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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MILANI CALBERTA LARREA et al.,

Defendants and Appellants.

F066300 & F066331

(Super. Ct. Nos. BF131238A &
BF131238C)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua,
Judge.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and
Appellant Abel Gaeta.

A.M. Weisman, under appointment by the Court of Appeal, for Defendant and
Appellant Milani Calberta Larrea.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney
General, Catherine Chatman and Daniel B. Bernstein, Deputy Attorneys General, for
Plaintiff and Respondent.

Milani Calberta Larrea, Abel Gaeta, Jr., and Ronnie D. Fleming were charged with the murder (Pen. Code, § 187)¹ and robbery (§ 212.5, subd. (a)) of Wesley Nunley. As a special circumstance, it was alleged that the murder was committed in the commission of robbery (§ 190.2, subd. (a)(17)(A)). As to Gaeta, the information further alleged that he served three prior prison terms (§ 667.5, subd. (b).)

Larrea and Gaeta (together appellants) pled not guilty and denied the allegations. Fleming eventually pled guilty to voluntary manslaughter and robbery and agreed to testify against appellants in return for a prison term of 11 years.

A jury subsequently found appellants guilty of murder and robbery as charged and found the special circumstance allegation true. The prior prison term allegations against Gaeta, bifurcated before trial, were dismissed. Appellants were both sentenced on the murder to life without the possibility of parole and on the robbery to the upper term of six years, stayed pursuant to section 654.

On appeal we reject appellants' contentions that there was insufficient evidence their acts were the proximate cause of Nunley's death and that the robbery-murder special circumstance is unconstitutional. In addition, we reject Larrea's contention that the trial court erred in refusing to instruct the jury on duress as a possible defense and that the instructions, as given, precluded the jury from finding her guilty of the lesser included offense of involuntary manslaughter. We agree that the parole revocation fine imposed for appellants must be stricken and that Larrea is entitled to an additional day of presentence custody credits. In all other respects, the judgments are affirmed.

STATEMENT OF THE FACTS

Gaeta, Larrea and Fleming all were methamphetamine users. On February 15, 2010, Fleming stole a vehicle. Gaeta was with him at the time, and Gaeta then took Fleming to meet Larrea. The following day, Larrea directed Fleming and Gaeta to the

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

trailer home of Wesley Nunley, from whom Larrea had previously obtained methamphetamine, but they were unable to do so on this occasion.

That night, Gaeta suggested to Fleming that they return to Nunley's trailer and rob him. On the way there, they stopped at a gas station and purchased beer and duct tape. When they got to the trailer, there was a light on inside but no one answered the door. The two returned to a house where they were staying with Larrea and the three of them ingested methamphetamine and stayed up all night.

On the morning of February 17, the three left the house and, after various stops, went to Nunley's trailer. At Larrea's suggestion, Fleming backed the car into the dead-end street behind the trailer. Gaeta and Larrea then returned to the trailer while Fleming stayed in the car. Gaeta came back to the car by himself and told Fleming "Nobody's there. Come on." When Fleming got to the trailer, the front door was open, Gaeta and Larrea were standing near the doorway and Nunley was sitting down behind a table.

Gaeta punched Nunley in the face and Nunley fought back. Gaeta called for help. Fleming entered the trailer and punched Nunley in the ribs and put him in a headlock. While the fighting was going on, Gaeta told Larrea to "bring the tape," which she retrieved from the car. While Gaeta and Fleming restrained Nunley, Larrea wrapped Nunley's hands behind his back with duct tape. She then wrapped his ankles. Gaeta removed Nunley's wallet, which contained \$500 and some methamphetamine, from his pocket. At Gaeta's suggestion, Larrea searched the back of the trailer. When Larrea returned, Gaeta and Fleming dragged Nunley to the back of trailer and set him on the floor against a wall, lying on his side. Fleming placed a hat over Nunley's face so he could not see.

Various items were removed from the trailer, including a laptop computer, portable DVD player, and an iPod. Larrea remained outside during most of this time and had moved a bicycle belonging to Nunley to a spot near the car. At one point, Gaeta told Larrea to come inside and take a plastic bin of VHS tapes to the car.

Meanwhile, at about 8:15 a.m., two of Nunley's relatives drove up to the trailer home to check on his welfare. William Lively got out of his pickup to enter the trailer; his wife waited in the pickup. Realizing someone was coming, Gaeta, Fleming and Larrea all headed back toward their car. Larrea and Fleming got in, but Gaeta remained outside, holding a small bat and yelling at Lively's wife to get back into her pickup.

At this point, Larrea locked the doors of the car to prevent Gaeta from getting in. When Gaeta told Larrea to unlock the car, she suggested he ride the bicycle. Eventually Larrea unlocked the door, moved to the back seat so Gaeta could get in front, and Fleming drove off. Gaeta was mad at Larrea for claiming that the bin of videos he wanted her to take was too heavy to put in the car while at the same time she was trying to take a welder. As the three drove off, Gaeta told Fleming to head to a field, saying he wanted to kill Larrea because he could not trust her. Fleming calmed Gaeta down. Once back at their house, Gaeta divided the cash, methamphetamine and items, giving Larrea a smaller share.

Officers arrived at Nunley's trailer around 9:00 a.m. and found him lying on his side on the floor with a hat covering his face; his hands and feet were bound by duct tape. Nunley had no signs of life, and emergency personnel pronounced him dead at 9:15 a.m. The front pockets of Nunley's pants were inside out. More than six feet of tape encircled Nunley's ankles and more than 16 feet of tape encircled his wrists.

An autopsy of Nunley revealed lacerations and abrasions to his face and head, consistent with being punched, and hemorrhaging to his face and head, consistent with being in a headlock. Nunley, who suffered from coronary artery disease and congested lungs, had a moderate amount of methamphetamine in his bloodstream. The forensic pathologist concluded that Nunley's death was a homicide caused by "positional asphyxia associated with the blunt-force trauma and the extremity binding, along with the contributory factor of the methamphetamine intoxication."

Larrea's fingerprints were found on a cup near the stolen bicycle; her DNA was found on the plastic wrapping from a roll of duct tape inside the trailer. Gaeta's DNA was found on a strip of duct tape stuck to a dresser in the trailer.

DISCUSSION

I. THERE IS SUFFICIENT EVIDENCE THAT APPELLANTS' ACTS WERE THE PROXIMATE CAUSE OF NUNLEY'S DEATH.

Appellants contend their murder convictions must be reversed because the record does not contain substantial evidence that their actions were the proximate cause of Nunley's death. Specifically, they argue that the forensic pathologist's testimony failed to show that the assault and binding of Nunley was a substantial factor in his death. We disagree.

Pathologist's Testimony (Autopsy Results)

Lesley Wallis-Butler, M.D., the forensic pathologist who performed the autopsy on Nunley, testified that, in determining whether a death is a homicide, she considers not only the condition of the decedent's body, but also the scene circumstances and circumstances surrounding the individual's death, including any x-rays and toxicology reports. For a pathologist, homicide means "death at the hands of another." An accident "is an unforeseen event that just happened that resulted in somebody's death." When the circumstances do not provide enough information to form an opinion, the cause of death is "undetermined."

Dr. Wallis-Butler testified that, at the time of his death, Nunley's hands were bound with duct tape behind his back and his ankles were also bound with duct tape. There were several small lacerations on his face and head, consistent with having been punched. Nunley had hemorrhaging throughout the right side of his neck, as well as in the hyoid bone in his neck, injuries consistent with having been in a headlock. Although Nunley had "significant coronary artery disease," Dr. Wallis-Butler was unable to determine if he had had a heart attack. Nunley's lungs were "heavy and congested," a

possible sign of methamphetamine ingestions; he had a “moderate amount” of methamphetamine in his body, as well as some marijuana.

Dr. Wallis-Butler reviewed the written statement of emergency personnel and photos of Nunley’s body as found at the scene. Based on the autopsy and the other information available, Dr. Wallis-Butler made the following “pathologic diagnoses”: (1) positional asphyxia; (2) blunt force trauma, multiple contusions, neck hemorrhage and facial lacerations; (3) arms and legs bound with duct tape; (4) atherosclerotic cardiovascular disease; and (5) methamphetamine intoxication.

Dr. Wallis-Butler testified that “positional asphyxia” meant the inability to breathe through the nose or mouth because of the position of the head. As explained by Dr. Wallis-Butler, Nunley’s body was on its side, with his hands behind his back inhibiting his respiratory muscles, his head wedged between the wall and a space heater, and his nose and mouth pointed toward the floor so that he was not able to move his airway. According to Dr. Wallis-Butler, having one’s arms bound behind the back inhibits breathing by “locking your ribs into an up position.” His bound feet made it more difficult for him to get out of the position he was in. Dr. Wallis-Butler opined that Nunley was unconscious, either due to partial strangulation or methamphetamine intoxication, and then, because of the position he was in, not able to clear his nose and mouth.

Dr. Wallis-Butler testified that she could not say how much each of the contributing factors played in Nunley’s death, nor which was the primary factor, but concluded his death was a homicide caused by “positional asphyxia associated with the blunt-force trauma and the extremity binding, along with the contributory factor of the methamphetamine intoxication.”

On cross-examination, Dr. Wallis-Butler acknowledged that a person could lapse into a coma from methamphetamine intoxication. She also acknowledged that positional

asphyxia could result from a seizure or other illness, so she could not say exactly how Nunley was rendered unconscious.

Applicable Law and Analysis

The felony-murder doctrine provides a killing is first degree murder if “committed in the perpetration” of certain enumerated felonies, including robbery. (§ 189.) The killing is first degree murder “regardless of whether it was intentional or accidental.” (*People v. Coefield* (1951) 37 Cal.2d 865, 868.) The requisite mental state is “simply the specific intent to commit the underlying felony” because only felonies that are inherently dangerous to life or pose a significant prospect of violence are listed in section 189. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

The purpose of the felony-murder rule is “to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.” (*People v. Washington* (1965) 62 Cal.2d 777, 781.)

“The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.” (*People v. Burton* (1971) 6 Cal.3d 375, 388, disapproved on other grounds in *People v. Lessie* (2010) 47 Cal.4th 1152, 1156.)

Consequently, a conviction of first degree felony-murder does not require proof of a strict causal relationship between the underlying felony and the homicide so long as the killing and the felony are part of one continuous transaction. (*People v. Thompson* (1990) 50 Cal.3d 134, 171; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1024.) “There is no requirement that the killing occur, ‘while committing’ or ‘while engaged in’ the felony, or that the killing be ‘a part of’ the felony, other than that the few acts be a part of one continuous transaction.” (*People v. Stamp* (1969) 2 Cal.App.3d 203, 210 (*Stamp*)). “As long as the homicide is the direct

causal result of the [underlying felony] the felony-murder rule applies whether or not the death was a natural or probable consequence of the [underlying felony].” (*Ibid.*)

A homicide conviction requires proof that the defendant’s conduct proximately causes the victim’s death. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1009 (*Butler*)). “To be considered the proximate cause of the victim’s death, the defendant’s act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical.” [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 643.) “[A]s long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death.” (*Ibid.*, quoting *People v. Catlin* (2001) 26 Cal.4th 81, 155 (*Catlin*)). “This is true even if the victim’s preexisting physical condition also was a substantial factor in causing death.” (*Catlin, supra*, at p. 155.) “So long as a victim’s predisposing physical condition, regardless of its cause, is not the *only* substantial factor bringing about his death, that condition ... in no way destroys the [defendant’s] criminal responsibility for the death.” (*Ibid.*, quoting *Stamp, supra*, 2 Cal.App.3d at p. 210.)

A jury’s finding of proximate causation will not be disturbed on appeal if there is substantial evidence - evidence that is reasonable, credible, and of solid value - from which it may be reasonably inferred that the defendant’s act was a substantial factor in producing death. (*Butler, supra*, 187 Cal.App.4th at p. 1010.) On appeal, we do not reweigh the evidence or determine credibility issues; “““[i]f the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” (*Catlin, supra*, 26 Cal.4th at p. 139.)

Appellants argue that Dr. Wallis-Butler’s testimony did not amount to substantial evidence of causation because the exact cause of Nunley’s unconsciousness could not be determined. Citing *People v. Phillips* (1966) 64 Cal.2d 574 (*Phillips*), overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 490, footnote 12, and *Stamp, supra*, 2

Cal.App.3d 203, appellants claim that a medical opinion regarding the cause of death must identify the defendant's actions as a substantial factor in the victim's death.

In *Phillips*, the eight-year-old victim had fast-growing eye cancer and was scheduled for surgery, when the defendant, a chiropractic doctor, convinced her parents that the hospital was experimenting on their daughter and only wanted their money and that he could cure their daughter without surgery. (*Phillips, supra*, 64 Cal.2d at p. 577.) The parent's cancelled surgery and put their daughter in the defendant's care. She later died and the defendant was convicted of murder. (*Ibid.*) The Supreme Court held there was sufficient evidence to prove causation where, in addition to the defendant's advice to the parents, the prosecution's medical expert testified that, to a "reasonable medical certainty," the surgery would have prolonged the girl's life or even cured her. (*Id.* at p. 579 & fn. 2.)

In *Stamp*, the defendants robbed the employees of a business at gunpoint. The owner, who had a history of heart disease, died of a heart attack about 15-20 minutes after the robbery. (*Stamp, supra*, 2 Cal.App.3d at pp. 207-208.) Three physicians testified that the heart attack was precipitated by "some immediate upset to his system" and that "but for the robbery there would have been no fatal seizure at that time." (*Id.* at p. 208.) The court in *Stamp* found this evidence, which the doctors described in terms of a "medical probability," as sufficient evidence to prove causation. (*Id.* at p. 209 & fn. 2.)

But neither *Phillips* nor *Stamp* stands for the proposition that an expert medical opinion regarding the cause of death must be disregarded unless it is explicitly couched in terms of reasonable medical certainty. To the contrary, "a diagnosis need not be based on certainty, but may be based on probability; the lack of absolute scientific certainty does not deprive the opinion of evidentiary value." (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1293; see also *People v. Jackson* (1971) 18 Cal.App.3d 504, 507.)

In *Butler, supra*, 187 Cal.App.4th 998, the prosecution’s medical expert identified four cause-of-death factors: head injuries, restraint, asphyxiation, and cocaine toxicity. The defendant argued that there was insufficient evidence of causation because the expert was unable to say which of the four factors was the most prominent in the victim’s death. (*Id.* at p. 1010.) The court rejected this claim, stating, “when there are multiple concurrent causes of death, the jury is not required to determine which, if any, cause was the primary cause. Rather, the jury need only determine that the defendant’s conduct was a substantial factor contributing to the death.” (*Ibid.*)

Here, while Dr. Wallis-Burton was unable to attribute a percentage value to each contributing factor, it did not preclude the jury from reasonably inferring that the acts of hitting Nunley, choking him, binding him, and placing him on his side played a substantial role in his death. The evidence at trial showed that Nunley was awake and alert when appellants entered his home, which is likely why they beat him up, placed him in a headlock and bound his limbs before taking items from him and his trailer. Even if Nunley had been experiencing methamphetamine intoxication at the time, the jury could reasonably have concluded that circumstance alone did not cause his death. “[A]s long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death.” (*Catlin, supra*, 26 Cal.4th at p. 155.)

It is for the jury, not the reviewing court, to determine whether the testimony of a qualified expert is persuasive. (See *People v. Mercer* (1999) 70 Cal.App.4th 463, 466-467.) Here, there was ample evidence from which the jury court infer that appellants’ actions were a substantial factor contributing to Nunley’s death and we reject their claim to the contrary.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE AN INSTRUCTION ON DURESS AS A POSSIBLE DEFENSE FOR LARREA.

Larrea contends the trial court prejudicially erred by refusing to instruct the jury on the defense of duress. According to Larrea, such instructions were warranted because

there was sufficient evidence from which the jury could have concluded that she did not participate in the robbery until after the perpetrators left the scene, during which time Gaeta threatened to kill her. This claim is meritless.

Procedural Background

During discussions on instructions, Larrea’s counsel requested that the jury be instructed on the defense of duress, using both a pattern instruction (CALCRIM No. 3402), as well as a special instruction crafted by counsel.² The request was based on defense counsel’s theory that, because Gaeta threatened to kill Larrea after they left the scene, the jury could infer that Gaeta had also threatened to kill Larrea earlier as well.

In analyzing the defense request for the duress instructions, the trial court ruled that Larrea was entitled to an instruction on the lesser included offense of involuntary manslaughter. The trial court based its decision on the inference that Larrea was unaware of Gaeta and Fleming’s plans to rob Nunley when they returned to the trailer with Larrea, and therefore might not have had the requisite intent. Fleming had testified Larrea was not present when he and Gaeta discussed plans to rob Nunley and when they purchased the duct tape for that purpose. The trial court also found that an argument could be made that, even after the assault on Nunley began and his limbs were bound, Larrea was not aware that the reason for the assault was to rob Nunley.

But the trial court disagreed that an instruction on the defense of duress was in order:

“it does not appear that this was a case of duress, necessarily, consistent with *People vs. Saavedra* [(2007) 156 Cal.App.4th 561], wherein the Court laid out in that case that the defense of duress requires that the threat or menace be accompanied by a direct or implied demand that the defendant committed the criminal act charged. [¶] In this particular case, there’s only

² The requested special instruction stated in part, “You may consider evidence of duress solely for the purpose of determining whether defendant Milani Larrea had actually formed the mental state required for the charged offense of robbery and for the special circumstance allegations.”

one particular instance where a threat was made, and that was at the conclusion of the act of robbing Mr. Nunley while all three persons were inside the vehicle immediately leaving or getting ready to leave Mr. Nunley's residence while at the vehicle. [¶] To the extent that that occurred after the assault upon Mr. Nunley, as well as gathering Mr. Nunley's belongings, the Court does feel that duress has not been shown, nor proved, that might address particular intent issues, but not as it relates to duress."

Applicable Law and Analysis

A trial court has a duty to instruct on a particular defense "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Barton* (1995) 12 Cal.4th 186, 195, quoting *People v. Seden* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Substantial evidence is evidence sufficient for a reasonable jury to find in favor of the defendant. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) In making this determination, the trial court "does not determine the credibility of the defense evidence." (*Ibid.*) Instead, the issue "turns on whether the defendant offered substantial evidence that, if believed by the jury, would raise a reasonable doubt as to" the defendant's guilt. (*Id.* at p. 983.)

It is settled that duress is not a defense to any form of murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 780.) "Moreover, because duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first degree murder, [the California Supreme Court has] further reject[ed the] argument that duress could negate the requisite intent for one charged with aiding and abetting a first degree murder. [Citation.]" (*People v. Vieira* (2005) 35 Cal.4th 264, 290.) Our state's high court has recognized a single exception: "[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*People v. Anderson, supra*, at p. 784.) "Liability for first degree murder based on a felony-murder theory is proper when the defendant kills in the commission of [one of the felonies] listed in section 189."

(*People v. Lewis* (2001) 25 Cal.4th 610, 642.) “The mental state required is simply the specific intent to commit the underlying felony” (*People v. Cavitt, supra*, 33 Cal.4th at p. 197.) “If one is not guilty of the underlying felony due to duress, one cannot be guilty of felony murder based on that felony.” (*People v. Anderson, supra*, at p. 784.)

“An essential component of this defense is that the defendant be faced with a direct or implied demand that he or she commit the charged crime.” (*People v. Saavedra, supra*, 156 Cal.App.4th at p. 567.) There must be “immediacy and imminency of the threatened actions,” i.e., the situation must involve a “present and active aggressor threatening immediate danger.” (*People v. Otis* (1959) 174 Cal.App.2d 119, 125.)

In support of her argument on appeal, which takes a different approach than that presented at the time the instructions were requested, Larrea emphasizes the trial court’s statement that there was sufficient evidence from which the jury could conclude that she was not a knowing participant in the robbery. What the trial court stated was that there was evidence presented that would suggest that Larrea did not know what was going to transpire at Nunley’s trailer and that, even after obtaining the duct tape and returning to bind Nunley’s hands and ankles, “she still had no idea that she was to participate in a robbery.” But the court immediately added, “That could be an argument made. That is certainly not to suggest that the Court believes that that is what happened. In fact, I am not the fact finder in this case and have previously denied the [section] 1118.1 motion.”³

Larrea also argues that Gaeta’s threat as they left the scene was sufficient to support the duress instruction because it supports a finding that she did not participate in the robbery until flight and asportation of the loot from the scene. In support of her argument, Larrea cites CALCRIM No. 1603, which was given and stated, in part, that to be guilty of robbery as an aider and abettor, “the defendant must have formed the intent to aid and abet a commission of the robbery before or while the perpetrator carried away

³ Larrea’s trial counsel had made a section 1118.1 motion for acquittal on both the murder and robbery counts after the prosecution rested.

the property to a place of temporary safety.” Larrea argues that, if the jury concluded that she did not form the intent to aid and abet the commission of the robbery until Gaeta and Fleming were leaving the scene, the jury could also conclude that she agreed to participate in the crime only because Gaeta threatened to kill her if she did not.

But Larrea did not drive the getaway car, nor did she provide any assistance in helping the others reach a place of temporary safety. The only thing Larrea did at that point was promise Gaeta that she would not tell anyone about the robbery. Because there was no evidence that Larrea facilitated or encouraged the asportation aspect of the robbery, she could only be liable as an aider and abettor if she participated in the robbery prior to the asportation stage. (See *People v. Beeman* (1984) 35 Cal.3d 547, 561 [discussing elements of aider and abettor liability]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1161 [getaway driver who has no prior knowledge of a robbery, but who forms the intent to aid in carrying away the loot during such asportation may be found liable as an aider and abettor of the robbery].)

There was evidence at trial that, when they arrived at the trailer, Larrea directed Fleming to park in the back of the trailer instead of the front. Once in the trailer, Gaeta told Larrea to get the duct tape. When she returned with the tape, she used it bind Nunley’s ankles and wrists while Fleming and Gaeta restrained him. Afterwards, Larrea was told to search the back of the trailer, which she did. There was evidence that Larrea took both a welder and a bicycle from Nunley and that she carried both items to the car, although there is no evidence that either item was placed in the car before they were confronted by Nunley’s relatives.

There was no substantial evidence that Larrea formed the intent to aid and abet the robbery only after the perpetrators left the scene. The trial court was therefore not required to instruct on the defense of duress based on Gaeta’s threat to kill Larrea during the getaway.

III. THE INSTRUCTIONS AS GIVEN DID NOT PRECLUDE THE JURY FROM FINDING LARREA GUILTY OF THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.

Larrea contends that the jury instructions on involuntary manslaughter incorrectly failed to explain the difference between murder on the theory presented and involuntary manslaughter. Specifically, Larrea contends that the involuntary manslaughter instruction was incorrect “in its purported statement that the difference between the lesser-included offense of involuntary manslaughter and the charged offense of first-degree felony-murder depended on the presence or absence of implied malice rather than on the presence o[r] absence of knowing participation in a robbery.” Larrea contends this error precluded the jury from finding her guilty on the lesser included offense of involuntary manslaughter. We disagree.

Procedural Background

The prosecution relied on a theory that Larrea was guilty of felony murder based on robbery as an aider and abettor. Larrea’s defense counsel argued Larrea was not guilty of either the murder or robbery. Instead, defense counsel’s argument was that Larrea had no intent to commit robbery, but that her intent was only to help commit an assault and battery on Nunley. And since Nunley subsequently died, Larrea was guilty of involuntary manslaughter. In summation, defense counsel stated,

“I would say to you that because [the prosecutor] has not proved that [Larrea] knew there was going to be a robbery, that she aided and abetted in the commission of a robbery, that she is not guilty of the robbery charge and certainly not guilty of the murder charge. I would say she is not guilty on both charges. [¶] But the law does ask the jury to consider holding her responsible for what it is that she did commit, which was the battery upon Mr. Nunley. It was the product of criminal negligence and is captured in the final jury instruction I will share with you that is the involuntary manslaughter instruction, and that is captured in [CALCRIM No.] 580.”

The trial court instructed the jury on felony murder, pursuant to CALCRIM No. 540A, as follows:

“The defendant is charged in Count 1 with murder under a theory of felony murder. [¶] To prove that the defendant is guilty of first degree murder

under this theory, the People must prove that[:] one, the defendant committed robbery; two, the defendant intended to commit robbery; and three, while committing robbery the defendant caused the death of another person. [¶] *A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.* [¶] To decide whether the defendant committed robbery, please refer to these separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder. [¶] The defendant must have intended to commit the felony of robbery before or at the time that he or she caused the death. [¶] It is not required that the person die immediately, as long as the cause of death and the felony are part of one continuous transaction.” (Italics added.)

The trial court instructed the jury on involuntary manslaughter, pursuant to CALCRIM No. 580, as follows:

“When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter. [¶] *The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another and done in conscious disregard of that risk is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.* [¶] Defendant Larrea committed involuntary manslaughter if[:] one, the defendant committed a crime; two, the defendant committed the crime with criminal negligence; and three, the defendant’s acts caused the death of another person. [¶] The People allege that Defendant Larrea committed the following crimes: battery upon Wesley Nunley. [¶] Instruction 960 tells you what the People must prove in order to prove that the defendant committed battery. [¶] Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when[:] one, he or she acts in a reckless way that creates a high risk of death or great bodily injury; and two, a reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinary careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have

happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.” (Italics added.)

Applicable Law and Analysis

“When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner.” (*People v. Houston* (2012) 54 Cal.4th 1186, 1229; see *People v. Tate* (2010) 49 Cal.4th 635, 696; *People v. Ayala* (2000) 24 Cal.4th 243, 289.) “The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury.” (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) We also ““assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.”” (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) “Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.” (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

Larrea argues that the italicized portion of CALCRIM No. 580 was improperly given because it explains the difference between implied-malice second degree murder and involuntary manslaughter, rather than the difference between felony murder and involuntary manslaughter, which “effectively removed the lesser-included offense of involuntary manslaughter from jury consideration.”

We disagree. Reading the instructions as a whole, it is clear that involuntary manslaughter was an option if the jury found Larrea participated in the battery upon Nunley with criminal negligence, in such a way that a reasonable person would have

recognized the victim faced a high risk of death. This was the theory argued by Larrea’s trial counsel. But to convict Larrea of the lesser included offense of involuntary manslaughter, the jury was instructed, pursuant to CALCRIM No. 640⁴, that it would have to find Larrea not guilty of felony murder. To do so, the jury would have to reject the prosecution’s theory that Larrea aided and abetted the robbery of Nunley and accept defense counsel’s argument that Larrea had no knowledge of the plan to rob Nunley before and during the assault.

The instructions were not inconsistent: Larrea could be liable for felony murder committed in the course of aiding and abetting a robbery, even if the killing was accidental or negligent, or, if the jury found that she had no knowledge of the plans to rob Nunley, she could be found guilty of the lesser included offense of involuntary manslaughter if she aided and abetted a battery with criminal negligence. Nothing in the instructions, as given, precluded a verdict of involuntary manslaughter.

IV. THE FELONY-MURDER SPECIAL CIRCUMSTANCE IS NOT UNCONSTITUTIONAL.

Appellants argue the felony-murder special circumstance is unconstitutional as applied in their case because the felony-murder theory of first degree murder was based on the same facts as the robbery special circumstance; the one elevates the degree of homicide to first degree murder and the other renders them eligible for life imprisonment without parole (§§ 189, 190, subd. (a), 190.2, subd. (a)(17)(A)). As such, there is no “meaningful distinction between the felony-murder special circumstance and the felony-murder theory of first-degree murder,” violating the Eight Amendment. Consequently, they argue the felony-murder special circumstance must be reversed. We disagree.

⁴ CALCRIM No. 640, as given, states: “You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of involuntary manslaughter only if all of you have found Defendant Larrea not guilty of first degree murder.”

Applicable Law and Analysis

Appellants' argument is based on the following constitutional backdrop to the special circumstance law. To comply with the Eighth Amendment, a state's capital punishment scheme must "afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not." (*People v. Crittenden* (1994) 9 Cal.4th 83, 154; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465; see also *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) "A legislative definition lacking 'some narrowing principle' to limit the class of persons eligible for the death penalty and having no objective basis for appellate review is deemed to be impermissibly vague under the Eighth Amendment. [Citations.]" (*People v. Bacigalupo, supra*, at p. 465.)

Therefore, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244.) The same rule applies to the sentence of life imprisonment without parole based on the special circumstance law. (*People v. Estrada* (1995) 11 Cal.4th 568, 575-576.)

The narrowing function which limits the sentence of death or life imprisonment without parole to a small subclass of murderers is provided in California by the special circumstances contained in section 190.2, subdivision (a). (*People v. Crittenden, supra*, 9 Cal.4th at pp. 154-155; *People v. Bacigalupo, supra*, 6 Cal.4th at p. 467.) Here, the applicable special circumstance is the robbery-murder special circumstance of section 190.2, subdivision (a)(17).

Appellants' claim that use of the same felony-murder facts to establish both first degree murder and the robbery-murder special circumstance resulted in a denial of the constitutionally required narrowing of the class of death or life imprisonment without parole eligible murderers in violation of the Eighth and Fourteenth Amendments.

But the California Supreme Court, as appellants acknowledge, has repeatedly rejected the challenge they raise in this appeal and instead has upheld the felony-murder

special circumstance as providing a meaningful basis for narrowing the class of persons subject to the death penalty or life imprisonment without parole. (See, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 528; *Catlin, supra*, 26 Cal.4th at p. 158; *People v. Millwee* (1998) 18 Cal.4th 96, 164; *People v. Marshall* (1990) 50 Cal.3d 907, 946; *People v. Coleman* (1989) 48 Cal.3d 112, 153.)

The decisions of the California Supreme Court are binding upon and must be followed by all the state courts of California. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction and it is not their function to attempt to overrule decisions of a higher court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In view of the California Supreme Court’s holdings on the issue, we must reject appellants’ constitutional challenge.

We likewise reject appellants’ alternate claim of ineffective assistance of counsel for failure to raise the constitutionality issue. “Representation does not become deficient for failing to make meritless objections.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.)

V. THE SECTION 1202.45 PAROLE REVOCATION FINES MUST BE STRICKEN.

Appellants contend the trial court erred in imposing a \$240 fine pursuant to section 1202.45 on each of them, which was stayed pending successful completion of parole. Respondent concedes the issue, and we agree.

Such a fine is not applicable in cases where the defendant’s sentence includes a term of life without parole. (*People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1185.) The fine should not have been imposed because appellants were sentenced to life without the possibility of parole.

VI. LARREA IS ENTITLED TO ONE ADDITIONAL DAY OF CUSTODY CREDITS.

Larrea contends that the trial court short-changed her custody credits by one day, awarding her 1,006 days of presentence custody credits when it should have awarded her 1,007 days. Respondent agrees, as do we.

When calculating custody credits for a defendant in continuous custody from arrest to sentencing, the arrest date and the sentencing date are both counted as full days. (*People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) We have consulted a calendar, and take judicial notice that 2012 was a leap year. We have calculated the number of days between Larrea's arrest on March 3, 2010, and sentencing on December 3, 2012, and conclude there were 1,007 days.

DISPOSITION

The trial court is ordered to amend both Gaeta's and Larrea's abstract of judgment to delete the \$240 section 1202.45 fine which was ordered and stayed pending successful completion of parole. In addition, Larrea's abstract of judgment must also be amended to state the correct number of presentence custody credits as 1,007. In all other respects, the judgment is affirmed.

Franson, J.

WE CONCUR:

Poochigian, Acting P.J.

Peña, J.