

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN RAY WARE,

Defendant and Appellant.

E052149

(Super.Ct.No. RIF146746)

OPINION

APPEAL from the Superior Court of Riverside County. Craig G. Riemer, Judge.

Affirmed in part; reversed in part with directions.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Christine Levingston Bergman, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant, Nathan Ware, of first degree murder (Pen. Code, § 187, subd. (a)),<sup>1</sup> with the special circumstance that it occurred during a robbery (§ 190.2, subd. (a)(17)(A)), and during which he used a firearm (§ 12022.53, subd. (b)) and a knife (§ 12022, subd. (b)(1)). The jury further convicted defendant of first degree robbery (§ 211) and residential robbery (§ 212.5, subd. (a)), during both of which he used a gun and a knife. In bifurcated proceedings, defendant admitted having been convicted of two prison priors (§ 667.5, subd. (b)). He was sentenced to prison for life without the possibility of parole to be served concurrently with a 17 year sentence. He appeals, claiming the trial court erroneously admitted certain evidence and sentenced him. We reject his first contention. The parties agree that the trial court made some errors in sentencing him and the amended abstracts of judgment incorrectly reflect the sentence the court actually imposed and we will direct the trial court to correct these errors. Otherwise, we affirm.

### **FACTS**

The girlfriend of the murder victim (hereinafter, the “victim”) testified that the victim had been selling marijuana out of their Rubidoux apartment for about three years before the crimes occurred. Defendant had been at the apartment a number of times buying marijuana and playing Play Station with the victim. Around 8:00 p.m. on November 19, 2008, the victim, who was in the master bedroom with his girlfriend, answered a knock at their front door. The girlfriend heard no arguing or fighting before

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

defendant entered the master bedroom. After defendant did, he told the girlfriend to get up off the bed and come into the living room. Defendant tried to take a phone from the girlfriend's hand and he hit her on the side of her face. She kicked him. The girlfriend's daughter came into the room from her bedroom and told defendant to get his hands off her mother. Defendant got in the daughter's face and told her to shut the fuck up. The girlfriend got in between her daughter and defendant and put her hand over her daughter's mouth. Defendant told both to go into the living room, which they did. The victim was in the dining room, standing by the table. A man unknown to the girlfriend, who was wearing gloves, and holding a gun pointed at the victim, was in the living room. The victim lay on his stomach on the living room floor and the girlfriend and the daughter sat on the floor, with the gunman standing in front of them. The victim said he didn't have anything. Defendant asked the victim where "it" was at—that they knew that he had "it." Defendant looked through the drawers in the living room. The victim said he didn't have anything. Defendant returned to the master bedroom and searched it. While defendant was gone, the gunman asked the victim where he was from. The victim said he was from a gang and the gunman said he was from the same gang and the two discussed mutual acquaintances. Defendant returned from the bedroom, got a knife from the kitchen and put on a pair of black gloves he had in his pocket. While the gunman held the gun on the victim, defendant smashed the prostrate victim's head onto the floor with his foot and stomped on it. Defendant put the blade of the knife to the victim's neck and said, "I'll kill you right now." The gunman told the girlfriend to give him her jewelry and she did. The gunman asked the daughter for money and she gave him \$12

from her pocket. The girlfriend stood up and said they had nothing and she would take the gunman to the bedroom and show him—that they could search the apartment. Defendant stepped away from the victim and as the gunman passed him on the way to the master bedroom with the girlfriend, defendant told him to give him the gun and they exchanged weapons. Once in the master bedroom, the girlfriend asked the gunman not to hurt her family, that he could search, but they had nothing. The gunman told her that she and her daughter “were cool” but they were going to get the victim. There was a commotion in the living room and the gunman ran out of the master bedroom, with the girlfriend following him. Defendant and the victim were at the front door, fighting over the gun. The girlfriend moved towards the victim, but the gunman approached her with the knife. The girlfriend noticed that her daughter was not in the living room and she went out the sliding glass door onto the balcony, where the daughter was. The two jumped off the balcony and ran to a neighbor’s apartment, where the girlfriend called 911. She reported that two men tried to rob them and the victim knew one of them. She said that at times, defendant called the gunman “Cuz” and defendant did most of the demanding and never appeared to be afraid of the gunman.

The 12-year-old daughter testified that after defendant and the gunman entered the apartment, she saw the victim, who was sitting at the dining room table, pull either money or something else out of a drawer and give it to defendant. Defendant was not wearing gloves but the gunman was. The victim put up his hands and said, “Whoa, whoa, whoa.” Defendant went into the master bedroom. The daughter heard her mother say, “Why are you grabbing me like that?” The daughter went into the hall and saw

defendant punch her mother in the face. The daughter yelled “Stop fighting.” Defendant got in her face and told her to shut the fuck up. The girlfriend told her daughter to be quiet and pushed her towards the living room as defendant led the way. The girlfriend and the daughter sat on the floor. The gunman stood next to them, pointing the gun at them. The gunman told the girlfriend to give him her jewelry while defendant told her that if he didn’t get all the money he would hurt the daughter. This was the only thing the gunman demanded. The victim asked the men not to hurt his family. At that time, defendant had a knife from the kitchen and was near the victim, who was lying face down on the floor. Defendant had gotten the knife before going to the master bedroom and returning with the girlfriend’s laptop. At some point, defendant put the knife to the victim’s throat and hit the victim’s head on the floor with his hand. Defendant paced back and forth and said he wanted all the money and “stuff.” The victim told him to take whatever he wanted, just not to hurt his family. The girlfriend said she’d take the gunman into the master bedroom to look for whatever could be found. The gunman gave the gun to defendant, who now had both weapons. While the girlfriend and the gunman were in the master bedroom, defendant paced back and forth and told the victim that if the latter did not give him all the money, he would hurt the daughter. After the daughter told the victim that she loved him, the victim got up and rushed defendant as the latter moved towards the front door. The victim pushed defendant against the door and the girlfriend and gunman came out of the master bedroom. The girlfriend went to her daughter, they opened the sliding glass door and jumped off the balcony. The daughter thought she heard defendant tell the victim that they were getting away and the gunman

should go get them. She thought she saw the gunman try to pursue them. She heard the apartment door open. It did not appear to her that the victim and the gunmen knew each other.

The victim was found on the landing just outside his front door with stab wounds to his leg and abdomen. There were two unfired bullets inside on the floor near the front door. The knife was found east of a wall separating the apartment complex from the adjoining church parking lot. Two pair of gloves were also found nearby.

A neighbor who lived downstairs from the victim heard the sound of a thud coming from the victim's apartment, then ten seconds later, the sound of two people coming down the stairs, then the sound of running. He then heard a voice say, "Call 911, call 911" then, "Help. Call 911." Twenty seconds later, he saw blood dripping from the area outside the victim's front door and found defendant lying on the ground there. The victim told his neighbor that he had been shot and stabbed. The neighbor's 911 call was played for the jury. During it, the neighbor reported that he heard shots fired. The neighbor asked the victim who shot him and the neighbor repeated the victim's response that it was Nate (defendant's first name) and he was from the PJ's (a subset of Project Crips gang). The neighbor reported that the victim knew the people and they had tried to rob him before they shot him. When the police arrived at the scene the victim said his assailant was "C-Note."

A police officer who arrived at the victim's apartment asked the victim who his assailant was and the victim did not answer his question. The officer then told the victim that it looked like to him that the victim was going to die and the victim had better tell

him who did this. The victim replied that it was Nate, Nathan, C-Note, whom he said was a PJ Crip.

The victim's apartment had been ransacked and no money was found when the police arrived. There were no holes visible in the pictures police took of the mattress in the master bedroom.

The victim died two days later of his injuries.

It was stipulated that defendant may have been a contributor to the DNA in black gloves that were found in the church parking lot and this DNA could be found in 1 out of 58 billion African-Americans.

Defendant testified that the victim was his main supplier of marijuana and he would buy \$100 or less from him at a time, two to three times a day, but his consumption had slowed at the time of the crimes because he was on Proposition 36 probation. The victim kept the marijuana he sold sometimes in the living room, sometimes in the drawer near the dining room table and sometimes in the master bedroom, but defendant did not know where in the bedroom the victim kept it. When defendant bought marijuana from the victim, the victim would put the money in the drawer near the dining room table, where the rest of the money was.

On November 19, 2008, defendant called the victim's apartment to make sure he had marijuana defendant could buy. An hour or so later, defendant met Cartoon, a member of East Coast Crips, out of Los Angeles, on the street in front of his mother's house in the company of one of his friends or cousins. Cartoon overheard defendant calling his girlfriend to pick him up and take him to the victim's apartment to buy

marijuana and Cartoon said that he needed to talk to the victim, who was also a member of East Coast Crips, because the victim had not been coming around the neighborhood in Los Angeles and Cartoon wanted to see him. Cartoon said he would take defendant to the victim's apartment. Defendant's intent was to buy marijuana from the victim and he thought Cartoon's intent was to talk to the victim. Before they left and on the way over, Cartoon said nothing about "taxing" the victim. As they pulled up to the victim's apartment complex, defendant pulled out a \$100 bill which he was going to use to buy marijuana. Cartoon said he was getting marijuana from the victim for free because he was the victim's homie. They did not discuss what Cartoon was planning. They parked near the church parking lot and jumped over the wall between the lot and the apartment complex because the victim's landlord had complained to the victim about traffic going in and out of the victim's apartment. Cartoon put the hood of his jacket over his head as they entered the victim's apartment. The victim acknowledged Cartoon. The victim sat at the dining room table near the drawer where he kept the marijuana and money.

Defendant gave the victim his \$100, which the victim put on the table, and defendant said he wanted six grams. Defendant said he did not know what happened thereafter to the \$100 bill. Cartoon asked the victim what was up with him and they had a friendly conversation. Defendant began breaking up the marijuana to smoke it and Cartoon questioned the victim as to where the latter had been. Cartoon pulled out a gun and the victim said, "Whoa, whoa, whoa." This was the first time defendant had seen the gun and Cartoon had not told him before this that he had it. He claimed this is when things went bad. The victim handed Cartoon a sack of marijuana and told him that he could

have it. The defendant did not hear Cartoon demand money or use the word, “tax,” which means a gang member getting a percentage of something, which gang members usually do to each other. Defendant denied going to the apartment with the intent to “tax” the victim or knowing that Cartoon intended to do this. Cartoon told the victim “You don’t think this shit funny now.” Cartoon told defendant to tell the girlfriend (he called her by her unusual first name) and the daughter to come out. Defendant felt he had to and he was not free to leave, at the risk of being shot by Cartoon. Defendant went to the master bedroom and told the girlfriend that there was a dude out in the living room and he had a gun, so she should come out there. She refused. They struggled over her phone and he pushed her in the face after she kicked him.<sup>2</sup> He did not want her to call for help. The daughter came into the master bedroom and yelled at defendant. Defendant told her to be quiet, as there was a dude out in the living room who had a gun. He denied telling her to shut the fuck up. Instead, he told the girlfriend to shut up, and that the dude had the victim at gunpoint, which caused the girlfriend to grab her daughter and walk out of the bedroom and into the living room, with defendant trailing them. The daughter sat near the sliding glass door, but the girlfriend stood. Cartoon asked the victim where “it” was at. Cartoon told the victim to give him all of “it,” which defendant thought meant the marijuana and money. The victim said he had nothing and he told defendant to tell Cartoon the same, which defendant did, explaining that the victim only sells a little bit of

---

<sup>2</sup> Later, defendant contradicted his testimony and said that he was the first one to hit the girlfriend and she kicked him to get him off her. Still, later, he reverted to his previous testimony that he pushed her.

marijuana at a time. Cartoon accused the victim of lying. Defendant told Cartoon that he was wrong. Cartoon told defendant to get a knife from the kitchen and poke holes in the side of the mattress in the master bedroom, saying, "That's where he like to keep his weed at" and Cartoon knew that that was where the victim kept his money and marijuana. Defendant told Cartoon that the victim did not, but Cartoon told defendant to check and defendant complied because he feared Cartoon would shoot him. Without moving the sheet, defendant stabbed the left side of the mattress three times and felt nothing. Defendant denied taking out the drawer that was on the bed when police arrived after the crimes or removing any of the dresser drawers. When defendant re-entered the living room, the victim was on the floor. Defendant put the knife on the dining room table. Defendant stood at the victim's feet and told Cartoon that there was nothing in the mattress. Defendant said the victim had nothing, hoping Cartoon would leave. Cartoon repeated his demand. Defendant bent down to the victim and told him in a non-threatening way that if he had anything, he should give it to Cartoon "so all this can stop." He denied threatening the victim or putting a knife to his neck. He also denied putting his foot on the victim's head. The victim said he had nothing. Defendant stood back up and repeated this to Cartoon and said, "It's a wrap." Cartoon said that someone was going to give him something and he pointed the gun at the girlfriend and the daughter and took the girlfriend's jewelry. The daughter offered Cartoon the \$15 she had on her and he took it. Cartoon said that was not enough and he knew they had more. Defendant and the victim said there wasn't, but Cartoon insisted there was. The girlfriend jumped up and offered to show Cartoon whatever they had in the master

bedroom. The knife was still on the dining room table. As Cartoon moved towards the master bedroom, defendant talked him into giving him the gun, saying Cartoon could not leave defendant in the living room with nothing. Defendant denied doing this to help Cartoon—he did it to get the gun away from him. While Cartoon and the girlfriend were in the master bedroom, defendant approached the front door to leave. However, the victim jumped up and grabbed defendant from the back and they scuffled. Defendant told the victim that he had nothing to do with what was going on and to let him go. The victim said Cartoon was going to have to kill him to get anything from him. Cartoon came up and all three had their hands on the gun, and it opened and two bullets fell out. The girlfriend and daughter went out the sliding glass door. Defendant ended up with the gun and he hit Cartoon with it twice and kicked the victim once as Cartoon and the victim continued to struggle with each other near the front door. Defendant did this to get them to stop. He ran out of the apartment, thinking that the victim was safe, since he had the gun. He ran down the stairs and over the wall into the church parking lot. He did not see Cartoon stab the victim. He denied wearing gloves that night and he said Cartoon had gloves on the entire time he was there.<sup>3</sup> He ran down the street and Cartoon pulled up in his car and picked defendant up. Cartoon had blood on his sweater and he told defendant that the victim's mouth was bleeding. Cartoon wanted the gun, but defendant refused to give it to him, later disposing of it in a dumpster.

Other facts will be stated as they are relevant to the issues discussed.

---

<sup>3</sup> Later, however, he testified that Cartoon put gloves on right before he pulled out the gun.

## 1. *Admission of Evidence*

### a. *Defendant's Prior Offenses*

In his statement to police about a month after the crimes, defendant initially denied any involvement in the crimes. After his interrogator suggested that what happened might have been an accident, defendant eventually agreed that it was. He admitted that Cartoon, a member of the East Coast gang in Los Angeles, who was an acquaintance of one of his friends, told him that the victim, who was a member of the same gang, “was not paying.” Defendant, who was going to the victim’s apartment to buy marijuana, went with Cartoon to the victim’s apartment, where the gang member planned to “tax” the victim, but going there was Cartoon’s, not defendant’s idea. “Taxing” is taking something from someone. Defendant claimed Cartoon “used him” to get to the victim. Things went awry when the victim resisted Cartoon’s efforts to “tax” him by rushing him and tussling with him. Defendant denied that either he or Cartoon went to the victim’s apartment to rob the victim. Defendant admitted hitting the victim’s girlfriend in order to get her to sit down in the living room. Defendant claimed that the victim refused to give Cartoon anything and he held onto Cartoon. Defendant admitted kicking and hitting the victim in order to get the victim to let go of Cartoon. Defendant claimed he helped the girlfriend and her daughter escape. He maintained that Cartoon did not tell him that the latter had a gun, that while struggling with the victim, Cartoon took the gun out and defendant took it from him.<sup>4</sup> Defendant denied knowing where Cartoon got the knife and

---

<sup>4</sup> The following colloquy occurred between defendant and his interrogator,  
*[footnote continued on next page]*

he denied being in the apartment when Cartoon stabbed the victim with it. He explained that Cartoon wanted to “tax” the victim, even though both were members of the same gang, because the victim had not been showing up in the gang’s turf in Los Angeles and members of the gang felt that the victim was neglecting them. He denied that either was wearing gloves that night. He claimed that after going out the front door, he waited by the stairs and when he was halfway or completely down the stairs he saw Cartoon come out with blood on him and he heard the victim say to call 911. At that point, the victim asked defendant why he did it and he told defendant that later he would straighten defendant out for what defendant had done. The victim knew he had been stabbed, but he thought defendant had done it and defendant told him he had not. Defendant said he saw the victim die.

Before trial began, the trial court interpreted defendant’s remarks during the above-summarized statement as constituting an admission by him that he had the intent to rob the victim when he and Cartoon went to the victim’s apartment, and, therefore, intent

---

*[footnote continued from previous page]*

“Q [Interrogator]: It wasn’t planned?”

“A [Defendant]: Not to kill [the victim] . . . .”

“Q [Interrogator]: Just to tax him.”

“A [Defendant]: Or to rob him.”

However, as stated in the text, defendant asserted four times that either he alone or he and Cartoon did not go to the apartment to rob the victim.

The interrogator went on to ask defendant if he and Cartoon were going to “tax” the victim. Defendant’s reply is difficult to discern, but he appears to say that whatever Cartoon wanted from the victim, the latter was not going to give it to him and defendant thought at that moment that the two were going to fight. When the interrogator tried to pin defendant down about what Cartoon intended to do when he went to the victim’s apartment, defendant gave an unintelligible response. Defendant implied that he took the gun from Cartoon so the latter could not shoot the victim.

“does not appear to be at issue . . . .” Based on this conclusion, the trial court ruled that evidence of defendant’s prior commissions and/or adjudications/convictions of armed robberies and commercial burglaries, which the People sought to introduce under Evidence Code section 1101, subdivision (b),<sup>5</sup> to prove defendant’s intent to rob during these crimes, was “unnecessary and thus unnecessarily prejudicial.”

After the close of the People’s case-in-chief, defense counsel announced that defendant would be testifying. Defense counsel moved to exclude defendant’s juvenile adjudications which had occurred in 1995 on the bases that he was 15 years old at the time and 13 years had passed between them and the current offenses. In response, the prosecutor pointed out that defendant was not law-abiding during the 13-year gap and the 1995 crimes were the only armed robberies which defendant committed or of which he had been adjudicated to have committed. The prosecutor pointed out that the evidence of these crimes contradicted defendant’s assertion, during his statement, that he never did anything like what occurred in this case, he never hurt anyone and he did not do that type of thing<sup>6</sup> and he did not know Cartoon had a gun until the latter pulled it out during his struggle with the victim. Defense counsel responded that defendant’s assertions during his statement could be interpreted in a manner that did not support the admission of

---

<sup>5</sup> That subdivision provides in pertinent part, “Nothing in this section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact such as . . . intent . . . other than his . . . disposition to commit such an act.”

<sup>6</sup> Specifically, defendant said, “. . . I ain’t never did no shit like that. I ain’t never hurt nobody in my life. Still ain’t hurt nobody, just [Cartoon] did. But I never did no shit like that. [¶] . . . [¶] I don’t do that type of shit . . . I don’t know . . . that shit.”

evidence of the robberies to contradict them. The trial court ruled that evidence of these crimes contradicted some of the assertions the jury could interpret that defendant made during his statement and “that potentially he would . . . repeat as a witness on the stand.” Therefore, the trial court ruled that evidence of all of defendant’s prior offenses could be introduced to impeach his credibility as a witness and to contradict his pretrial statement and anticipated testimony.

During his direct testimony, defendant admitting being part of five robberies in 1995, some of which “included a gun.” He admitted being convicted of two commercial burglaries in 2003, another in 2005, of conspiracy to commit a crime as a gang member, which, although he was not a gang member, he committed with his two cousins who were, and of a drug offense, for which he was on probation at the time of these crimes. When asked at trial why he did not say during his pretrial statement that the victim did not have enough money for defendant to rob him, defendant said, “. . . [I]f I’m going to do something with a gun . . . or do any type of robbery . . . , I wouldn’t go to somebody [at an apartment], better yet somebody at a house or something. I would try to . . . [get] something way bigger, more . . . with some millions of dollars or something.” When asked why he did not pull the gun on Cartoon in order to save the victim, defendant replied, “. . . I ain’t used to being in that situation. That’s not an everyday situation. You’ve got a split decision to make fast. I just tried to make the quickest one I could, get out the door. It wasn’t my business.”

On cross-examination, the prosecutor asked defendant about his assertion that he was not used to being in a robbery situation where things go bad. The prosecutor asked

defendant whether in the robberies he had been involved with in the past, the victims were more compliant, “especially if a gun is involved.” Defendant’s answer was non-responsive. The prosecutor then asked defendant if he admitted to a probation officer that he committed 13 robberies within a couple of days with several different co-perpetrators. Defendant denied recalling this. The prosecutor asked defendant if he was charged with five robberies during this time. Defendant said he did not know. Defendant admitted committing only two. He said that during one, he approached the victim while the latter was with three other people, pointed a semi-automatic handgun at him and demanded his money and took his wallet, which the victim surrendered. Defendant admitted that during a second robbery, on the same day, he and others followed the female victim from a department store and he demanded her purse while pointing a gun on her and she dropped the purse. Another victim identified defendant, on another occasion in 1995, as the person who approached her vehicle, which was stopped at a stop sign, and pounded on the passenger door with a handgun. Defendant conceded that he had admitted committing this crime. He denied getting into the victim’s car and striking her on the leg before she backed up and crashed her car into a parked camper. We assume that when defendant admitted that one of his previous victims had been physically harmed, he meant this victim. He also admitted that on the same day in 1995, while he was a gang member, he and three others tried to rob young people while one of his cohorts held a gun on them. However, the victims had no money, so the keys to a car owned by one of them were taken, as was the car. Defense counsel objected to none of this testimony on bases not previously asserted.

The prosecutor asked defendant if, during the commercial burglaries he committed as an adult, he always had back-up with him. When the prosecutor began questioning defendant about the details of one of his commercial burglaries, defense counsel objected. Counsel said it was her understanding that the trial court had admitted evidence of the details of the 1995 crimes in order to impeach defendant's pretrial statement and his anticipated trial testimony, but the evidence of his adult crimes had been admitted only as evidence of moral turpitude to impeach his credibility as a witness. The prosecutor asserted that during "most" of defendant's adult crimes, handguns were stolen or he had a handgun in his pocket. According to the People's earlier motion to admit evidence pursuant to Evidence Code section 1101, subdivision (b), during one of the 2003 commercial burglaries, a handgun had been taken and during another defendant had a stolen loaded gun in his pocket. The trial court overruled defense counsel's objection to the introduction of this evidence, saying, "I think it's consistent with [the prosecutor's] theme of introducing evidence that contradicts his claims of not hurting people. Her theory is that the only reason he didn't hurt anyone—it's not that he wasn't prepared to hurt anyone or it's not that he wasn't taking property with something that was capable of hurting someone, rather that it was just no one there offering resistance who needed to be harmed in order to accomplish the theft involved." The prosecutor added, "As well, to establish this record, he is charged with not only the [murder] special circumstance of robbery but two crimes of robbery [involving the girlfriend and her daughter]. He's already denied his intent of why he went [to the victim's apartment]. So showing this prior conduct refutes what he's already testified to and impeaches him in that he

continues to commit burglaries as moral turpitude crimes that corroborate the robbery charges.” The trial court replied, “But we’ve already gotten evidence out of all the robberies. So to the extent that the details of *those robberies* are relevant, they’re relevant only to support [the prosecution’s] theory that he’s lying when he says he’s a peace-loving guy.”

Defendant went on to admit committing a commercial burglary in San Clemente in 2003 and to being convicted for it. He admitted that he and co-participants stole cash but he denied that a gun had been taken. He said he had a stolen loaded gun in his pocket at the time of another commercial burglary in San Clemente. He admitted committing and being convicted of a 2003 commercial burglary, grand theft and theft of a handgun in San Diego County. He admitted that he and co-participants committed a commercial burglary in Point Loma in 2005. He also admitted being convicted of commercial burglary in Merced County and of conspiracy to commit a street crime with a street gang allegation in San Diego County, both in 2005. He conceded that he possessed cocaine in 2008.

Defendant here contends that the trial court erred in admitting evidence of the facts underlying both the 1995 armed robberies and the later commercial burglaries. As to the armed robberies, we disagree with defendant that the facts related to them did not contradict his pretrial statement that he never did anything like what happened in this case, that he never hurt anyone and he did not do that type of thing. The fact that defendant, during his testimony, offered an explanation of this portion of his statement that did not dovetail with the interpretation the jury could reasonably ascribe to it does not mean the evidence was inadmissible. The jury was free to accept defendant’s

interpretation or to give it one that supported the admission of the evidence. The evidence also contradicted defendant's trial testimony that he had never been in a situation like the one in this case and, therefore, he made the impulsive decision not to point the gun at Cartoon and stop the progress of events that resulted in the victim's death, but, instead, to leave the victim to his fate. Finally, it contradicted defendant's trial testimony that he could not have intended to rob the victim and could not have willingly participated in the robberies with Cartoon because if he was going to do a robbery or an armed robbery, he would pick someone who lived in a house or someone with millions of dollars. We also disagree with defendant's assertion that this evidence was not admissible under Evidence Code section 1101, subdivision (b) to show his intent during the crimes, although that did not serve as the basis for the trial court's admission of the evidence.<sup>7</sup> Defendant here asserts that the 1995 robberies were insufficiently similar to the charged crimes to permit admission of evidence of them to show his intent. However, he points to such insignificant differences as the facts that the 1995 robberies did not take place in a home, but in parking lots and streets, and the 1995 crimes involved more than one co-participant, while the current crimes involved one. Defendant also seeks to distinguish the two sets of crimes on the basis that the girlfriend testified that she thought when defendant asked the victim where "it" was, he meant drugs, and what was taken during the robberies were money and a car, the latter, only when there was no money to

---

<sup>7</sup> We disagree with the trial court that defendant's pretrial statement constituted an admission that he intended to rob the victim when he went to the apartment. Moreover, he emphatically denied having such intent during his testimony. (See fn. 4, *ante*, pp. 12-13.)

be surrendered. However, the girlfriend's testimony was impeached by other statements she made that defendant demanded money. More importantly, the girlfriend testified that Cartoon demanded money from the daughter.

Defendant testified that he had committed only two of these prior robberies. In an attempt to refresh defendant's recollection that he, in fact, had committed five, the prosecutor asked defendant about the details of these crimes. Therefore, that evidence was admissible for the additional reason that defendant attempted to mislead the jury by minimizing the facts. (See *People v. Robinson* (1997) 53 Cal.App.4th 270, 282, 283.)

As to the evidence of the commercial burglaries, we agree with defendant that the trial court's reason for admitting them—that they showed that when defendant is not confronted with resistance to his taking property, he does not use force and this contradicted his pretrial statement or his trial testimony that he doesn't do the type of thing he was alleged to have done in this case—is insupportable. However, the facts underlying these convictions was minimal compared to the impact of the evidence of his 1995 armed robberies. Moreover, they contradicted his direct testimony at trial that he left the gang and “gang related stuff” in 1998 “to get myself together and get my life back on track” and lead a better life. He admitted that he committed one of his 2003 commercial burglaries with a Project Crips gang member and the one in Point Loma in 2005 with his cousins, who were Project Crips gang members. Additionally, defendant testified that the profits from the burglaries gave him the money he had, which caused his friends to call him C-Note, the latter of which he admitted during his pretrial statement.

Therefore, the evidence was relevant to contradict or explain statements defendant had made.

b. *Gang Evidence*

As stated before, during direct examination, defendant testified that he had been a member of Project Crips from the time he was 12 until 1998, when he was 18, when he left to pursue a better life. However, after 1998, he “still found himself associating with [Project Crips members] because they’re family and [he] grew up with them[.]” He admitted being convicted in 2005 of a “conspiracy to commit an offense as it relates to street crimes . . . [¶] . . . as a gang member” even though he was not an active one at the time, which he committed with his cousins who were active members. He said that he left the victim’s apartment after getting the gun while Cartoon and the victim were still struggling because “when it comes to two people from the same . . . hood, . . . you try to not mix up any because you can get yourself in trouble with the people or get yourself hurt.” Defendant also testified, during direct, that he did not call the police and tell them that Cartoon was the person who had stabbed the victim after learning that the victim had been stabbed and was in the hospital and after learning the victim had died because he “grew up in an area where . . . [if] you [involve the] police [in such things], [gang members] don’t only take it out on you, they take it out on your family.” He had the same excuse for lying during his pretrial statement and initially claiming he did not know the identity of the gang member who killed the victim and had no way of finding out who he was so he could tell the police. He also asserted during the statement, and repeated when he testified on direct, that if you associate with gang members, as he did, and they

commit crimes, “you are going to get in trouble one way or the other.” As to why he did not assume that Cartoon went to the victim’s apartment for any sinister reason, defendant testified, on direct, “I should have thought about it, but me judging a person because he’s around my friends and he’s on a street [(defendant claimed he met Cartoon shortly before leaving for the apartment with him while Cartoon was hanging out on the street in front of defendant’s mother’s house in the company of defendant’s friends and cousins)<sup>8</sup>] that I basically grew up on all my life, I figure he’s cool. If they allow him down here, he’s . . . got to be cool. So I didn’t think twice.” There were many references to defendant’s involvement with the Project Crips in his pretrial statement.

During defendant’s cross-examination the prosecutor sought permission to question him about his family, through their ties to the Project Crips, running drugs in the area. The prosecutor represented, as an offer of proof at sidebar, that defendant was a member of the Butts, Butler and Burnett families and they are members of Project Crips, and they run the area of Rubidoux in which defendant lived for over 20 years and drugs in that area. The prosecutor asserted that this evidence went to the issue of taxing, in that the fact that defendant or his family runs the area gave him a motive to tax someone who was not in his family or a Project Crips member and who was encroaching on the drug business in the area. The prosecutor said defendant committed all his past crimes with members of these three families. Defense counsel objected as follows, “It’s collateral. It’s 352. It’s prejudicial. How far into his family are we going to get? . . . I don’t have

---

<sup>8</sup> On cross-examination, he admitted that some of these were gang members.

any information about the Butts or the Butlers or who's involved with what and what they do. . . . [¶] . . . [¶] . . . [A]ll it does is prejudice the whole case. [¶] It's collateral. Now, we're getting into his family and the history of Butlers and the Butts and how horrible or how they're into crimes, and it's just going to be guilty by association. [¶] . . . Now it's not [Project Crips]; it's the Butler family and the Butts family and he went [to the victim's apartment] because of the family. Or did this guy go over to tax because of the East Coast Crips. . . . I think it's prejudicial." The trial court ruled that the prosecutor could question defendant about the family relationships between defendant and the co-perpetrators of his previous crimes and whether those people are members of the Project Crips gang and "explore his relationship with . . . other members of the Butts and Butler family . . . [and] . . . whether or not the Butts and Butler family control the Project Crips."

On cross-examination, defendant was asked about a reference he made to two of his cousins during his pretrial statement. He explained that he committed crimes with them in San Diego, but had not since then. He said that some of the people with whom he committed past crimes were gang members and some were not. He said that he was a member of the Butts family, he denied being related to the Butlers and the Burnetts, but he said he knew the Butlers. He testified that the Butts and Butlers live in the Rubidoux area "mostly" and several of his family members were in Project Crips. He reiterated his direct testimony that he was no longer in the gang, but hung out with gang members because they were part of his family "and where [he] live[s]." He admitted that one of his co-participants in the second San Clemente commercial burglary in 2003 was a

member of Project Crips. He admitted that he had been with his cousins, who were Project Crips members, during the 2005 commercial burglary in Point Loma, and as a result of that crime, a street gang allegation was found to be true. He said that the Rubidoux area is Project Crips turf, but the area of Rubidoux where the victim lived was not, but was run by the Hispanic gangs. However, he acknowledged that a police detective had testified that West Side Rivas, a Hispanic gang, and Projects Crips controlled that part of Rubidoux. He later admitted that the two gangs claim the same area of Rubidoux and they are rivals, the latter of which he had also said during his pretrial statement. He testified that the Project Crips, including the Butts and the Butlers and the cousins with whom he committed the 2005 Point Loma burglary, had “certain ties to the area.”<sup>9</sup> He said there were several Butts and Butlers in the victim’s area of Rubidoux. He admitted that he had done other crimes with another Project Crips member, without specifying when. After initially denying it, he admitted asking that he be housed with the PJ division of the Project Crips in jail following his arrest in this case.

---

<sup>9</sup> The following colloquy occurred between the prosecutor and defendant,  
“Q. [THE PROSECUTOR]: As a member, whether it’s prior or current, of the Project Crips, you are aware of who . . . are the members and who runs the area that [the Project Crips] control, correct? [¶] . . . [¶] . . . The [Project Crips] do have certain ties to the area, don’t they?  
“A. [THE DEFENDANT]: Yes.  
“Q. [THE PROSECUTOR]: And that includes the Butts and the Butlers; correct?  
“A. [THE DEFENDANT]: That’s correct.  
“Q. [THE PROSECUTOR]: Several of your family; correct?  
“A. [THE DEFENDANT]: Yes.  
“Q. [THE PROSECUTOR]: Including [your two] cousins . . . ?  
“A. [THE DEFENDANT]: Yes.”

However, he denied making this request because he was “still associating with the PJ Crips, they’re your family, they’re your friends, they’re your co-conspirators.” He denied being aware that taxing occurs in Project Crips turf or in Rubidoux. He said that the victim was a member of East Coast. He admitted that he said during his pretrial statement that he stopped hanging out with his gang in 2005. He explained that he stopped gang-banging in 1998, and then stopped hanging around gang members when he got the enhancement in 2005 for doing the burglary with his two gang-member cousins. He denied that he was hanging with gang members at the time of these crimes. He admitted saying during his pretrial statement that when one runs with gang members, anything can happen. He said he learned this and other rules on the street and the rules of the gang world while being entrenched in the latter since age 12. However, he denied knowing that taxing would occur when he went with Cartoon the night of the crimes. He said it made no sense that a gang member from Los Angeles would tax someone in Rubidoux. He admitted that it was common for gang members to carry guns, especially when they are going to commit crimes, but he could not say if it surprised him that Cartoon had one that night. He said that in the gang community, it can happen that a gun that has been used in a crime is circulated by passing it off to someone else, which followed defendant’s denial that he did not put the gun in a trash bin. Defendant admitted that he had been from a gang that rivaled the victim’s gang and that he had said in his pretrial statement that “there was no fucking love” between the two and the victim did not care anything about him.

Defendant claims the trial court abused its discretion in ruling that evidence of the family relationships between defendant and the co-perpetrators of his priors and their membership in Project Crips and his relationship with members of the Butler and Butts family and whether they controlled Project Crips was admissible. He asserts that through that cross-examination, “the prosecut[or] s[ought] to suggest that [defendant] was ‘entrenched’ with the gang, that his family ran the gang, that his family ‘ran’ drugs and ‘control[led]’ the territory [the victim] was dealing [marijuana] in, and that [defendant] acted as his family’s attempted [*sic*] to ‘tax’ [the victim] as a henchman for his family-gang.” In so asserting, defendant grossly overstates the testimony the prosecutor elicited from defendant during her cross-examination of him, which has been summarized above. Other than reiterating defendant’s pretrial statement and direct testimony that he had family members in the Project Crips gang and he continued to commit crimes with them because they were family members, whatever the prosecutor hoped to prove further concerning the Butler, Butts and Burnett families and their connection to Project Crips fell flat. Defendant did not testify that his family ran the gang or that they controlled the area where the victim sold marijuana or that defendant acted as the henchman for his family in taxing the victim.<sup>10</sup> Defendant’s assertion that this evidence “raised an

---

<sup>10</sup> Defendant concedes that what the prosecutor did “was less successful” in establishing whether the Butts and the Butlers ran the area that the Project Crips controlled, but her questions whether the Butts and Butlers ran Project Crips turf and whether defendant (or his family) controlled that area, referring to RT 495 and 514, were inflammatory. The first question was never asked. (See fn. 9, *ante*, p. 24, for the actual questions and answers on Reporter’s Transcript p. 514.) The second question was never  
*[footnote continued on next page]*

inference that [defendant] is a person of bad character or criminal disposition because of his association with family members, who are gang members” is absurd. There was a startling amount of evidence about defendant’s character without any reference whatsoever to his family members.

To the extent defendant may also be complaining about the admission of any gang evidence the prosecutor brought out during her cross-examination of defendant, we cannot ignore that the story of these crimes, whether it be the defendant’s versions or the girlfriend’s and her daughter’s, can only be explained in terms of their gang contexts. This evidence was also admissible, as already discussed, to impeach and/or explain statements made by defendant. Finally, defendant did not object to all of the gang evidence the prosecutor elicited, but only to that related to defendant’s family, their ties to the gang and whether they controlled the area or drugs in the area. Therefore, he waived all other matters. (Evid. Code, § 354.)

*c. Harmless Error*

Finally, we agree with the People that it is not reasonably probable that defendant would have enjoyed a different outcome even if the evidence of defendant’s priors and the particular gang evidence objected to by the defense below had been excluded.

(*People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant’s version of the crime in his pretrial statement differed in significant aspects from his version at trial and he omitted

---

*[footnote continued from previous page]*

answered, after being objected to by defense counsel. There was no evidence in this regard about which defendant can now complain.

many crucial facts from the pretrial statement that he later testified to at trial, suggesting that he manufactured them. While defendant did his best on the stand to attempt to explain these discrepancies and omissions, the jury was free to, and obviously did, reject his explanations. Defendant's own trial testimony was, at times, contradictory. Additionally, some aspects of both his accounts of the crimes made absolutely no sense whatsoever, while others were contradicted by the physical evidence presented. Also telling was defendant's words to his girlfriend and to himself just before he began to admit his involvement in the crimes during his pretrial statement.<sup>11</sup> Finally, both versions were significantly contradicted by the testimony of the girlfriend and the daughter. Therefore, any error in admitting this evidence does not require reversal of his convictions.

## 2. Sentencing

### a. *Enhancement for Knife Use*

The trial court imposed a 10 year enhancement for defendant's use of a gun and a one year enhancement for his use of a knife as to all three offenses. (§§ 12022.53, subd. (b) & 12022, subd. (b)(1)).<sup>12</sup> The parties agree that only one weapon use enhancement may be imposed. Therefore, we will direct the trial court to stay the knife use enhancements as to all three offenses.

---

<sup>11</sup> He told his girlfriend that they had him for murder and he would spend the rest of his life in prison. He repeated this to his interrogator. He told himself that he had had a good life and "[T]his be a wakeup to anybody to know they're gone."

<sup>12</sup> In his brief, defendant switches the two.

b. *Concurrent Terms*

At the beginning of the sentencing hearing, the trial court stated its tentative decision to impose a term of life without the possibility of parole for the murder in addition to ten years for the gun use and one year for the knife use. The court went on to say, “It would be the [c]ourt’s intention to sentence the defendant on Counts 2 [(the robbery of the girlfriend)] and 3 [(the home invasion robbery of the daughter)] concurrently . . . [i]n light of the fact that they . . . both involve the same robbery, for which the special circumstance was found true on [the murder], so there would be 15 year[s]—the [c]ourt would impose the midterm, plus the ten-year enhancement [for the gun use], plus the one-year enhancement [for the knife use], for 15 years on both Counts 2 and Count 3 to be run concurrently with Count 1.” The trial court ultimately sentenced defendant for the murder, its enhancements and the two prison priors as it had predicted. However, the court said as to the remaining convictions, “The [c]ourt selects Count 2 *as the principal term*, . . . in light of the fact that there . . . are other counts that could be served consecutively but the [c]ourt intends to have served concurrently.” The court then imposed, for Count 2, the midterm of four years, 10 years for the gun use, one year for the knife use and two years for the two prison priors. For Count 3, the court imposed a midterm sentence of four years, plus 10 years for the gun use and one year for the knife use, noting that it would not impose two years for defendant’s prison priors “twice.” It ran this total term concurrently with the sentence on Count 2. When later prompted by the prosecutor as to whether the terms were to be run concurrently or consecutively, the trial court said, “The determinate terms will be served concurrently with the

indeterminate term. Or, to put it differently, the indeterminate term shall be served concurrently with the determinate terms. Either way.”

The amended indeterminate abstract of judgment shows that the life term was imposed concurrently and it lists the terms imposed for the gun- and knife-use enhancements, but not the prison prior enhancements. It notes that an additional determinate term was imposed and states, defendant “[s]entenced . . . for a determinate sentence of 17 years . . . plus indeterminate sentence of [l]ife without possibility of parole.” The amended determinate abstract of judgment shows that a four year term was imposed for count 2, with a 10 year enhancement for the gun use and a one year enhancement for the knife use, and concurrent terms of the same for count 3, plus two one year enhancements for the two prison priors, for a total determinate term of 17 years.

The parties agree that it was the trial court’s intention to run the terms imposed for counts 2 and 3 concurrently with the term for count 1 and the amended abstracts of judgment should be amended to reflect this fact. The parties further agree that the amended determinate abstract should be amended to show that the enhancements on count 1, including defendant’s prison priors, which total 12 years, are to run consecutive to the life without parole sentence and are to be served before defendant begins his life without parole sentence.

*c. HIV Testing*

The parties agree that the trial court erred in ordering defendant to undergo HIV testing. Therefore, we will direct the trial court to strike this order from the minutes of the sentencing hearing (the order does not appear in the amended abstracts of judgment).

## **DISPOSITION**

The trial court is directed to stay the knife-use enhancement as to all three offenses and to amend the amended abstracts of judgment to reflect this. The trial court is additionally directed to amend the amended indeterminate abstract of judgment to include the two prison priors, for which one-year terms were imposed for each, to omit the references to the life without the possibility of parole sentence and the terms for the gun-use enhancement as running concurrently and, on the second page, to note that the determinate term of 12 years is to be served before and consecutive to the term of life without the possibility of parole. Finally, the trial court is directed to amend the amended determinate abstract of judgment to omit its reference to the prison prior enhancements and to indicate that the sentence for count 2 and its gun-use enhancement are to be served concurrently to the sentences for count 1 and count 3. The minutes of the sentencing hearing are to be amended to reflect all of these changes. We reverse the trial court's order that defendant undergo HIV/AIDS testing and we direct the trial court to omit the reference in the minutes of the sentencing hearing to it. If defendant has already been tested, the court directs the trial court to order the test results destroyed

and any copies of the test results already provided to any person or organization destroyed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICAL REPORTS

RAMIREZ  
P.J.

We concur:

RICHLI  
J.

MILLER  
J.