced by His Trial Counsel's Failure to Ask the Trial Court to State Its Reason for Imposing a Consecutive Sentence on Count 6

In the event we conclude, as we have, that section 654 “does not bar imposition of a sentence on count 6,” Peterson claims his trial counsel was ineffective in failing to ask the trial court “to state reasons for imposition of a consecutive sentence” on that count. Although Peterson is correct that the trial court erred in failing to state reasons for imposing a consecutive sentence, his ineffective assistance claim fails because there is no reasonable probability he would have obtained a lesser sentence had counsel asked the court to state its reasons. (See *People v. Maury* (2003) 30 Cal.4th 342, 389.)

Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (See *In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) California Rules of Court, rule 4.425 sets forth specific criteria affecting the decision, including the presence of any circumstances in aggravation or mitigation. The sentencing court is required to state reasons for choosing to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) “Incorporating by reference the . . . factors in a probation report, as was done here, does not satisfy the requirement of a statement of reasons.” (*People v. Pierce* (1995) 40 Cal.App.4th 1317, 1320.)

The failure to state reasons for a consecutive sentencing choice is error. (*People v. Powell* (1980) 101 Cal.App.3d 513, 518 [decision that sentences run consecutively is a sentencing choice for which trial court is required to state its reasons at time of sentencing]; Cal. Rules of Court, rule 4.406(b)(5).) However, the error is harmless and no remand is required if it is not reasonably probable that a result more favorable to defendant would occur. (*People v. Blessing* (1979) 94 Cal.App.3d 835, 838-839.)

By sentencing Peterson consecutively on the firearm possession charge, the trial court impliedly found that he had an intent and objective for the possession offense that was distinct from the robbery charge. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) Among the “[c]riteria affecting the decision to impose consecutive rather than concurrent sentences” is whether or not “[t]he crimes and their objectives were predominantly independent of each other.” (Cal. Rules of Court, rule 4.425.) Thus, though the trial court did not state a reason for running the sentence on that count 6 consecutive to the rest, an objection would have been futile. There is no reasonable probability Peterson would have obtained a lesser sentence had counsel objected. (*People v. Maury, supra*, 30 Cal.4th at p. 389.)

VI  
Cumulative Error

Lastly, Reed claims that the cumulative effect of the alleged errors was prejudicial. The premise behind the cumulative error doctrine is that while a number of errors may be harmless taken individually, their cumulative effect requires reversal. (*People v. Bunyard* (1988) 45 Cal.3d 1189.) Any of the potential errors identified above “were harmless, whether considered individually or collectively. Defendant was entitled to a fair trial but not a perfect one. [Citations.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

DISPOSITION

The judgments are affirmed.

BLEASE, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.