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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EARL EUGENE ROSE,

Defendant and Appellant.

D057948

(Super. Ct. No. FVA010494)

APPEAL from a judgment of the Superior Court of San Bernardino County, Michael A. Smith, Judge. Affirmed in part; reversed in part with directions.

A jury convicted Earl Eugene Rose of first degree felony murder, attempted murder (two counts), robbery, attempted robbery, and possession of a firearm by a felon. The jury found that Rose committed the murder during the commission of a robbery and that he intentionally discharged a firearm, resulting in death and great bodily injury. The jury also found that Rose had four prior strike convictions, one prior prison term

conviction, and five prior serious felony convictions.¹ The court sentenced Rose to life without the possibility of parole, consecutive to 125 years to life, consecutive to a determinate term of 26 years.

Rose contends (1) the court denied him his constitutional rights to due process and jury trial by instructing the jury with an erroneous special instruction regarding an uncharged robbery offense that allowed the jury to find the key fact of identity on a reduced burden of proof; (2) the court prejudicially erred by instructing the jury with CALCRIM No. 376 (regarding possession of recently stolen property as evidence of a crime) because in conjunction with the court's special instruction regarding the uncharged offense, it allowed the prosecution to establish identity under a reduced burden of proof; (3) his trial counsel was ineffective in failing to object when the prosecutor improperly discussed the uncharged crime evidence as proof of identity, intent, and criminal propensity during closing argument; (4) the cumulative effect of the three preceding assignments of error denied him a fair trial; (5) there was insufficient evidence of intent

¹ There is a discrepancy between the parties' briefs and the record regarding the jury's findings as to prior strikes, prior serious felonies, and prior prison term convictions. Rose was charged with the following: murder (count 1), attempted murder (counts 2 and 4), robbery (count 3), attempted robbery (count 5), and possession of a firearm by a felon (count 6). According to the parties' briefs, the jury found as to counts 1 through 6 that Rose had been convicted of six prior strike convictions (Pen. Code, §§ 1170.12, 667, subds. (b)-(i)) and one prior prison term conviction (Pen. Code, § 667.5, subd. (b)), and that as to counts 1 through 5, he had committed five prior serious felonies (Pen. Code, § 667, subd. (a)). The record shows that the jury found one prior strike conviction as to count 1 and four prior strike convictions as to counts 2 through 6; four prior serious felony convictions as to counts 1 through 4 and one prior serious felony conviction as to count 5; and one prior prison term conviction as to counts 1 through 6.

to kill to support the attempted murder conviction as to Anna Rodriguez; (6) the mode of culpability constructed by Penal Code² sections 187, 189, and 190.2, subdivision (a)(17)(A), creating a sentence of life without parole for a killing during a robbery, whether premeditated or not, is unconstitutionally vague as applied to this case; and (7) his sentence on two prior serious felony enhancements must be reversed.

FACTS

The Charged Offenses

In August 1998 Luis Rodriguez owned a business in Fontana. On the night of August 29, 1998, at about 9:00 p.m., Luis drove to his office with his wife Anna Rodriguez, his two-year-old son, Andy Rodriguez, and his 14-year-old niece, Nora Rodriguez. Luis stopped by the office to pick up some documents he needed for a business trip the next day and to make a telephone call to his employee Alejandro Barron. He parked in front of his office and went inside while Anna, Andy, and Nora waited in the car.

About five minutes later as Luis was standing behind his desk talking to Barron on a speakerphone, Anna ran into the office and told him a black man was walking toward the office. Luis and Anna walked to the front entryway of the office and where Rose was then standing. Rose asked Luis for the time and Luis gave it to him. Rose then walked away, Luis went back into his office, and Anna returned to the car. Less than a minute later, Anna saw Rose "walking really fast" toward the office. She became frightened and

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

ran back into the office with Nora and Andy, and Rose followed them into the office. She tried to close the office door, but Rose pushed his way into the office and closed the door behind him.

Luis testified that he was standing behind his desk talking to Barron on the speakerphone when Rose entered the office. Anna sat in a chair, holding Andy, and Nora stood close to a window. Rose pointed a gun at Luis and demanded money. Luis said, "What money?" or "I don't have any money." Rose called him a liar and again demanded money and Luis's wallet. Luis told Rose he could have cash that was in his pocket, and Rose approached him to take the money because he did not want Luis to put his hand in his pocket. Rose took \$1,600 that Luis was carrying for his business trip from Luis's pocket. He also took Luis's wallet, which contained Luis's credit cards and ATM card. Rose demanded the personal identification number for Luis's ATM card and Luis gave it to him.

After Rose took Luis's wallet he told Nora to sit down, but Nora remained standing. Luis told Rose that Nora did not speak any English. Rose then shot Luis in the neck and shot Nora in the head. Blood gushed from the wound in Luis's neck and Nora fell to the floor. Rose next fired one or two shots at Anna. Thinking that Rose was going to kill his family, Luis put his arms around him and tried to hold him in a bear hug. As Luis and Rose wrestled, Rose shot Luis in the face.

Luis let go of Rose and Rose left the office. Luis followed Rose and saw him get into a car down the street where it was very dark. Luis walked over to a house across the

street and yelled for help. He was unable to make it back to his office, so he lay on the sidewalk until the police and ambulance arrived.

Anna testified that when Rose entered the office holding the gun, he said to Luis, "Sorry man. Give me your money." Luis told Rose he had no money and Rose called him a liar. Rose then told Anna to give him her watch. Luis told Anna in Spanish not to give Rose the watch, and Anna replied, "Give him everything." Rose then took the money from Luis's pocket. When Rose ordered Nora to sit down, Luis told him that Nora did not speak English. Rose called him a liar and shot him in the throat, and then shot Nora.

Anna heard Luis tell Barron in Spanish on the speakerphone to call the police. At that point Rose said, "I'm going to kill your wife." Luis then came out from behind the desk and struggled with Rose. While they were struggling, Rose shot Luis in the left side of his face. Anna heard more gunshots during the struggle. Rose got away from Luis and ran outside, and Luis ran after him. Anna tried to call 911, but was unable to dial.

Barron testified that while he was on the speakerphone with Luis, he heard someone say, "Give me all your money." He heard Luis say, "I don't have any money," and the other person respond, "Liar, liar." When Barron heard gunshots, he dropped the phone and immediately drove to Luis's office. He arrived and saw Luis at the house across the street trying to ask for help. There was blood all over Luis's chest and Luis "was throwing up the blood from his mouth." Barron saw Anna come out of the office. She was screaming and asking him to check on Nora. Barron went into the office and saw Nora lying motionless on the floor.

Nora sustained two gunshot wounds—one in the front of her right thigh and the fatal shot, which entered the left side of the back of her head and exited through the base of her skull, and then went through her neck and lodged next to her left collarbone. The bullet entry wound on her thigh had an irregular shape, indicating the bullet had passed through, or ricocheted off, an object or another person before entering the thigh.

Luis was in critical condition when he arrived at the hospital. He suffered two gunshot wounds—one to the face through the mandible and one to the neck. Medical personnel had to wire his jaw shut and perform a tracheotomy to enable him to breathe because his airway was being crushed by blood building up inside his neck. A doctor who provided follow-up care removed a bullet from Luis's right shoulder. The gunshot wound to Luis's face damaged nerves in his neck and gave him Horner's syndrome, a permanent condition that causes drooping of the eye on the injured side of his face, permanent constriction of the pupil of that eye, and inability to sweat on that side of the face.

Anna suffered a gunshot wound to her right hand that fractured a bone, a graze wound across her left breast, and a "through-and-through" wound to her left arm that transected the brachial artery, the dominant artery in the arm. She underwent emergency surgery to harvest a vein graft from her leg that was used to reconstruct the damage to her brachial artery. She also underwent two surgeries to repair her right hand.

The Uncharged Offenses

The prosecution presented evidence that about 24 hours before Rose murdered Nora and shot Luis and Anna, he robbed and shot Antonio Coye in the City of Walnut in

Los Angeles County. As stated in the jury instructions, the court admitted the evidence of these uncharged offenses "for the limited purpose of circumstantial evidence in deciding whether or not [Rose] possessed the firearm that was used in this case."

Coye testified that on the night of August 28, 1998, he drove back to his house with his friend Ming Huang at about 9:00 p.m. and parked his car in his driveway with the front of the car facing the street. He talked with Huang for a few minutes by her car, which was parked in front of his house, and then Huang drove away.

Shortly after Huang left, Coye saw a white car pull over and park across the street. Coye saw "an African male" exit the car and walk across the street toward Coye's house. The man approached Coye as he was taking merchandise out of the trunk of his car and asked him for directions to Pomona College on Temple Avenue. Coye testified that the man who approached him was about six feet tall and well-dressed, and "appeared to be maybe a college student." His hair was cut short and he had a light, thin mustache. In court, Coye identified Rose as that man.

Coye gave Rose directions to Temple Avenue. He had a "bad feeling" about Rose. Rose asked Coye if he could use his phone and looked toward Coye's house. Coye thought Rose wanted to get into the house, so he offered him his cell phone. Rose seemed surprised. He took Coye's cell phone and appeared to dial a number. Rose then asked Coye if he was black. Coye replied that he was African, but technically Hispanic.

At that point Rose put Coye's cell phone into his pocket, pulled out his own cell phone and a gun, and held the gun to Coye's back. He told Coye not to move because he was being robbed. Coye turned and saw a small gun in Rose's hand. He distracted Rose

by looking toward his house, and then grabbed Rose's hand that was holding the gun and struggled with him, causing Rose to fire a wild shot. Coye lost his balance and both he and Rose fell to the ground. Rose stood up and Coye remained lying on his back. Rose pointed the gun at Coye's head and demanded his wallet.

After Coye gave Rose his wallet, which contained about \$114, Rose fired three shots at Coye's head. Coye blocked the first shot by raising his left arm over his forehead. The bullet passed through his arm and hit the back of his ear. Coye attempted to dodge the second and third shots by rolling from side to side. The second shot entered Coye's upper right back and exited through the front of his shoulder, and the third shot hit him in the shoulder. Coye then heard a clicking sound that made him think the gun had jammed or run out of bullets. Rose ran to his car and drove away. Coye followed him and tried to get his license plate number, but he was unable to read the number.

Police Investigations

Sergeant William McGenney, a detective and Spanish translator with the Fontana Police Department, interviewed Anna in the hospital the day after she was shot. Her account of the incident was largely consistent with her trial testimony. She told McGenney that when Luis said he had no money, Rose became angry and said he was going to shoot "your wife." After Rose took Luis's money, he shot Luis, Nora, and Anna in that order, and then fired a random shot. He shot Luis a second time before he ran out of the building. Anna was sitting and holding Andy in her lap during the shooting.

Anna described Rose as a dark complexioned black man who was about 5 feet 11 inches tall and weighed about 180 to 185 pounds. He was well dressed and had short

hair. MeGenney asked Anna about Rose's skin color in a later interview because his report indicated that Anna might have told someone other than MeGenney that the perpetrator had light colored skin. Anna told MeGenney he might have misunderstood something she said. She was adamant that the perpetrator did not have light skin or light eyes, but was a black man with a dark complexion and dark eyes.

Captain Robert Ramsey of the Fontana Police Department interviewed Luis in the hospital the night of the incident. Luis described Rose as a 25- to 27-year-old black male, about six feet tall and weighing between 150 and 160 pounds, with short hair shaved on the sides and a thin mustache. Luis's account of the incident was also consistent with his trial testimony. He told Ramsey that Rose shot him in the neck after taking his money. After shooting Luis, Rose shot Nora and then shot Anna twice while she was holding Andy in her arms. At that point Luis began to wrestle with Rose. While they were wrestling, Rose fired an errant round into the wall and then shot Luis again, in the face.

Anna was shown a photographic lineup on September 9, 1998, but she did not identify anyone in the lineup. On September 17, Luis and Anna were separately shown a second photographic lineup. Luis identified a photograph of Rose with a beard within a few seconds, but said that Rose did not have a beard at the time of the incident. Anna also identified the photograph of Rose, but said she was not sure, and that she preferred to see live persons.

On November 3, 1998, Luis and Anna attended a live lineup. By court order, Rose's face was shaved and his hair was cut short before the lineup. When the six men in the lineup walked onto the stage, Luis and Anna both yelled out and began to cry.

McGenney testified that their emotional reaction was "very powerful" and that he had "never been to a lineup quite like that one in all the time [he had] been an officer." At Anna's request, the men were asked to say, "Sorry[] man." Luis and Anna both picked Rose from the lineup and were sure that he was the man who shot them.

Sergeant Mario Estrada, a detective with the Los Angeles County Sheriff's Department, was the lead investigator assigned to the Coye robbery. On September 9, 1998, Estrada showed Coye a photographic lineup, and Coye chose a photograph of Rose in about three to five seconds. However, Coye commented that the photograph was "a little fuzzy." Coye testified that he was drawn to the photograph of Rose based on facial features and wanted to "point him out," but he thought it would be unfair to do so because of the poor quality of the photograph. However, he would have selected the photograph of Rose but for its poor quality. He asked Estrada for a better photograph.

Estrada arrested Rose the next day and took another photograph of him. On September 11, Estrada showed Coye a second photographic lineup that included the new photograph of Rose. Coye immediately identified Rose as the person who shot him.

Estrada obtained records for Coye's cell phone, which was registered to his friend Huang. After Estrada arrested Rose, he asked Rose if he had made any calls on Coye's phone. Rose initially denied that he had the phone or had made any calls on it. Estrada then showed Rose the cell phone records and asked, "Do you remember any of this?" Rose denied making any of the listed calls. When Estrada said he was going to start calling the numbers in front of Rose, Rose admitted that he made the calls and said he

had borrowed the phone from a friend. However, he said he could not remember the name of the person who gave him the phone.

Rose told Estrada that he knew three people whose numbers were listed on the cell phone records: Alice Brice, Violet Flores, and a man named Marlin. Someone made a call to Marlin on Coye's phone about 15 minutes after the phone was stolen, but Rose denied making that call. He told Estrada that Marlin was a friend of his girlfriend Irene. Marlin told Estrada that he did not know Rose but his girlfriend knew him. He said he did not call Rose, but his girlfriend might have been talking to Rose, and that was how he knew who Rose was. Several calls were made to Marlin's number from Coye's phone, including the one made about 15 minutes after the phone was stolen.

Rose admitted to Estrada that he knew Violet Flores and had called her. Flores testified that she had met Rose in July or August of 1998, and received a call from Rose late one night, and a second call from him at 10:00 a.m. the next morning. The cell phone records showed that she received a call from Coye's phone at 12:47 a.m., about three hours after it was stolen.

The prosecution's firearm and tool mark examiner compared cartridge casings recovered from the Coye robbery scene with casings recovered from the Rodriguez murder/robbery scene. He determined that all of the casings from both crime scenes had been fired from the same .380-caliber gun.

DISCUSSION

I. *Special Instruction Regarding Uncharged Offense*

Rose contends that he was denied his constitutional rights to due process and jury trial because the court gave the jury an erroneous special instruction regarding the uncharged Coye robbery that allowed the jury to find the key fact of identity on a reduced burden of proof.

Because shell casings recovered from the Coye crime scene were determined to be from the same gun as shell casings recovered from the crime scene in this case and Rose was identified as the shooter in the uncharged Coye robbery, the court ruled that evidence of the uncharged offense was admissible as circumstantial evidence of the identity of the perpetrator in this case. However, before the prosecution introduced Coye's testimony, the court orally gave the jury a modified version of CALCRIM No. 375 that instructed them to consider Coye's testimony only if the prosecution proved by a preponderance of the evidence that Rose committed the uncharged offenses against Coye.³

³ The court instructed: "the evidence from Mr. Coye relates to . . . a different incident than the incident that Mr. Rose is currently charged with. And there are some special rules . . . that result to this evidence. So let me explain to you those rules.

"The People are about to present evidence that the defendant may have committed another offense that is not charged in this case. [¶] You may consider this evidence only if the People ultimately prove by a preponderance of the evidence that the defendant, in fact, committed this other offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt.

"A fact is proved beyond a preponderance of the evidence if you conclude that it, more likely than not that the fact is true. [¶] If the People do not meet this burden, you must disregard this evidence entirely and not consider it for any purpose.

Defense counsel immediately objected to the court's having instructed on the preponderance of the evidence burden of proof. Counsel argued that before the jury could consider evidence of the uncharged offense as circumstantial evidence that Rose possessed the gun, the uncharged offense had to be proved beyond a reasonable doubt. The court agreed, and then instructed the jury with CALCRIM No. 223, which defines and explains the difference between "direct evidence" and "circumstantial evidence," and then instructed with CALCRIM No. 224 as follows: "[B]efore you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has in fact been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find a defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. [¶] If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of the reasonable conclusions points to innocence and another to guilt, then you must accept the one that points to innocence. [¶] However, when considering

"If the People do meet this burden and do prove by a preponderance of the evidence that the defendant, in fact, committed this other offense, you may, but are not required to, consider the evidence only for a very limited purpose. [¶] And the limited purpose in this case for this other evidence is to determine whether or not the defendant possessed the firearm that was used in this case, whether or not he possessed that gun the day before the homicide in this case. [¶] And if you find that he did possess that gun, you may, but are not required to, conclude that the defendant was the person who committed the offense in this case.

"You may not consider this evidence for any other purpose except for the purpose that I have just explained to you. [¶] Specifically, you are not to conclude from this evidence that the defendant has a bad character, or that he is disposed to commit a crime."

such circumstantial evidence, you must accept only reasonable conclusions from the circumstantial evidence, and reject unreasonable conclusions."

The People appear to concede that the court erred by instructing on the preponderance of the evidence standard of proof, but argue that the error was harmless in light of later oral and written instructions that required the jury to consider the uncharged offense only if the prosecution proved beyond a reasonable doubt that Rose committed it. We conclude that the court properly admitted the uncharged offense evidence under Evidence Code section 1101, subdivision (b), to prove identity and, therefore, correctly instructed the jury that the prosecution's burden of proof as to the uncharged offense was preponderance of the evidence.⁴

Evidence Code section 1101, subdivision (b), provides that a trial court may admit "evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." "In cases in which [a party] seeks to prove the defendant's identity as the perpetrator of the charged offense by evidence he had committed uncharged offenses, admissibility 'depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity.' " (*People v. Medina* (1995) 11 Cal.4th 694, 748 (*Medina*)). We review the trial court's admission of

⁴ The People argue that the court properly admitted the evidence of the uncharged offense under Evidence Code section 1101, subdivision (b), in connection with the issue of whether the prosecutor presented improper closing argument, discussed *infra*.

evidence under Evidence Code section 1101 for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 202.)

In a discussion with counsel before jury selection, the court expressly stated it was not admitting the evidence of the Coye robbery under Evidence Code section 1101, subdivision (b). However, as noted above, the court admitted evidence of the uncharged offense as circumstantial evidence of Rose's identity as the perpetrator of the charged offenses.⁵ Thus, notwithstanding its contrary view, the court effectively admitted the evidence of the uncharged offense under Evidence Code section 1101, subdivision (b), as proof of Rose's identity as the perpetrator of the charged offenses, with the use of the same gun in the charged and uncharged offenses being the "shared mark" that tied Rose to both offenses. We conclude that the court's admission of the uncharged offense evidence was not an abuse of discretion.

In *People v. Harvey* (1984) 163 Cal.App.3d 90, 101, this court noted that "as the number of shared marks [between an uncharged and charged offense] decreases, their distinctiveness must increase in order for the evidence to be admissible." In *Medina*, the California Supreme Court considered whether there were sufficient common marks

⁵ The court stated: "[I]t's kind of a circumstantial line of reasoning, shots were fired from a gun in the Walnut case. Shell casings were left at the scene. The defendant is identified as the shooter in that case. And then shell casings are left . . . at our current crime scene. And ballistics, expert testimony says that the shell casings were fired from the same gun. The only way to say that the defendant had that gun is to say he was the person who fired the shots. He has to be identified as the shooter." The court added: "We have shell casings from another crime scene. The defendant is identified as the shooter at that other crime scene, and that means that the defendant had the gun that fired the shots from our crime scene. I think that's highly probative."

between the murder charged in that case and two other uncharged murders to justify the trial court's admission of evidence of the uncharged murders under Evidence Code section 1101, subdivision (b), as evidence of the defendant's identity as perpetrator of the charged murder. In addition to other common marks, the Supreme Court noted that ballistic reports showed the same .22-caliber handgun, traced to the defendant, was used in all three murders. (*Medina, supra*, 11 Cal.4th at p. 748.) The Supreme Court stated that "the ballistic evidence alone probably would have been sufficient to justify admission of the 'other crimes' evidence." (*Id.* at pp. 748-749; see also *Williams v. Stewart* (9th Cir. 2006) 441 F.3d 1030, 1040 [fact that the same gun belonging to defendant was used to shoot at victim during uncharged burglary and to kill victim during charged burglary was a signature element linking defendant to both burglaries, rendering evidence of the uncharged burglary admissible to prove identity]; *U.S. v. Higgs* (4th Cir. 2003) 353 F.3d 281, 311–312 [evidence of a nightclub shooting two months prior to a murder was admissible identity evidence where the caliber of the bullets fired at the nightclub was the same as the caliber of the bullets fired in the murder].)

These cases support our conclusion that the single shared mark of the same gun being used in both the charged and uncharged offenses in this case was sufficiently distinctive for the court to reasonably admit the evidence of the uncharged offense under Evidence Code section 1101, subdivision (b), to prove identity. The court's stated reason for admitting that evidence is immaterial. "If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory,

a mistaken theory, or one not raised below." (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

Because the court properly admitted the evidence of the uncharged offense under Evidence code section 1101, subdivision (b), the court did not err in instructing the jury that if it found that Rose committed the uncharged offense by a preponderance of the evidence, it could consider that evidence for the purpose of determining whether Rose "possessed that gun the day before the homicide in this case" as evidence that he was "the person who committed the offense[s] in this case." The California Supreme Court has "long held that 'during the guilt trial evidence of other crimes may be proved by a preponderance of the evidence' [Citations.] The 'beyond a reasonable doubt' standard is applicable only to evidence of 'other crimes' sought to be admitted as aggravating evidence at the *penalty* phase of trial." (*Medina, supra*, 11 Cal.4th 694, 763; *People v. Virgil* (2011) 51 Cal.4th 1210, 1259 (*Virgil*).)⁶ "The preponderance of the

⁶ In *Medina*, the trial court instructed the jury that it could consider evidence of the defendant's uncharged crimes if those crimes were proved by a preponderance of the evidence. (*Medina, supra*, 11 Cal.4th at p. 763.) The appellant argued "this instruction was erroneous and conflicted with the court's general instruction to the effect that facts established through circumstantial evidence and admitted to establish defendant's guilt must be proved beyond a reasonable doubt." (*Ibid.*) The *Medina* court rejected that contention, explaining that "we have long held that 'during the guilt trial evidence of other crimes may be proved by a preponderance of the evidence,' " (*ibid.*), and that "the facts tending to prove the defendant's other crimes for purposes of establishing his criminal knowledge or intent are deemed mere 'evidentiary facts' that need not be proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the 'ultimate fact' of the defendant's knowledge or intent." (*Ibid.*) Noting that case law has developed special rules for "other crimes" evidence, the *Medina* court rejected the defendant's contention that when such "evidence is offered to prove such matters as intent or identity, these facts should be proved by the 'beyond reasonable

evidence standard adequately protects defendants. Once the other crimes evidence is admitted, whatever improper prejudicial effect there may be is realized whatever standard is adopted. If the jury finds by a preponderance of the evidence that defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered.

[Citations.] The preponderance standard is also consistent with the rule stated in Evidence Code section 115 that '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' " (*People v. Carpenter* (1997) 15 Cal.4th 312, 382, superseded by statute on another point as noted in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106, also superseded by statute on another point as noted in *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1119, fn. 5.)

Even if we were to determine the trial court erred by initially instructing the jury that it could consider the uncharged offense as evidence if it found it was proven by a preponderance of the evidence, we would conclude the error was not prejudicial. As noted, the court immediately followed its preponderance of the evidence instruction with the instruction that before it could rely on circumstantial evidence to conclude that a fact necessary to find Rose guilty had in fact been proved, it must be convinced the prosecution had proved each fact essential to that conclusion beyond a reasonable doubt. (CALCRIM No. 224.)

doubt' standard usually applicable to facts sought to be proved by circumstantial evidence." (*Id.* at p. 764; accord, *Virgil, supra*, 51 Cal.4th at p. 1259.)

Further, the court prefaced its reading of the complete jury instructions prior to closing arguments with the statement: "[A]t the very beginning of the trial . . . I read you some jury instruction[s] because the attorneys were talking about certain issues. During the course of the trial, as certain things came up, I also read certain instructions to you. These instructions that I'm giving you now are the final and definitive instructions. [¶] *So, if anything that I may have given to you previously seems to be different or to conflict with the instructions that I am now giving you, disregard the earlier instructions and base your decision only on the instructions that I'm giving you now.*" (Italics added.)

The court's ensuing instructions included a modified version of CALCRIM No. 375 that, unlike the earlier version it orally gave, instructed the jury to consider the evidence that Rose committed the uncharged Coye robbery "only if the People have proved *beyond a reasonable doubt* that [Rose] in fact committed this uncharged offense."⁷ (Italics added.)

⁷ The court instructed: "The People presented evidence that the defendant may have committed the offense of robbery of Antonio Coye that was not charged in this case. [¶] You may consider this evidence only if the People have proved beyond a reasonable doubt that the defendant in fact committed this uncharged offense. [¶] If the People have not met this burden by proving that charge true beyond a reasonable doubt, you must disregard that evidence entirely and not consider it for any purpose.

"If you decide that the defendant did commit the uncharged offense involving Antonio Coye, you may, but are not required to, consider that evidence only for the limited purpose of circumstantial evidence in deciding whether or not the defendant possessed the firearm that was used in this case. [¶] Do not consider this evidence for any other purpose, except for the limited purpose of circumstantial evidence in deciding whether or not the defendant possessed the firearm that was used in this case. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

"If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider, along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged crimes or that the

The complete jury instructions, which the jury took into the deliberation room in written form, also included versions of the following: CALCRIM No. 359, which instructed that Rose could not be convicted based on out-of-court statements alone and concluded with the admonishment that the jury could not find Rose "was involved in the incident involving Antonio Coye unless the People have proved that beyond a reasonable doubt"[;] CALCRIM No. 376 regarding possession of stolen property, which reminded the jury: "Remember that you may not find the defendant committed the uncharged offense of robbery against Antonio Coye unless you are convinced that each fact essential to that conclusion—to the conclusion that the defendant committed the uncharged offense of robbery against Antonio Coye has in fact been proven beyond a reasonable doubt"[;] and CALCRIM 220, which explained the "beyond a reasonable doubt" standard of

other allegations have been proved. [¶] The People must still prove each charge and allegation beyond a reasonable doubt."

proof.⁸ These instructions inured to Rose's benefit because they subjected the prosecution to a higher burden of proof on the uncharged offense than the law requires.

We presume the jury understood and followed the court's instruction to disregard any previous instructions given during trial that were inconsistent with the ultimate instructions the court read and provided to the jury in written form. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 [the presumption that jurors understand and follow instructions is the crucial assumption underlying our constitutional system of trial by jury]; *People v. Prieto* (2003) 30 Cal.4th 226, 255 (*Prieto*) [the misreading of a jury instruction does not warrant reversal if the jury received the correct written instructions].) Accordingly, we presume the jury followed the ultimate written instructions that required it to find beyond a reasonable doubt that Rose committed the Coye robbery before it could consider that uncharged offense as evidence that Rose committed the charged offenses. Any arguable error in the court's instruction during trial that allowed the jury to consider the uncharged offense if the prosecution proved Rose committed it by a preponderance of the evidence

⁸ CALCRIM No. 220 instructed: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is always open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

was harmless in light of the court's ultimate instructions requiring proof of the uncharged offense beyond a reasonable doubt.

II. *CALCRIM No. 376*

The court instructed the jury with CALCRIM No. 376 as follows: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not conclude by this alone that the defendant committed the uncharged acts of robbery against Antonio Coye. However, if you also find that supporting evidence tends to prove the defendant committed the uncharged offenses of robbery against Antonio Coye, then you may conclude that the evidence is sufficient to prove he committed the uncharged crimes of robbery against Antonio Coye.

"The supporting evidence need only be slight and need not be enough by itself to prove that the defendant committed the uncharged offense of robbery against Antonio Coye. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove he committed the uncharged crimes of robbery against Antonio Coye.

"Remember that you may not find the defendant committed the uncharged offense of robbery against Antonio Coye unless you are convinced that each fact essential to the conclusion that the defendant committed the uncharged offense of robbery against Antonio Coye has been proved beyond a reasonable doubt."

Rose contends the court prejudicially erred by giving this instruction because in conjunction with the modified version of CALCRIM No. 375 discussed above, it allowed

the prosecution to establish identity under a reduced burden of proof and allowed the jury to "override" the directive in CALCRIM No. 224 to accept a reasonable conclusion that points to innocence when the evidence supports two or more reasonable conclusions from circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt.

We conclude the court did not err in instructing the jury with CALCRIM No. 376. As we discussed above, despite the court's final instructions to the contrary, the prosecution's burden of proof on the uncharged offense was preponderance of the evidence for the purpose of allowing the jury to consider the evidence of that offense as proof of identity. Accordingly, the court's special instruction to that effect did not improperly lower the prosecution's burden of proof as to the uncharged Coye robbery; nor did the court's later instruction with CALCRIM No. 376 as to the Coye robbery improperly lower the prosecution's burden of proof or "override" CALCRIM No. 224.⁹

⁹ As noted, the court erroneously instructed the jury that it could not find that Rose committed the *uncharged offense* of robbery against Coye unless it was "convinced that each fact essential to the conclusion that [Rose] committed the uncharged offense of robbery . . . [had] been proved beyond a reasonable doubt." Although Rose does not contend that CALCRIM No. 376, standing alone, impermissibly lowers the prosecution's burden of proving guilt beyond a reasonable doubt, we note that the California Supreme Court has rejected the contention that CALJIC No. 2.15, the predecessor to CALCRIM No. 376, impermissibly alters the prosecution's burden of proof, stating that the instruction "does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution's burden of establishing guilt beyond a reasonable doubt[.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 376 (*Gamache*).)

The court's modified version of CALCRIM No. 376 *permitted* the jury to infer that Rose robbed Coye from the fact that he admitted to police that he possessed Coye's cell phone and made calls on it after initially denying that he had the phone—his initial denial constituting "supporting evidence" under CALCRIM No. 376 showing consciousness of guilt. However, CALCRIM No. 376 did not *require* the jury to make that inference, and did not preclude the jury from concluding that Rose borrowed the phone and thus was innocent of the robbery, *had the jury found that conclusion reasonable*. The jury reasonably could have found that conclusion *unreasonable* in light of Rose's initial denial that he possessed the phone and his refusal or inability to tell the police the name of the friend from whom he claimed to have borrowed it.¹⁰

Although CALCRIM No. 224 instructed the jury of its duty to find Rose not guilty if it found circumstantial evidence was susceptible of two interpretations, one of which points to guilt and the other innocence, "it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the [jury's] findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*People v. Thomas* (1992) 2 Cal.4th 489, 514; *People v. McFarland* (1962) 58 Cal.2d 748, 755 [It is for the jury to decide whether to

¹⁰ It is also possible that the jury decided the prosecution had not met its burden of proof on the uncharged Coye robbery and convicted Rose of the charged offenses based on the eyewitness testimony of Luis and Anna and other evidence.

make an inference of guilt based upon the totality of the evidence presented.].) The court's special "preponderance of the evidence" instruction derived from CALCRIM No. 375 and its modified version of CALCRIM No. 376 did not negate or override the court's instruction with CALCRIM No. 224.

Rose notes that the California Supreme Court in *Prieto* held that the trial court in that case erred by applying CALJIC No. 2.15, which is substantively the same as CALCRIM No. 376, "to nontheft offenses like rape or murder" (*Prieto, supra*, 30 Cal.4th at pp. 248-249; accord, *Gamache, supra*, 48 Cal.4th at p. 375 [instruction that possession of stolen property may create an inference that a defendant is guilty of murder is error].) To the extent Rose is arguing that the court's instruction with CALCRIM No. 376 was erroneous because it allowed the jury to infer that Rose committed the charged nontheft offenses based on a finding that he committed the uncharged offense, which finding could have been based on his possession of stolen property, we disagree.

The version of CALJIC No. 2.15 given in *Prieto* broadly referenced an inference, based on possession of stolen property, that the defendant was "guilty of the *crimes charged*." (*Prieto, supra*, 30 Cal.4th at p. 248, fn. omitted, italics added by *Prieto*.) Similarly, in *Gamache* the trial court's version of CALJIC No. 2.15 expressly permitted the jury to infer guilt of *murder and kidnapping* for robbery in addition to the theft-related crimes of robbery and burglary based on the defendant's possession of stolen property. (*Gamache, supra*, 48 Cal.4th at pp. 374, fn. 12 & 375-376, fn. 14.) In the present case, the court properly limited its version of CALCRIM No. 376 to the uncharged Coye robbery. The fact that a chain of inferences allowed the jury to conclude

Rose was guilty of the charged offenses based on the finding that he committed the uncharged Coye robbery does not render the court's instruction under CALCRIM No. 376 erroneous. The court did not err in instructing the jury with CALCRIM No. 376 as to the uncharged Coye robbery.

III. *Defense Counsel's Failure to Object to Prosecutor's Closing Argument Regarding the Uncharged Offense*

Rose contends that his trial counsel was ineffective for failing to object when the prosecutor, during closing argument, discussed the uncharged crime evidence as proof of identity, intent, and criminal propensity. "To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.) Since the failure of either prong of an ineffective assistance of counsel claim (defective representation or prejudice) is fatal to establishing the claim, we need not address both prongs if we conclude appellant cannot prevail on one of them. (*People v. Cox* (1991) 53 Cal.3d 618, 656, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, and superseded by statute on other grounds as stated in *Jones v. Superior Court* (1994) 26 Cal.App.4th 1202, 1210; *Strickland v. Washington* (1984) 466 U.S. 668, 697.)

We conclude that Rose has not shown his trial counsel was constitutionally deficient in failing to object to the prosecution's closing argument. Rose first complains that the prosecutor stated, at the beginning of his closing argument: "[T]he reason we're here is that [Rose] went on a shooting and robbery rampage over a twenty-four hour period in both the counties of Los Angeles and San Bernardino." Rose argues this statement amounted to improper argument that the Coye robbery showed a criminal disposition and a common plan, and contravened the trial court's ruling admitting evidence of the Coye robbery solely to show possession of the gun.

Rose further complains that the prosecutor "grafted the robber's cold-blooded intent to kill Coye after obtaining his property onto the facts of the Fontana case where the evidence presented at trial did not support the same conclusion." Rose specifies the prosecutor's following statements about the Coye robbery: "And as the defendant came up [to Coye], they actually began to talk for about ten minutes. [¶] . . . And we know as they're talking that there's sufficient lighting in this area. Mr. Coye told you it was sufficient that he could actually read. And, as he's talking to the defendant, we know that there's nothing covering th[e] defendant's face."

"[T]hey [began] to struggle. . . . [¶] [Coye] falls down, and the defendant gains the advantage. And the defendant is, basically, standing in front of him, two to three feet back from the feet area, pointing the gun directly at him. [¶] At this point, the defendant orders Mr. Coye to hand over his wallet. Which he does. . . . And once this defendant now has Mr. Coye's wallet with all his property, and his cell phone, the defendant then proceeds to shoot Mr. Coye multiple times. He's got all his stuff, but he's still trying to

shoot him. [¶] And he shoots him. . . . And, as he sees the first shot fired, he . . . takes one in the arm. Defendant shoots again. Shoots him again in the upper body. Shoots him again, shoots him in the upper body. [¶] And, Mr. Coye told you the only thing that stopped him from being shot more was he heard a click, like the gun jammed or was out of bullets at that point. That's the only thing that stopped this defendant."

" 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567; *People v. Cunningham* (2001) 25 Cal.4th 926, 1026 ["[T]he prosecution has broad discretion to state its views regarding which reasonable inferences may or may not be drawn from the evidence."].) Counsel on both sides "have a right to present to the jury their views of the proper deductions or inferences which the facts warrant. Their reasoning may be faulty, their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel." (*People v. Willard* (1907) 150 Cal. 543, 552.) If a prosecutor's conduct does not render a criminal trial fundamentally unfair, it constitutes prosecutorial misconduct under California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury or the court. (*People v. Cunningham, supra*, at p. 1000.)

The portions of the prosecutor's closing arguments that Rose cites constitute fair comment on the evidence rather than a deceptive or reprehensible method of jury persuasion. The prosecution was required to prove that Rose committed the uncharged

Coye robbery by a preponderance of the evidence, as circumstantial evidence of Rose's identity as the perpetrator of the charged offenses, and the court ultimately instructed the jury that the prosecution had the burden of proving the uncharged robbery beyond a reasonable doubt. The facts of the Coye shooting were relevant to prove robbery, i.e., to prove that Rose took Coye's personal property by use of force or fear (§ 211). The prosecutor was also entitled to recount the facts of the Coye shooting because the shell casings from the gun used against Coye matched those from the gun used in the charged offenses.

Rose complains that the prosecutor related the facts of the charged offenses in a way that paralleled his recounting of the Coye robbery. However, when the prosecutor related the facts of the charged offenses he did not expressly draw parallels to the Coye robbery or even refer to the Coye robbery; he simply recounted a version of the facts that the evidence reasonably supported. The prosecution's wide latitude to fairly comment on the evidence of both the charged and uncharged offenses was not limited by the fact that there were similarities between the two incidents. Because the portion of the prosecutor's closing argument that Rose challenges did not constitute prosecutorial misconduct, Rose's trial counsel was not ineffective for failing to object to it.¹¹

¹¹ Having rejected Rose's claims of substantive error upon which he bases his claim of cumulative error, we necessarily reject his claim of cumulative error. (*People v. Brents* (2012) 53 Cal.4th 599, 619-620.)

IV. *Sufficiency of the Evidence to Support the Conviction of Attempted Murder of Anna*

The court properly instructed the jury on attempted murder with CALCRIM No. 600, which provides, in relevant part: "To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person." (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*)). Rose contends there was insufficient evidence of intent to kill to support his conviction of attempted murder as to Anna.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.] [¶] ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]" (*Smith, supra*, 37 Cal.4th at pp. 733, 738-739.)

We conclude there is sufficient evidence to support the attempted murder conviction as to Anna. First and foremost, Anna testified that Rose said to Luis, "I'm going to kill your wife." That testimony alone is sufficient evidence of specific intent to kill Anna to support Rose's attempted murder conviction as to Anna. Additionally, Luis testified that after Rose took his wallet, Rose shot him in the neck, shot Nora in the head, and then shot at Anna, which provoked Luis to wrestle with Rose because he thought Rose intended to kill his family. From the fact that Rose fired shots that killed Nora and wounded Luis and Anna, the jury could reasonably infer—as Luis did at the crime scene—that Rose intended to kill Anna.

V. *Constitutionality of Statutes Concerning Killing During Robbery*

Rose contends that the mode of culpability constructed by sections 187, 189, and 190.2, subdivision (a)(17)(A), creating a sentence of life without parole for a killing during a robbery, whether premeditated or not, is unconstitutionally vague as applied to this case.

Section 189 provides that a murder "committed in the perpetration of, or attempt to perpetrate, . . . robbery . . . is murder of the first degree." The penalty for first degree murder is "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." (§ 190, subd. (a).) Under section 190.2, subdivision (a)(17)(A), the penalty for first degree murder is death or life in prison without the possibility of parole if the defendant is found to have committed the murder while engaged in the commission or attempted commission of a robbery. Rose argues that this statutory scheme is unconstitutionally

vague because it makes no meaningful distinction between first degree felony murder based on robbery and the robbery-murder special circumstance under section 190.2, subdivision (a)(17)(A), and that "[t]he absence of a meaningful distinction encourages arbitrary enforcement, giving prosecutors unfettered discretion as to which defendants will be subjected to the possibility of death or life in prison without the possibility of parole, rather than 25-to-life for first degree murder without a special circumstance."

This court considered a similar vagueness challenge in *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297 (*Bradway*). The trial court in *Bradway* granted the defendant's motion to dismiss a lying-in-wait special-circumstance allegation under section 190.2, subdivision (a)(15), on the ground the language of that provision, as modified by the passage of Proposition 18 in 2000, was unconstitutionally vague because it was identical to the language of section 189 defining the crime of first degree murder by means of lying in wait and, therefore, the two statutes failed to give fair notice of what the lying-in-wait special circumstance prohibits or to provide definite guidelines to prevent arbitrary and discriminatory enforcement. (*Bradway, supra*, at pp. 302-303.) The trial court determined there was no meaningful distinction " 'between first degree murder lying in wait and special circumstances lying in wait' in cases where a person has the intent to murder and does so by means of lying in wait." (*Id.* at p. 303.)

The *Bradway* majority noted that "[g]enerally there are two separate and distinct legal theories for challenging a statute on vagueness grounds, depending on the interests at stake. [Citation.] A person challenging aggravating circumstance statutes in death penalty cases brings such under the Eighth Amendment, asserting 'the challenged

provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with . . . open-ended discretion' [Citation.] *In noncapital cases, the challenge comes under the due process clause and 'rest[s] on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.'*

[Citation.] Where there is no First Amendment right implicated, such due process challenges 'are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.' " (*Bradway, supra*, 105 Cal.App.4th at p. 309, citing *Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362, italics added.) Because the defendant did not face the death penalty and no First Amendment rights were implicated, the *Bradway* majority considered the constitutionality of section 190.2, subdivision (a)(15) as applied to the defendant under the facts of that case. (*Bradway, supra*, at p. 309.)

The *Bradway* majority concluded that the trial court's reasoning was flawed to the extent the court was concerned that intentional first degree murder by means of lying in wait and murder with the special circumstance of lying in wait had the same elements and therefore failed to narrow the class of persons eligible for the death penalty or life

without the possibility of parole.¹² The majority noted that even after Proposition 18, the lying-in-wait special circumstance is distinguishable from first degree murder by means of lying in wait because the special circumstance "requires the specific intent to kill, whereas first degree murder by lying in wait does not." (*Bradway, supra*, 105 Cal.App.4th at p. 309.) Regarding the matching elements of first degree murder by means of lying in wait and murder with the special circumstance of lying in wait, the majority noted "it has long been held that 'first degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth Amendment.' " (*Id.* at p. 310.)

The *Bradway* majority also rejected the trial court's conclusion that section 190.2, subdivision (a)(15), "does not provide sufficient notice of what conduct is prohibited and fails to provide guidelines to prevent arbitrary and discriminatory enforcement[.]" The majority concluded that "[s]ection 190.2, subdivision (a)(15) provides a clear definition of what is required to satisfy its elements. In addition to the elements of lying in wait, which [after the 2000 amendment] are now the same as for first degree murder, a person must specifically intend to kill 'by means of lying in wait.' Any reasonable person

¹² The Eighth Amendment to the federal Constitution requires that a state's capital punishment scheme narrow the class of persons eligible for the death penalty and "afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not. [Citation.] A legislative definition lacking some 'narrowing principle' to limit the class of persons eligible for the death penalty and having no objective basis for appellate review is deemed to be impermissibly vague under the Eighth Amendment." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 465, citing *Maynard v. Cartwright, supra*, 486 U.S. at p. 361 and *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.)

considering [the defendant's] conduct, or planning similar acts, would know that those acts constituted murder by means of lying in wait and that the special circumstance could be alleged if the person in addition specifically intended to kill his victim by such means.

[¶] As for guidelines to prevent arbitrary and discriminatory enforcement, the statute is clear as to what conduct would subject a person to possible punishment by death or [life without the possibility of parole]." (*Bradway, supra*, 105 Cal.App.4th at p. 310.)

The *Bradway* majority's reasoning applies to the robbery-murder special circumstance under section 190.2, subdivision (a)(17)(A). Sections 189, 190 and 190.2, subdivision (a)(17)(A), give notice to any reasonable person considering Rose's conduct (in the charged offenses), or planning similar acts, that he or she could be charged with the robbery-murder special circumstance, and they provide clear notice of what conduct subjects a person to punishment by death or life in prison without the possibility of parole.

As for Rose's complaint that the statutory scheme gives a prosecutor unfettered discretion regarding the penalty to which a defendant will be subjected, we note that such prosecutorial discretion does not violate due process. " [T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does

not give rise to a violation of the Equal Protection or Due Process Clause. [Citations.] Just as a defendant has no constitutional right to elect which of two applicable . . . statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.' " (*People v. Wallace* (1985) 169 Cal.App.3d 406, 411, quoting *U.S. v. Batchelder* (1979) 442 U.S. 114, 125; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1280 [prosecutorial discretion whether to seek the death penalty in a particular case does not deny a defendant the right to equal protection of the laws or due process]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179 [prosecutorial discretion in deciding whether to seek the death penalty is constitutional].)

Finally, we conclude that there is a meaningful distinction between a robbery-murder special circumstance and the crime of first degree murder based on a robbery-felony-murder theory. To prove a robbery-murder special circumstance, the prosecution must show that the defendant had an independent purpose for the commission of the robbery, i.e., that the robbery was not merely incidental to an intended murder. (*People v. Bolden* (2002) 29 Cal.4th 515, 554.) If the robbery was merely incidental to the murder, the special circumstance does not apply. (*Ibid.*; *People v. Williams* (1994) 30 Cal.App.4th 1758, 1762.) In contrast, the felony-murder rule requires only that the killing occur during the commission or attempted commission of the underlying felony, which was robbery in this case. (*People v. Williams, supra*, at p. 1762.)¹³

¹³ The court instructed the jury accordingly. Regarding the robbery-murder special circumstance, the court instructed that "[t]he defendant must have intended to commit robbery before or at the time of the act causing death. [¶] In addition, in order for this

The fact that the evidence in this case does not support a finding that the robbery was merely incidental to the murder—i.e., that the murder of Nora was not committed to facilitate the robbery but was Rose's primary goal or purpose—does not render the statutory scheme unconstitutionally vague as applied to Rose. It simply means the evidence placed Rose's murder of Nora squarely within the class of murders that subjects the killer to the penalty of death or life in prison without the possibility of parole under section 190.2. The mode of culpability constructed by sections 187, 189, and 190.2, subdivision (a)(17)(A), is not unconstitutionally vague as applied to Rose in this case.

VI. *Sentencing Error*

Rose contends, and the People concede, that his sentence on two prior serious felony enhancements must be reversed. The prosecutor filed a first amended information that alleged that Rose had suffered five prior serious felony convictions under section 667, subdivision (a)(1): three for a 1994 robbery, and his convictions for the attempted murder and robbery of Coye in 1999. The prosecution moved to dismiss the 1999

special circumstance to be true, the People must prove that the defendant intended to commit robbery independent of the killing. *If you find that the defendant only intended to commit murder[,] and the commission of the robbery was merely part of or incidental to the commission of the murder, then this special circumstance has not been proved.*" (CALCRIM No. 730, italics added.) Regarding first degree felony murder based on robbery, the court instructed the jury with CALCRIM No. 540A as follows: "The defendant is charged in Count 1 with murder, under a theory of felony murder. [¶] To prove that the defendant is guilty of first degree murder under this theory, the People must prove that: [¶] 1. The defendant committed or attempted to commit robbery; [¶] 2. The defendant intended to commit robbery; [¶] AND [¶] 3. While committing or attempting to commit robbery the defendant did an act that caused the death of another person. [¶] A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent."

attempted murder and robbery convictions because they postdated the offenses charged in this case. The court said, "That's fine. We'll go through the Information and specifically designate that as being dismissed later." However, that was not done and, as a result, the jury made true findings on at least four prior serious felony allegations, and the court sentenced Rose to five consecutive five-year enhancements for five serious prior convictions under section 667, subdivision (a)(1).¹⁴ Because the allegations of the 1999 attempted murder and robbery convictions were dismissed, the jury should not have considered those allegations, and the two five-year enhancements that the court imposed for those convictions must be stricken.

¹⁴ The record reflects that the jury made true findings on the four prior robbery convictions; it does not reflect that they made a true finding on the 1999 attempted murder conviction. However, as Rose points out in his opening brief, the pagination of the verdict forms in the record indicates that 10 pages and possibly three of the verdict forms on section 667, subdivision (a), allegations are missing from the record. In any event, the court imposed enhancements for *five* prior serious felonies. We will assume for purposes of our disposition that the jury made true findings on both the 1999 robbery conviction and the 1999 attempted murder conviction.

DISPOSITION

The jury's true findings on the 1999 robbery and attempted murder prior serious felony allegations are reversed, and the five-year sentence enhancements imposed under section 667, subdivision (a)(1), for those findings are stricken. The trial court is directed to amend the abstract of judgment by deleting the two stricken five-year enhancements, and to forward a certified copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.