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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

QUINCY PORTER et al.,

Defendants and Appellants.

E050961

(Super.Ct.No. FSB060072)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed as to defendant and appellant Quincy Porter. Affirmed with directions as to defendant and appellant James Cleo Dean.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Quincy Porter.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant James Cleo Dean.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants James Cleo Dean and Quincy Porter were charged with a number of offenses arising out of a string of robberies and a murder that took place in December 2006 through January 2007. Although both defendants were charged jointly as to some of the offenses, they were tried by separate juries. Dean's jury found him guilty of the offenses surrounding the murder of Shawn Nix. Porter's jury acquitted him of the offenses connected to the Nix murder, but found him guilty of offenses connected to the string of robberies. Porter's appeal asserts evidentiary error, in the admission of prejudicial evidence, and the exclusion of probative evidence. Dean's appeal raises claims of instructional and sentencing error. With the exception of one matter, correcting the abstract of judgment in Dean's case, we affirm the judgments as to each defendant.

FACTS AND PROCEDURAL HISTORY

West Kendall AutoZone Robbery on December 3, 2006 (Count 4)

On the evening of December 3, 2006, two men went into an AutoZone store on West Kendall Drive in San Bernardino. One robber, the "husky" man, held an assault rifle to an employee's head and demanded money from the cash register. The other robber, a younger, slenderer man, had a handgun; he took employee Lisa Diaz to the back and forced her to open the safe. The robbers got away with about \$3,000.

Baseline AutoZone Robbery on December 16, 2006 (Count 6)

In the morning of December 16, 2006, a man with a handgun entered an AutoZone store on Baseline Street in San Bernardino. Store manager Joanna Guerra was helping a customer at the cash register when the gunman ordered everyone to get to the ground. He fired a shot into the ceiling, pointed the gun at Guerra, and demanded that she give him the cash from the register. After she complied, he then took her to the back of the store where he forced her at gunpoint to open the office safe. The robber took about \$2,500 in this robbery.

Guerra described the robber as a man in his mid-twenties, about five feet nine inches in height, and weighing about 240 pounds. He wore a beige beanie, sunglasses and dark clothing. She later identified a handgun recovered from defendant Porter's home as the gun the robber had pointed at her.

Second West Kendall AutoZone Robbery on January 7, 2007 (Count 5)

On January 7, 2007, about a month after the first robbery, the West Kendall Drive AutoZone store was robbed again. This time, there were four robbers. All four men had their faces covered. Three of the robbers carried guns, a shotgun, an assault rifle, and a large handgun. Again, one of the robbers demanded money from the cash register, while another took Diaz to the back and forced her at gunpoint to open the safe. This time, the robbers took about \$1,400. The robbers ran out the back door of the store.

Despite the disguises, Diaz recognized two of the guns from the previous robbery, and recognized the voices of two of the men as the robbers from the earlier robbery in

December. The “husky” man held the assault rifle and did most of the talking during the second robbery.

Radio Shack Robbery on January 24, 2007 (Counts 1 and 3)

In the evening of January 24, 2007, three men with covered faces entered a Radio Shack store on Highland Avenue in San Bernardino. One of the men had an assault rifle. Another man had a handgun. Employee Aisha Allen described the robbers: one was about 18 years old, and wore all black. A second robber was short and “husky,” in his mid-twenties. He also wore all black. The third robber was tall and skinny, in his mid-thirties. He wore a gray shirt. The oldest man held the assault rifle. One of the other robbers had the handgun.

The man with the assault rifle yelled at everyone to get on the floor. One of the younger men jumped over the counter and stuffed money from the cash register into a backpack. One of the robbers commanded Allen to open the safe, but she told the men that the safe would open only after a delay of three minutes. The men decided not to wait, but ran out the front door. They got into a waiting car which then sped away.

Pursuit and Apprehension of the Robbers

While the robbers were inside the Radio Shack store, two women who had seen the event flagged down a passing police officer, Daniel Ireland. The women told him that they thought the Radio Shack store across the street was being robbed. As Officer Ireland turned his patrol car around and crossed onto Highland Avenue, he saw a black four-door Dodge automobile stopped in front of the Radio Shack store. As he

approached the black Dodge, Officer Ireland saw three men walk quickly out of the store and get into the waiting car. One of the men carried a backpack, and another carried a rifle.

Officer Ireland pulled his patrol car behind the black Dodge, which accelerated away. Officer Ireland activated his lights and siren and pursued the fleeing Dodge. During the pursuit, the Dodge traveled between 40 to 50 miles per hour in a residential 25 mile per hour zone. The fleeing car also ran several red lights, but came to a stop when it collided with another car on Osburn Road. After the collision, all the doors of the Dodge opened; four men bailed out of the Dodge and ran away. A surveillance helicopter helped trace them to a nearby apartment complex, where they entered Apartment 19. As Officer Ireland initiated foot pursuit, he glanced into the abandoned Dodge and saw an assault rifle on the floorboard in the backseat.

At that time, teenaged A. was living in the apartment with his mother (Ronnie Lusk), his stepfather (defendant Porter), his older brother, 16-year-old Dorian Goodman, and his little sister. A. had been busy playing a video game when the four robbers—defendant Porter, Dorian Goodman, A.'s uncle Sean Lusk, and David Weed—ran yelling into the apartment. The men scattered in different directions inside while the police attempted to cordon off the apartment complex. A. saw defendant Porter inside the garage, changing his clothes.

There was a standoff with police surrounding the building for several hours. Eventually, the occupants of the apartment were flushed out with tear gas. One man was

spotted on the roof of the apartment. Those taken into custody were Sean Lusk, David Weed, and Dorian Goodman. Defendant Porter escaped, but an inspection revealed damaged doors and some displaced window screens from one of the neighboring apartments. In addition, all the units share the same attic space. Defendant Porter was taken into custody when he returned to the apartment on February 1, 2007.

Meanwhile, a search of the crashed car and the apartment yielded numerous items of evidence. As noted, police found the assault rifle in the abandoned Dodge. Paperwork in the name of David Weed was also found there. In the area between the car and the apartment, they found a discarded pair of shoes, one shoe that later was matched to another shoe found inside the apartment, and some packaging from a cell phone, consistent with Radio Shack merchandise. A black beanie and a glove were also recovered outside. In the apartment on Osburn Road, the police recovered a long-sleeved gray sweatshirt, consistent with one worn by one of the Radio Shack robbers. Defendant Porter's wallet and identification, as well as another wallet containing David Weed's identification, were found in the master bedroom of the apartment. A lease agreement in the name of Ronnie Lusk was also in the master bedroom. A small safe in the bedroom contained ammunition for a .30-caliber gun. A .30-caliber automatic handgun was found in the apartment bathroom. In another bedroom, police found a backpack under a bed, containing approximately \$1,500 in cash, and a personal check made out to Radio Shack. Police found a pair of sunglasses like those worn by the robber in the Baseline AutoZone robbery on December 16, 2006. There, the robber had shot a bullet into the ceiling. The

cartridge recovered at the Baseline AutoZone store matched the .30-caliber handgun found at the apartment.

The items found in the aftermath of the events of January 24 established a link to another crime that had taken place in December 2006: the robbery and murder of Shawn Nix in Ontario.

The Nix Robbery/Murder on or About December 24, 2006 (Count 7 [Special Circumstances Murder], and Counts 8 and 9 [Second Degree Robbery and First Degree Residential Robbery, Respectively])

Defendant Porter was acquainted with defendant Dean and Dean's stepbrother, David Weed. Weed and Dean would spend time at Porter's residence, where they sometimes smoked marijuana and played video games with Porter's stepson, A. Dean knew about but claimed he did not participate in the robberies perpetrated by others (e.g., Porter, Weed, Dorian Goodman), but he was sometimes at Porter's residence when the robbers returned; Porter would occasionally give Dean money or buy him alcohol or drugs.

On or about December 24, 2006, Dean was at Porter's residence with Porter and Dorian Goodman. Dean asked Porter to take him to meet the victim, Shawn Nix, who was a drug dealer that Dean knew. Dean had a little money and he wanted to buy drugs. Porter had agreed to take Dean to Nix's apartment, but first he and Dorian Goodman went upstairs for a while. By the time they came back downstairs, Weed had arrived.

Dean had telephoned Nix at some point that evening to say that he would come over to Nix's house if he could get a ride.

Weed owned a dark blue or black Dodge Intrepid, the same car that was later involved in the January 24 robbery of the Radio Shack store. The four men, defendant Dean, Weed, defendant Porter and Dorian Goodman, set out for Nix's apartment in Ontario in Weed's car. Defendant Dean was driving. Porter brought his handgun with him. There was also a tire wrench on the floor in the backseat of the car.

Dean told Porter that he knew Nix had lots of drugs and money and things at the apartment that they could steal. Dean had floated the idea of robbing Nix before, and Porter had rejected the idea, but this time they agreed to do so. When they arrived at Nix's apartment building and parked the car, Dean and his stepbrother Weed went to the door first, while Porter and Dorian Goodman waited in the car. The plan was for Dean and Weed to gain entry, because Nix was cautious and would not open the door for strangers. Once Dean and Weed were inside, they planned to knock out Nix so that Porter and Dorian Goodman could come in and steal items from the apartment. Weed took the tire wrench with him, concealed in his coat, to carry out this plan. Dean told police that he did not know that Porter or the others intended to rob or kill Nix; for his own part, he only went to Nix's apartment to buy drugs.

About five minutes after Dean and Weed went into the apartment, Porter and Dorian Goodman entered. Nix was standing with his hands up, and he was bleeding from

the head. Weed held the tire wrench up and commanded Nix to get on the floor. Porter punched Nix in the face to gain compliance; Nix then lay face down on the floor.

While Nix was on the floor, Porter stood over him with the gun. The others ransacked the apartment, grabbing whatever they could. Then Porter had Dean hold the gun on Nix while Porter rummaged through the apartment. Dorian Goodman took the items they stole and put them into the car. As he came back into the apartment, Porter ordered Dean and Dorian Goodman to return to the car. Dorian Goodman wanted to see what was going on, however, so he looked back as he was being ushered outside. He saw Porter shoot Nix. Porter then handed the gun to Weed and Weed fired a second shot. Dean tried to grab Dorian Goodman to take him outside, but he did not leave. After Nix had been shot, all four men walked out. They returned to Porter's apartment where they sorted through the items taken from Nix.

On the morning of December 25, 2006, Janelle Chavez and her boyfriend went to Nix's apartment to buy drugs. They discovered Nix's body and called 911.

Another man, Darion Marshall, had also gone to Nix's apartment on December 25, 2006. He discovered the door ajar and Nix lying on the ground. He panicked and left, but not before stealing some items from Nix's apartment.

Ontario Police Department officers responded to the location to investigate Nix's murder. Nix had likely been dead for 12 to 24 hours. He had died from two bullet wounds to the back of his head. He had also suffered blunt force trauma and lacerations

to the head. Nix also had methamphetamine in his system. The apartment had been ransacked.

Police recovered a bullet and a bullet fragment from the floor underneath Nix's body. A spent shell casing was also recovered from the apartment. There were no signs of forced entry. Later ballistics evidence showed that the bullet casing found at the Nix murder also matched a casing from the ceiling shot fired during the Baseline AutoZone robbery of December 16, 2006 (count 6).

Charges and Trial

As a result of these events, defendants Dean and Porter (and codefendant Weed, whose charges were later severed) were charged in a third amended information as follows:

Porter (with Weed) was charged in count 1 with second degree robbery of Aisha Allen (Pen. Code, § 211) in the Radio Shack robbery on January 24, 2007.

Porter (with Weed) was charged in count 2 with possession of an assault weapon (Pen. Code, § 12280, subd. (b)).

Porter (with Weed) was charged in count 3 with evading an officer (Veh. Code, § 2800.2, subd. (a)) arising from the chase on January 24, 2007.

Porter was charged in count 4 with second degree robbery (Pen. Code, § 211) arising from the West Kendall AutoZone robbery on December 3, 2006.

Porter (with Weed) was charged in count 5 with second degree robbery (Pen. Code, § 211) arising from the second West Kendall AutoZone robbery on January 7, 2007.

Porter was charged in count 6 with second degree robbery (Pen. Code, § 211) arising from the December 16, 2006 Baseline AutoZone robbery.

Porter and Dean (with Weed) were charged in count 7 with the murder of Shawn Nix (Pen. Code, § 187).

Porter and Dean (with Weed) were charged in count 8 with second degree robbery of Nix (Pen. Code, § 211). (This count was dismissed by the district attorney before trial commenced.)

Finally, Porter and Dean (with Weed) were charged in count 9 with first degree residential robbery of Nix (Pen. Code, § 211).

The information also included numerous enhancement and other due process notification allegations, such as firearm enhancement or acting in concert allegations.¹

¹ As to count 1 (Radio Shack robbery) it was alleged that the offense was a strike (Pen. Code, § 1192.7, subd. (c)), that a principal personally used a firearm in its commission (Pen. Code, § 12022.53, subds. (b) and (e)(1)), that a principal was armed with an assault weapon (Pen. Code, § 12022, subd. (a)(2)), and that Porter personally used an assault weapon (Pen. Code, § 12022.5, subd. (b)), causing the offense to become a serious and violent felony (Pen. Code, §§ 1192.7, subd. (c)(8) and 667.5, subd. (c)(8)).

As to count 4 (first West Kendall AutoZone robbery), the information alleged that the charge was a strike, that a principal was armed with an assault rifle, and that Porter personally used an assault rifle in the commission of the offense.

As to count 5 (second West Kendall AutoZone robbery), the information added allegations that the offense was a strike, that a principal was armed with an assault rifle, and that Porter personally used a handgun in the commission of the offense.

As to count 6 (Baseline AutoZone robbery), the information alleged that the offense was a strike, that Porter personally used a firearm in the commission of the

Porter also had a prior serious felony and a prior strike allegation, based on a 1999 robbery conviction.

Codefendant Weed's motion to sever was granted and he proceeded to trial separately. The trial against Porter and Dean went forward with separate juries.

On April 19, 2010, Dean's jury found him guilty of first degree murder in count 7 and found true the special circumstance allegation. The jury found not true the allegation that Dean had personally used a firearm in the commission of the murder, but found true the allegation that the murder was committed while he was engaged in the commission of the robbery. Dean's jury found him guilty of the crime of first degree residential robbery

offense, and that he personally and intentionally discharged a firearm in the commission of the offense (Pen. Code, § 12022.53, subd. (c)).

As to count 7 (murder), the information alleged that the offense qualified as a strike, that conviction of the offense would require submission of biological samples, that a codefendant (Weed) personally used a handgun in the commission of the offense, that Weed had personally discharged a firearm causing great bodily injury and death to the victim (Pen. Code, § 12022.53, subd. (d)), that Weed had personally and intentionally discharged a firearm in the commission of the offense, that the murder was committed in concert with two or more others within a habitation (Pen. Code, § 213, subd. (a)(1)(A)), that the murder was committed while engaged in the commission of robbery, that Porter personally discharged a firearm causing great bodily injury and death to the victim, that Porter personally discharged a firearm, that Porter personally used a firearm in the commission of the offense, that Porter committed the murder while engaged in the robbery of Nix, that Dean personally used a firearm in the commission of the offense, that the murder was committed by Dean while he was engaged in the commission of the robbery of Nix, and the special circumstance that the murder was committed while all the defendants were engaged in the crime of robbery.

As to count 9 (first degree residential robbery of Nix), the information included strike allegations, firearm allegations, and acting in concert allegations similar to those attached to the other counts.

in count 9, and found true the allegation that he acted in concert to commit the robbery in an inhabited dwelling. As before, it found not true the gun use allegation.

Porter's jury returned verdicts on April 20, 2010, finding him guilty on counts 1 through 6, and finding true all the special allegations as to him on those counts. Porter's jury acquitted him of the murder and robbery of Nix (counts 7 and 9). In a separate proceeding, the trial court found true the prior conviction allegations against Porter.

The court sentenced Porter to five years in state prison on count 6 (Baseline AutoZone robbery) as the principal count, doubled to 10 years as a second strike, plus 20 years for the personal discharge of a firearm enhancement as to that count. On count 1 (Radio Shack robbery), count 4 (first West Kendall AutoZone robbery) and count 5 (second West Kendall AutoZone robbery), the court imposed consecutive terms of two years each, plus gun enhancements of three years four months on each of counts 1 and 5, plus a one-year gun enhancement on count 4. The court sentenced Porter to one year four months on count 3 (evading a peace officer), and imposed a five-year prior conviction enhancement, for a total state prison term of 50 years.

The court denied Dean's motion for a new trial, and sentenced him to life in prison without the possibility of parole for the murder (count 7). On count 9 (robbery of Nix), the court imposed the middle base term of six years, stayed pursuant to Penal Code section 654.

Each defendant filed a notice of appeal.

ANALYSIS

I. Porter's Appeal

A. The Trial Court Properly Denied Porter's Mistrial Motion After a Witness Mentioned Porter's Prior Incarceration

The trial court granted a pretrial motion to exclude any references in the People's case-in-chief to defendant Porter's prior incarceration or convictions. The court implemented this ruling by ordering the prosecutor to instruct the prosecution witnesses to refrain from mentioning Porter's prior incarceration or convictions. Witness Dorian Goodman was a particular focus of this instruction, and the prosecutor was admonished to inform Dorian Goodman's counsel of it. Defense counsel was to explain to Dorian Goodman that any questions he would be asked would not call for an answer or response that referenced Porter's incarceration or convictions.

At one point, however, after some lengthy sessions of direct and cross-examination, Dorian Goodman was being cross-examined by Porter's counsel. Dorian Goodman had testified earlier that he might have reported something to the police, except that Porter "was around me 24, 7. Every day, every night. When I woke up, when I went to sleep, he was there. If I didn't have [Porter] over my head, I probably would have. But I don't know. I was scared of the whole thing to begin with after it happened. I didn't know what to do."

Porter's counsel asked a bit later, "You testified just now that [Porter] was around you 24, 7; is that correct?" Dorian Goodman replied, "Yes." The questioning went on:

“Q: During what period of time are you referring to?

“A: Every day.

“Q: Well, from what month to what month, or what year to what year?

“A: [Porter] was around me since he came home from prison.

“Q: When was that?

“A: I don’t know.

“Q: What year?

“A: 2005, 2006.”

Counsel did not object to the question and answer at the time it was given, but raised the point the next day in a motion for mistrial. The prosecutor explained that Dorian Goodman had been counseled about the issue (i.e., not to mention Porter’s incarceration or convictions) and he did not believe the lapse was intentional. He also stated that he did not intend to refer to or comment on the prison reference.

The trial court found that there was no misconduct by the prosecutor, and further found that the statement was not intentional on the part of Dorian Goodman. Dorian Goodman had been on the stand for a good length of time, through some vigorous cross-examination. The court denied Porter’s motion for a mistrial.

On appeal, Porter argues that the reference to Porter’s imprisonment was “so prejudicial that the trial court should have granted the defense motion for a mistrial and the failure to do so requires reversal of the judgment.”

““A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]’ [Citation.] A motion for a mistrial should be granted when ““a [defendant’s] chances of receiving a fair trial have been irreparably damaged.”” [Citation.]” (*People v. Collins* (2010) 49 Cal.4th 175, 198-199.)

The trial court did not abuse its discretion in denying the motion for mistrial. Porter’s counsel failed to object at the time of Dorian Goodman’s statement. Moreover, he failed to request any kind of admonition or curative instruction at the time of the motion for mistrial. Dorian Goodman had testified extensively over the course of several days up to that point in the trial. The reference to Porter’s incarceration was very brief; it was not repeated and received no other mention or emphasis of any kind. There is no reasonable likelihood that the jury convicted Porter of the robberies and other crimes on the basis of that one fleeting reference, rather than on the overwhelming evidence of Porter’s participation in the robberies and other crimes of which he was convicted. Dorian Goodman’s testimony provided great detail of Porter’s participation in these crimes. Porter had been filmed on videotape at several of the robbery scenes. Clothing or accessories like those he wore in several of the robberies was found at Porter’s residence. Proceeds from the Radio Shack robbery were also found at his residence. He owned the gun that matched ballistics evidence at the Baseline AutoZone robbery. While

in police custody, he tried to dispose of an earring that he could be seen wearing at some of the robberies. There is no evidence that Porter's jury was unduly influenced by the brief reference to his release from prison, inasmuch as the same jury acquitted Porter of the most serious charges against him.

We defer to the trial court's ruling if it is supported by substantial evidence. (*People v. Drake* (1992) 6 Cal.App.4th 92, 97.) There was such evidence here, as indicated by the circumstances cited above. Porter has thus failed to show any prejudice, or that the trial court abused its discretion in denying his motion for mistrial.

B. The Trial Court Properly Excluded Evidence of a Purported Telephone Call Between Dorian Goodman and Defendant Porter's Mother

Porter next complains that the trial court excluded evidence he proffered, purporting to be a tape recording of a telephone call between a person calling himself "Dorian Goodman" and a female claimed to be defendant Porter's mother. The transcript of the telephone call has the person identifying himself as "Dorian Goodman" stating that he intended to testify that Porter "had nothing to do with" the crimes.

The trial court excluded the evidence because Porter could not establish a foundation for it. Dorian Goodman himself denied making any such telephone call, and, when the tape was played, he denied that the voice on the tape was his. The other party to the conversation, Porter's mother, lived in Chicago and was not available to testify in court. The court expressed the concern that the evidence might have been manufactured; Porter's mother is a person with an obvious bias. The prosecutor also explained that

criminal defendants sometimes use the names and booking numbers of other inmates to make unauthorized telephone calls. The trial court tentatively sustained a foundational objection to the admission of the tape.

The next day, Porter's counsel presented a transcript of the telephone call, but indicated that Dorian Goodman had indeed denied that it was his voice on the recording. Dorian Goodman had also specifically testified during the trial that he never made any telephone call to Porter's mother, and that he had never assured her that "it would be okay." Porter's counsel presented no further evidence to authenticate the tape recording, so the trial court sustained the foundational objection and excluded it from evidence.

The trial court properly sustained the objection. The tape recording of the telephone call qualified as a "writing" which was required to be authenticated before it could be admitted into evidence. (Evid. Code, §§ 250, 1401, subd. (a).) Defense counsel failed, however, to provide evidence to authenticate the recording.

When the relevance of proffered evidence depends on the existence of a preliminary fact, the proponent of the evidence has the burden of producing evidence as to the existence of that preliminary fact. (Evid. Code, § 403, subd. (a)(1).) "The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion." [Citations.] (*People v. Bacon* (2010) 50 Cal.4th 1082, 1103.) Here, the preliminary fact or the foundational evidence was the evidence which would be required to authenticate the tape recording. Dorian Goodman denied that the voice on the tape was his. He testified during the trial that he never telephoned defendant Porter's

mother and did not tell her that “it would be okay.” Although the person on the recording stated the name of Dorian Goodman and used Dorian Goodman’s booking number, that information could have been obtained by any number of people. Porter’s counsel did not produce any witness to authenticate the tape. The court did not abuse its discretion in excluding the evidence.

People v. Olguin (1994) 31 Cal.App.4th 1355, on which Porter relies, is inapposite. In that case, the defendant objected to the introduction of some rap lyrics on the ground that they were not properly authenticated. The rap lyrics contained internal references, such as the defendant’s gang nickname, which tended to connect the writing to him. However, unlike here, the internal references within the writing were not the sole connection to the defendant. The rap lyrics were also found in the defendant’s own home. Here, there was no evidence as to how defense counsel came by the tape recording. It might have been made by anyone, anywhere, at any time. It was not shown to be connected to Dorian Goodman by any such similar connection as in *Olguin*.

The same criticism disposes of any reliance on *People v. Gibson* (2001) 90 Cal.App.4th 371. The writings proffered into evidence contained internal references connecting them to the defendant, but such writings were also found in the defendant’s own bedroom. There was no such assurance here that internal references in the recorded telephone conversation (Dorian Goodman’s name and booking number) were connected to him in any way, and there was evidence to the contrary.

In any case, even if the court erred, it is not reasonably probable that the error affected the verdicts. In view of the overwhelming evidence, including photographic evidence, of Porter's participation in the various robberies, as well as the circumstantial evidence of his involvement found in his home, no reasonable juror could have believed the purported, fantastic, statement that Porter "had nothing to do with" the various crimes of which he was convicted.

II. Dean's Appeal

A. Background: Dean's Defense Evidence

After his arrest, Dean was interviewed by police. Dean claimed that he had gone to Nix's apartment solely to buy drugs. He repeatedly told the officer that he had had no idea the others intended to rob Nix or to kill him.

Dean claimed that he went into Nix's apartment, and asked Nix for some methamphetamine. He wanted to "get a blast" before he left but, as he was getting ready to "take a hit," Porter and Dorian Goodman burst in. Porter had a gun. Dean, surprised, asked what Porter was doing, and Porter replied, "[Y]ou know what time it is." Porter told Dean to wait outside. Until that time, Dean had not seen Porter with a gun that night.

Dean was scared and left Nix's apartment. He went to the parking lot of the apartment building, while Porter, Weed and Dorian Goodman stayed inside. Dean was high on drugs at the time. He paced around the parking lot, and a few minutes later, he heard two shots. Weed, Porter and Dorian Goodman then came out of the apartment and left in Weed's car, but Dean did not go with them. Instead, he called his friend Darion

Marshall to pick him up. Marshall did not come, however, so Dean walked to Marshall's house, which took him about three hours. Porter later told Dean that Dorian Goodman had shot Nix, and thus "got his stripes."

Throughout the interview, despite accusations of lying, Dean maintained that he did not know that the others were planning to rob or kill Nix, and that he (Dean) had only gone there with the intent to buy drugs. Dean also repeatedly stated that, in the month after the killing, he never called the police because he was afraid of Porter.

In October 2007, Dean made a telephone call from the jail to his mother; the call was recorded and the recording was played for the jury. During the conversation, Dean told his mother that she should visit Porter, because Porter said that Dean could change his statement to benefit all three coparticipants (Dean, Porter and Weed). Dean's mother promised to visit Porter and listen to him, and she would then come to visit Dean. Dean's mother said that she had talked to the district attorney, who had told her that the prosecution would help Dean if he told the truth. Dean's mother had assured the prosecutor that Dean would tell the truth, but she would not help if the district attorney was trying to send Dean to state prison.

The defense theory of the case was that Dean, who was not argued to have actually shot Nix, never had any intent to commit robbery. Defense counsel argued in closing, however, that, "If you get to the point where you feel that he committed the robbery, then he is sunk."

In support of the theory that Dean had nothing to do with, or at least did not know about, the plan to rob Nix, defense counsel pointed to Dean's police statement, wherein he denied any intent to rob, or any knowledge that the others intended to rob Nix. He claimed, for example, not to have seen Porter with the gun at any time before Porter and Dorian Goodman came into the apartment.

The defense presented expert witnesses concerning the effects of habitual methamphetamine use. Some of these effects generally included a distortion of attention to detail, and hallucinations. Other aspects of behavior might be that, once a user finds a good and reliable source, he or she might typically prefer to go back to that source, even if other options might be more convenient.

Toxicologist John Treuting testified, based on his interview with Dean, that Dean was addicted to methamphetamine. Dean reported to Treuting that he had auditory and visual hallucinations as a result of his drug use.

Forensic psychologist Dr. Marjorie Graham-Howard also examined Dean in four interviews conducted after his arrest. Dr. Graham-Howard took a history from Dean, in which he explained that he had begun to use methamphetamine when he was 18, and had progressed to using every day since he was 23 years old. As a result of his drug use, Dean had some psychotic symptoms, including hallucinations, delusions, paranoia and distorted thoughts.

Dean described the events of the crime to Dr. Graham-Howard, saying that he had intended to get drugs from Nix. His main reason for going to Nix's apartment was "to

get high.” Dean also told Dr. Graham-Howard, however, that there had been discussions about robbing Nix. Porter knew where Nix lived, and knew that he had drugs. Porter had done favors for Dean in the past, and Dean was afraid of Porter; if someone “crossed” Porter, that person would “end up dead.” Thus, Dean felt he had to go along with the scheme. This contradicted Dean’s statement to the police, however, in which he had denied any prior discussion of robbery, or any knowledge that anyone may have intended to rob Nix.

When the group arrived at Nix’s apartment, Dean and Weed went in first; Dean just wanted to get drugs. Dean began using the drugs, but at some point, Weed hit Nix with the tire iron and Porter and Dorian Goodman came in. Dean still claimed that he left the apartment before Nix was shot. He was in shock and asked the others to take him home. He told Dr. Graham-Howard that the others had dropped him off at home. Again, this contradicted the story Dean had told to police, when he claimed he had walked to Darion Marshall’s house.

In closing argument, Dean’s defense counsel suggested that Dean may have acted under duress or coercion. He also remarked that people’s personalities may change when using drugs, and indicated that Dean was probably under the influence of methamphetamine on the date the murder took place. He suggested that Porter and Dorian Goodman planned the robbery of Nix while they were upstairs changing clothes at Porter’s apartment, out of earshot from Dean.

Counsel argued, in essence, “Dean just wanted dope. He was already high so his perception was distorted.” Nix was Dean’s connection, and his friend, something that Dean would not want to jeopardize. Porter, Weed and Dorian Goodman were the ones who planned the robbery, not Dean. Dean “realize[d] he was used. He did give information to the perpetrators. His fear was ignored and the killing was totally unexpected.”

Counsel painted a portrait of Dean as a person who had been abandoned and abused as a child, so that he “will never be an alpha male.” Dean used drugs to help his self-esteem “because he had none.” Dean tended to “take[] the background, . . . he doesn’t take charge, . . . he just let[]s things happen, . . . he is not a person that has a vendetta on anybody. It’s hard for him to defend himself.” Thus, Dean’s psychological makeup was that of a passive person with few coping skills.

The jury evidently did not credit the suggestion that Dean did not know about or intend the robbery, however, and did convict him of both the robbery and the murder of Nix.

B. The Failure to Give the Instruction Defining Aiding and Abetting Was Harmless
Beyond a Reasonable Doubt

The prosecution, as noted, did not contend that Dean actually directly participated in the murder. His murder conviction, therefore, depends upon his liability for the robbery. The defense argued that he had no intent to commit the robbery. The issues were tendered to the jury on the theory either that Dean directly participated in the robbery, or that he aided and abetted the robbery.

Dean's defense counsel requested, and the trial court agreed to give CALCRIM Nos. 400 and 401 concerning aiding and abetting. When the jury was actually instructed, however, the court gave CALCRIM No. 400,² but inadvertently omitted CALCRIM No. 401.³

² CALCRIM No. 400 as given to the jury, states: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator who directly committed the crime. [¶] A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it. [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

³ CALCRIM No. 401, which was not given, states in part: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, the defendant does not need to actually

On appeal, Dean now contends that this omission was prejudicial and violated his right to a fair trial. The People concede that the trial court had a sua sponte duty to give the instruction on aiding and abetting, if the prosecution relied on an aiding and abetting theory of liability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) The failure to give the aiding and abetting instruction amounted to a failure to instruct on the intent element for aiding and abetting liability. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 271.) The failure to instruct on a required element of intent amounts to federal constitutional error. (*Ibid.*) Under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705], such error is reversible unless it may be found harmless beyond a reasonable doubt.

We conclude that any error was harmless beyond a reasonable doubt, based on a review of the record, the evidence, the remaining instructions, and the specific findings made by the jury.

As argued to the jury, the prosecutor conceded that Dean was not one of the actual shooters in the murder of Nix. Rather, “the only issue is his intent to commit robbery. . . . [¶] The issue is whether or not he had the intent to commit that robbery with Quincy [Porter], Dorian [Goodman], and David [Weed]. A sub-issue is did Dean’s use or non-use of meth negate in any way his intent to commit robbery.” As to the murder, Dean’s

have been present when the crime was committed to be guilty as an aider and abettor.

“[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]”

liability, if any, was predicated on felony-murder. “[W]e’re proceeding on a felony murder theory. That is if you find that James Dean intended to rob Shawn Nix and someone dies, then he’s guilty of first-degree murder by operation of law.” The prosecutor’s argument did not address aiding and abetting, but rather focused on the issue of intent.

The trial court did give numerous other instructions, such as the definition of robbery, and instructions on the robbery-murder special circumstance.⁴ Most

⁴ Among other instructions that the trial court did give were:

CALCRIM No. 1600, defining robbery:

“The defendant is charged in Count 9 with robbery in violation of Penal Code section 211. [¶] To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant took property that was not his own;

“2. The property was taken from another person’s possession and immediate presence;

“3. The property was taken against that person’s will;

“4. The defendant used force or fear to take the property or to prevent the person from resisting;

“AND

“5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently.

“The defendant’s intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery.”

CALCRIM No. 404, concerning the effect of intoxication:

“If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant:

“Knew that Quincy Porter, David Weed, and Dorian Goodman intended to First Degree Residential Robbery [*sic*];

“AND

“Intended to aid and abet Quincy Porter, David Weed, and Dorian Goodman in committing First Degree Residential Robbery.

“Someone is *intoxicated* if he took or used methamphetamine that caused an intoxicating effect.

“Do not consider evidence of intoxication in deciding whether *murder* is a natural and probable consequence of First Degree Residential Robbery.”

CALCRIM No. 3402, concerning duress:

“The defendant is not guilty of First Degree Residential Robbery if he acted under duress. The defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger if he refused a demand or request to commit the crime. The demand or request may have been express or implied.

“The defendant’s belief that his life was in immediate danger must have been reasonable. When deciding whether the defendant’s belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed.

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

“The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of First Degree Residential Robbery.

“The defense does not apply to the crime of *murder*.”

CALCRIM No. 540B, on felony murder:

“The defendant is charged in Count 7 with murder, under a theory of felony murder.

“The defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

“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, or aided and abetted to commit PC 211, First Degree Residential Robbery;

“2. The defendant intended to commit, or intended to aid and abet the perpetrator in committing PC 211, First Degree Residential Robbery;

“3. If the defendant did not personally commit or attempt to commit PC 211, First Degree Residential Robbery, then a perpetrator, whom the defendant was aiding and abetting or with whom the defendant personally committed or attempted to commit PC 211, First Degree Residential Robbery;

“AND

“4. While committing or attempting to commit PC 211, First Degree Residential Robbery, the perpetrator 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.

“To decide whether the defendant and the perpetrator committed or attempted to commit First Degree Residential Robbery, please refer to the separate instructions that I

will give you on that crime. To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I will give you on aiding and abetting. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

“The defendant must have intended to commit, or aid and abet in the felony of First Degree Residential Robbery before or at the time of the act causing the death.

“It is not required that the defendant be present when the act causing the death occurs.”

If the jury found defendant guilty of murder it was also instructed to decide whether the special circumstance was true.

CALCRIM No. 705 concerned the intent required to find the special circumstance true:

“In order to prove the special circumstance of Murder committed while engaged in the commission of a Robbery, the People must prove not only that the defendant did the act charged, but also that he acted with a particular intent. The instruction for the special circumstance explains the intent required.

“An intent may be proved by circumstantial evidence.

“Before you may rely on circumstantial evidence to conclude that the defendant had the required intent, 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 conclude that the defendant had the required intent, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did not have the required intent, you must conclude that the required intent was not proved by the circumstantial evidence.

“However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”

CALCRIM No. 703 described the intent required to find the special circumstance true:

“If you decide that the defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance of murder committed while engaged in the commission of a robbery, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life.

“In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove either that the defendant intended to kill, or the People must prove all of the following:

“1. The defendant’s participation in the crime began before or during the killing;

importantly, the court instructed the jury that it could not find the robbery-murder special circumstance true unless it found that the People had proved beyond a reasonable doubt that Dean had “acted with either the intent to kill or with reckless indifference to human life and was a major participant in the [robbery].” The jury, under the given instructions, found the special circumstance true. Thus, it must have found that Dean was a major participant in the underlying robbery. Where “the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions” (*People v. Flood* (1998) 18 Cal.4th 470, 485), then the instructional error was harmless.

The evidence fully supported the jury’s findings that Dean was a major participant in the robbery, not merely an aider and abettor, and that he was at least indifferent to human life, if he did not intend to kill Nix. Although Dean claims that Dorian

“2. The defendant was a major participant in the crime;

“AND

“3. When the defendant participated in the crime, he acted with reckless indifference to human life.

“A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death.

“The People do not have to prove that the actual killer acted with intent to kill or with reckless indifference to human life in order for the special circumstance of murder committed while engaged in the commission of a robbery to be true.

“[¶] . . . [¶]

“If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance of murder committed while engaged in the commission of a robbery to be true. If the People have not met this burden, you must find this special circumstance has not been proved true for that defendant.”

Goodman's testimony "was simply not believable" on certain points,⁵ Dean's own statements were contradictory and not readily believable either. If, for example, Dean was just a meth addict who wanted drugs, then there was utterly no reason to have a dangerous and violent person like Porter (and Dorian Goodman) accompany him and Weed on this journey. Dean had initially asked Porter for a ride to Nix's apartment, but by the time Porter and Dorian Goodman came downstairs again, Dean's stepbrother, David Weed, had arrived. Dean had his ride; there was no need to drag Porter and Dorian Goodman all the way to Ontario unless something was up. Dean painted himself as a kind of hapless, passive hanger-on. However, although Dean may not have participated directly in the string of robberies of the various stores, he nevertheless had no objections to taking a handout from Porter out of the proceeds. Dean knew perfectly well what kind of person Porter was, and he knew that robbery was one of Porter's regular occupations. Dean told Detective Mitchell that Porter was a cold-hearted killer, and claimed that he (Porter) had killed people in the past. Dean's statements that he feared Porter showed clearly that he knew exactly whom he was dealing with, and exactly what to expect from any enterprise involving Porter.

⁵ Dean makes much of Porter's acquittal of the Nix crimes, urging that Porter's jury must not have found Dorian Goodman's testimony credible. That conclusion is not warranted, however; the key issue in Porter's case was whether there was sufficient independent, nonaccomplice corroboration of Dorian Goodman's testimony. Porter's jury may well have fully credited Dorian Goodman's story, and yet have failed to convict because of the lack of corroboration.

As to the specific incident with Nix, clearly, a plan had been hatched before the quartet arrived at Nix's apartment. Dean plainly admitted that much, when he told Dr. Graham-Howard that he would not have agreed to the robbery if he had known the others intended to kill Nix. Dean, who knew Nix, and his stepbrother Weed, needed to approach the door first, to gain Nix's trust and entry into the apartment. Weed was pre-armed with the tire wrench. While Weed was busy subduing Nix, Dean was the one who, according to Dorian Goodman, waved the others inside. Dorian Goodman also testified that he had seen Dean flipping over a mattress in the bedroom while ransacking the apartment, searching for things to steal. Afterward, Dean readily participated in the division of the property taken from Nix's apartment. Even if Dean did not personally hold the gun on Nix,⁶ or kill him, the evidence was more than sufficient to establish that Dean was a major participant in the robbery, and that he was at least recklessly indifferent toward Nix's life.

Although the trial court did err in failing to give complete instructions on the issue of aiding and abetting, the error was harmless beyond a reasonable doubt. The factual issue—defendant Dean's intent—was necessarily resolved against him by other proper instructions. (*People v. Pulido* (1997) 15 Cal.4th 713, 715-716, 726-727.)

C. Any Error in the Intoxication Instructions Was Harmless

Defendant Dean presented a defense of methamphetamine intoxication through his expert witnesses. The intoxication was relevant to the issue of aiding and abetting; the

⁶ Dean's jury found the gun use allegations not true as to both count 7 and count 9.

jury could consider the intoxication in determining whether Dean had the required mental state of knowledge and specific intent to aid the perpetrator in the commission of the robbery. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1129-1133.) Dean contends that the trial court's instructions on intoxication were erroneous, because one instruction conflicted with another.

The court gave CALCRIM No. 404 on intoxication, and another instruction based on CALCRIM No. 3426, concerning voluntary intoxication.⁷ Defendant contends these

⁷ CALCRIM No. 404, concerning the effect of intoxication:

“If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant:

“Knew that Quincy Porter, David Weed, and Dorian Goodman intended to First Degree Residential Robbery [*sic*];

“AND

“Intended to aid and abet Quincy Porter, David Weed, and Dorian Goodman in committing First Degree Residential Robbery.

“Someone is *intoxicated* if he took or used methamphetamine that caused an intoxicating effect.

“Do not consider evidence of intoxication in deciding whether *murder* is a natural and probable consequence of First Degree Residential Robbery.”

Instruction based on CALCRIM No. 3426, on voluntary intoxication:

“You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with *the intent to permanently deprive the owner of his property*.

“A person is *voluntarily intoxicated* if he becomes intoxicated by willingly using methamphetamine that it could produce an intoxicating effect [*sic*], or willingly assuming the risk of that effect.

“Do not consider evidence of intoxication in deciding whether *murder* was a natural and probable consequence of First Degree Residential Robbery.

“In connection with the charge of First Degree Residential Robbery the People have the burden of proving beyond a reasonable doubt that the defendant acted with *the intent to permanently deprive the owner of his property*. If the People have not met this burden, you must find the defendant not guilty of First Degree Residential Robbery.” (Original italics.)

instructions were inconsistent, because CALCRIM No. 3426, on voluntary intoxication, told the jury that it could consider voluntary intoxication only for the issue whether Dean had the intent to permanently deprive Nix of his property, whereas CALCRIM No. 404 told the jury that it could consider intoxication in determining whether Dean knew the others intended to rob Nix, and whether Dean intended to aid and abet the others in the commission of the robbery. Dean also contends that this conflict in the instructions was infected by the court's additional error in failing to give complete instructions on the intent required for aiding and abetting.

Again, Dean's jury found the special circumstance allegation true. It necessarily found, therefore, that Dean was not merely an aider and abettor, but was a major participant in the robbery which led to Nix's death. The evidence showed that, whether Dean had ingested drugs or not, he knew about the plan to rob Nix, he took the first steps to gain entry to carry out the plan, he let in Porter and Dorian Goodman once Weed had gained control over Nix by hitting him with the tire wrench, he actively took part in ransacking the apartment, and he helped divide the spoils of the murderous raid. Unquestionably, Dean knew of the intent to rob, and he intended to permanently deprive Nix of his property.

To the extent that Dean argues that the findings as to the special circumstance do not satisfy the same intent required as an aider and abettor, i.e., the specific intent to aid the robbery in addition to merely knowing the robbery would occur, we must reject the claim. A specific finding that Dean was a "major participant" in the robbery underlying

the murder, which was required to find true the special circumstance, encompassed far more than mere passive knowledge that a robbery was intended or was occurring. And the evidence supports the finding, inasmuch as Dean took a very active part in the entire process of the robbery, from formulating the plan, helping all the robbers gain entry, actively searching for and collecting the items to steal, and sharing in the spoils afterward. As a “major participant” in the robbery, Dean necessarily had the required intent, not only that he knew beforehand about the robbery, but that he also intended to, and by his conduct in fact did, “aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.” (CALCRIM No. 401.)

As before, then, the issue of intent (e.g., the effect of intoxication on intent) was necessarily resolved adversely to defendant on the basis of other, proper, instructions. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 721; see also *People v. Geiger* (1984) 35 Cal.3d 510, 532.)

Any error in the instructions on voluntary intoxication was harmless for the additional reason that there was no evidence to show that he was actually intoxicated, or impaired from any intoxication, on the day of the murder. There was little enough evidence to show that Dean had actually ingested any methamphetamine that day. Dorian Goodman, for example, had not seen Dean use any methamphetamine that day, or indeed at any time. Detective Mitchell believed that Dean may have been under the influence of drugs when he interviewed Dean, but of course the interview took place many months after the robbery and murder. As to the interview itself, there was no

indication that Dean was unable to understand or respond to the officer's questions; thus, even if he was under the influence of methamphetamine at that time, it provided no reason to question Dean's actual intent at the time of the crimes. As to the crimes, although Dean told Detective Mitchell that he had been high at the time, he gave a lucid account, claiming to remember in great detail exactly what had happened. There was no evidence to show that Dean's purported use of methamphetamine had had any impact on his mental state. "A defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

Any error in the intoxication instructions was harmless beyond a reasonable doubt.

D. Dean's Sentence Did Not Constitute Cruel or Unusual Punishment

Dean next contends that his sentence to life in prison without the possibility of parole violates federal and state constitutional prohibitions against cruel and unusual punishment.

Defendant moved for a new trial below, based on argued insufficiency of the evidence; the alleged insufficiency of the evidence was premised, in turn, on the notion that the jury had relied more on one portion of Dean's statement to Dr. Graham-Howard, to the detriment of Dean's numerous claims of coercion, which appeared both in other portions of his statement to the psychologist, and throughout his interview with Detective Mitchell. Defense counsel appended a letter arguing that, in this case, "the felony-murder

rule is both inordinately strict and cruel in this case in every sense of those words.”

Dean’s counsel argued both that the evidence was “insufficient,” and that the trial court should exercise its discretion to grant equitable relief.

The chafing point appears to be that Dean was convicted of the robbery and felony-murder of Nix, while, through a jury error, Porter—the principal instigator—was acquitted of those crimes.

The trial court properly denied defendant Dean’s motion for a new trial. The evidence was plainly sufficient to support the verdicts in his case. The jury heard and was entitled to weigh the efficacy of Dean’s claims that he was coerced into committing the robbery (and thus participating in the felony precipitating the murder).

Neither did the case call for equitable relief. A trial court might grant a new trial on equitable grounds if the error denied the defendant a fair trial, and the defendant had no earlier opportunity to raise the issue. (*People v. Mayorga* (1985) 171 Cal.App.3d 929, 942-943.) However, that ground does not apply here, because defendant had a full opportunity to present the critical issue (coercion) at trial. The jury simply did not believe that evidence. Defendant Dean was not deprived of a fair trial on that ground.

Dean bears the burden of establishing that his sentence was unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.) However, Dean’s sentence comports with that for other similarly situated felony-murderers with special circumstance findings. Here, the apparent unfairness of defendant’s sentence appears to consist of a comparison with the sentences of other codefendants, such as Porter. It appears that Porter’s jury was

deadlocked, but instead of reporting the deadlock to the court, signed the verdicts acquitting him of the Nix crimes. That Porter managed to escape punishment by a fluke or error, however, does not render Dean's punishment disproportionate to his own culpability. (*People v. Webb* (1993) 6 Cal.4th 494, 536.)

“To determine whether defendant's sentence is disproportionate to his individual culpability, we examine the circumstances of the offense, including its motive, the extent of defendant's involvement, the manner in which the crime was committed, the consequences of defendant's acts, and defendant's personal characteristics including age, prior criminality, and mental capabilities. (*People v. Steele* [(2002)] 27 Cal.4th [1230,] 1269.)” (*People v. Rogers* (2006) 39 Cal.4th 826, 895.) The circumstances of the offense were violent and opportunistic. The motives were venal, Dean's participation was “major,” the crime was committed in a cruel and callous manner, and resulted in the victim's senseless murder. Dean was of an age that he was not particularly innocent, he had long been involved with illegal drugs, his mental capacity was average. There is nothing in the circumstances of the crime that suggests that Dean's punishment does not comport with his culpability.

Neither does his sentence violate the federal Constitution. In noncapital cases, only a narrow proportionality principle is prescribed. (*Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108].) Here, defendant participated voluntarily, intentionally and knowingly in a scheme to rob Nix. Nix was beaten and then brutally

killed for drugs, money and other property. His sentence is not disproportionate to his individual culpability for active, “major” participation in this criminal enterprise.

Dean’s sentence to life in prison without possibility of parole did not violate constitutional guaranties against cruel and unusual punishment.

E. The Abstract of Judgment Must Be Corrected

Defendant Dean contends that his abstract of judgment must be corrected as to count 9 (robbery). The trial court sentenced Dean to the middle term of six years on count 9 and stayed that sentence pursuant to Penal Code section 654. The abstract of judgment, however, reflects that Dean was sentenced to the aggravated term. The People concede that the abstract of judgment must be corrected to reflect the imposition of the middle term on count 9.

DISPOSITION

As to defendant Quincy Porter, the judgment is affirmed. As to defendant James Cleo Dean, the trial court is directed to correct the abstract of judgment to reflect the imposition of the middle term of six years on count 9. In all other respects, the judgment as to Dean is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P.J.
MILLER
J.