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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MILLER,

Defendant and Appellant.

D056855

(Super. Ct. No. SCE266581)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed.

I.

INTRODUCTION

Defendant Anthony Miller appeals from a judgment entered after a jury convicted him of two counts of first degree murder. On appeal, Miller contends (1) that the trial court should not have admitted inculpatory statements that Miller made to police detectives at his home and at the police station, on the grounds that he was not given

*Miranda*¹ warnings prior to or during the interrogations, and that the statements were involuntary because they were induced by deceptive and coercive police tactics; (2) that the trial court erred in instructing the jury on the defense of duress by improperly modifying the standard CALCRIM instruction in a manner that shifted to the defense the burden of proving duress; and (3) that the trial court erred in imposing consecutive life terms because the court was acting under the misimpression that it did not have the discretion to impose concurrent life terms. We conclude that none of Miller's contentions has merit. We therefore affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On March 1, 2006, Samir Yousif had planned to meet his friend, Heather Mattia, for a late dinner in El Cajon. Mattia and her brother owned the Granada Liquor Store on Broadway in El Cajon, and Mattia was working at the store until 11:00 p.m. that night. After 11:00 p.m., Yousif went to the restaurant where he and Mattia were going to meet, but Mattia was not there. Yousif called Mattia's cell phone. She did not answer. He then drove to the store.

When Yousif arrived at the store, he noticed that the lights were off, and the store appeared to be closed for the day. Yousif parked his car and honked the horn, but no one came out of the store. He went to the door of the store and discovered that it was not

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

locked. He opened the door and called out for Mattia but got no response. Yousif then walked to a neighboring fast food restaurant and asked if Mattia was there. Upon finding out that Mattia was not there, Yousif asked an employee of the restaurant to accompany him back to the Granada Liquor Store. Omar Serdah agreed to accompany Yousif. Yousif and Serdah went into the store, where they found Mattia's body and the body of Granada Liquor Store employee Firas Eiso lying next to each other on the floor.

Yousif and Serdah both called 911, and police officers responded to the Granada Liquor Store. The officers found the bodies of Mattia and Eiso lying face down on the floor near the cash register, with their arms crossed underneath their heads. Each had suffered a gunshot wound to the head. The cash register drawers were open and had been emptied. Eiso's pants pockets and Mattia's jacket pockets had been pulled inside out.

The store had a motion-activated video security system. The recordings from the store's cameras showed a number of things that occurred between 11:04 p.m. and 11:29 p.m. First, car headlights can be seen turning on across the street. The car crossed the street and parked in front of the store. Mattia and Eiso set the alarm, locked the door, and started to leave. A man, later identified as Jean Rices, forced Mattia and Eiso back into the store at gunpoint, and made them crawl in front of the cash register counter. Rices, who was wearing a hoodie, and another man who was wearing a ski mask (later identified as Miller) can be seen going behind the counter where the cash registers were located. Both men were wearing gloves. Miller went through the cash registers, removed money and other items, and put the money and items into a duffle bag.

The cameras recorded Miller and Rices standing close to one another. They appeared to be talking to each other. The recordings then show Miller walking toward the door and looking back at Rices for approximately five seconds. After looking back at Rices, Miller left the store.

At 11:11 p.m., less than two seconds after Miller walked out of the store, one of the cameras was apparently activated by the motion of dust that was kicked up as a result of a bullet ricocheting in the store.

Rices left the store approximately 12 seconds after Miller. The next event that the recordings show is Yousif arriving at the store.

The case remained unsolved until November 2006, when El Cajon Police Department Detective James Hoefer received information that Miller had been involved in the Granada Liquor Store robbery and murders. Hoefer and two other detectives went to Miller's apartment in Alpine to interview him. Miller lived in the apartment with his mother and younger siblings.

The detectives initially asked Miller what he knew about some bank robberies for which Rices had been arrested. The detectives then brought up the subject of the Granada Liquor Store robbery and murders. Miller initially denied knowing anything about the robbery and murders. However, after Hoefer told Miller that he had received information that Miller had been involved, Miller changed his story. Miller first said that he had been the getaway driver, but later acknowledged that he was the person who had held the bag of money.

Miller told the detectives that he and Rices had been talking about committing robberies for several months, and that he knew that the Granada Liquor Store would have a lot of cash. Miller said that on the night of the robbery, he, Rices and another man, Nut-Nut, had driven to a location across the street from the liquor store, where they stopped. Rices laid out the plan for the robbery. Miller then drove the car over to the liquor store. Mattia and Eiso came out of the store, and Rices forced them back into the store at gunpoint. Nut-Nut was supposed to follow Rices, but he "froze up", so Miller got out of the car with a bag and followed Rices into the store. When Miller entered the store, he saw that Rices had made Mattia and Eiso lie down on the floor, and both were begging for their lives.

Miller said that he retrieved the cash after Mattia told them where it was, and that he also grabbed two packs of cigarettes. As Miller left with the money, he walked by Rices, who told him, "Get in the car. Start the car now. I gotta handle some business." Miller left the store.

At trial, Miller told a different story. Miller said that Nut-Nut had not been involved. According to Miller, he had been in the car riding around with Rices and Rices's girlfriend when Rices suddenly decided to rob a liquor store. Miller testified that the incriminating things that he had told police had been lies, and said that he had told the police these lies because he was "stressed" at the time.

B. *Procedural background*

Miller was charged in an information with two counts of murder (Pen. Code, § 187, subd. (a)).² In addition, the information alleged special circumstances, i.e., committing murder while aiding and abetting in robbery and burglary (§ 190.2, subd. (a)(17)) and multiple murders (§ 190.2, subd. (a)(3)), as well as the enhancement that another principal was armed with a firearm in committing the offenses (§ 12022, subd. (a)(1)).

A jury convicted Miller of both counts of first degree murder, and found as to each count that another principal was armed with a firearm.³ The jury was unable to reach a unanimous verdict as to the special circumstance allegation that the murders were committed in the course of a burglary or robbery.

The trial court sentenced Miller to an indeterminate term of 50 years to life, consisting of two consecutive terms of 25 years to life, plus a consecutive two years for the firearm enhancements.

Miller filed a timely notice of appeal.

² All statutory references are to the Penal Code unless otherwise specified.

³ This verdict was rendered in a second trial. Miller's first trial ended in a mistrial after the jury reported that it was hopelessly deadlocked.

III.

DISCUSSION

A. *The trial court did not err in admitting statements that Miller made to police*

Miller contends that the trial court erred in admitting statements he made to the detectives when they interviewed him at his apartment and later at the police station.

Miller maintains that the detectives violated his Fifth Amendment rights by using a "question-first" technique that rendered meaningless any subsequent *Miranda* warnings.

Miller also contends that the court should not have admitted his statements because the statements were not made voluntarily.

1. *Additional background*

Prior to trial, Miller moved to suppress the statements he made to the detectives during the interview at his apartment and at the police station. Miller argued that the statements had been taken in violation of *Miranda*, and that he had been coerced into making the statements. The court held a hearing on the motion.

At the hearing, Miller called Detective Hoefler to testify. Hoefler testified that he had been the lead detective on the Granada Liquor Store murder investigation. Almost nine months after the crime, he received information from a confidential informant that Rices had admitted to committing the murders, and that Miller had been involved in the robbery. On the same day that Hoefler received this information, Hoefler and two investigators from other law enforcement agencies went to Miller's apartment. They were dressed in plain clothes and drove an unmarked vehicle. Miller's mother answered

the door, and the investigators asked to speak with Miller. When Miller came to the door, the investigators asked him if they could speak with him. Miller agreed to talk with them.

There were other people in the apartment. When Miller headed toward the dining room table, Hoefler asked whether they could talk in a more private area. Miller then led the detectives to his mother's bedroom. The door to the bedroom was left open while the detectives talked with Miller. The detectives did not tell Miller that he could not leave the room.

The detectives questioned Miller regarding what he knew about Rices having committed bank robberies. After discussing that topic, Hoefler asked Miller if he knew of any involvement that Rices might have had in the Granada Liquor Store robbery and murders. The detectives told Miller that they thought he might have some information about those events, but did not tell him at that time that they suspected he had been involved.

Hoefler handed Miller photographs of the murder victims at the liquor store. According to Hoefler, after seeing the photographs, Miller began to "wring his hands, look to the left, and burp quietly." Miller then handed the photographs to another detective. Hoefler asked Miller if he had killed the two victims, and also asked whether Miller had played any part in the robberies. Hoefler told Miller that the victims' families were frustrated by not knowing what had happened. Hoefler then told Miller that he knew that Miller had been involved. After Hoefler made this statement, Miller had difficulty

speaking and his voice became slightly hoarse. Miller said that he wished he could speak to his godfather. Miller then admitted that he had been involved in the robbery and murders.

Hoefler testified that he never told Miller that Miller could not leave the room. The detectives told Miller repeatedly that he was not under arrest. They never displayed handcuffs or guns. After Miller admitted to having been involved in the murders, he left the room unaccompanied three times, and was out of the room for several minutes each time. During the interview, Miller's mother would occasionally look in to see if anyone needed anything.

At the end of the interview at Miller's apartment, Detective Hoefler asked Miller if he would be willing to come to the police station for a videotaped interview. Miller agreed to do so. The detectives left Miller in the apartment so that he could change his clothes. When Miller came out of the apartment 10 to 15 minutes later, Hoefler told Miller that the trip to the station was voluntary, and that if Miller changed his mind about the interview, they would bring him home. Hoefler reminded Miller several times, both on the ride to the police station and while at the police station, that the detectives would take him home whenever he wanted to leave. The detectives did not handcuff Miller or pat him down.

During the ride to the police station, Miller asked what his potential sentence might be. Hoefler replied that it would not be up to him, but that the case had the potential to be a death penalty case. Miller said that if it came to that, he would accept it.

At the police station, the detectives told Miller again that he was not under arrest, that he was free to leave, and that they would take him home if he wanted them to; he only had to ask.

After the interview at the police station, Hoefler offered to pay for Miller to stay in a hotel. Miller accepted the offer without hesitation. Miller spent the night in a hotel with a different El Cajon police detective. The plan was that Miller would show police where they might be able to find some evidence related to the crimes the following morning. The next day, Hoefler told Miller that he did not have to take the police to try to find the evidence and that he was free to leave at any time. Miller gave Hoefler a hug and shook his hand. Hoefler left and did not accompany Miller and the other officers that day.

Miller drove around with the police officers to locations where he thought the murder weapon might be. Later, Miller went to the county jail, at the request of police, and engaged in a pretext interview with Rices. Hoefler had explained to Miller that he did not have to do any of these things, but said that he would appreciate it if Miller would do them. Miller agreed to do the pretext interview with Rices, but declined to conduct another pretext interview with a different inmate.

Shortly after 5:00 p.m. that evening, Hoefler asked Miller if he wanted to go home. Miller said that he did. Hoefler asked Miller to provide him with telephone numbers at which Hoefler would be able to reach Miller. Miller responded that he was not planning to run and instead, was planning to do some extra work to earn more money for the holidays. Hoefler then took Miller home.

Two days later, Hoefer arrested Miller at Miller's apartment. At the time of his arrest, Miller thanked the officers for how they had treated him.

Miller did not offer any other evidence as to what occurred during his interviews with detectives.

Based on Detective Hoefer's account of the circumstances under which Miller made the statements at issue, the trial court concluded that Miller had not been in custody during either the interview at his house or the interview at the police station. The court found that the detectives' representations to Miller that he was free to leave had been genuine, and that the detectives had not conditioned Miller's ability to leave on his providing them with information.

2. *Analysis*

- a. *There was no Miranda violation because Miller was not in custody at the time he confessed to his role in the robbery and murders*

Miller argues that the detectives should have given him *Miranda* warnings as soon as the interview at his apartment turned to the subject of the Granada Liquor Store murders. He suggests that a reasonable person in his position would have believed that he was in police custody at that point in time.

"*Miranda* requires courts in criminal cases to exclude, at least from the prosecution's case-in-chief, self-incriminatory statements made by the accused during *custodial* interrogation unless the accused has knowingly and voluntarily waived the Fifth Amendment privilege against self-incrimination, which in this context includes the rights

to silence and the assistance of counsel." (*People v. Lessie* (2010) 47 Cal.4th 1152, 1156, italics added.) " Thus two requirements must be met before *Miranda* is applicable; the suspect must be in "custody," and the questioning must meet the legal definition of "interrogation." ' [Citation.] The prosecution has the burden of proving that a custodial interrogation did not take place. [Citation.] [¶] A person is in custody for purposes of *Miranda* if he is 'deprived of his freedom in any significant way or is led to believe, as a reasonable person, that he is so deprived.' [Citation.] 'Interrogation consists of express questioning or of words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.' [Citations.]" (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 953.)

In *People v. Ochoa* (1998) 19 Cal.4th 353 (*Ochoa*), the California Supreme Court outlined the standard of review that applies to a defendant's claim that he was in custody for purposes of determining whether *Miranda* advisements were required:

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry, all agree, is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a "mixed question of law and fact". . . .' [Citation.] Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding "basic,

primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators' " ' [Citation.] Having determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*Ochoa, supra*, at pp. 401-402.)

We conclude that the facts, as found by the trial court based on Detective Hoefler's testimony, demonstrate that Miller was not in custody for purposes of *Miranda* during either the initial interview at his apartment or the videotaped interview at the police station. Miller agreed to talk with the detectives in his home. He was expressly and repeatedly told that he was not under arrest. During the interview, the door to the bedroom was left open, and Miller's mother came in periodically to see if anyone needed anything. The police made no show of force. Miller left the room at least three times during the interview, and the detectives did not stop him or suggest he was not free to leave. Given these circumstances, a reasonable person would have believed that he was at liberty to stop the interview and would not have considered himself to be under the restraint associated with a formal arrest. (See *Ochoa, supra*, 19 Cal.4th at pp. 401-402.)

With respect to the interview at the police station, when the detectives asked Miller if he would come to the police station for a videotaped interview, they specifically told Miller that he did not have to do so, and again informed him that he was not under arrest. Once at the police station, the detectives again assured Miller that he was not under arrest and that they would take him home any time he wanted to leave. The following day, when Miller accompanied police officers to attempt to locate evidence

pertaining to the liquor store robbery and murders and participated in the pretext interview with Rices, the police again reminded Miller that he was not under arrest and that he was free to leave. A reasonable person would not have considered himself to be under arrest or under the restraint associated with arrest under these circumstances. We therefore conclude that the trial court correctly determined that the interviews of Miller at his apartment and at the police station, prior to his formal arrest two days later, were not custodial interrogations, and that the trial court thus did not err in declining to suppress the statements that Miller made to police during these interviews.

b. *Miller's statements were voluntary and were not the product of coercion*

Miller's contention that his confession was coerced either because the detectives were too nice to him, or because they offered an implied promise of leniency if he agreed to talk with them, fails.

" It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citations.] A statement is involuntary [citation] when, among other circumstances, it "was ' "extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight" " [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the "totality of [the] circumstances." [Citations.]' [Citation.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1402 (*Leonard*).

" It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere 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" [Citations.]" (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

"The test for determining whether a confession is voluntary is whether the questioned suspect's 'will was overborne at the time he confessed.' [Citation]" (*People v. Cruz* (2008) 44 Cal.4th 636, 669.) " 'A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citation.]" (*Ibid.*)

Miller suggests that his inculpatory statements were coerced because the detectives "cozied" up to him, such that he was "lulled into believing false assurances that the officers were interested only in information about Rices and the perpetrator of the shooting" at the Granada Liquor Store. In addition, Miller argues that the detectives'

statement to the effect "that by helping them appellant was also helping himself," was improperly coercive. Finally, Miller contends that his statements were involuntary because the detectives impliedly promised Miller leniency in exchange for a confession.

As an example of coercion on the part of the detectives, Miller contends that when Hoefler told him that the penalty for the charges he was facing included the possibility of capital punishment, Hoefler was "clearly implying appellant was being given the opportunity to avoid such charges." However, the record belies Miller's contention. Hoefler did not raise the possibility of Miller receiving the death penalty on his own. Rather, Hoefler mentioned capital punishment only in responding to Miller's question about what his potential sentence might be. In addition, Hoefler did not imply to Miller that Hoefler would have control over the punishment that Miller might face. On the contrary, Hoefler specifically told Miller that the penalty would not be up to Hoefler, and proceeded to tell Miller the truth, which was that the case had the potential to be a death penalty case. Beyond this, by the time Hoefler told Miller that he might be facing capital charges, *Miller had already implicated himself in the crime*. Thus, Detective Hoefler's statement about capital punishment could not have caused Miller to confess his role in the robbery scheme.

It was not improper for the detectives to suggest to Miller that he would be better off if he helped them by telling them the truth about what had occurred. "Absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth." (*People v. Williams* (2010) 49 Cal.4th 405, 444, citing, e.g.,

People v. Carrington (2009) 47 Cal.4th 145, 171; *People v. Hill* (1967) 66 Cal.2d 536, 549 [" 'advice or exhortation by a police officer to an accused to "tell the truth" or that "it would be better to tell the truth" unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary' "], quoting *People v. Nelson* (1964) 224 Cal.App.2d 238, 250.) There is no evidence that the detectives threatened Miller or promised him leniency in exchange for telling them the truth. Further, it was not improper for detectives to focus their questioning on what Miller knew about Rices's role in the robbery and murders. There is no evidence that the detectives suggested to Miller that he would not be prosecuted for his role in the crimes. The fact that Miller asked Hoefler what his potential punishment might be while they were riding in the car to the police station indicates that Miller understood that he would be held responsible for his role in the crimes.

There is no evidence that the detectives threatened Miller, made false promises to him, either expressly or impliedly, or engaged in abusive questioning. The fact that the detectives made Miller feel comfortable, and that he, in turn, cooperated with them, does not constitute evidence that Miller's inculpatory statements were the result of coercive police tactics. There is simply nothing in this record that demonstrates that Miller was coerced into confessing his role in the crime.

B. *Because Miller was not entitled to an instruction on the defense of duress, any error that the court might have made in altering the CALCRIM instruction on duress was harmless*

Miller contends that the trial court erred in instructing the jury on the defense of duress by telling the jury that Miller had the burden of proving that he acted under duress in participating in the Granada Liquor Store robbery.

1. *Additional background*

At Miller's request, the trial court instructed the jury on the defense of duress. However, the court modified the standard CALCRIM No. 3402 instruction to shift the burden of "proving th[e] defense" to Miller.

The standard CALCRIM No. 3402 instruction provides:

"The defendant is not guilty of _____ *<insert crime[s]>* if (he/she) acted under duress. The defendant acted under duress if, because of threat or menace, (he/she) believed that (his/her/ [or] someone else's) life would be in immediate danger if (he/she) refused a demand or request to commit the crime[s]. The demand or request may have been express or implied.

"The defendant's belief that (his/her/ [or] someone else's) life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed.

"A threat of future harm is not sufficient; the danger to life must have been immediate.

"[The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of _____ *<insert crime[s]>* .]"

After defense counsel requested that the court instruct the jury on the defense of duress, the trial court heard argument from the attorneys regarding whether it would be appropriate to give the instruction. The prosecutor argued that if the court were to give the instruction, the burden to prove the defense was on the defendant and the jury should be so instructed. The court agreed with the prosecutor and modified the paragraph of CALCRIM No. 3402 that states that the People must prove that the defendant did not act under duress to read as follows:

"The defendant has the burden of proving this defense. To meet this burden, the defendant must raise a reasonable doubt that he acted in the exercise of his free will."

2. *Analysis*

Miller contends that the trial court erred in modifying the duress instruction in this manner. He argues that CALCRIM No. 3402 correctly places the burden on the People to prove that the defendant did not act under duress. Specifically, Miller maintains that because a trial court properly instructs on duress only if the defendant has met his burden to produce evidence that raises a reasonable doubt that he acted in the exercise of his free will, the People bear the burden to prove, beyond a reasonable doubt, that the defendant did not act under duress.

We need not determine whether the trial court's modification of the CALCRIM No. 3402 duress instruction was erroneous because, even assuming that it was, on the record in this case, any such error was harmless. Our review of the record convinces us that there was insufficient evidence of duress to justify any instruction on that defense.

Since Miller was not entitled to have the jury instructed on the defense of duress, the trial court's giving an erroneous modified instruction concerning that defense could not have prejudiced him. (See *People v. Johnson* (1993) 6 Cal.4th 1, 43 [concluding that, because evidence of provocation was insufficient, "trial court's instruction on manslaughter was inappropriate and unnecessary, though obviously not prejudicial to defendant"].)

A trial court has a sua sponte duty to instruct regarding a defense if there is substantial evidence to support the defense and it is not inconsistent with the defendant's theory of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Substantial evidence is evidence from which a jury reasonably could conclude that the particular facts underlying the instruction exist. (*People v. Flannel* (1979) 25 Cal.3d 668, 685-686.) In deciding whether there is substantial evidence to support a defense, "the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt'" (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

Duress is available as a defense to defendants who commit a crime "under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (§ 26, subd. Six; *People v. Otis* (1959) 174 Cal.App.2d 119, 124–125.)⁴ The defense of duress requires evidence that the defendant

⁴ Although duress may not negate the elements of malice or premeditation and thereby reduce a first degree murder to second degree murder or manslaughter (see *People v. Anderson* (2002) 28 Cal.4th 767, 781-784), duress may provide a defense to the underlying offense that is the predicate offense to felony murder (*id.* at p. 784).

acted upon *an actual and reasonable belief* that his life was *presently and immediately endangered* if he refused to participate. (*People v. Quinlan* (1970) 8 Cal.App.3d 1063, 1068; *People v. Manson* (1976) 61 Cal.App.3d 102, 206.) The immediacy of the threat or menace is central to the duress defense. Threats of future harm do not diminish criminal culpability. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 125, judgment vacated on other grounds by *Bacigalupo v. California* (1992) 506 U.S. 802.) In order to establish the duress defense, the threat or menace "[must] be accompanied by a direct or implied demand that the defendant commit the criminal act charged." (*People v. Steele* (1988) 206 Cal.App.3d 703, 706.) "The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger; none depict a phantasmagoria of future harm." [Citations.]" (*People v. Vieira* (2005) 35 Cal.4th 264, 290.)

The evidence on which Miller relies to support his contention that there was substantial evidence to support the defense of duress in this case is the evidence that the trial court summarized when the court was considering whether to instruct the jury on duress:

"Defendant's testimony at trial was that after Mr. Rices got out of prison, he told Mr. Miller about all the bad things he did, including stabbing people. Mr. Rices had earned the nickname, according to Mr. Miller, of 'Face' because he shot another gang member in the face.

"Mr. Miller testified that he knew that Mr. Rices murdered people inside and outside of prison. He testified that he knew Mr. Rices always had a gun. On March 1st, Mr. Miller testified he wasn't planning to do a robbery. He was just going to hang out, took his Playstation and clothes to Mr. Rices' place. There was a decision to go out for the purpose of recreation, movie or bowling. The evidence shows that he didn't take his key with him, the key to his house in Alpine.

"He testified that evening, Rices seemed very agitated. In fact, pissed off. He was yelling instructions at Nichele Hopson. Mr. Miller said he first saw the gun when he got out of the car at the Granada parking lot. Rices gave him the duffle bag and mask and told him to put on the mask and follow him. At that time, Mr. Rices had a distant look in his face, something Miller had never seen before.

"I'm not going to go into any detail [about] what happened in the store because I basically agree with the People that that's not really the pertinent transaction. But I have considered the fact that, inside the store, Rices is yelling, telling him to hurry up, giving him directions and orders to get the money. Mr. Miller says, 'I did what Rices told me to do.' In Nichele Hopson's trial testimony—again, I'm not assessing credibility—she contended that the robbery wasn't planned. She never heard Rices and Miller plan a robbery. She only knew what was happening when it was happening. She was out that evening for recreation.

"Crucial to my decision is a statement attributed to Miller in the El Cajon police station interview. . . . Mr. Miller says the following after being question by Investigator Hoefer, 'Do you remember what time you go to her house,' referring to Raquel Good. 'No, I can't say I do,' so on and so forth. And then, 'I was kind of—once it was going down—well, before. Once I realized and kind of got—I was like, okay, he's about to do something stupid. I was like, fuck. Damn. What do I do? You know, do I just—you know, do I just get out and try to walk out of the car, leave him here, leave him stuck on top of that? You know, I didn't want to do that and fuck around and have this little—shooting at me, you know, pissed. If he's going to kill anyone over anything. You know, he'll definitely kill me for turning my back on him. That's what he would say, "You turned

your back on me. You're walking out." He would try. I'm pretty positive that he would have let off a few rounds at me.' "

Our review of the record establishes that the trial court's summary accurately sets out all of the evidence that would arguably support a duress defense.⁵ Even crediting this evidence, we conclude that it does not constitute substantial evidence to support the elements of the defense of duress.

Duress requires that the defendant show that he acted *under immediate threat of harm and reasonably believed his life was in danger*, such that the defendant did not have time to form the required criminal intent. (§ 26, subd. Six; *People v. Heath* (1989) 207 Cal.App.3d 892, 899-901.)

Although Miller's statement to police suggested that Miller may have believed that Rices would have shot him if Miller refused to participate in the robbery, there is no evidence that Rices made either an express or an implied threat that he would kill Miller if Miller did not commit the robbery with him. There was no evidence that Rices pointed the gun at Miller prior to Miller's decision to follow Rices into the store and assist in the robbery, or that Rices said or did anything that suggested that he would harm Miller if Miller refused to participate. Miller seems to have reached the conclusion that Rices might have shot him if he refused to assist Rices based on other information that he knew about Rices's history of violence, and his belief that Rices was a bad character. Miller's statement that he was "*pretty* positive that he [Rices] would have let off a few rounds at

⁵ Miller also relies on this summary as the evidence that supports his argument on appeal.

me" (italics added) demonstrates that Miller did not firmly believe that Rices had actually threatened him. Rather, it appears that Miller was simply speculating about what he thought Rices might do. This generalized fear of an accomplice is not the type of fear that would negate a defendant's criminal intent for purposes of a duress defense. In order to be entitled to an instruction on duress, there must be evidence that the defendant's fear of harm was based on express or implied threats or menace, such that the defendant had an actual and reasonable belief that his life was in immediate danger.

Even if there was evidence that Miller actually believed that Rices would do him immediate harm if he refused to participate in the robbery, this would not be sufficient to support a duress defense because there was no evidence of a threat on Rices's part, and no evidence that such a fear on Miller's part would have been *reasonable* under the circumstances. The evidence demonstrated that Rices and Miller had been friends for many years, and there was no evidence that Rices had ever been violent toward Miller or any of Rices's other friends. In addition, Miller admitted that he perceived Rices to have been "bragging" when Rices told Miller about having shot a rival gang member in the face. Miller's conclusion that Rices might kill him if he did not assist Rices thus cannot be considered to have been objectively reasonable.

No reasonable jury could have concluded on the basis of the evidence presented at trial that Miller reasonably and actually believed that he faced imminent death if he refused to participate in the robbery. Rather, any belief that Miller may have had that he was acting under an imminent threat to his life would clearly have been based on mere

speculation on his part. Miller thus was not entitled to an instruction on duress. Since he was not entitled to a duress instruction at all, Miller cannot demonstrate that he was prejudiced by the court's giving a duress instruction that may have incorrectly shifted the burden to prove the defense onto him.⁶

C. *The record reveals that the trial court understood that it had discretion to sentence Miller to concurrent sentences, but chose to impose consecutive sentences.*

Miller contends that the trial court "was not aware of the extent of its discretion" to impose concurrent, rather than consecutive, prison terms. He asserts that the trial court "stated it could find no legal or factual basis for imposition of concurrent terms," despite the fact that pursuant to section 669, the sentence would automatically be concurrent unless the court found reasons to impose consecutive sentences. On this basis, Miller concludes that the court "misunderstood its authority to impose concurrent terms." In the alternative, Miller contends that to the extent the trial court may have understood that it had discretion to impose either concurrent or consecutive terms, but nevertheless decided to exercise that discretion to sentence him consecutively, the trial court abused its discretion by choosing to sentence him to consecutive terms and imposing a term of 50 years to life.

When a defendant is convicted of multiple crimes, the trial court has discretion to impose sentence on the subordinate counts to run consecutively or concurrently. (§ 669;

⁶ We emphasize that we are not deciding the question whether the trial court erred in modifying CALCRIM No. 3402 to shift the burden to prove the defense of duress to the defendant.

see also *People v. Bradford* (1976) 17 Cal.3d 8 (*Bradford*.) "It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*Id.* at p. 20.)

We reject Miller's contention that the trial court was under the misimpression that it had no discretion to impose concurrent sentences in this case. There is nothing in this record that suggests that the trial court was under such a misimpression. Rather, after hearing argument from both parties, the trial court assessed the case and indicated that in determining whether to sentence Miller to concurrent or consecutive terms, the court was trying to base the sentence on Miller's personal culpability in the robbery and murder.

The trial court explained:

"I indicated that I struggled, Mr. Miller, in terms of how to balance all these things. . . . [¶] The balance is really a very, in my mind, fragile balance. When I read the probation officer's report and the rationale for recommending the consecutive term, I didn't reject it. I understood it. And I was bothered by the idea that this court would sentence Mr. Miller for these crimes motivated by, basically, retribution, and I wanted to assure [defense counsel], Mr. Miller, and family members who are here that the court is not motivated by retribution.

"I sought some guidance in cases that are similar, and our jurisprudence throughout the United States rejects retribution as the justification for penalty What you do, in American criminal law, is consider the defendant's intentions. You consider moral guilt. You consider the degree of criminal culpability. Punishment

must be tailored to a defendant's personal responsibility and moral guilt. And my decision is being guided by that. . . .

"When I balance all these factors, Mr. Miller, I told [defense counsel], I reject the conclusion that you were a dupe or a pawn of Mr. Rices. I reject that. I don't believe a faithful, fair evaluation of the evidence can come to the conclusion that your story was credible, that all of a sudden, that evening, you are confronted with the need to make a decision in a heartbeat, 'Get out of the car, put on this mask, come inside with me, hold this bag.' That do[esn]'t make [any] sense at all.

"So in measuring your criminal culpability, I do believe that, in a fashion, the genesis for this, the comments that you made to Mr. Rices, you testified you were aware that this guy is a bad guy. You were aware that he was armed. You were aware that that gun could be used. All of these factors play into my decision as to the degree of your criminal culpability and your moral culpability.

"[¶] . . . [¶]

"You did not pull the trigger. I don't believe you entered the store with the intent to kill. The People did not argue to the jury that you entered the store with the intent to kill. For me, the bottom line is you were responsible for selecting Granada. You were a major participant in that crime, and but for your role, but for your promotion of the crime, these two young people would be alive today. So that's my assessment of your moral culpability and your criminal culpability, and that's why I made the tentative conclusion [to sentence consecutively].

"And I have to say, I'm going to stick to that tentative conclusion, and I can't find any factual, legal, or moral basis for merging the punishment for the murder. You've been convicted of first degree murder, two first degree murders. I can't find any rationale that would justify my merger of those two punishments. The punishment should be separate."

It is clear from the trial court's comments that the court was aware that it had the discretion to sentence Miller to either concurrent or consecutive terms, and that the court made a deliberate decision to exercise its discretion to impose consecutive terms. When the court stated, "I can't find any factual, legal, or moral basis for merging the punishment for the murder," the court was not indicating that it believed it had *no authority* to impose concurrent sentences on Miller. Rather, the court was expressing its opinion that given the circumstances of this case, including the fact that there were two murder victims and that Miller played a significant role in planning the robbery that resulted in the murders, consecutive terms were the appropriate sentencing choice.

Miller also contends that to the extent the trial court understood that it had discretion to sentence him to either concurrent or consecutive terms and chose to sentence him to consecutive terms, the trial court abused its discretion by imposing a term of 50 years to life. Miller suggests that this sentence is "unfair." We disagree. The trial court acted reasonably in deciding to impose consecutive terms of 25 years to life—one term for each victim in the Granada Liquor Store robbery and murder. Although Miller may not have been the person who pulled the trigger, as the trial court noted, he was the one who suggested the Granada Liquor Store as the target for the robbery, and he willingly participated in the robbery with Rices, whom he knew to be armed with a gun and prone to commit violent crimes. The sentence imposed does not exceed the bounds of reason, and we see no basis for second-guessing the trial court's discretionary sentencing decision.

IV.
DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

McINTYRE, J.