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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.

DAVID GOMEZ et al.,

Defendants and Appellants.

E057193

(Super.Ct.No. FVI1000420)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed in part, reversed in part, remanded with directions.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant David Gomez.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant Edgar Gutierrez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants David Gomez and Edgar Gutierrez were charged and convicted of the special circumstance murder of Jesus Rocha. (Pen. Code,¹ §§ 187, subd. (a), 190.2, subd. (a)(1).) The jury further found true the allegations that defendant Gomez personally used and discharged a firearm, causing death (§ 12022.53, subds. (b), (c) & (d), that a principal personally used and discharged a firearm, causing death (§ 12022.53, subds. (b), (c), (d), & (e)(1)), and that both defendants were accomplices to the murder for financial gain (§ 190.2, subds. (a)(1), (c)). Both defendants were sentenced to life without the possibility of parole, and defendant Gomez also received a consecutive 25 years to life. Both appeal.

Defendant Gomez contends: (1) his counsel was ineffective; (2) the prosecutor committed misconduct; (3) the trial court erred when it instructed the jury with CALCRIM No. 335; and (4) the case should be remanded for resentencing. Defendant Gutierrez contends: (1) the trial court erred in refusing to instruct the jury on accomplice testimony; (2) his counsel was ineffective; (3) the cumulative error doctrine applies; and (4) the abstract of judgment must be amended to reflect the oral pronouncement.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

I. STATEMENT OF FACTS

On December 19, 2009, the San Bernardino County Sheriff's Department became involved in the investigation of the murder of Jesus Rocha, Sr. (the victim, also known as Don Chuey). The victim's body was found buried in a shallow grave at the Wheeler Road Ranch. He died from firearm (shotgun and handgun) injuries of the head, chest and abdomen. There were six gunshot injuries, three from a shotgun blast. According to the coroner, "the amount of damage caused to the head [of the victim] was typical of contact to shotgun injuries." The victim was shot in the abdomen first, and then in the head. The coroner opined that the shotgun shot to the head was a contact wound, because the "plastic cup in which the bird shot is encased in the cartridge of the shotgun cartridge" was "actually embedded in the base of the skull." Detectives found a pickax, posthole digger, and a shovel. Gloves were also collected and analyzed for DNA evidence. DNA samples were taken from defendant Gomez. Forensic DNA analyst Audrey Delgado compared the DNA samples from the gloves with the DNA samples from defendant Gomez and testified that they matched.

There were no leads on suspects until Jose Sosa called Detective Scott Landen. Because of Sosa's telephone call, detectives discovered the identities of the four individuals responsible for the victim's murder, and those individuals were charged with the applicable crimes. Two entered into plea agreements and two faced trial.

The victim lived in a trailer on a 10-acre chicken ranch (Wheeler Road Ranch) that he owned with his cousin, Marco Rocha, in Helendale. Nicholas Leon (also known as

Bolas) lived in another trailer on the ranch in exchange for feeding the animals. Hector Villanueva (also known as Bootie and Nalguitas) lived in Los Angeles, on the same block as defendant Gomez (also known as Tamalero), who was “like family” to Villanueva. In 2005, Villanueva met defendant Gutierrez (also known as Super Changa and/or Super Chang) at a cock fight and the two became friends. On occasion, defendant Gutierrez would pay Villanueva to go to the ranch to feed the chickens and clean the rooster cages. Villanueva introduced the parties to one another. Specifically, in December 2009, Villanueva introduced Oscar Acosta (age 17) to defendant Gutierrez and defendant Gomez to Sosa. Sosa knew Acosta and Villanueva from playing football together.

A. Sosa’s Testimony

Sosa testified that Acosta, defendant Gomez,² and Villanueva spoke to Sosa on Sunday night, asking if he “wanted to do a job,” i.e., “kill somebody” the next day. Initially Sosa declined but asked “who is it,” and was told that it was “some guy that . . . owed [defendant] Gutierrez some money.” The “guy” was identified as Bolas. Acosta informed Sosa that they were “going to go and act normal, and that they had been to that place before, so they were not going to suspect nothing and . . . they were going to take Bolas in the trailer and ask him if he could use the bathroom, and they were going to kill him in the trailer.” Acosta said they were going to shoot Bolas.

On Monday, Acosta and defendant Gomez picked up Sosa around 9:30 or 10:00 a.m. They drove to defendant Gomez’s house, where they “loaded up the guns,” putting

² This was the first time that Sosa met defendant Gomez.

them in the trunk. The trio then went to Villanueva's house to get a key to the ranch. Sosa learned they were each going to get paid \$1,000, and all he had to do was "be a lookout." He brought rubber gloves but no weapon. The three drove to the Wheeler Road Ranch. Defendant Gomez was the driver. Before reaching the ranch, they stopped so that defendant Gomez could load and fire a few shots from the shotgun. Because defendant Gomez did not know how to load the weapon, Sosa did it for him. Acosta had the revolver. Sosa learned that two people were living at the ranch, but Bolas was the target.

When they reached the ranch around noon, no one was there. Defendant Gomez and Acosta told Sosa, who was standing outside the gate, to watch for Bolas's van and let them know when it arrived. Meanwhile, defendant Gomez dug a hole, and then he and Acosta test fired the weapons. The three waited for a few hours. During the wait, defendant Gomez constantly spoke on the phone with defendant Gutierrez.

After 4:30 p.m., the victim arrived at the ranch. Defendant Gomez and Acosta went to meet him, while Sosa waited in the back. After approximately 15 minutes, Sosa heard them approaching. He heard the victim say "I can't be too far from my trailer." Defendant Gomez kept walking towards the car and told Acosta to bring the victim. Defendant Gomez pulled a gun out of the car and the victim panicked and said that he did not know what was going on. Defendant Gomez and Acosta took the victim into a horse stable area, and the victim started to resist. Acosta pistol whipped the victim and forced him to continue to walk. The victim repeatedly said that he did not "have anything to do

with this.” Sosa heard the victim cry “no; please; please,” followed by gunshots and silence. The first sound was from a shotgun which defendant Gomez used. Sosa heard enough shots that would be consistent with both defendant Gomez and Acosta unloading their weapons.

As Acosta approached, Sosa asked what had happened. Acosta replied “nothing; nothing.” Sosa went to the area where the victim was taken and saw defendant Gomez covering the victim’s body with dirt. Sosa helped because he wanted to leave. Acosta used Sosa’s gloves and defendant Gomez used both latex and black gloves. After leaving the ranch, Sosa got the gloves and shotgun shells, made a hole on the side of the road, and buried them. Defendant Gomez stopped before train tracks and put the license plate back on the car they were using. Acosta continued to assure Sosa they would get paid. They stopped at a Subway to eat. Sosa was dropped off at his house around 7:30 or 8:00 p.m.

Afterwards, Sosa’s calls and texts to Acosta about the money were unanswered. In February 2010, Sosa contacted Sergeant Scott Landen and provided him with names and nicknames of the men involved in the murder of the victim. After speaking with Sosa, deputies contacted Acosta. Based on information provided by Sosa, deputies unearthed the buried gloves and shell casings. Defendant Gomez’s DNA was found on a pair of black knit gloves but not on the latex gloves that were also recovered. Sosa pled guilty to voluntary manslaughter, kidnapping, and a weapons charge. He received a sentence of 13 years 8 months and agreed to testify at trial.

B. Acosta's Testimony

Acosta also pled guilty to killing the victim and received a sentence of 35 years to life. As part of his plea bargain, he agreed to testify truthfully. He testified at trial that Villanueva had invited him to go to rooster fights, and they rode with defendant Gutierrez. This was the first time he had met defendant Gutierrez. The group returned to Los Angeles around 4:00 or 5:00 in the afternoon and went to a home on 56th and Broadway, where they relaxed. Defendant Gomez, who was 16 years old, arrived later. While at the home, defendant Gutierrez told Acosta, Villanueva, and defendant Gomez that he wanted them to kill someone at the ranch. He offered to pay them each \$5000. Defendant Gutierrez said that he wanted evidence of the kill, specifically, a finger from the victim. The group left the home and went to Villanueva's home, where they retrieved guns from a van. They later drove to a restaurant to eat, and then Acosta was dropped off at home.

Acosta could not sleep because he was thinking about what they were going to do. Thus, he called Sosa and asked him to go to the ranch, because Acosta "needed somebody to help [him] feel more comfortable, protected." Although Acosta testified that "we" went to Sosa's house that night, after the restaurant, he claimed he did not tell Sosa about the murder until the next day when they picked him up to drive to the ranch. Acosta needed someone to "have [his] back," but he knew that if he "would have told [Sosa] it was for a murder, he wouldn't have gone.

Defendant Gomez picked up Acosta and Sosa. The plan was to wait for the victim, shoot him, and bury him. Acosta did not know the name of the victim or what he looked like. Upon arriving at the Wheeler Road Ranch, defendant Gomez and Acosta began digging the hole. After digging the hole, they waited, talking and firing guns. They had three guns: a shotgun, a .38-caliber revolver, and a .22-caliber pistol or small gun. Acosta was in possession of the .38-caliber revolver, while defendant Gomez had the shotgun.

When the victim arrived, defendant Gomez started talking to him. Defendant Gomez signaled Acosta to hit the victim in the head with the gun. When the victim fell, the two picked him up and began dragging him towards the hole. The victim was “pushing and shoving and screaming.” Acosta held onto the victim as defendant Gomez went back to the car to get the shotgun. Acosta was “bear hugging” the victim. Defendant Gomez approached from behind and told Acosta to move out of the way. By the time Acosta moved, he heard the first shot. Defendant Gomez shot the victim near his left rib cage and looked at Acosta. Then Acosta shot the victim. Both Acosta and defendant Gomez fired more than once. When they stopped firing, Acosta saw the victim on the ground and ran away. He later helped defendant Gomez and Sosa carry the victim to the hole. Acosta viewed a photograph of the deceased victim and confirmed that it depicted what he and defendant Gomez had done to the victim.

The three left the ranch, stopped by some train tracks while defendant Gomez put the plates back on the car, buried their gloves and shells, and stopped at Subway. After

dropping off Sosa at his home, the other two went to the house on 56th and Broadway, where they met with Villanueva and defendant Gutierrez. Defendant Gomez told defendant Gutierrez and Villanueva about the murder. After the conversation was finished, the four went inside the garage. Defendant Gutierrez closed the garage door and took out some money. Acosta could not recall how much money he received; however, he did receive more later on. When he was interviewed by an officer, Acosta said that he could make \$5,000; however, part of his payment was a car. Although he promised Sosa money for helping with the murder, Acosta never gave Sosa any money.

C. Villanueva's Testimony

Villanueva was called to testify; however, he could not remember anything involving the victim's murder. The prosecutor played the tape of his interview with the detectives. Playing the tape refreshed Villanueva's memory. He recalled picking up a shotgun from the Wheeler Road Ranch and giving it to defendant Gutierrez, who placed it in his van. Although Villanueva knew that defendant Gutierrez gave defendant Gomez and Acosta a shotgun, he could not confirm that it was the same shotgun he had picked up from the victim. Villanueva was present when defendant Gutierrez gave defendant Gomez and Acosta money; however, Villanueva did not know why the money was being given to them. It could have been for work the two did on the ranch. On cross-examination, defendant Gutierrez's counsel confirmed that Villanueva had entered into a "deal" that provided that anything he testified to in court would not be held against him. Villanueva stated that he had not heard defendant Gutierrez order "anybody to kill

anybody.” He claimed that defendant Gutierrez was “drunk that night.” Villanueva also denied giving anyone a key to the ranch. On cross-examination by defendant Gomez’s counsel, Villanueva stated that defendant Gomez was a “pretty slow person” who does not remember much and “does crazy stuff.”

Villanueva’s sister, Jessica, also testified. The prosecutor focused his questions on a night in December 2009 when Acosta, Villanueva, and defendants were together and she joined them to go out to eat at a restaurant near the Nokia Theater. She confirmed that defendant Gutierrez owned a white van that was at their home.

D. Defendant Gomez’s Interview

Detective Landen provided a summary of defendant Gomez’s interview on March 5, 2010. Also, the jury heard the recording of part of the interview.³

The prosecution rested its case, and counsel for defendant Gutierrez chose not to present any evidence. Counsel for defendant Gomez offered the testimony of defendant Gomez’s friends and family members. Counsel also called defendant Gomez to the stand. Erika Cortes was present during defendant Gomez’s arrest in December 2009. She said the officers knocked him down and punched him several times, even though he was being cooperative. Sister Catalina Gomez testified that defendant Gomez was “slow minded” and that he suffered from memory loss. Defendant Gomez’s mother, Modesta

³ Our recitation of the facts intentionally omits the contents of defendant Gomez’s confession interview, along with his trial testimony; however, both will be included where relevant to our analysis of the issues raised.

Bareto, testified that her son was in special education classes in school and that he had memory problems. When he was two years old, defendant Gomez had fallen out of a taxi, landed on his head, and suffered injuries over his head and body.

II. DEFENDANT GOMEZ'S APPEAL

A. Ineffective Assistance of Counsel (IAC)

Defendant Gomez contends his counsel was ineffective by failing to present evidence at the hearing on his suppression motion that showed (1) the police beat him when he was arrested, and (2) he invoked his *Miranda*⁴ rights prior to his confession. He further faults his counsel for failing to move to sever his trial from that of his codefendant's trial, arguing that redaction of his interview with police to accommodate his codefendant eliminated his defense. He asserts that his counsel's deficient performance created a conflict of interest, rendering counsel unable to provide conflict-free advice as to whether or not defendant Gomez should testify in his own defense. More specifically, he challenges his counsel's decision to call him to the stand to testify on his own behalf.

Each of defendant Gomez's claims of IAC stems from the admission of his interview confession. For example, he argues that if his confession had been suppressed because either his *Miranda* rights were violated or it was the result of detectives beating him, then he never would have testified, there would have been no need to seek a redaction of the interview confession, and there would have been no conflict of interest.

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Accordingly, if we conclude that, but for defense counsel’s ineffective assistance defendant Gomez’s interview confession would have been suppressed, then our conclusion disposes of defendant Gomez’s remaining claims of IAC. We therefore begin with the claim that defense counsel was ineffective in failing to present sufficient evidence at the suppression hearing to support a finding that defendant Gomez had invoked his *Miranda* rights prior to his confession.

1. Standard of Review

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. [Citations.]” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; see also *People v. Jennings* (1991) 53 Cal.3d 334, 357.) “Under this right, the defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake. But he can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. [Citations.]” (*People v. Ledesma, supra*, at p. 215.)

To prevail on a claim of IAC, a criminal defendant has the burden of proving (1) counsel’s deficient performance under an objective standard of professional reasonableness, and (2) prejudice to the defendant under a test of reasonable probability. (*Strickland v. Washington* (1984) 466 U.S. 668, 690-691 (*Strickland*); *People v. Mayfield* (1993) 5 Cal.4th 142, 175.)

A criminal defense trial attorney's performance was deficient if his "representation fell below an objective standard of reasonableness" in the light of prevailing norms of professional practice. (*Strickland, supra*, 466 U.S. at p. 688; see *People v. Ledesma, supra*, 43 Cal.3d at p. 216). For us, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Strickland, supra*, at p. 688.) Our review of counsel's performance is "highly deferential" (*id.* at p. 689), and "there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 437.) The burden of overcoming this presumption "is difficult to carry on direct appeal " "Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." [Citation.]" (*Ibid.*) To show that counsel's failure to raise certain issues at the suppression motion was the product of incompetence, the defendant must show that the motion would have been granted.

2. *Motion to Suppress*

Defendant Gomez was arrested on March 3, 2010. During his interrogation, he confessed to shooting Rocha. Prior to trial, defense counsel moved to suppress the confession on the grounds that: (1) defendant was not advised of his right to remain silent; (2) if he was advised, he did not understand his right; and (3) the arrest was unreasonable. On appeal, defendant Gomez contends that his counsel was ineffective at

the suppression motion by failing to present evidence that (1) the police beat him when he was arrested, and (2) he invoked his *Miranda* rights prior to his confession. We begin with the question of whether defendant Gomez invoked his right to remain silent.

(a) The hearing

At the suppression hearing on November 29, 2011, the prosecutor called Detective Niles to testify regarding his March 3, 2010, interview with defendant Gomez. The detective advised the defendant of his *Miranda* rights, asked if he understood those rights, and then asked if he was willing to talk. Detective Niles testified that defendant Gomez “kind of muttered to himself and said, Yeah, but I got nothing to say.” The detective believed that defendant Gomez was “attempting to minimize his role in this crime and ultimately not wanting to elaborate on what his true role was in committing this murder.” The detective then testified that he told defendant Gomez “that [Gomez] had some questions for [the detective], and that [the detective] would answer them for him.” On cross-examination, defense counsel asked if defendant Gomez indicated that he did not want to talk, and the detective replied, “No, sir.” Admitting that the defendant said, “I don’t have nothing to say,” the detective added that defendant Gomez “at no time ever said he did not want to talk to me.” Defense counsel asked if the detective and another detective continued to interrogate the defendant, and Detective Niles stated that the interview continued.

Defense counsel called defendant Gomez, who testified that he was 16 years old when he was arrested and that he had attended “special-ed” classes since the fifth grade.

He added that he did not remember much after his initial arrest because he had been drinking; however, he did remember “getting hit by the cop.” Cross-examination and further redirect revealed that defendant Gomez has a learning disability and, when he was a baby, fell “off a taxi,” landed on his head, suffered several injuries, and had to be taken to the hospital.

Both sides submitted without argument. The trial court observed that defendant Gomez “may have . . . subnormal ability to understand but doesn’t sound like he’s got the inability to understand.” The court made no comment on the passing reference to getting “hit by the cop” during his arrest. Rather, it focused on the waiver of the defendant’s right to remain silent, stating: “The detective has indicated that [defendant] Gomez was informed of his rights: That he said he understood them, and he waived those rights. The detective’s impression was that he never said, I don’t want to talk to you. He said, I don’t have anything to say but understood the rights, was willing to talk but simply—the comment I don’t have anything to say was an attempt to minimize his involvement, which the detective took as an understanding voluntary waiver.

“The Court thinks that that’s a reasonable conclusion for the detective to have reached. It sounds like [defendant] Gomez was sufficiently aware of his circumstances to wish to minimize his involvement, which I understand later he changed his mind and came around to the point—you used the term confession. I don’t know whether there’s a confession. That’s something that I’ll reserve judgment on, but he made admissions. I think that’s clear and that’s why [the prosecutor] is offering this statement.

“I’m going to find that [defendant] Gomez’s statement was free and voluntary and rule that it is admissible.”

Careful review of the transcript of the recording of defendant Gomez’s interview leads us to conclude otherwise. According to transcript of the recording,⁵ the following transpired at defendant Gomez’s interview:

“NILES: . . . Dave like I told you I know you got questions and-and I want to answer the questions I can for you. But given the way this all unfolded tonight I—I have to read you your rights before I can explain anything to you okay. [The detective reads defendant Gomez his rights.] Do you understand the rights I’ve just explained to you?

“GOME[Z]: Yeah.

“NILES: Do you understand the rights?

“GOME[Z]: (door shutting and I can’t hear answer)

“NILES: With these rights in mind are you willing to talk to me?

“GOME[Z]: I don’t got nothing to say.

“NILES: Well, I’m—I’m sure you got questions though. And I want to be [*sic*] answers these questions for ya, okay.

“GOME[Z]: I was just wondering why they went to go [*sic*] me you know?

⁵ “Where [as here] there is no conflict in the evidence, there is no requirement that the reviewing court view [a *Miranda* ruling] in the light most favorable to upholding the trial court’s determination. [Citations.] [Citation.]” (*People v. Carey* (1986) 183 Cal.App.3d 99, 104 (*Carey*).)

“NILES: Well I’ll—I’ll get you up [to] speed a little bit. We’re investigating a crime that happened out in the desert, northern San Bernardino County, okay. . . . You’re just one of many people we’re talking to but we’re at the point now we need to talk about this crime and I’m really hoping you’ll be an honest person with me. Let me know what happened.

“LANDEN: Do you guys

“NILES: This is Detective Landen.

“LANDEN: What’s up man?

“NILES: What are you thinking?

“GOME[Z]: I don’t got nothing to say.

“NILES: Do—do you understand when I told ya like I said we’ve been, we’ve been working on this case for awhile now. We’ve talked to a lot of people and we’ve collected quite a bit of evidence, okay.

“GOME[Z]: Yes.

“NILES: We’re not coming at you at the beginning of this investigation asking what happened. We’re coming at you at the very end of the investigation, now knowing what happened. We’re giving you an opportunity to tell your side of the story.

“GOME[Z]: I got no story. I got nothing to do.

The detectives then informed defendant Gomez about the murder and continued to provide him with more information about it. Detective Niles displayed items from the

murder and told defendant, “Your DNA is gonna come back on that.” The following exchange occurred:

“NILES: “And the District Attorney and the jury is gonna hear, you shake your head, you say wasn’t my DNA, what is your DNA [defendant Gomez], this. It’s 100% your DNA. . . . [T]his is your last chance to tell your side of the story.

“GOME[Z]: I ain’t got nothing to say.

“NILES: How could you have nothing to say?

(b) Was counsel’s performance deficient under an objective standard of professional reasonableness?

In order to determine whether defense counsel’s performance at the suppression hearing was deficient, we begin by evaluating whether defendant Gomez’s *Miranda* rights were violated during his interview with detectives.

“In *Miranda* . . . [the United States Supreme Court] established certain procedural safeguards designed to protect the rights of an accused, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimination during custodial interrogation. The Court specified, among other things, that if the accused indicates *in any manner* that he wishes to remain silent . . . interrogation must cease . . .” (*Fare v. Michael C.* (1979) 442 U.S. 707, 709, italics added.) However, a reviewing court must examine the totality of the circumstances surrounding that interrogation before concluding whether such an invocation has been made, and whether a suspect’s answer to a subsequent question was truly a product of a knowing and voluntary waiver of his

constitutional rights. (*Id.* at pp. 724-725.) The relevant circumstances are “the juvenile’s age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights” (*Id.* at p. 725, italics added.)

Here, defendant Gomez faults his counsel for never offering into evidence the actual audio recording of the interview, which “shows that [the detective’s] testimony about the waiver was false.” He cites *Carey* for the proposition that his statements (“I don’t got nothing to say,” and “I ain’t got nothing to say”) were unambiguous invocations of his right to remain silent. The police in *Carey* arrested the defendant for robbery and read him his *Miranda* rights. (*Carey, supra*, 183 Cal.App.3d at p. 103.) After indicating he understood his rights, a detective asked him whether, having those rights in mind, the defendant wished to talk. The defendant responded, “I ain’t got nothin’ to say.” (*Ibid.*) The detective requested clarification of the defendant’s response, asking if he meant he did not know what to say or if he would be willing to answer some of the detective’s questions. (*Id.* at pp. 103-104.) The defendant replied, “I ain’t got nothin’ to say at all.” (*Id.* at p. 104.) The detective requested further clarification: “I don’t understand, I mean, saying you have nothing to say.” The defendant, again, replied, “I ain’t got nothin’ to say, nothin’, nothin’.” (*Ibid.*) The detective asked, “You don’t want to say anything?” The defendant reiterated, “I ain’t got nothin’ to say.” (*Ibid.*) The detective asked, “How about if I asked you questions? Would you have some response to those?” (*Ibid.*) The defendant replied that it depended on the questions. The detective then

commenced the interrogation without any express waiver of the defendant's *Miranda* rights, culminating in defendant's virtual confession "to all of the charged offenses." (*Carey, supra*, at p. 104, fn. omitted.)

The *Carey* court held "that the police may not 'clarify' unambiguous and repeated refusals to say anything after a custodial suspect has been advised of and indicates that he understands his constitutional rights" (*Carey, supra*, 183 Cal.App.3d at pp. 101-102.) It concluded that the defendant's "quadruple invocation of the right to remain silent was consistent with" an effective assertion of his *Miranda* rights. (*Carey, supra*, at p. 105.) "A fourfold repetition not only reasonably appears inconsistent with a present willingness on the part of [the defendant] to discuss his case freely and completely with [the detective] at that time, it is *only* inconsistent therewith." (*Ibid.*, fn. omitted.) Thus, the *Carey* court reversed the judgment for impermissible admission at trial of the defendant's inculpatory statements. (*Id.* at p. 106.)

Defendant Gomez argues the facts in *Carey* are identical to this case, noting that "when a defendant is advised he has a right to silence, and the defendant responds by saying he has nothing to say, the defendant has invoked his right to silence and questioning must cease." He asserts that his statement that "I don't got nothing to say" was sufficient to invoke his *Miranda* rights. We agree.

A suspect is not required to "utter[] the talismanic incantation: 'I hereby invoke my constitutional rights pursuant to the United States Supreme Court decision in *Miranda v. Arizona*.'" It is well settled the "" . . . desire to halt the interrogation may be indicated

in a variety of ways”” (Carey, *supra*, 183 Cal.App.3d at pp. 104-105.) “I don’t got nothing to say” or “I ain’t got nothing to say” constitutes just such an indication. “Using an accused’s subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. “No authority, and no logic permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.’ [Citation.]” (*Smith v. Illinois* (1984) 469 U.S. 91, 98-99, fn. omitted.)

Indeed, the detective’s comments and questions to defendant Gomez assumed that Gomez did not wish to speak with them, then and the statements and questions focused solely on the reason why he did not want to do so, i.e., he had questions about why he was being questioned, or he was scared. Unlike the cases the People rely upon,⁶ the comments/questions here were not directed at whether defendant Gomez was invoking his right to silence, nor were they clarifying whether he understood his rights. Rather, the comments conveyed the status of the case and asked, “How could you have nothing to say?” This specific question assumes that defendant Gomez had invoked his right to

⁶ *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 217-220, 219 [In response to question whether defendant would speak to the detective “right now,” the defendant stated: “If you can bring me a lawyer, that way I, I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me” This response was deemed to be conditional, ambiguous, and equivocal]; *People v. Farnam* (2002) 28 Cal.4th 107, 181 [defendant’s comments (“I’m not going to answer any of your fucking questions”; “Fuck this, I’m not staying here anymore”) and his attempt to walk away from the officers, viewed together, require clarification of whether he was invoking or waiving his right to remain silent and right to counsel].)

remain silent. “Officers have no legitimate need or reason to inquire into the reasons why a suspect wishes to remain silent.” (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 361, fn. omitted; see *People v. Marshall* (1974) 41 Cal.App.3d 129, 135 [defendant’s reason for asserting his right to remain silent is immaterial].)

Because defendant Gomez was not willing to talk, Detective Niles should have ceased interrogation. However, he did not. Defendant Gomez’s statements were not the result of a fully informed and willing waiver of his rights. To the contrary, they were the product of the detective’s intentional desire to overcome defendant Gomez’s constitutionally protected right to remain silent. Therefore, his statements could not be used as evidence to prove guilt.

(c) Was defendant Gomez prejudiced by his counsel’s performance at the suppression hearing?

Defendant Gomez was prejudiced by his counsel’s performance at the suppression hearing if we conclude that the error in admitting defendant Gomez’s incriminatory statements was not harmless beyond a reasonable doubt. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312; *People v. Cahill* (1993) 5 Cal.4th 478, 510; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

“As elaborated in California, the *Chapman* test does not compel the reversal of convictions for errors which are ‘harmless’ in the sense that there is no reasonable possibility that they affected the outcome of the trial; rather, it permits affirmance if compelling evidence of guilt forecloses all reasonable possibility that the jury could have

reached any verdict other than one of guilt, even if the error had not occurred. [Citation.] Nevertheless, the reviewing court cannot let affirmance rest solely upon the extrajudicial statement's minor effect upon the jury; must weigh its impact upon the *trial*; must inquire whether there is a *reasonable possibility* that the inadmissible evidence might have contributed to the conviction; must consider the possibility that it induced the defendant's choice to take the stand in his own defense; must consider also the possibility of prejudice emanating from that action of the defendant. [Citation.]" (*In re Cline* (1967) 255 Cal.App.2d 115, 123-124.)

The prosecution must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.) "Harmless-error review [under *Chapman*] looks . . . to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is . . . whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*People v. Flood* (1998) 18 Cal.4th 470, 494.)

Here, defendant Gomez claims that, but for the admission of his interview he would not have taken the stand. For purposes of argument we will assume his claim to be true. However, our recitation of the facts above does not consider or include defendant Gomez's testimony. Furthermore, it does not consider his statements in his interview. Rather, our summary of the facts is based on the testimonies of two eyewitnesses (Acosta and Sosa) and the forensic evidence. The eyewitnesses testified to defendant Gomez's participation, and actions, in the murder of the victim. They described, in detail, his role.

Because they were accomplices as a matter of law, corroborating evidence was necessary. Such corroborating evidence came in the form of independent forensic evidence that showed defendant Gomez's DNA on tools used in the murder. Specifically the gloves used in the murder contained defendant Gomez's DNA.

Accordingly, even without defendant Gomez's interview confession, the evidence leaves no reasonable doubt that the jury made the findings necessary to convict him of the murder of the victim. We can affirmatively say that the verdict actually rendered in this trial was "surely unattributable" to his confession. (*People v. Neal* (2003) 31 Cal.4th 63, 87.) Because we conclude it was harmless error to allow defendant Gomez's statements to be admitted into evidence at trial, we also conclude that defendant Gomez was not prejudiced by his counsel's deficient performance in arguing to suppress his interview confession.

3. *Other Claims of IAC*

As we initially noted above in section A, our conclusion that defense counsel was ineffective in arguing to suppress defendant Gomez's interview confession disposes defendant Gomez's remaining claims of IAC which stem from counsel's failure to have the interview confession suppressed.⁷

⁷ Regarding the alleged beating that defendant Gomez received from the detectives, he faults his counsel for (1) not calling Erika Cortes to testify that she witnessed officers beating him; (2) not calling the arresting officers and questioning them under oath about the alleged beating; (3) not introducing his "contemporaneous consistent statements—captured on audio recorded during his interrogation—discussing the beating"; (4) not asking Detective Niles whether defendant Gomez described the

[footnote continued on next page]

B. Presentation of False Evidence

Defendant Gomez claims the prosecutor presented false evidence at the suppression hearing when Detective Niles characterized defendant Gomez’s invocation of his right to silence into a waiver of that right, in violation of his due process rights. Because we conclude that defendant Gomez invoked his *Miranda* rights, this issue is also moot.

C. Accomplice Instructions

Defendant Gomez contends the court directed a verdict for the prosecution when it told the jury he was an accomplice. Pointing out the jurors were instructed that he had been charged with murder, and that they received CALCRIM Nos. 335, and 400, he takes issue with this sentence: “If the crime of murder was committed, then Oscar Acosta, Jose Estban [*sic*] Sosa and David Gomez were accomplices to those crimes.” He complains that the “introductory phrase to this instruction—requiring the jury to find ‘the crime of murder was committed’—was not particularly useful” because, given Acosta’s plea and

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beating during the interrogation; (5) not asking the detective whether he was successful in his promise to “find” the officer responsible for the beating; and (6) not arguing that his confession was inadmissible because of the beating. Defendant Gomez argues this evidence would have proven that his confession should have been suppressed. Assuming we did not conclude that his interview confession should have been suppressed, defendant Gomez faults his counsel for failing to move to sever his trial from that of his codefendant’s trial, arguing that redaction of his interview to accommodate his codefendant eliminated his (defendant Gomez’s) defense, and created a conflict of interest, making counsel unable to provide conflict-free advice as to whether or not defendant Gomez should testify in his defense. More specifically, defendant Gomez challenges his counsel’s decision to call him to the stand to testify on his own behalf.

testimony, “clearly ‘the crime of murder was committed.’” He argues that telling the jury he was an accomplice to the murder, at worst “effectively constituted a directed verdict for the prosecution,” or at best, “constituted an improper and prejudicial comment on the evidence.”

While the People contend this argument was forfeited because defendant Gomez failed to object to CALCRIM No. 335 in the trial court, in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn. 34, our state’s highest court recognized that defendants “may assert on appeal instructional error affecting their substantial rights,” including instructional error in accomplice instructions. We address defendant Gomez’s argument on the merits.

(a) Standard of review

The correctness of jury instructions is a question of law subject to de novo review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) ““[I]nstructions should be given a reasonable, not a close and technical, interpretation, and they should be construed in connection with the evidence and the remainder of the charge. Whether a jury has been correctly instructed is not to be determined from a consideration of *parts* of an instruction or from *particular* instructions, but from the *entire* charge of the court.”” [Citation.] Hence, jury instructions must be considered in their entirety. [Citations.]” (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074.)

(b) Additional background

The trial court instructed the jury with CALCRIM No. 335, as follows:

“If the crime of murder was committed, then Oscar Acosta, Jose Estaban Sosa and David Gonzales were accomplices to those crimes.

“You may not convict a defendant of any crime based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

“1. The accomplice’s statement or testimony is supported by other evidence that you believe;

“2. That supporting evidence is independent of any accomplice’s statement or testimony;

“AND

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

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

“The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

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

(c) Analysis

Defendant Gomez’s argument relies on the holding in *People v. Hartung* (1950) 101 Cal.App.2d 292 (*Hartung*). In that case, accomplice testimony was offered by both the prosecution and the defense. (*Id.* at pp. 293-295.) The court held that it was error to instruct the jury that the testimony of an accomplice should be viewed with distrust where the accomplice testifies for the defendant. (*Id.* at p. 295.) Here, defendant Gomez contends that “telling the jury [Acosta] was an ‘accomplice’ to the charged murder . . . effectively constituted a directed verdict for the prosecution.” However, Acosta was called by the prosecution; thus, defendant Gomez’s reliance on *Hartung* is misplaced. Nonetheless, we consider whether instructing the jury that defendant Gomez was an accomplice, where accomplice was defined as either the perpetrator or an aider and abettor, constituted a directed verdict for the prosecution.

A court may determine that a witness is an accomplice as a matter of law only if the facts regarding the witness’s culpability are clear and undisputed. (*People v. Williams* (1997) 16 Cal.4th 635, 679.) An instruction that a witness is an accomplice as a matter of law may be given only if the undisputed evidence established his or her complicity. (*People v. Davis* (1954) 43 Cal.2d 661, 672.) This is such a case. It is

undisputed the offenses were committed and that Acosta and Sosa participated. The only issue was whether defendant Gomez was also involved.⁸

In *People v. Hill* (1967) 66 Cal.2d 536, the state Supreme Court observed: “[W]here a codefendant has made a judicial confession as to crimes charged, an instruction that as a matter of law such codefendant is an accomplice of other defendants might well be construed by the jurors as imputing the confessing defendant’s foregone guilt to the other defendants. [Citation.]” (*Id.* at p. 555.) The court concluded that, under these circumstances, it is not error to forego giving accomplice instructions “where the giving of them would unfairly prejudice a codefendant in the eyes of the jury.” (*Ibid.*)

In the present matter, CALCRIM No. 335 did not unfairly prejudice defendant Gomez. Neither Acosta nor Sosa was a codefendant at trial, inasmuch as they had already reached plea agreements. The jury was instructed that it must ignore the circumstances of their being in custody (i.e., their guilty pleas) when deciding the issues in the case. (CALCRIM No. 337.) Because the sole issue for the jury was whether defendant Gomez participated in the murder of the victim, the complicity of the others in the murder was not at issue except insofar as it made their testimony suspect. (CALCRIM Nos. 301 & 335.) Under these circumstances, there was no significant danger that the jury would impute the guilt of Acosta or Sosa to defendant Gomez. (See, e.g., *People v. Bittaker* (1989) 48 Cal.3d 1046, 1063, 1100 [no error in instructing that

⁸ At this point in our analysis, we do not consider defendant Gomez’s interview where he confessed to the crime, nor do we consider his testimony at trial.

Norris was an accomplice as a matter of law where Norris entered into a plea agreement and testified at the defendant's trial that he and the defendant committed a series of kidnappings and rapes], overruled in part on other grounds as stated in *People v. Black* (2014) 58 Cal.4th 912, 919.)

Notwithstanding the above, CALCRIM No. 335 was given because the parties agreed that Acosta, Sosa and defendant Gomez were accomplices as a matter of law given each of their respective confessions. Although we have concluded that because defendant Gomez's *Miranda* rights were violated, his confession should have been suppressed and, in all likelihood, he would not have testified, we must consider whether CALCRIM No. 335 was appropriate given the state of the record, including defendant Gomez's interview confession and testimony.

According to defendant Gomez's interview confession, he and Acosta shot the victim and buried the body because "Super Chang" told them they had to do it.⁹ At trial,

⁹ During the interview with detectives, defendant Gomez admitted that when they arrived at the ranch they dug a big hole on the backside of the property to bury the body of the intended victim. If the victim was not at the ranch, they would kill anyone who was. They shot guns and waited for someone to show up.

Defendant Gomez told detectives that at some point, "Bull" or "Uncle Bull" showed up. Defendant Gomez said that he confronted Bull at his vehicle and tried to get him to walk towards the hole. Bull refused, and Acosta hit Bull on the head with a gun and then the two dragged Bull to the hole. When they got near the hole, Bull began begging for his life. Defendant Gomez and Acosta both shot Bull several times. Defendant Gomez used the shotgun, while Acosta used the .38-caliber revolver. They buried the body in the hole and left. After driving a short distance, they buried their gloves and the shotgun shells. They proceeded to Subway, where they changed clothes and purchased food. Defendant Gomez "grinded" up the weapons and threw them in the

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defendant Gomez testified that he accidentally shot the victim, got scared and shot some more.¹⁰ Defendant Gomez claimed that his nickname was “Super Changa.” Given defendant Gomez’s interview confession and trial testimony, the record supports instructing the jury with CALCRIM No. 335, that Acosta, Sosa, and defendant Gomez were accomplices as a matter of law. However, to the extent that defendant Gomez denied responsibility by claiming that either he was forced to shoot the victim or it was an accident, we note that the jury was not instructed to view defendant Gomez’s testimony as untrustworthy. (CALCRIM No. 301.)

We do not view instructions or portions of instructions in isolation when considering contentions of error. The instructions are erroneous only if, reading them as a whole, a reasonable jury would have misunderstood and misapplied them. (*People v. Rundle* (2008) 43 Cal.4th 76, 149.) Here, in addition to CALCRIM No. 335, the jury was instructed with CALCRIM Nos. 220 (Reasonable Doubt), 226 (Witnesses), 301 (Single

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river. He was paid \$5,000 for the murder, while Acosta received \$2,500 and a vehicle worth \$2,500.

¹⁰ Defense counsel called defendant Gomez to the stand and asked five questions about the shooting, eliciting the conclusory statement that the shooting was an accident. Defendant Gomez testified that he did not remember what he had told the police, and he denied being paid for killing the victim. He said that he told Sergeant Landen lies because he was scared and the police had already beaten him up. He said that he was shooting at bottles and junk when the victim appeared out of nowhere. Defendant Gomez claimed that he shot the victim by accident, got scared, and continued shooting him. He then dug a hole and buried the victim’s body. During cross-examination, the prosecutor questioned defendant Gomez as to how it could have been an accident, given that he had shot the victim three times with the shotgun and then switched guns. Defendant Gomez maintained that it was an accident and that he did not take part in any plan to kill anyone.

Witness's Testimony), 334 (Accomplice Testimony Must Be Corroborated: Dispute Whether Witness is Accomplice), 337 (Witness in Custody or Physically Restrained), 358 (Evidence of Defendant's Statements), and 362 (Consciousness of Guilt: False Statements). CALCRIM No. 301 identified only three witnesses whom the jury should consider their testimony as being insufficient to prove any fact without supporting evidence or corroboration. Those witnesses were Acosta, Sosa, and Villanueva. Thus, while CALCRIM No. 335 instructed the jury to consider and treat defendant Gomez as an accomplice, CALCRIM No. 301 instructed jurors that defendant Gomez's testimony did not require corroboration. Moreover, as the People point out, the challenged statement did not state that defendant Gomez, as an accomplice, was liable for the charged offenses.¹¹ Instead, it stated that only if the jurors conclude that a murder was committed, can they view defendant Gomez as an accomplice. However, unlike most accomplice testimony, defendant Gomez's testimony did not require corroboration. Instead, the jury was permitted to consider defendant Gomez's claim that he was forced to shoot the victim, or that it was accident, without any restriction or independent corroboration. Accordingly, we reject defendant Gomez's challenge to CALCRIM No. 335.

¹¹ ““If the crime of murder was committed, then Oscar Acosta, Jose Estban [*sic*] Sosa and David Gonzales were accomplices to those crimes.””

D Remand for Resentencing

Defendant Gomez, who was 16 years old at the time of the shooting, was sentenced to life without the possibility of parole (LWOP). (§ 190.5, subd. (b).¹²; see *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17.) On appeal, he argues that his LWOP sentence violates the Eighth Amendment’s ban on cruel and unusual punishment as stated in *Miller v. Alabama* (June 25, 2012, Nos. 10-9646, 10-9647) __ U.S. __, __ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*.) Alternatively, he contends, and the People concede, the case must be remanded for resentencing in accordance with *Miller* and section 190.5, subdivision (b).

We begin by noting that the California Supreme Court recently considered the constitutionality of LWOP sentences imposed under section 190.5 in light of *Miller*. (*People v. Gutierrez* (May 5, 2014, S206365, S206771) 58 Cal.4th 1354 (*Gutierrez*.) Our high court disapproved prior case law (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1142; *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 159; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089) which construed the statute as establishing a presumption that LWOP is the appropriate term for a 16- or 17- year-old defendant. (*Gutierrez, supra*, at p. 1387.) Instead, it adopted a construction of section 190.5, subdivision (b), that found the statute to be constitutional.

¹² “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.” (§ 190.5, subd. (b).)

(*Gutierrez, supra*, at p. 1387.) It held that section 190.5, subdivision (b), properly construed, “confers discretion on the sentencing court to impose either life without parole or a term of 25 years to life on a 16- or 17-year-old juvenile convicted of special circumstance murder, with no presumption in favor of life without parole.” (*Gutierrez, supra*, at p. 1387.)

The California Supreme Court further held that *Miller* requires a trial court, in exercising its sentencing discretion, to consider the “‘distinctive attributes of youth’ discussed in *Miller* and how those attributes ‘diminish the penological justifications for imposing the harshest sentences on juvenile offenders.’ [Citation.]” (*Gutierrez, supra*, 58 Cal.4th at p. 1390.) The court outlined certain factors, including the juvenile offender’s age, family and home environment, the circumstances of the homicide offense, incompetencies associated with youth, and the possibility of rehabilitation, which the sentencing court must consider. (*Id.* at pp. 1387-1390.)

Because section 190.5, subdivision (b), authorizes and requires consideration of the distinctive attributes of youth identified in *Miller*, the California Supreme Court concluded that section 190.5, subdivision (b), is not unconstitutional. (*Gutierrez, supra*, 58 Cal.4th at p. 1387.) Where a minor defendant was sentenced before *Miller* in accordance with the interpretation of section 190.5, subdivision (b) prevailing at the time (see *People v. Guinn, supra*, 28 Cal.App.4th at p. 1142), remand for resentencing is necessary. (*Gutierrez, supra*, at pp. 1390-1391.)

Here, both sides agree the record demonstrates a lack of meaningful consideration of defendant Gomez's personal circumstances. Accordingly, we must remand for resentencing in light of the principles set forth in *Miller* and *Gutierrez*.

III. DEFENDANT GUTIERREZ'S APPEAL

A. Accomplice Instructions

Defendant Gutierrez contends that Villanueva was an accomplice as a matter of law, and that the trial court erred in refusing to so instruct the jury.

1. *Additional Background*

At the conclusion of the presentation of evidence, defendant Gutierrez moved for acquittal under section 1118.1. He claimed that there was no substantial evidence to corroborate the testimony of Villanueva, who was an accomplice as a matter of law. The trial court responded that, in its belief, the issue of whether Villanueva was an accomplice must be decided by the jury. The court observed that because the jury could conclude that Villanueva was not an accomplice, no corroboration was needed, and his testimony could be sufficient to support a conviction of either defendant if the jury did so conclude. Accordingly, the court denied defendant Gutierrez's motion.

As noted above, the jury was instructed with both CALCRIM Nos. 334 and 335. These instructions informed the jury that it could not convict a defendant based solely on the testimony or statements of one or more accomplices; there had to be supporting evidence tending to connect the defendant to the commission of the crime, independent of an accomplice's statement or testimony. More specifically, the jury was told that before

it could use Villanueva's testimony or statements as evidence against either defendant, it must decide whether or not Villanueva was an accomplice, and that defendants were burdened with proving it was more likely than not that he was. Regarding Acosta, Sosa and defendant Gomez, the jury was instructed that, if they concluded that murder was committed, then these three were accomplices to the murder.

Following the jury verdict convicting defendant Gutierrez of murder, he moved for a new trial on grounds that the evidence against him was insufficient because it consisted entirely of the accomplice testimony. In opposition, the prosecution argued that defendant Gutierrez failed to prove that Villanueva was an accomplice, and Jessica Villanueva's testimony "connected Gutierrez to the admitted shooters in this case." The trial court denied defendant Gutierrez's motion for new trial without comment.

2. Was Villanueva an Accomplice as a Matter of Law

Defendant Gutierrez argues that Villanueva was an accomplice as a matter of law because the testimonies of Acosta, Sosa, defendant Gomez, and Villanueva support a finding that he was an aider and abetter. Furthermore, defendant Gutierrez contends there "was evidence of three significant ways in which [Villanueva], having . . . knowledge [of the plan to kill someone at the ranch], went on to facilitate the planned murder." First, Villanueva "participated in the transfer of firearms from [defendant] Gutierrez's van, parked outside [Villanueva's] house" Second, Villanueva drove Acosta and defendant Gomez to Sosa's house and helped persuade Sosa to accompany them to the ranch. And, finally, Villanueva gave the trio a key to the ranch. Thus,

defendant Gutierrez faults the trial court for omitting Villanueva from its CALCRIM No. 335 instruction.

When there is evidence at trial which would support a jury finding that the witness was an accomplice, the court must give jury instructions on accomplice testimony. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271; *People v. Felton* (2004) 122 Cal.App.4th 260, 267-268 [Fourth Dist., Div. Two].) If the evidence shows that the witness was an accomplice as a matter of law, the court must so instruct the jury. (*Hayes, supra*, at p. 1271.) Otherwise, the court must instruct the jury to determine whether the witness was an accomplice. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) The court also must instruct the jury to view an accomplice's testimony with caution. (*Ibid.*)

Section 1111 defines "accomplice" as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." An accomplice may be a direct perpetrator or an aider and abettor. (*People v. Avila* (2006) 38 Cal.4th 491, 564.) Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn from the facts. (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) "However, an aider and abettor is chargeable as a principal only to the extent he or she actually knows and *shares* the full extent of the perpetrator's specific criminal intent, and actively promotes, encourages, or assists the perpetrator with the intent and purpose of advancing the perpetrator's successful commission of the target offense. [Citation.]" (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220.) Mere presence at the scene of

the crime is inadequate. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90.) A person is an accomplice as a matter of law only if the evidence is uncontested and unequivocal.

(*People v. Williams* (2008) 43 Cal.4th 584, 637.) The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. (*People v. Fauber*, *supra*, at p. 834.)

In response to defendant Gutierrez’s claim that the evidence conclusively shows Villanueva was an accomplice as a matter of law, the People claim the evidence was disputed. Specifically, they argue there was conflicting evidence as to whether Villanueva provided a key to the ranch and whether he knew about the plan to murder someone at the ranch. They also point out that defendant Gutierrez acknowledges “not all of the” evidence in support of his argument was “uncontradicted.”

We conclude the evidence did not establish that Villanueva was an accomplice as a matter of law. He was present with Acosta, Sosa, and defendants during their discussions regarding the planned murder. But while the evidence established Villanueva possessed knowledge that defendant Gutierrez had asked Gomez and Acosta to kill someone at the ranch, and that they retrieved defendant Gutierrez’s guns to do so, the evidence failed to conclusively reveal Villanueva’s intent. “Mere presence at the scene of the crime and failure to take steps to prevent the crime do not establish aiding and abetting liability. [Citation.] To establish criminal liability on an aiding and abetting theory, the defendant must have ‘act[ed] with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or

facilitating commission of, the offense.’ [Citation.]” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161.) Here, there is contradictory evidence that Villanueva acted with the intent to commit, encourage, or facilitate the murder.

The trial court correctly concluded that Villanueva could not be found to be an accomplice as a matter of law, and properly instructed the jury with CALCRIM Nos. 334 and 301. (*People v. Hayes, supra*, 21 Cal.4th at pp. 1270-1271 [where the evidence adduced at trial would warrant a jury’s conclusion that the witness is an accomplice of the defendant, the court has a sua sponte duty to charge the jury to determine if the witness is an accomplice and, if so, to view the accomplice’s testimony with distrust].)

B. Ineffective Assistance of Counsel

Acosta and Sosa were charged with murder; however, prior to trial, both pled guilty, i.e., Acosta to first degree murder and Sosa to voluntary manslaughter and kidnapping with a weapon. Their plea agreements required their testimony at defendants’ trial. During their testimony, evidence of their guilty pleas was admitted as a means of explaining their motives for testifying. Defendant Gutierrez did not request, and the trial court did not give, any limiting instruction on the use of this evidence. On appeal, defendant Gutierrez faults his counsel for failing to have the jury instructed that it could not use Acosta’s and Sosa’s guilty pleas to infer guilt.

1. Standard of Review

As previously set forth, to prevail on a claim of IAC, a defendant must establish that counsel’s representation fell below an objective standard of reasonableness, and that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at pp. 694-698.)

2. Analysis

We agree that Acosta's and Sosa's pleas could not be admitted to prove defendant Gutierrez's guilt. The guilty plea of a codefendant cannot be used as substantive evidence to prove the guilt of a defendant. (*Hudson v. North Carolina* (1960) 363 U.S. 697, 702-703.) However, as the People point out, "[w]hile the evidence may not be used to establish a defendant's guilt, it may properly be considered by the jury in evaluating witness credibility. [Citations.]" (*U.S. v. Halbert* (9th Cir. 1981) 640 F.2d 1000, 1004 (*Halbert*)). In such cases, trial courts are cautioned about the prejudicial effect. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1322.) In *Cummings*, evidence of Cummings's guilty pleas was admitted in the trial of codefendant Gay. "The trial court ruled that evidence of Cummings's guilty pleas was admissible because it corroborated Pamela's testimony regarding the robberies and the conspiracy. It did so only insofar as she had testified that Cummings participated in those offenses, however. It does not corroborate her testimony that Gay was a participant unless one infers that Gay was Cummings's crime partner in all of the robberies committed by Cummings. Any probative value attached to that inference is clearly outweighed by the prejudicial impact of the evidence. [Citation.]" (*Ibid.*) When guilty pleas are admitted for the purpose of aiding the jury in assessing the credibility of the testifying witnesses, the jury should be instructed on the limited purpose for which the pleas could be used. (*Halbert, supra*, 640 F.2d at p. 1006.)

While we are not bound by decisions of the Ninth Circuit (*People v. Williams* (1997) 16 Cal.4th 153, 190), we need not determine whether *Halbert* was properly decided because, even if it was properly decided and a specific instruction should have been given here, defendant Gutierrez cannot show he was prejudiced by his counsel's failure to request such instruction.

As the People point out, the jury was instructed that if a witness has been convicted of a felony or promised leniency in exchange for testimony, it may consider that fact only in evaluating the witness's credibility. (CALCRIM Nos. 226 & 316.) The jury was further told that "[t]he evidence shows that another person may have been involved in the commission of the crime charged against the defendant. . . . You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime charged." (CALCRIM No. 373.) Thus, even if there was no specific limiting instruction regarding the use of Acosta's and Sosa's guilty pleas, there were general instructions which limited the use of the fact of witnesses' guilt.

In addition, defendant Gutierrez has failed to show that Acosta's and Sosa's guilty pleas (as opposed to their substantive testimonies) were the sole evidence relied upon by the jury. This is not a case in which the codefendants' guilty pleas were admitted into evidence in a vacuum. Each codefendant was questioned concerning his plea and its conditions. Further, each codefendant was questioned concerning the events, his participation in the events, and defendant Gutierrez's participation in the events. In

closing, the prosecuting attorney primarily relied on the testimonies, not the guilty pleas, in arguing for the jury to convict defendant Gutierrez of the charges against him. It would be unreasonable to conclude that the jury relied on the guilty pleas rather than the testimonies to determine the facts upon which it found defendant Gutierrez guilty of murder.

Given the standard instructions and the prosecutor's argument, it is unlikely the jury relied, to any extent, on Acosta's and Sosa's pleas in finding defendant Gutierrez guilty. Thus, we conclude it is not reasonably probable that defendant Gutierrez would have obtained a more favorable verdict had his counsel requested and obtained a limiting instruction.

C. Cumulative Error Doctrine

Defendant Gutierrez contends the cumulative effect of the trial court's errors compels reversal of the judgment. According to defendant Gutierrez, whether the above-asserted errors are considered harmless in isolation, their cumulative effect renders them prejudicial. However, we have rejected all of defendant Gutierrez's claims of error. Hence, there was no cumulative effect of multiple errors, the only situation in which the cumulative error doctrine applies.

D. Amendment to the Abstract of Judgment/Clerk's Minutes

Finally, defendant Gutierrez contends, and the People concede, that the clerk's minutes and abstract of judgment should be amended to reflect the oral pronouncement of judgment.

The clerk's minutes of the proceedings on the rendering of the verdicts state that the jury found the allegation pursuant to "12022.53D/E(1)PC" true as to defendant Gutierrez and that the court ordered the allegations pursuant to "12022.53(B)(E)1PC" and "12022.53C/E(1)PC" stricken. However, none of that is reflected in the reporter's transcript of oral proceedings on that date. At sentencing, the trial court sentenced defendant Gutierrez to life without possibility of parole. The clerk's minutes and abstract of judgment indicate that he was also sentenced to an additional term of 25 years to life for a firearm enhancement.

The minutes and the abstract of judgment are thus inconsistent with the court's oral pronouncement of sentence. The oral pronouncement of sentence controls where it is at variance with the minute order or the abstract of judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 [pronouncement of judgment is a judicial function, while entry into the minutes and abstract of judgment is a clerical function; thus, any inconsistency is presumed to be clerical error]; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123 [appellate court has authority to correct such clerical errors].) We therefore accept the People's concession and will order the trial court to amend the minutes of the sentencing proceeding and the abstract of judgment, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

IV. DISPOSITION

Defendant Gomez’s sentence is vacated and the matter is remanded to the superior court for resentencing consistent with the views expressed in *Miller* and in this opinion. Otherwise, defendant Gomez’s judgment is affirmed.

Regarding defendant Gutierrez, the matter is remanded and the trial court is directed to correct the clerk’s minutes of December 9, 2011 and September 7, 2012, along with the abstract of judgment, to reflect the oral proceedings on those dates. The clerk is to then forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, defendant Gutierrez’s judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.