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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FABIAN FELIX,

Defendant and Appellant.

D059719

(Super. Ct. No. SWF017408)

APPEAL from a judgment of the Superior Court of Riverside County, F. Paul Dickerson, III, Judge. Affirmed in part, reversed in part, remanded for resentencing.

I.

INTRODUCTION

A jury found appellant Fabian Felix guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189)¹ and made true findings that Felix personally and intentionally discharged a firearm and proximately caused the victim's death (§§ 12022.53, subd. (d),

¹ Unless otherwise noted, further statutory references are to the Penal Code.

1192.7, subd. (c)(8)); intentionally killed the victim while lying in wait (§ 190.2, subd. (a)(15)); and committed the murder in the attempted commission of a robbery (§§ 211, 190.2, subd. (a)(17)(A)). Felix was sentenced to life without the possibility of parole.

Felix contends that there is insufficient evidence in the record to support his first degree murder conviction and the two special circumstance allegations made pursuant to section 190.2. He also claims that the trial court made a series of instructional and evidentiary errors that compel reversal of his conviction and a retrial.

We conclude that there is sufficient evidence to support the jury's finding of guilt on the charge of first degree murder, and we reject Felix's evidentiary challenges. However, we agree with Felix that the evidence is insufficient to support the jury's true finding on the special circumstance that he intentionally killed the victim while lying in wait. Further, although we conclude that the evidence is sufficient to support a true finding on the robbery special circumstance allegation, we nevertheless conclude that the trial court committed reversible error in failing to instruct the jury that, for purposes of this special circumstance, an accomplice's testimony must be corroborated by independent evidence tying Felix to the robbery. We therefore reverse the special circumstance findings. The lying-in-wait special circumstance finding is reversed for insufficient evidence, and the robbery special circumstance finding is reversed for instructional error. We therefore remand the matter for resentencing, or for retrial of the robbery special circumstance allegation, if the People elect that option.

II.

FACTUAL BACKGROUND²

On October 3, 2005, Felix rented a white Dodge Magnum. The next day, Felix, together with his brother Alfredo Felix (Alfredo)³ and their cousin Cristobal D'Arte (Cristobal), drove from Waterford, California, which is near Modesto, to Hemet, California, where Rosa Molina (Rosa) and her husband Juan Molina (Juan) lived. Rosa is the sister of Felix and Alfredo. Rosa testified⁴ that Felix and Juan were engaged in selling marijuana.

Juan testified that on October 4, 2005, the date of the murder, Felix called him at about 2:00 p.m. and said that he was going to stop by for a visit. Felix, Alfredo and Cristobal arrived at Juan's residence about 30 minutes later in the Dodge Magnum, which Felix was driving.⁵

² We provide the relevant procedural background with the corresponding analysis of the issues raised on appeal.

³ Since many of the parties involved in this case share last names, we refer to everyone other than the defendant and the victim by his or her first name.

⁴ The trial court found that Rosa was unavailable to testify as a witness at trial. Her testimony from the preliminary hearing was read into the trial record pursuant to the parties' stipulation.

⁵ Juan testified against Felix pursuant to a plea agreement. In November 2005, police searched Juan and Rosa's apartment and found almost five pounds of marijuana, \$12,000 to \$13,000 in cash, scales and packaging materials. Juan subsequently pleaded guilty to possession of marijuana for sale. Juan later entered into a plea agreement in connection with the instant case, in which he pled guilty to conspiracy to commit

Juan testified that while the group was in his apartment, Felix, Alfredo and Cristobal talked about "meeting up with somebody and planning a robbery." Initially, Juan did not know whom the three were planning to rob. The men were discussing robbing the victim of his marijuana, and Juan agreed to participate. At some point, it became clear that the intended victim was Pedro Gomez.⁶

Felix's plan was to convince Gomez to ride with him and Alfredo in the Dodge Magnum, and to bring his marijuana with him, rather than Gomez keeping his marijuana in his own car and following them. Felix and Alfredo would drive Gomez to a nearby apartment complex where they would be met by Juan and Cristobal. Felix's plan called for Juan and Cristobal to run to the car, open the passenger door, pull Gomez from the car and beat Gomez while Felix and Alfredo drove away with Gomez's marijuana.

As the men discussed the plan, Juan testified that he could see that Felix and Alfredo each had a handgun. Before Felix and Alfredo left to meet Gomez, they exchanged handguns. Felix said that he "didn't want to be carrying the nine-millimeter on him."

voluntary manslaughter, possession of stolen property and a violation of parole, among other crimes, in return for his testimony in the instant case and an 18-year prison term.

⁶ Juan testified that he did not personally know Gomez, although he had seen Gomez once before, about a year prior to the murder, when Felix and Gomez had met in the driveway of Juan's former residence. According to Juan, on that day, he was expecting to purchase marijuana directly from Felix but Felix did not have any marijuana with him. While Juan waited inside his house, he watched through a window as Gomez handed Felix a bag that Juan knew contained marijuana. According to Juan, Gomez was one of Felix's "connection[s]."

Juan testified that Felix's plan required Juan and Cristobal to wait for Felix's call at Juan's apartment. About 30 minutes after Felix and Alfredo left the apartment, Juan and Cristobal left in Juan's car, drove to a liquor store and then to the nearby apartment complex where they were to rendezvous with Felix, Alfredo and Gomez. Phone records show that a call was placed from Juan's phone to Felix's phone at 4:18 p.m., a call was made from Felix's phone to Juan's phone a minute later, and, at 4:25 p.m., a call was made from Juan's phone to Felix's phone.

About 15 minutes later, Felix arrived at the rendezvous location in the Dodge Magnum. Witnesses testified that they saw a Dodge Magnum enter the apartment complex at a high rate of speed. According to Juan, Gomez was sitting in the front seat and Alfredo was sitting in the back seat, directly behind Gomez. Felix parked the Dodge Mangum in a carport. As planned, Juan and Cristobal got out of Juan's car and started "speed walking" toward the Dodge Magnum.

As Juan and Cristobal approached the Dodge Mangum, Juan testified that he saw Alfredo put Gomez in a headlock and point a gun to Gomez's head. Juan next saw Felix turn to his right and face Gomez. Juan then heard a single gunshot. Juan testified that he stopped about 12 feet from the car, and saw the passenger door being opened and Gomez being pushed out of the car. Alfredo then jumped from the back seat of the Dodge Magnum into the front seat and Cristobal ran and got into the back seat. Witnesses testified that the car sped out of the parking lot, bottoming out on a speed bump in the process. Juan ran to his car and drove home.

Ten minutes after Juan got home, Felix, Alfredo and Cristobal arrived at his residence. Juan testified that Felix was acting nervous and scared, and that Felix and Alfredo got into a disagreement over what had just transpired. Felix and Cristobal then left in the Dodge Magnum, taking Gomez's marijuana with them. Juan testified that he had expected to keep Gomez's marijuana to sell.

Phone records tracked Felix's drive north following the murder. When Felix returned the Dodge Magnum to the car rental agency on October 5, 2005, there were 976 additional miles on the odometer. Alfredo stayed in Hemet for a few days with Juan and Rosa.

Officers were dispatched at 4:41 p.m. to the location of the shooting. Officers found Gomez lying dead in a flower bed. Gomez had more than \$1,000 in his wallet.

A forensic pathologist testified that Gomez died from a single gunshot wound. The path of the bullet supported the inference that Gomez had been shot from the driver's seat while sitting in the passenger seat of a car. The bullet entered Gomez's left forearm, penetrated both of Gomez's lungs and heart, and came to rest in the skin under Gomez's right shoulder.

About a week after the killing, police located Gomez's truck approximately four miles from the apartment complex where Gomez was killed. Police found Gomez's cell phone in the truck. Records from that phone indicated that on the day of the killing, calls were placed from Gomez's phone to Felix's phone at 7:49 a.m., 1:29 p.m., and 4:20 p.m., and that calls were placed that same day from Felix's phone to Gomez's phone at 7:51 a.m., 1:29 p.m., 3:31 p.m., 3:33 p.m., and 4:01 p.m. Phone records also showed that in

the month before the killing, there were numerous phone calls back and forth between Felix and Gomez's phones.

More than a month after the killing, police located and impounded the Dodge Magnum that Felix had rented in early October 2005. Investigators were unable to find any latent fingerprints, trace evidence or gunshot residue in the car. An expert expressed the opinion that there was no evidence in the car because the car rental agency cleaned and vacuumed it each time it was rented.

Felix's wife, Elizabeth Gonzalez (Elizabeth), told police that money had been "tight" at the time of the killing, that she, Felix and their two children received government assistance, and that Felix did "odd jobs" to make money, including landscaping and buying and selling cars. In response to the question whether she knew that her husband was also selling marijuana to make money, Elizabeth told police that that was "his [Felix's] business" and that she "[didn't] ask questions."

On or about October 15, 2005, about 11 days after the killing, Elizabeth and Felix purchased a 2001 Mercedes ML 430 for just under \$28,000. Elizabeth testified that they made a down payment of about \$17,000 and financed the balance. Elizabeth also testified that they paid the down payment by applying the proceeds from the sale of her 2000 Nissan Maxima, which she estimated totaled about \$9,000, and by obtaining a loan of about \$9,000 from her sister who resided in Riverside.⁷ During an earlier interview

⁷ Paperwork completed and submitted by Elizabeth to the Department of Motor Vehicles showed that she sold the Nissan Maxima on November 29, 2005, for \$6,000.

with police, however, Elizabeth had said she and Felix had put \$8,000 from their savings towards the down payment for the Mercedes.

III.

DISCUSSION

A. *There is sufficient evidence to support the jury's guilty verdict on the first degree murder charge*

Felix contends that his conviction for first degree murder should be reversed because there is insufficient evidence to support any of the three theories of culpability for first degree murder that the prosecution offered. Specifically, Felix asserts that there is insufficient evidence that he (1) premeditated and deliberated, (2) was lying in wait, or (3) committed the murder during a robbery. We conclude that there is sufficient evidence to support the theory that Felix premeditated and deliberated Gomez's killing. We therefore affirm his first degree murder conviction.

1. *Legal standards applicable to claims of insufficiency of the evidence*

In reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the prosecution and draw all reasonable inferences in support of the verdict, upholding the judgment if any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1199–1200.)

2. *The evidence is sufficient to support the finding that Felix premeditated the murder*

Murder that is willful, deliberate, and premeditated is of the first degree. (§ 189.)

"In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means

'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 (*Mayfield*); see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1080 (*Koontz*) [noting that " '[d]eliberation' refers to careful weighing of considerations in forming a course of action," and that " 'premeditation' means thought over in advance."].)

The process of deliberation and premeditation does not require any extended period of time: "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly" (*Mayfield, supra*, 14 Cal.4th at p. 767, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900 (*Thomas*); accord, *People v. Perez* (1992) 2 Cal.4th 1117, 1127.) The requirement of premeditation and deliberation excludes homicides that are the "result of mere unconsidered or rash impulse hastily executed." (*Thomas, supra*, at pp. 900-901.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*), the Supreme Court identified three categories of evidence that are ordinarily used to establish premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. These categories provide guidance and are not intended to exclude other types of evidence, or combinations of evidence, that would also support a finding of premeditation and deliberation. (*People v. Prince* (2007) 40 Cal.4th 1179, 1253.) It also is not necessary that any of these categories of evidence be accorded a particular weight (*People v. Sanchez* (1995) 12 Cal.4th 1, 32-33), and it is not essential that there be evidence falling

within each category in order to sustain a conviction. (*People v. Romero* (2008) 44 Cal.4th 386, 401.)

The manner of the killing in the instant case strongly supports a finding of premeditation and deliberation. (See *Anderson, supra*, 70 Cal.3d at p. 27.) The record shows that Felix fired a single shot at close range into Gomez's chest while they were sitting in a vehicle together. Felix fired this shot while Alfredo was holding Gomez in a head lock and pointing a gun at Gomez's head. This manner of killing—i.e., a close-range shooting without any provocation or evidence of a struggle—reasonably supports an inference of premeditation and deliberation. (See e.g., *People v. Thompson* (2010) 49 Cal.4th 79, 114-115 [noting a shooting at close range "reasonably supports an inference of premeditation and deliberation"]; see also *People v. Marks* (2003) 31 Cal.4th 197, 230 [close range shooting with no evidence of provocation demonstrates premeditation and deliberation]; *Koontz, supra*, 27 Cal.4th at p. 1082 [concluding a "shot at a vital area of the body at close range" supported finding of deliberate intent to kill].) Felix contends on appeal that the evidence demonstrates that Gomez was shot in the arm, and argues that this indicates that there was no premeditation or deliberation because "[s]omeone who rationally considered and determined to shoot the victim would not shoot him in the arm." However, a more reasonable conclusion is that Gomez was shot in the chest at close range, and that the shot penetrated his arm only because he held his arm in front of himself in an attempt to defend himself.

We conclude that the evidence of premeditation is substantial and credible, and is more than sufficient to support the finding that Felix killed Gomez with premeditation and deliberation. (See *Koontz, supra*, 27 Cal.4th at p. 1080.)

The fact that there was evidence in the record that could have supported different inferences and findings—i.e., that Felix (or someone else) impulsively killed Gomez for an unknown reason—does not alter our conclusion that there is sufficient evidence to support the jury's determination. (See *People v. Riazati* (2011) 195 Cal.App.4th 514, 532 [noting a court of review does not "resolve conflicts in the evidence, or reevaluate the credibility of witnesses"].) Our function is not to reweigh the evidence already evaluated and considered by the jury. (*People v. Fuiava* (2012) 53 Cal.4th 622, 711 [a " 'substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence . . . upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question,' " and noting that " '[o]nce such evidence is found, the substantial evidence test is satisfied . . . [e]ven when there is a significant amount of countervailing evidence . . . ' [citation]"].)

In sum, we conclude that there is substantial evidence in the record to support the finding that Felix killed Gomez with premeditation and deliberation. Because we conclude that there was at least one valid ground to support the first degree murder verdict, reversal of the first degree murder conviction is not required, even if we were to presume that there was insufficient evidence to support the other two theories of first degree murder—i.e., murder by lying in wait and murder committed during a robbery.

(See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) We therefore affirm Felix's first degree murder conviction.

B. *The special circumstance allegations*

1. *Lying in wait*

Felix contends that there is insufficient evidence to support the true finding of the special circumstance of lying in wait (§ 190.2, subd. (a)(15)).

We apply the same standard of review in considering circumstantial evidence and the support for special circumstance findings as we apply in reviewing the sufficiency of the evidence to support a conviction. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1273.)

" ' "The lying-in-wait special circumstance requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage' [Citations.]" ' [Citation.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073.)⁸ " ' "The element of concealment is satisfied by a showing " 'that a defendant's true intent and purpose were concealed by his [or her] actions or conduct. It is not required that he [or she] be literally concealed from view before he [or she] attacks the victim.'" ' [Citation.]" ' [Citation.] As for the watching and waiting element, the purpose of this requirement 'is to distinguish those cases in which a defendant acts

⁸ The lying-in-wait special circumstance requires an *intent to kill*, while lying in wait for purposes of first degree murder requires only a wanton and reckless intent to inflict injury likely to cause death. (*People v. Moon* (2005) 37 Cal.4th 1, 24, fn. 1.)

insidiously from those in which he [or she] acts out of rash impulse. [Citation.] This period need not continue for any particular length " 'of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.' " [Citation.]' [Citation.] 'The factors of concealing murderous intent, and striking from a position of advantage and surprise, "are the hallmark of a murder by lying in wait." [Citation.]' [Citation.]" (*Ibid.*, fn. omitted.)

In *People v. Mendoza, supra*, 52 Cal.4th 1056, the defendant, who was on parole, purchased a handgun and ammunition two weeks prior to the murder. On the night of the murder, the defendant was armed. He was walking with his girlfriend and a fellow gang member. Police Officer Daniel Fraembs stopped his police vehicle behind the group, got out of the car and spoke to them. When the defendant responded rudely, Officer Fraembs directed the defendant and his girlfriend to sit on the curb. Officer Fraembs patted down defendant's fellow gang member. While this was happening, the defendant slowly moved behind his girlfriend, draped his left arm over her shoulder and placed his right hand behind her back. He then pushed her forward into the street and toward Officer Fraembs. When he and his girlfriend were within six or seven feet of Officer Fraembs, the defendant pushed his girlfriend aside and shot Officer Fraembs. (*Id.* at p. 1065.)

Under these circumstances, the Supreme Court concluded that there was sufficient evidence to prove a substantial period of watching and waiting for an opportune time to attack for purposes of lying in wait:

"[A] rational jury could find that defendant, who was carrying a gun in knowing violation of his parole conditions, decided at or near the outset of the encounter that he would kill the officer rather than face

a certain return to custody. As the trial testimony reflected, when Fraembs drove up, defendant ignored the suggestions of both Flores and [the fellow gang member] to simply flee the scene. At the point Fraembs exited his car to question them, defendant rudely challenged the officer but did not panic or immediately reach for his gun and shoot. Instead, as Fraembs began a patsearch of [the fellow gang member] after directing defendant and Flores to sit on the curb, defendant positioned himself behind Flores so that his right arm was hidden from the officer's view. He then controlled her movements in order to approach the officer without attracting attention. Once they were close enough that defendant could not miss hitting Fraembs, he pushed Flores aside, drew his weapon, and stepped even closer to the officer before firing. On this record, a rational jury could conclude that defendant did not react impulsively to Fraembs's appearance at the scene, but that he watched Fraembs for a substantial period as he not only waited for, but affirmatively engineered, the opportune moment to launch a surprise attack." (*People v. Mendoza, supra*, 52 Cal.4th at p. 1074, fn. omitted.)

The Supreme Court determined that there was also substantial evidence of concealment of purpose and of a surprise attack on an unsuspecting victim from a position of advantage: "Although Officer Fraembs was certainly aware of defendant's physical presence, the evidence reflected that defendant managed to conceal his murderous purpose so well that he took the officer completely by surprise when he fired the single deadly shot at close range. From this evidence, a rational jury could infer that defendant did not kill out of rash impulse, but rather in a purposeful manner that required stealth and maneuvering to gain a position of advantage over the unsuspecting officer. [Citations.]" (*People v. Mendoza, supra*, 52 Cal.4th at p. 1074.)

In this case, there are no similar circumstances that could give rise to the reasonable inference that Felix concealed a purpose to kill the victim, or that he watched and waited for an opportune time to kill the victim. The only evidence in the record as to

what happened between Felix and the victim that compelled the victim to join Felix in the car is the testimony of Juan, Felix's accomplice, and Juan's testimony did not indicate in any way that Felix lured Gomez into the car with the intention of killing him. In fact, the plan, according to Juan, was to rob Gomez of his marijuana, *not* to kill him. Thus, at most, the evidence could reasonably show that Felix and his accomplices concealed a plan to rob the victim, and that they were waiting for an opportune time to carry out their plan to attack the victim by beating him up. On this record, there is simply no evidence that any of the trickery involved in this plan was undertaken with the purpose of killing Gomez, as opposed to assaulting him or robbing him. Rather, given the state of the record, one would have to make a number of speculative leaps to reach the conclusion that Felix concealed a plan to kill Gomez and waited for an opportune time to act. The evidence is thus insufficient as a matter of law to support the jury's finding on the lying-in-wait special circumstance allegation, and we reverse that finding.

2. *Robbery*

Felix contends that there is insufficient evidence in the record to support the robbery special circumstance true finding because, he maintains, the only evidence that a robbery of Gomez was planned, attempted or occurred is the uncorroborated testimony of Juan, an accomplice. Section 1111 prohibits a conviction based "upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." Felix also contends that the trial court's failure to instruct *sua sponte* on the corroboration requirement in section 1111 in connection with the robbery special circumstance allegation constituted prejudicial error.

We disagree with Felix that there is insufficient evidence to support the jury's finding of the robbery special circumstance, in that there was evidence to corroborate his accomplice's testimony that was sufficient to satisfy the "slight" evidence standard applicable to Felix's claim. However, we agree with Felix's contention that the trial court erred in failing to instruct the jury with respect to the corroboration requirement in section 1111 in connection with the robbery special circumstance, and that this error was prejudicial. We therefore reverse the robbery special circumstance finding. Because the basis for our reversal of this finding is instructional error, the prosecutor may elect to retry Felix on this special circumstance allegation.

- a. *There is sufficient evidence to support the robbery special circumstance finding*

Section 1111 provides, in relevant part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Under section 1111, an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

"The law requiring corroboration of accomplice testimony is well established. . . .
' " The requisite corroboration may be established entirely by circumstantial evidence.
[Citations.] Such evidence 'may be slight and entitled to little consideration when standing alone. [Citations.]' " ' [Citations.] ' "Corroborating evidence 'must tend to

implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citation.]" ' [Citations.] In this regard, 'the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]" [Citation.] ' "Corroborating evidence is sufficient if it substantiates enough of the accomplice's testimony to establish his credibility [citation]." ' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 (*Rodrigues*).

If, as in this case, a special circumstance requires proof of some crime other than the charged murder, the prosecution must prove the corpus delicti of that crime, and in doing so, the prosecution cannot prove that crime by the uncorroborated testimony of an accomplice. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1176-1177.) Thus, although section 1111 by its terms refers to a "conviction," the Supreme Court has extended the corroboration requirement of section 1111 to special circumstances based on a crime other than the charged murder. (See *People v. Hamilton, supra*, 48 Cal.3d at pp. 1176-1177.)

"[A]ccomplice testimony requires corroboration not because such evidence is factually insufficient to permit a reasonable trier of fact to find the accused guilty beyond a reasonable doubt, but because '[t]he Legislature has determined that because of the reliability questions posed by certain categories of evidence, evidence in those categories by itself is insufficient as a matter of law to support a conviction.' [Citations.] That is, even though accomplice testimony would qualify as 'substantial evidence' to sustain a

conviction within the meaning of *People v. Johnson* (1980) 26 Cal.3d 557, 578, the Legislature has for policy reasons created an 'exception[]' to the substantial evidence test and requires accomplice testimony to be corroborated. [Citation.]" (*People v. Najera* (2008) 43 Cal.4th 1132, 1136-1137 (*Najera*).)

Although the independent evidence of robbery in this case is "slight" and circumstantial, and clearly would not be entitled to consideration in the absence of Juan's testimony, we conclude that the trial record contains the minimal independent evidence tending to connect Felix to a robbery such that the jury could have found adequate corroboration of Juan's testimony on this point. Among the independent evidence that arguably corroborates Juan's testimony that Felix planned to rob Gomez is the following: 1) Rosa's testimony that Felix and Juan were involved in marijuana sales before and at the time of the murder and that within hours before Gomez was killed, Felix, Alfredo and Cristobal arrived at her apartment in Hemet in a Dodge Magnum; 2) witnesses from the apartment complex where the shooting occurred testified that they saw the vehicle involved, identified it as a light colored Dodge Magnum driven by a Hispanic male, and rental car records indicate that Felix rented precisely this type of car the day before the murder and returned the car the day after; and 3) Gomez was shot while in this car.

The evidence of force used against Gomez (i.e., the fact that he was put in a headlock, had a gun held to his head, and was shot while in the car with Felix and Alfredo) could be viewed as evidence tending to connect Felix to a robbery. Although there may not be independent evidence that corroborates Juan's testimony that Felix and the other accomplices actually ended up taking any of Gomez's property during these

events, the independent evidence required to corroborate an accomplice's testimony need not establish *all* of the elements of a particular crime, or even the most significant element of a crime. Rather, corroborating evidence " "must relate to some act or fact which is an element of the crime" ' [and] ' "is sufficient if it substantiates enough of the accomplice's testimony to establish his credibility" ' [Citation.]" (*Rodrigues, supra*, 8 Cal.4th at p. 1128.) Here, there was evidence indicating that force was used against Gomez, and that this force was applied by Felix and another accomplice. The use of force to prevent a victim from resisting or to take the victim's property is one element of a robbery. (See § 211; see also CALCRIM No. 1600.)

Finally, there is some minimal evidence that arguably corroborates Juan's claim that Felix and the other accomplices actually did take marijuana from Gomez. Although not sufficient, in itself, to support a conviction for robbery, the evidence that Felix and Elizabeth purchased a Mercedes Benz about 11 days after the killing, combined with evidence that Elizabeth gave police contradictory stories regarding the source of the \$17,000 down payment for the car and admitted that at the time of the killing money was "tight," tends to corroborate Juan's story that he and his accomplices robbed Gomez of his marijuana. Elizabeth's varied accounts as to how she and Felix came into possession of the cash used to purchase the car, as well as the fact that she claimed that she had obtained some of the money through selling her old vehicle despite records demonstrating that her previous vehicle was not sold until *after* they purchased the Mercedes Benz, constitutes evidence that could be viewed as tending to establish that the cash was actually the proceeds of a robbery. A reasonable inference from the

circumstantial evidence regarding this very large cash down payment is that Felix and Elizabeth used money obtained by selling the marijuana stolen from Gomez to fund the purchase of the Mercedes Benz, a little over a week after the murder.

Although the independent evidence of a robbery is entirely circumstantial and, in our view, constitutes the bare minimum that could be found to corroborate Juan's testimony that Gomez was killed during the commission of a robbery, we conclude that it is sufficient to permit the jury to find that the murder was committed during a robbery. The corroborating evidence, which tends to link Felix to a robbery, in combination with Juan's testimony that provides all of the elements necessary to establish a robbery, constitutes sufficient evidence to support the jury's finding on the robbery special circumstance allegation.

b. *The instructional error requires reversal*

Felix contends that the robbery special circumstance finding must be set aside because the jury instructions allowed the jury to convict him without finding that Juan's testimony on this point was corroborated by independent evidence connecting Felix to the crimes.

The trial court instructed the jury with CALCRIM No. 335, which informed the jury that it could not convict Felix of deliberate or premeditated murder, the firearm allegation or lying in wait based solely on Juan's uncorroborated testimony.⁹ As the

⁹ The instruction that the trial court provided to the jury read:

People concede, the trial court should also have instructed that corroboration of an accomplice's testimony was required in order to find the robbery special circumstance allegation to be true. The People thus concede instructional error with respect to the

"If the crime of deliberate and premeditated murder (was) committed, then Juan Molina (was) an accomplice to (that) crime.

"You may not convict the defendant of deliberate and premeditated murder or the allegations of personal use of a firearm causing death or lying in wait based on the (testimony) of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if:

"1. The accomplice's (testimony) is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's (testimony);

"AND

"3. That supporting evidence tends to connect the defendant to the commission of the crime.

"Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Any (testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

robbery special circumstance allegation.¹⁰ The parties disagree as to whether this error was prejudicial and requires reversal. We conclude that the court's failure to instruct that corroboration of Juan's testimony was required in order for the jury to return a true finding on the robbery special circumstance allegation was not harmless.

A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is *sufficient* corroborating evidence in the record to convince the court that the instructional error was harmless. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) We review the error and the sufficiency of the corroborating evidence in the record to determine whether there is a reasonable probability that the jury would have reached a different result if it had been given the proper instruction. (*Rodriguez, supra*, 8 Cal.4th at p. 1132, citing *People v. Andrews* (1989) 49 Cal.3d 200, 215 and *People v. Watson* (1956) 46 Cal.2d 818, 836.)¹¹

¹⁰ "In the absence of an instruction on the legal requirement that an accomplice be corroborated, there is a risk that a jury—especially a jury instructed in accordance with CALJIC No. 2.27 that the testimony of a single witness whose testimony is believed is sufficient for proof of any fact—might convict the defendant without finding the corroboration Penal Code section 1111 requires. [Citation.] The corroboration requirement for accomplices thus qualifies as a general principle of law vital to the jury's consideration of the evidence, and the jury must be so instructed even in the absence of a request. [Citation.]" (*Najera, supra*, 43 Cal.4th 1137.) Here, the jury was instructed with CALCRIM No. 301, that a single witness's testimony "can prove any fact."

¹¹ The question whether there is "sufficient" corroborating evidence for purposes of considering whether a defendant suffered prejudice from the failure to instruct that an accomplice's testimony must be corroborated is not the same inquiry as whether there is "sufficient" evidence to support a verdict or special circumstance finding. Rather, because corroborating evidence may be "slight" and need not itself establish all of the elements of an offense, for purposes of assessing the potential prejudice flowing from the failure to instruct on the corroboration requirement, we consider whether the state of the

Although we have concluded that there is evidence that the jury *could have* found tended to connect Felix to the robbery, we cannot conclude that the corroborating evidence is of adequate strength (i.e., that it is sufficient corroborating evidence) such that there is not a reasonable probability that the jury would have reached a different result if had it been properly instructed that it could not find the robbery special circumstance true based on Juan's testimony alone. As noted, the corroborating evidence that a robbery was planned, attempted or completed was quite minimal. Under these circumstances, it is entirely possible that the jury, having been instructed that an accomplice's testimony must be corroborated for only some of the offenses/special circumstances alleged, but not for a robbery, might have relied solely on Juan's testimony in finding true the allegation that the murder was committed during a robbery.

It is particularly troubling that the trial court instructed the jury correctly with respect to the need for independent corroborating evidence as to (1) deliberate and premeditated murder, (2) personal use of a firearm causing death, and (3) lying in wait, but omitted the need for corroborating evidence to support the robbery special circumstance. The implication of the court's instruction to the jury was that while it was

corroborating evidence is such that we are convinced that there is no reasonable probability that the jury would have reached a different result if it had been properly instructed that it could not rely solely on an accomplice's testimony, and could rely on an accomplice's testimony only if it finds that there is also independent evidence that tends to connect the defendant to the crime. Courts have sometimes phrased the rule as follows: "The omission of such instructions [i.e., accomplice corroboration instructions], even if erroneous, is deemed harmless where there was ample evidence corroborating the witness's testimony. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 143; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1228 ["If there is ample evidence corroborating the accomplice's testimony, an error in failing to give accomplice instructions is harmless"].)

not appropriate to rely on Juan's testimony alone to convict Felix of deliberate and premeditated murder or to find true that he personally used a firearm or was lying in wait, it *was appropriate* to rely on Juan's testimony, alone, to find that Felix killed Gomez during a robbery. This implication also improperly suggested to the jury that it need not view Juan's testimony "with caution" with respect to the robbery. Because the independent evidence to corroborate that Gomez was killed in the course of a robbery (as opposed to any number of other possible offenses, such as an assault or a revenge killing) is so slight that it barely meets the standard necessary to satisfy a sufficiency of the evidence review, we simply cannot conclude that if the jury had been instructed that independent evidence had to corroborate Juan's testimony about the robbery, it would have concluded that Felix committed the murder in the commission of a robbery.

Because there is a reasonable probability that the jury would have reached a different result on the robbery special circumstance allegation if it had been given the proper instruction with respect to accomplice testimony, we reverse the jury's finding on that allegation. However, since we have determined that the evidence, though minimal, was sufficient to support a true finding, the People may elect to retry Felix on the robbery special circumstance allegation.

C. *The trial court did not abuse its discretion or infringe on Felix's rights by precluding defense counsel from cross-examining Juan regarding whether he and the victim had been employed at the same company in the past*

1. *Additional Background*

During cross-examination, defense counsel asked Juan if he had been employed at Trico Construction in 2005. The prosecutor objected on relevancy grounds, and the trial

court sustained the objection. Later, outside the presence of the jury, defense counsel raised the issue of asking Juan about having worked at Trico Construction. The prosecutor explained that Juan had not actually worked for Trico Construction, stating:

"Mr. Molina informed law enforcement during some of his latter interviews that he did *not* work for Trico [Construction]. And that the—his information, he provided to another male, who used his personal identifying information in order to secure employment and work at Trico [Construction]. And Mr. Molina did not work there. So he did not meet [Gomez] there. He did not know [Gomez] there. He did not work there." (Italics added.)

Defense counsel argued that the employment records were relevant to show that Juan and Gomez *may* have known each other, despite Juan's testimony that he had seen Gomez on only one occasion prior to the shooting, i.e., when Felix and Gomez engaged in a drug transaction in Juan's driveway. When the court asked defense counsel whether she had a witness whom she was planning to call to show that Juan and Gomez had worked at the same company at the same time, counsel replied, "I do not plan on calling anybody, but I can if he denies it."

The court affirmed its ruling excluding evidence regarding Juan's purported employment at Trico Construction, reasoning:

"I think at this point my ruling stands. I just don't think—I think under [Evidence Code section] 352, I don't see how it's that probative. [Defense counsel] already pointed out a number of inconsistencies regarding this individual, whether he knew him, how well he knew him, and when he saw him. I think this would be an undue consumption of time. You've already attacked his credibility, actually, on a number of issues over and over again. So I just don't think this would have any—under [Evidence Code section] 352, it would be marginal at best."

The following day during cross-examination, Detective Michael Elmore, who was the lead investigator on the case and who had interviewed Juan several times in connection with the murder, testified that he had reviewed the employment records from Trico Construction. The trial court sustained the prosecutor's objection to defense counsel's question to Detective Elmore whether law enforcement had obtained employment records from Trico Construction for both Gomez and Juan.

During closing, defense counsel argued that the person who was connected to Gomez was not Felix, but Juan, because "we know that both [Gomez] and [Juan] had work records at Trico Construction." After the trial court overruled the prosecutor's objection to this line of argument, defense counsel reiterated that the "person connected with [Gomez] is [Juan]," and informed the jury that Detective Elmore testified that he "pulled work records for both [Gomez] and [Juan]" from Trico Construction.

In rebuttal, the prosecutor responded there was no evidence that Juan and Gomez had ever worked together for the same company.

2. *Analysis*

Felix contends that Juan's credibility was crucial in this case, and that the trial court's limitation on defense counsel's cross-examination of Juan regarding his alleged employment at Trico Construction deprived Felix of his right to confront witnesses and to present a defense. Felix also contends that the employment records were relevant either to contradict Juan's assertion that he had seen Gomez only once (in his driveway), or to show that Juan had disregarded the truth by allowing another person to use his identifying information, thereby condoning the falsification of employment records.

A trial court exercises broad discretion in determining the relevancy of evidence, as well as its probative and prejudicial effect. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) We evaluate a trial court's relevance and Evidence Code section 352 rulings under an abuse of discretion standard. (*People v. Harrison* (2005) 35 Cal.4th 208, 230; *People v. Brown* (2003) 31 Cal.4th 518, 577.) " 'A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice.' [Citation.]" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1533.) Generally " 'violations of state evidentiary rules do not rise to the level of federal constitutional error.' [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 114.)

We need not decide whether the trial court erred when it refused to admit the marginally probative employment records of Juan showing that he may have worked at Trico Construction, because even assuming error, we conclude that any error was harmless since there is no reasonable probability that Felix would have achieved a more favorable result if the evidence had been admitted. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 828 [any error in excluding evidence was "harmless because it would not have resulted in a more favorable verdict"]; see also *People v. Watson, supra*, 46 Cal.2d at pp. 836–837 [reversal required only if a reasonable probability exists that the jury would have reached a different result had the evidence been excluded].)

The employment evidence that Felix sought to introduce was primarily for impeachment purposes—i.e., to show either that Juan had lied when he testified that he had seen Gomez only once before, about a year earlier, or, alternatively, to demonstrate that Juan was willing to allow someone else to use his personal information to falsify

employment records, which would call into question his credibility. However, the record reflects that the jury heard abundant evidence regarding Juan and his credibility (or the lack thereof) that was far more damaging than this evidence. Other evidence that cast doubt on Juan's credibility included evidence of Juan's arrest in November 2005, shortly after the murder, and his subsequent conviction of possession for sale of almost five pounds of marijuana; Juan's admissions that he had repeatedly lied to law enforcement about his involvement in the murder; Juan's testimony that he pled guilty to certain crimes, including conspiracy to commit voluntary manslaughter, in return for his testimony in the instant case and an 18-year prison term; Juan's testimony that even when he did not lie to police, he still "kept some things" from police; Juan's admission that he was a willing participant in Felix's plan to assault Gomez and rob him of marijuana; and Detective Elmore's testimony that Juan repeatedly lied during police interviews, particularly at the beginning of the investigation, regarding his involvement in, and knowledge of, the murder. In other words, there was plenty of evidence demonstrating that Juan's credibility was questionable.

The record also shows that Juan's questionable credibility was one of the primary focuses of the defense's closing argument. Defense counsel's attack on Juan's credibility during closing argument consisted of approximately 12 pages of the record. Defense counsel not only reminded the jury that Detective Elmore could not even estimate how many times Juan had lied to police, but she reviewed the myriad conflicting stories that Juan had given to police and investigators over the course of several interviews, and

noted that many of the factors listed in CALCRIM No. 226 regarding a witness's testimony applied to undermine Juan's credibility.¹²

In view of the mountain of evidence impeaching Juan's credibility that was already before the jury in this case, it is simply not reasonably probable that the admission of this

¹² CALCRIM No. 226, as given, provides: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. [¶] You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] What is the witness's character for truthfulness? [¶] Has the witness been convicted of a felony? [¶] Has the witness engaged in [other] conduct that reflects on his or her believability? [¶] Was the witness promised immunity or leniency in exchange for his or her testimony? [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good. [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

additional evidence regarding Juan's employment records would have resulted in a more favorable verdict for Felix. (See *People v. Gutierrez, supra*, 45 Cal.4th at p. 828; see also *People v. Greenberger* (1997) 58 Cal.App.4th 298, 350 [noting that "[e]xclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation"].)

D. *The trial court did not abuse its discretion in denying the defense's request to redact certain statements made by police to Felix during an interrogation; in any event, the failure to redact was harmless*

Felix contends that the trial court prejudicially erred when it denied his request for certain redactions to a July 2008 recorded interview between investigators and Felix that was played for the jury. Specifically, Felix claims that the trial court erred in refusing to redact the following five statements made by one or more interrogators during that interview:

(1) " 'I'm telling you up front. We're going to know a lot of answers to the questions we're asking you.' "

(2) " 'We talked to a lot of people in nine months. We just didn't decide yesterday. It's been nine months we've been working on the thing. We've talked to a lot of people. We know a lot.' "

(3) " 'I'm 100 percent positive and convinced you were there.' "

(4) " 'We've verified every single piece of evidence.' "

(5) " 'If you were in court with this and somebody . . . _____ all this information, and listen and the guy is saying, "I didn't [do] this. I don't know. I don't know" what would you think? You'd say he's full of shit. He's not even coming up with an excuse of why he did this.' "

Felix argues that the officers' statements improperly suggested to the jury that police were already sure that Felix was involved in the crime when they interviewed him, based on Juan's prior statements to police about what had happened. He also points out that he made no admissions in response to these statements, and suggests that the statements thus should not have been admitted under *People v. Simmons* (1946) 28 Cal.2d 699.

Felix concedes that we review the trial court's decision to admit or exclude evidence for an abuse of discretion. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 805.) No abuse of discretion can be demonstrated here. The court acted reasonably in concluding that the statements of the officers during their questioning of Felix were useful to assist the jury in understanding the context in which Felix's statements to police were made. Even though Felix may not have specifically replied to all of these statements by police, it was helpful for the jury to understand what the investigators had told him in order to understand his answers at other points in the interview. Further, the trial court did not permit the jury to consider the law enforcement officers' statements for their truth, or for that matter, as evidence of any sort. Rather, after the jury heard the interview, the trial court instructed the jury that only a witness's *answers* constitute evidence: "Questions asked by the police officers during the investigation of the case are not evidence. The answers given by the witnesses are the actual evidence during those interviews." This admonition was repeated in a special jury instruction and read to the jury.

Felix suggests that the jury may not have understood that this instruction applied to the *statements* made by the investigators, because the instruction refers only to "questions" asked by officers. We reject this challenge for two reasons. First, it is not reasonable to believe that the jury did not understand this instruction to exclude as evidence whatever comments were made by investigators, whether they were specifically in the form of direct questions or statements made during the questioning. The instruction made clear that the only evidence that the jury could consider was the statements made by the witness. The instruction thus adequately informed the jury that it was not to consider what the investigators said as evidence that Felix committed the crime. Second, if Felix believed that the instruction failed to adequately inform the jury that it was not to consider what the investigators stated as evidence, he had a duty to request a different instruction. (See *People v. Carrington* (2009) 47 Cal.4th 145, 189.)

In any event, even if we were to conclude that the trial court abused its discretion in failing to redact the statements at issue, we would nevertheless reject Felix's contention that he was prejudiced by the failure to redact these statements. (See *People v. Watson*, *supra*, 46 Cal.2d at pp. 836–837.) Again, the jury was instructed that it was not to consider as evidence the questions that police posed during interviews of witnesses, and, as we have explained, there is no reason to believe the jury would have considered these statements as evidence simply because they were not stated in the form of a question. Moreover, although the statements that Felix sought to have redacted suggested that the police knew certain things about his involvement in the case, it was clear from other testimony that the statements were part of a police strategy to get Felix to say more about

the crime. Specifically, after the interview was played for the jury, Detective Elmore testified that it is a common practice for police to use subterfuge and even to lie during an interrogation of a witness or suspect in order to elicit information. Thus, for example, Detective Elmore testified that when police told Felix during the interview that they had obtained "fiber evidence" and DNA from the Dodge Magnum that matched evidence found on or from Gomez, these statements were false. Detective Elmore essentially acknowledged that police officers routinely lie to suspects during interviews, and that it is an accepted police tactic during interviews with suspects to allude to having information that the police do not actually have.

Given this testimony, we reject Felix's contention that the officers' statements during the interview somehow "boost[ed] the credibility of the prosecutor's key witness" and improperly told jurors that the police were already sure that Felix was involved when they interviewed him. It was clear from the statements, and from later testimony, that the police were exaggerating the information they had connecting Felix to the crime, and it is not reasonably probable that the jury improperly considered these statements as evidence of Felix's guilt or as evidence of Juan's credibility. We thus conclude that even if it was error to allow the jury to hear the officers' challenged statements, any such error did not prejudice Felix since there was no reasonable probability of a different result in the absence of such error. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

E. *The trial court did not abuse its discretion by the manner in which it handled Juan's statements regarding a polygraph test*

Felix contends that he was deprived of a fair trial because Juan twice mentioned on cross-examination that he had taken a polygraph test, and that the "cumulative effect" of the evidentiary rulings that the trial court made denying the defense the opportunity to question Juan about whether he was employed at Trico Construction and failing to redact the police officers' statements suggesting they knew certain information to Felix during his interrogation, combined with the fact that Juan mentioned taking a polygraph test, improperly bolstered Juan's credibility with the jury.

During cross-examination, defense counsel asked Juan if he had lied to police. After Juan responded, "Yes," defense counsel asked Juan if he also had lied to an investigator for the district attorney's office. Juan responded: "When I went and got a lie detector test?" Defense counsel said, "No. When—" and Juan interrupted and said, "That's the only time I remember talking to the D.A. investigator."

Defense counsel then attempted to set up a timeline to elicit testimony from Juan about the number of times that he had lied to various parties during specific interviews. Defense counsel asked Juan to estimate the number of times he had lied to the prosecutor or to an investigator from the district attorney's office while in custody. Juan replied: "I need to know an exact time, because I spoke to the investigator only when I went to go take a lie detector test and" Defense counsel reframed the question and then continued to ask Juan about how many times he had lied to the police and the prosecutor.

After the court dismissed the jury for a lunch recess, the attorneys and the court had a discussion on the record. Defense counsel moved for a mistrial, arguing that Juan's twice mentioning having taken a polygraph test was highly prejudicial because it improperly bolstered his credibility in the eyes of the jury. The trial court denied the mistrial motion, stating:

"I don't think that any mention that he's made of the polygraph test bolstered his credibility. Any mention that he made of the polygraph exam was not accompanied by any results—or any results that have been verified. And, in fact, Mr. Molina has stated on numerous occasions in his testimony this morning that he had lied repeatedly to law enforcement, both District Attorney's Offices and the line agencies working this case. And also he did have an agreement with the district attorneys that he was receiving 18 years in state prison for being part of the conspiracy to kill a human being. [¶] So I don't think that his mentioning gratuitously about any polygraph test would in any way render the trial [Felix] is receiving unfair or that it would sway the trier of fact one way or the other."

The trial court admonished Juan not to mention a polygraph test again in his testimony.

Felix's contention on appeal is not that the trial court abused its discretion in denying his motion for a mistrial. Rather, he contends that the trial court's evidentiary rulings with respect to Juan's employment records and the detective's statements during the Felix's interrogation served to improperly bolster Juan's credibility in the eyes of the jury, and that these errors were exacerbated by Juan's references to having taken a polygraph test during his testimony. Felix relies on *People v. Basuta* (2001) 94 Cal.App.4th 370 (*Basuta*), to argue that the mention of a polygraph test intended to bolster a witness's credibility, in combination with another more serious trial court error, constitutes prejudicial error. In *Basuta*, the prosecutor violated a court order not to

mention that a witness had taken a polygraph test. (*Id.* at pp. 390-391.) The appellate court concluded that "the improper mention of the polygraph test, in combination with the error in excluding evidence that Oliver's mother had jerked or shaken the child, was prejudicial" because "[b]oth errors substantially affected the crucial issue in the case— [the main witness's] credibility." (*Id.* at p. 391.) Applying the standard of prejudice review announced in *People v. Watson, supra*, 46 Cal. 2d at page 836, the *Basuta* court concluded that it was reasonably probable that but for those errors, a result more favorable to the defendant would have been reached. (*Basuta, supra*, at p. 391.)

The situation in this case is unlike the situation presented in *Basuta*. First, we have concluded that the trial court's other evidentiary rulings about which Felix complains on appeal did not constitute an abuse of the court's discretion. Thus, there is no cumulative error in this case that compels reversal. (See *People v. Salcido* (2008) 44 Cal.4th 93, 156; see also *People v. Butler* (2009) 46 Cal.4th 847, 885.) Further, the two fleeting references that Juan made to his taking a polygraph test were, by themselves, harmless. Juan made no mention of the results of the tests, and nothing he said implied that any particular aspect of his story was truthful. In addition, as the trial court pointed out, Juan *freely admitted that he repeatedly lied to police* about his involvement in, as well as the details surrounding, the murder, and defense counsel did a thorough job of attempting to undermine Juan's credibility in various other ways. We therefore conclude that it is not reasonably probable that the outcome of Felix's case would have been more favorable in the absence of Juan's two passing remarks about his having submitted to a polygraph test. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

IV.

DISPOSITION

The judgment is reversed with respect to the true findings on the lying-in-wait and robbery special circumstances. The judgment is affirmed in all other respects. The case is remanded for resentencing or retrial on the issue of the robbery special circumstance, at the option of the prosecuting attorney.

AARON, J.

I CONCUR:

McDONALD, J.

BENKE, J., Concurring and Dissenting.

I believe the majority undermines the well-established rule that as a court of review, we *must* "view the evidence in the light most favorable to the prosecution, adopt all reasonable inferences and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (See *People v. Vazquez* (2009) 178 Cal.App.4th 347, 352, citing *People v. Avila* (2009) 46 Cal.4th 680, 701 and *People v. Valencia* (2008) 43 Cal.4th 268, 289.) As such, I dissent to part III, section B, of the majority opinion, in which the majority unpersuasively holds (1) there is a lack of substantial evidence in the record to support the special circumstance true finding of lying in wait (Pen. Code, § 190.2, subd. (a)(15))¹ and (2) there is insufficient "other evidence" within the meaning of section 1111 to corroborate the testimony of an accomplice in connection with the robbery special circumstance.

A. *Lying-in-Wait Special Circumstance*

Defendant Fabian Felix contends—and the majority agrees—there is insufficient evidence to support the lying-in wait special circumstance. Specifically, the majority concludes the *only* evidence in the record as to what happened between Felix and victim Pedro Gomez that compelled Gomez to ride in the same car as Felix is the testimony of accomplice Juan Molina (Juan), which testimony the majority states was devoid of any evidence that Felix *and his accomplices* lured Gomez into the car to kill, as opposed merely to rob, Gomez. (Maj. opn. at p. 15.) The majority thus concludes a jury would

¹ Unless otherwise noted, all statutory references are to the Penal Code.

have to make a "number of speculative leaps to reach the conclusion that Felix concealed a plan to kill Gomez and waited for an opportune time to act." (*Ibid.*)

Initially, I disagree with the majority's statement that it must consider the "true intent and purpose" (see *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073, fn. omitted) of Felix's *accomplices* as well as the intent of Felix in determining whether there is sufficient evidence of concealment of purpose by Felix. While it is true that Juan believed the purpose of the proposed attack on Gomez was merely to rob him of what apparently was a large amount of marijuana,² what Juan or the other accomplices believed is in large part irrelevant to the "true intent and purpose" of Felix, inasmuch as the record clearly shows Felix masterminded the plan from start to finish and Felix was the shooter.

I conclude a rational jury could find on this record that Felix's true intent and purpose when he convinced Gomez to ride in Felix's car to a prearranged location was to kill Gomez. Indeed, the record discloses that immediately before Felix and his brother, Alfredo Felix (Alfredo), left to rendezvous with Gomez, they exchanged the handguns each was carrying. This evidence, which the majority chooses to ignore, along with the evidence that Felix used a rental car to meet Gomez on the day of the killing, supports the inference that Felix's true intent and purpose was to kill Gomez.

Moreover, the circumstances of the killing and the inferences to be drawn from them support such a finding. The record shows Alfredo sat directly behind Gomez in the

² The record is not clear on the amount of marijuana in Gomez's possession.

car while Gomez was in the front seat. When the car driven by Felix sped into the apartment complex and parked in a carport, as previously arranged by Felix, Juan saw Alfredo grab Gomez around the neck and point a gun to his head. At that point, Gomez was subdued, or at least there is no evidence of a struggle involving Gomez (as the majority recognizes (maj. opn. at p. 10)); nor is there any evidence that the planned robbery of Gomez went awry. In any event, Felix also knew Juan and Juan's cousin, defendant Cristobal D'Arte (Cristobal), were there waiting in the parking lot of the apartment complex as Felix had arranged, and thus if all Felix intended was to rob Gomez of his marijuana, as the majority suggests, the record shows it was then "four against one" with Alfredo and Felix also pointing weapons at Gomez.

In addition, Juan testified he and Cristobal were "speed walking" toward the parked car where Gomez, Alfredo and Felix sat. Again, if the intent of Felix, as opposed to his accomplices, was merely to rob Gomez, a rational jury could find there was no reason for Felix to have shot Gomez at point blank range while Gomez was in a headlock with a gun pointed to his head and while two other defendants were quickly approaching the car.

Unlike the majority, I conclude based on this evidence that a rational jury would *not* have to make a series of "speculative leaps" in finding Felix's true intent and purpose was to kill Gomez. (See *People v. Morales* (1989) 48 Cal.3d 527, 555 [noting that the "concealment element 'may manifest itself . . . by the creation of a situation where the victim is taken unawares even though [the victim] sees his murderer' [citation, italics omitted]"]; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331 [noting that "[r]eversal

[for insufficient evidence] is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient evidence to support [the conviction].' [Citation.]")

I also conclude this same evidence supports the "watching and waiting" and the "surprise attack" elements of special circumstance lying in wait. (See *People v. Mendoza, supra*, 52 Cal.4th at p. 1073.) Here, a rational jury could comfortably find that Felix did not react impulsively to Gomez at the time of the shooting, as Felix not only waited for the opportune time to kill Gomez but actually "affirmatively engineered" when to launch that attack (e.g., in the parking lot of the apartment complex, in a carport after he parked his car). (See *id.* at p. 1074.) Furthermore, because Gomez and Felix were well acquainted, as Gomez was one of Felix's long-standing marijuana "connection[s]," a rational jury could find that Gomez would not have suspected he was in danger when he initially was tricked by Felix to get into the car with Felix and Alfredo. (See *People v. Morales, supra*, 48 Cal.3d at p. 555.)

B. *Robbery Special Circumstance*

I also disagree with the majority decision to reverse the robbery special circumstance true finding. The majority concludes that although there is "minimal" (maj. opn. at p. 23) evidence of a robbery of Gomez, in light of the court's error in failing to instruct the jury on the corroboration requirement under section 1111³ in connection with

³ Section 1111 provides in part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

this allegation, such "minimal" evidence is insufficient to establish that the instructional error was harmless.

As the majority correctly notes, the corroborating evidence required under section 1111 " 'may be *slight*, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations[, italics added].]' . . . The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)

Here, I disagree with the majority's conclusion that the corroborating evidence that a robbery was planned, attempted or completed was "minimal." (Maj. opn. at p. 23.) I also disagree with this majority's conclusion that there is insufficient "slight" "other evidence" in the record to corroborate Juan's testimony linking Felix to the robbery of Gomez. (*Id.* at pp. 22-23, fn. 11.)

Such "other evidence" corroborating Juan's testimony includes: the testimony of Juan's wife, Rosa Molina (Rosa), who testified that Felix and Juan were involved in marijuana sales before and at the time of the murder and that within hours before Gomez was killed, Felix, Alfredo and Cristobal arrived at her apartment in Hemet in a car driven by Felix; witnesses from the apartment complex where the shooting occurred who identified the getaway vehicle that sped out of the apartment complex as the same type of car ultimately traced to Felix; phone records showing phone calls between Felix and Juan shortly before the murder, including a call at 4:25 p.m.—about 15 minutes before the killing—from Juan to Felix; phone records showing phone calls between Felix and

Gomez on the day of the murder, including a call from Gomez's phone to Felix's phone at 4:20, just a few minutes before the killing; phone records showing no calls to Gomez's phone from Felix's phone after the murder; and perhaps most importantly, the purchase of a Mercedes Benz by Felix and his then common-law wife about 11 days after the killing, and the fact Felix's wife gave police contradictory stories regarding the source of the \$17,000 down payment for the car when she admitted that at the time of the killing money was "tight," that they relied on government assistance and that Felix worked odd jobs to make money. In addition, in response to the question about whether she knew Felix bought and sold marijuana to make money, Felix's wife told investigators that was "his business" and that she "[didn't] ask questions."

I conclude the above evidence is substantial and is far greater than the mere "slight" evidence necessary to find harmless instructional error on this issue. (See *People v. Lewis, supra*, 26 Cal.4th at p. 370.) As such, I would affirm the jury's true finding on the robbery special circumstance.

Finally, I also disagree with the majority's conclusion that it is "particularly troubling" (maj. opn. at p. 23) that the jury was properly instructed with the collaboration requirement with respect to deliberate and premeditated murder, personal use of a firearm causing death and lying in weight, but not with respect to the robbery special circumstance. According to the majority, the implication in the failure to instruct the jury with the section 1111 requirement with respect to the robbery special circumstance suggested to the jury that it did *not* need to view Juan's testimony with caution. (Maj. opn. at pp. 23-24.)

Although it is *possible* to draw the implication suggested by the majority in connection with the robbery special circumstance, I believe it is just as likely, if not more likely, that the jury viewed Juan's accomplice testimony with caution as to *all* counts and allegations—including the robbery special circumstance, given the corroboration instruction the jury in fact received in connection with the more serious crime of deliberate and premeditated murder, for which Felix was convicted.

In any event, the majority's decision to settle on an implication that supports reversal of the robbery special circumstance—when so many other implications exist—suggests the majority needlessly reverses this special allegation and also undermines the well-established rules requiring us to "view the evidence in the light most favorable to the prosecution" (*People v. Vazquez, supra*, 178 Cal.App.4th at p. 352) and to "adopt *all reasonable inferences and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.*" (*Ibid.*, italics added.) I conclude the majority has not followed this basic rule of appellate review.

DISPOSITION

Because there is substantial evidence in the record supporting the true finding of the lying-in-wait special circumstance and because there is more than "slight" "other evidence" corroborating the accomplice testimony of Juan connecting Felix to the robbery of Gomez, I would affirm the judgment of conviction in its entirety.

I CONCUR AND DISSENT

BENKE, Acting P. J.