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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY DALE CHOATE,

Defendant and Appellant.

F066361

(Super. Ct. No. CRM011819A)

**OPINION**

APPEAL from a judgment of the Superior Court of Merced County. John D. Kiriwara, Judge.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jerry Dale Choate was convicted by jury of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)). The jury found true the special circumstances that the murder was committed in the course of a burglary (§ 190.2, subd. (a)(17)(G)) and robbery (§ 190.2, subd. (a)(17)(A)). The jury found not true the allegation defendant personally used a deadly weapon in the commission of the murder. The trial court subsequently sentenced defendant to a term of life without the possibility of parole.

On appeal, defendant contends the evidence is insufficient to corroborate the accomplice testimony supporting the first degree murder and special circumstances convictions, the trial court erred in admitting his statement in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, the trial court erred in admitting opinion testimony, his counsel was ineffective for failing to introduce certain evidence, and the trial court erred in imposing certain fines. We conclude the evidence was sufficient to support the judgment. However, we further find the trial court erred in admitting defendant's statement and the error was prejudicial, therefore we will reverse the conviction.

### **FACTS**

Charles Swan was a friend of the victim, Richard Mora. Swan met Mora while Mora was doing construction work, and he eventually hired Mora to renovate houses for him in exchange for room and board. Swan bought properties that needed renovation, and Mora lived in the homes while he worked on them. In June or July of 2010,<sup>2</sup> Mora began living at and working on a home located on West 20th Street that needed extensive work.

Swan described Mora as an alcoholic and a "happy drunk." Swan allowed Mora to drink beer in the home as long as he did not drink any hard alcohol. The last time Swan recalled speaking with Mora was approximately July 28.

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

<sup>2</sup>All further references to dates are to 2010 unless otherwise indicated.

On August 1, Detective Joseph Deliman was dispatched to investigate a suspicious death occurring on West 20th Street. A citizen had discovered a body in the home and notified police. Other officers and law enforcement personnel had arrived at the scene prior to Deliman. During his investigation of the home, Deliman discovered a small kitchen window at the rear of the home, facing the backyard, which was open. Mora, was found, deceased, in the living room of the home. Based on the condition of the body and the odor, Deliman opined the victim had been dead for at least a couple of days. It did not appear as if the body had been moved. The victim had what appeared to be several strike or impact injuries to the head and facial area. There was a significant amount of blood splatter on the wall near the victim's head. There was also dried blood on the victim, the ground, and the blanket he was lying on.

Officers discovered a wooden ax handle lying next to the victim's body. Believing the ax handle could be the murder weapon, Deliman collected it as evidence and submitted it for analysis. Subsequent testing revealed the presence of a DNA mixture on the ax handle. Defendant's DNA profile was excluded as a contributor to the mixture.

Deliman noted there were shoe impressions near the victim's body. Although there was blood splatter evidence near the victim's head, he did not notice any blood near the shoe prints. He collected footprints by putting tape over the prints and then removing the surrounding floorboards and requested analysis on the shoe prints. No useable fingerprints were found in the home.

On August 4, Deliman spoke to defendant. Defendant explained the victim was living in and remodeling a house down the street from him. He was acquainted with the victim from the neighborhood and described him as a "vulgar drunk." During the interview, Deliman asked defendant if he had ever been in the home where the victim's body was discovered. Defendant stated he had gone into the home in April, before the victim moved in. At some point during the interview Deliman noticed the shoes defendant was wearing appeared to have the same tread pattern as the shoe impressions

found at the murder scene, so he took them as evidence. Deliman did not see any blood on defendant's shoes, and a laboratory report subsequently confirmed there was no blood on the shoes.

Criminalist James Hamiel compared the pieces of flooring containing the latent shoe impressions recovered from the scene with a pair of size 10 Adio brand shoes belonging to defendant. He determined the shoe prints from the floorboards had the same tread design and size and were, therefore, consistent with defendant's shoes. However, Hamiel could not definitively say defendant's shoes made the impression because there was no unique detail on the tread of the shoes. Thus, his results were inconclusive. He conceded the shoeprint could have been made by any shoe with a similar size and the same tread pattern.

Deliman interviewed defendant for a second time on August 9. He recalled in the initial interview defendant had told him the home was abandoned when he was last in it. Knowing this, Deliman told defendant his shoe prints were found inside of the home where the victim was discovered. He did so as a ruse to gauge defendant's reaction. In response, defendant then said he remembered being in the house in late June or early July.

Deliman believed the shoe prints located at the murder were identical to defendant's shoes and believed defendant's shoes, in fact, left the shoe prints found in the home. He based his opinion upon the similarity of the shoe impressions and defendant's shoes, as well as his review of the witness testimony, defendant's statements, and the investigation as a whole. He disagreed with Hamiel's conclusion that the shoe prints were inconclusive because Hamiel only looked at the shoe prints themselves, while he was able to look at all the evidence. Deliman also noted he had looked at the shoes of the woman who discovered the victim's body. Because they were Vans brand with a different tread pattern than the impressions left at the scene, he did not send them for analysis.

Dr. Ann Bucholtz, a forensic pathologist, performed the autopsy on Mora. She observed multiple lacerations to the victim's head. Upon further inspection, she discovered multiple skull fractures that appeared to have been caused by some sort of impact. All of the victim's wounds were to the head. The injuries were consistent with being hit with an ax handle. Based on the injuries and their locations, Dr. Bucholtz opined the victim had to have been struck at least three times, but he could have been struck more. Dr. Bucholtz determined the cause of death was blunt force trauma to the head.

Based upon the condition of the body at autopsy and after reviewing the photos of the body when it was discovered, Dr. Bucholtz opined the victim had been dead for less than five days when he was discovered. That opinion was based partly upon the lack of maggot infestation. It could have been as short as 12 hours.

#### *Accomplice testimony*

Sara Stephens testified defendant came to her apartment on the night in question, which was in late July. When defendant arrived, Christopher Anderson and his wife were also there. Stephens recalled using methamphetamine with Anderson, but did not recall defendant using any drugs that night.

While they were visiting, defendant stated he knew of a home with some tools they could steal. The trio put on sweaters provided by Stephens and defendant also donned a pair of gloves provided by Stephens. The three walked to the home, entering the backyard. Once they were inside the yard, Anderson relieved himself in a shed. Then the three regrouped and Stephens recalled defendant picking up a stick from the yard. It appeared similar to the ax handle located next to the body.

Defendant opened a big back window to the home and defendant and Anderson climbed inside. Stephens waited for the men outside. After a short time, Stephens heard what sounded like a scuffle, then someone being hit. She estimated she heard eight strikes. The noise was loud and sounded like someone was being hit with an object. Afterwards, she heard someone struggling to breathe.

Subsequently, Anderson ran from the home holding a red case. Anderson and Stephens ran down the alley, stopping by a dumpster and waiting for defendant. Anderson appeared to be in shock as Stephens repeatedly asked him where defendant was. After a few minutes, defendant walked up carrying two bags. The three began walking back toward her apartment. Stephens and Anderson went behind Anderson's apartment, which was across the alley from hers, and put the stolen items in the back of his father's truck; all three then proceeded to her apartment. Sometime later she helped take the stolen property to Anderson's father's home.

While in her apartment, Stephens noted Anderson appeared "white as a ghost" and explained she felt anxious. She asked defendant what had happened at the home, and defendant replied "he stood over the guy and started hitting him." Defendant did not appear to be himself as he relayed what happened; the incident did not seem to bother him.

After they returned to her apartment, Stephens collected the clothes she had given the others and attempted to burn them but was unsuccessful. Later, she threw them in the dumpster. She disposed of the clothing before she spoke with the police. She also subsequently discarded her shoes, giving them to a friend, but did not do this until after she spoke to the police about the murder.

Stephens spoke to Deliman on August 6. She was provided immunity in exchange for her truthful testimony. She did not receive an immunity agreement until after she told Deliman what had happened. However, she conceded she had initially lied to the police about the murder, and it was not until she was threatened with the loss of her children that she told Deliman what happened.

Stephens testified Deliman's daughter, Angel, is one of her best friends. She admitted she called Angel after the murder to tell her she did something stupid and to ask her to come get her. However, Angel was out of town and could not pick her up. Stephens did not recall telling Angel anything about the murder. She did recall telling Deliman the pants she was wearing the night of the murder belonged to Angel.

At one point, Stephens recalled asking Deliman if she could speak with her boyfriend, Ricky Brown, who was in jail. She wanted to talk to him to help her calm down, but she did not talk to him about the case. Deliman allowed her to speak with Brown from his personal cell phone while Brown was in jail.

Stephens admitted she participated in the crime as a lookout and she took possession of some of the stolen property. Despite her involvement, Stephens was never charged or spent any time in jail. Rather, she received immunity for her testimony.

Anderson testified he met defendant on the night of the murder. He was at Stephen's home with his wife and Stephen's kids, smoking methamphetamine when defendant arrived. Shortly after defendant arrived, he said he knew of a home nearby that had tools they could steal. He and Stephens agreed to go with defendant to steal the tools, which they planned to sell to buy more drugs. On the night in question, Anderson was wearing Vans brand shoes.

The trio walked to the home occupied by the victim. Upon arrival, Anderson stopped in a shed to relieve himself. Meanwhile, defendant walked up to the home. The three began looking for a window to enter the home. In the back of the home, they found a slightly opened window that defendant opened completely. Defendant and Anderson proceeded to climb through the open window. Anderson did not see defendant with any weapon until after they entered the house.

Upon entering the home, the two proceeded through the kitchen into another room. Anderson turned to his right and heard a noise. When he looked back, he saw the victim on his back on the ground and defendant was standing over him with a stick in his hands. He observed defendant swing the stick six or seven times and heard the victim trying to scream. As defendant hit the victim, Anderson could hear a smacking sound, similar to a tree branch cracking. Defendant reached down, touched the victim, walked into another room, picked up a tool case and handed it to Anderson. Anderson left the home with the tool case and saw Stephens outside. The two began walking away but stopped after about half a block. They saw defendant approaching and waited for him to catch up.

Defendant handed each of them a bag, and they proceeded to walk back to Stephens's apartment. Although he knew the victim was injured, Anderson never called the police or an ambulance after they left the home.

Anderson admitted lying to the police when he was initially interviewed, claiming he had nothing to do with the murder. He acknowledged he told several lies. For example, he initially claimed he fled as soon as he saw defendant attack the victim. Additionally, he lied about not taking anything from the home. He lied because he was scared of going to prison. He knew he had broken into someone's home and stolen property. Anderson claimed he did not know defendant would attack anyone in the home, although he did recall him saying that if they encountered people, he would hit them with the stick.

Anderson denied attacking and killing the victim. He acknowledged he was charged with the murder of the victim and entered a plea agreement to robbery with great bodily injury in exchange for a sentence of 12 years. As part of the agreement, he promised to testify truthfully about the events surrounding the murder. On cross-examination, Anderson denied personally inflicting great bodily injury upon the victim even though he had pled to that charge. Anderson agreed to the plea deal because he did not want to serve life in prison.

### ***Additional Evidence***

Daniel McSwain testified he met defendant in the early part of August at someone's home. During the encounter, defendant told McSwain he knew of a location where McSwain could steal a lawnmower. Defendant admitted he had killed the person in the house and the body was lying there. Defendant had a blank look when he related this. He further provided McSwain with the location of the lawnmower, telling McSwain to enter through the back door of the home, noting the lawnmower would be located on the right. He specifically told him not to look to the left. McSwain denied learning this detail from the newspaper or from any other source. McSwain explained he did not

originally believe defendant when he told him about the murder, but defendant later told him not to say anything or he would come after him.

Although defendant had relayed this information to McSwain in August, McSwain did not provide this information to the police until October of that year while he was in custody on some warrants. McSwain noted he had been arrested in August, but did not tell the police about defendant's statements until he was later rearrested. When McSwain provided the information, he asked Deliman for protection from defendant.

As a result of the information he provided, McSwain received a reduced sentence on his pending charges in exchange for his truthful testimony at trial. He had been charged with several felony cases, one involving forgery and one involving two burglary charges. He pled to the forgery and one burglary and several other charges were dismissed, including another burglary and drug charges as well as some enhancements. Additionally, his 12-month sentence was reduced to six months. Furthermore, he was allowed to enter his plea in secret, although his attempt to exclude defendant's counsel from the proceeding was unsuccessful.

McSwain admitted he had committed numerous thefts in his past and at the time he was arrested he was using methamphetamine and selling pornographic material for drugs.

Deliman confirmed there was a lawnmower in the home where the victim was discovered. If one were to enter through the back door, the mower would have been to the right and the victim's body would have been to the left, consistent with what McSwain told him. Those facts had not been released to the public at that time.

Deliman explained the district attorney's office is responsible for making plea offers, not the police. He noted, however, Anderson provided his statement before he had received any plea deal. Furthermore, he testified he did not arrange the immunity agreement for Stephens. Rather his sergeant was the one who spoke to the district attorney regarding her testimony, and she was given immunity because they needed a witness to go forward with the case.

Regarding his investigation, Deliman noted he never seized Anderson's shoes and did not believe he seized McSwain's shoes. He did note, however, that he took a toolbox from Anderson's father's home.

Deliman admitted he never arrested Stephens for murder, robbery, or any other charges even though she was guilty of those crimes. He also noted he did not include in any report the fact he let Stephens speak to her boyfriend in jail on his personal phone because it did not contribute to the case. The statement that Stephens was wearing clothing belonging to Deliman's daughter also was not included in his report but it was included in another detective's report.

During the course of the investigation, Deliman obtained a search warrant for defendant's wife's cellular telephone records and recovered her text messages. He noted the text messages from that number generated an automated signature of "Amber" at the end of the messages. Defendant's wife's name is Amber. After receiving the text messages, he found three messages that were of interest to him. Each of the messages were sent from defendant's wife's phone number to defendant's mother's phone number. The first text message was sent on July 31 at 5:55 a.m. and stated: "Mom, I'm scared to death. I'm through right now and wish this so-called life of mine never happened. I really did do it. I went back and checked." The next message was sent on the same date at 5:58 a.m. It read: "Don't text back. Only talk by phone to me about this tomorrow. Okay. Love you, and I'm truly sorry I put you through everything. I'll die before I do life. Sorry." The final text was at 6:03 a.m. on the same date and stated: "I'm not the son you needed to have...Lost without a heart, all alone." Deliman believed the text messages were sent by defendant based on the language used. Deliman noted there were some sexually explicit messages on defendant's wife's phone that had been sent to someone other than defendant.

### *Defense Case*

Berkeley Akutagawa, a criminalist with the Department of Justice, analyzed defendant's shoes but found no evidence of blood on his shoes. She also took samples

from the ax handle recovered from the scene of the murder. She took swabs from two areas at the top of the ax handle that tested positive for blood. She also took a swab of the other end of the handle, which did not test positive for blood, and preserved all of the swabs for further testing.

Pin Kyo is also a criminalist with the Department of Justice, specializing in DNA analysis. She compared swabs taken from the ax handle to known samples of defendant's and the victim's DNA. Two of the samples contained a single source, meaning only one person's DNA was present. The two single source samples matched the victim's genetic profile. The other end of the handle contained a mixture of DNA. Regarding the mixture, Kyo opined Mora was one contributor to the sample. Kyo was able to eliminate defendant as a contributor to that mixture. Kyo was never asked to enter the remaining unidentified genetic profile into a statewide database of known offenders or asked to compare it to any other known samples. However, she noted the nature of the sample she obtained was such that it was not feasible to enter it into the database.

The sample taken from the top end of the ax that contained only the victim's DNA would be consistent with Mora being struck in the head with that portion of the ax handle. If a person were wearing gloves while using the ax handle, it would not be expected that DNA would be found.

Jody Rich lived next door to the home where the victim died. The victim was restoring the house and living there while he completed the work. Rich noted he and his son had been in the house about a month prior to the victim's death, observing Mora's handiwork. His son wears a size 13 shoe. The size 10 shoes admitted into evidence did not belong to either him or his son. Deliman noted he never seized for comparison the shoes of Rich or his son.

## DISCUSSION

### I. The Accomplice Testimony Was Sufficiently Corroborated

At the conclusion of the People's case, defense counsel made a motion pursuant to section 1118.1 to dismiss the special circumstances allegations, arguing there was insufficient corroboration of the accomplice testimony establishing a burglary or robbery occurred and that defendant committed it. The trial court denied the motion, finding sufficient corroboration was provided from the fact of a footprint appearing to match defendant's, the pathologist's testimony regarding the cause of death, the evidence of the text messages, and defendant's statements to McSwain.

The jury was instructed that if the crimes of robbery, burglary and murder were committed, then both Anderson and Stephens were accomplices. The jury was further instructed it could not convict defendant based on the testimony of either Stephens or Anderson alone; rather, their testimony could only be used to support a conviction if it was supported by other evidence, the evidence was independent of the accomplice testimony, and the evidence connected defendant to the commission of the crime.

On appeal, defendant argues the evidence was insufficient to support his conviction because it failed to corroborate Anderson's and Stephens's testimony regarding whether there was a burglary or robbery of the victim or that the killing of the victim was premeditated and deliberate. He asserts the error requires reversal of the first degree murder conviction. Likewise, he contends the special circumstances allegations must also be reversed because independent evidence did not support a finding defendant committed the murder in the commission of a burglary or robbery. We conclude there was sufficient corroboration of the accomplice testimony and therefore reject defendant's claim.

We “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt.” ( *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.)

A conviction may not be based upon the testimony of an accomplice unless it is “corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” (§ 1111.) Likewise, a special circumstance allegation may not be proven by the uncorroborated testimony of an accomplice. ( *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177.) It is well-settled that the

““requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence ‘may be slight and entitled to little consideration when standing alone. [Citations.]’” ( *People v. Zapien* [(1993)] 4 Cal.4th [929,] 982, quoting *People v. Miranda* (1987) 44 Cal.3d 57, 100.) “Corroborating evidence ‘must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.’ [Citation.]” ( *People v. Zapien, supra*, 4 Cal.4th at p. 982, quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1228.) In this regard, ‘the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]’ ( *People v. Perry* (1972) 7 Cal.3d 756, 769.) “Corroborating evidence is sufficient if it substantiates enough of the accomplice’s testimony to establish his credibility [citation omitted].” ( *People v. Bunyard* (1988) 45 Cal.3d 1189, 1206-1207.)” ( *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.)

The question presented here is whether there was sufficient independent evidence to corroborate the accomplice testimony that the murder was committed in the course of a burglary or robbery. A conviction for first degree felony murder and the felony-murder special circumstances required proof of defendant’s intent to steal upon entry into the home or proof defendant attempted to commit a robbery. As these elements require proof over and above the murder, the evidence must independently corroborate the accomplice testimony on this point. ( *People v. Rodrigues, supra*, 8 Cal.4th at p. 1129; *People v. Hamilton, supra*, 48 Cal.3d at p. 1177.) The corroborating evidence cannot come from another accomplice. ( *People v. Davis* (2005) 36 Cal.4th 510, 543.)

Regarding the necessary corroboration, we find *People v. Rodrigues, supra*, 8 Cal.4th 1060 instructive. There, the defendant and two cohorts planned a robbery of two drug dealers. The defendant, with one confederate, entered the victims' apartment and attacked the victims. (*Id.* at pp. 1095-1097.) The defendant stabbed one victim with a knife while his cohort attacked the other victim with a tire iron. During the course of the robbery, the defendant's cohort asked the victims "'where do you have it.'" (*Id.* at 1097.) One victim interpreted this question to refer to money or drugs and replied it was in the closet. But before the attackers could take anything, the phone began to ring and the two attackers fled. One of the victims died and the other survived.

On appeal, the defendant conceded there was sufficient evidence to corroborate the accomplice testimony regarding the murder, but argued the evidence did not adequately connect him with an attempted robbery or burglary.

"Focusing on the circumstances testified to by [the victim], defendant argues that the unadorned question—'where do you have it?'—does not in itself reflect any intent or attempt to commit the crime of robbery or burglary. In his view, the question is an ambiguous and essentially meaningless question if considered without aid or assistance from [the accomplice]'s testimony and statements." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1129.)

The court rejected the defendant's argument.

"Even though the attackers were not specific in demanding money or drugs, the totality of circumstances testified to by [the victim], even apart from [the accomplice]'s testimony, clearly justified the jury's determination that an attempted robbery and burglary had taken place. (See, e.g., *People v. Jackson* (1963) 222 Cal.App.2d 296, 298 [attempted robbery conviction upheld where evidence established that defendant entered store, pointed a gun at store operator, and said only, 'This is it.']; *People v. Gilbert* (1963) 214 Cal.App.2d 566, 567-568 [where two armed men appeared in market shortly after closing time and simultaneously displayed their weapons, one pointing at proprietor near cash drawer and the other herding remaining occupants to rear room, lack of phrase such as 'this is a stickup' or 'hand over your money' does not bar the reasonable inference that a forceful taking of property was intended].) Although [the victim] testified that it was [the codefendant] who demanded where 'it' was, the jury could reasonably infer from all the testimony given by [the victim] that the attackers coordinated their efforts in a joint plan to rob the [victims]. The

circumstances additionally supported the inference that the attackers would have succeeded in that plan had it not been for the telephone ringing. (Cf. *People v. Zapien, supra*, 4 Cal.4th at p. 984 [upholding special circumstance finding that defendant murdered victim during commission of attempted robbery and burglary where jury could reasonably conclude that defendant fled without money or valuables because he knew police had been telephoned].) Contrary to defendant's assertions, there is nothing fanciful or illogical about these inferences." (*People v. Rodrigues, supra*, 8 Cal.4th. at pp. 1129-1130, fn. omitted.)

Pursuant to *People v. Rodrigues*, it is apparent a jury may infer a defendant's intent to steal to corroborate accomplice testimony from the totality of the facts surrounding the crime. An immediate coordinated attack, coupled with the question, even from a codefendant asking where "it" was, leads to the inference the attackers intended to steal upon entry. Likewise in *People v. Thompson* (2010) 49 Cal.4th 79, the court concluded the condition of the victim's body led to an inference the defendant intended to steal from the victim before killing him. There the victim was shot several times and his body was found floating in a lake. An accomplice testified the defendant argued with the victim by the lake, demanded he take off his clothing, shot the victim, and returned with the victim's clothes and some small items. Later, the defendant was arrested at his mother's home. Police returned to the home with a search warrant after his arrest and found a jacket and duffel bag belonging to the victim in the trunk of the defendant's mother's car. Evidence established the victim had been wearing the jacket two days before his body was discovered. (*Id.* at pp. 87-92.) The Supreme Court found the accomplice testimony was sufficiently corroborated, noting the victim's body was found without a shirt or jacket, thus supporting the accomplice's testimony that the defendant took the items before shooting the victim. (*Id.* at pp. 115-116.)

Similar to *People v. Rodrigues* and *People v. Thompson*, the circumstances here surrounding the condition of the home when the victim was found and the timing of the crime lead to the reasonable inference that defendant entered the home with the intent to steal. Deliman testified the back window to the home was open when they discovered the victim's body. This corroborated Anderson's testimony he and defendant climbed in the

home through the back window. In addition, the text messages that were sent on July 31 in the early morning hours corroborated the timing of the incident. That defendant sent text messages to his mother, beginning at 5:55 a.m., indicating that he ““did do it”” and he ““went back and checked”” indicated the crime occurred sometime beforehand. Based on the content of the messages, it would be reasonable for a jury to infer the crime took place in the hours before defendant sent the text messages.

Furthermore, the condition of the victim’s body at the time it was discovered on August 1 leads to the inference he was killed at approximately the time the text messages were sent. Detective Deliman, who responded to the scene at 4:00 p.m., opined the victim had been deceased for a couple of days. Dr. Bucholtz opined the victim had died between 12 hours to five days earlier, possibly as long as two weeks prior. In her opinion, the deteriorated condition of the body was consistent with death occurring within a day or two, given the weather conditions in July. Additionally, Swan testified he recalled speaking with the victim on approximately July 28 to invite him to a party. This evidence leads to an inference the victim was killed during the late night or early morning hours of July 30 to 31.

Thus, independent evidence established an open window and provided a reasonable inference the victim was killed during the hours of darkness. Evidence of an entry into a home through a window facing the back of the home, under the cover of darkness, leads to the reasonable conclusion the intruder harbored the intent to steal upon entry. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1078 [evidence of forced entry through a window coupled with evidence house was ransacked was sufficient to infer intent to commit burglary]; *People v. Soto* (1879) 53 Cal. 415, 416 [“when a person enters a building through a window at a late hour of the night, after the lights are extinguished, and no explanation is given of his intent, it may well be inferred that his purpose was to commit larceny, such being the usual intent under these circumstances”]; *People v. Corral* (1964) 224 Cal.App.2d 300, 304 [in burglary prosecution, “intruder’s intent to commit theft within the houses was amply shown by (inter alia) the secret and

noiseless entry in an unusual manner at an odd hour of the night into the homes where he was not an invited guest”].)

The evidence of the open window and the timing of the text messages corroborate an unusual entry into the home under the cover of darkness, demonstrating the intent to steal. That a toolbox was recovered from Anderson’s father’s home and evidence established the victim was renovating the home while living there provide further corroboration of the intent to steal. Moreover, the lack of evidence demonstrating animosity or any type of relationship between defendant and the victim suggests the primary motive was to steal, not harm the victim. Indeed, the evidence suggests the murder weapon belonged to the victim due to the fact his DNA was found not only on the end used to bludgeon him, but also on the end used as a handle. That the murder weapon likely belonged to the victim suggests defendant did not enter the home with the intent to kill, but rather formed that intent during the course of the burglary. Shoe prints matching defendant’s shoes, defendant’s statement to McSwain that he killed a man at the home, and defendant’s text messages to his mother indicating he “did do it” and he “went back and checked” further corroborate it was defendant who entered the home and killed the victim in the course of the burglary.

Defendant relies upon several cases in arguing the evidence of his intent was insufficiently corroborated. We find the cases upon which defendant relies distinguishable. In *People v. Martinez* (1982) 132 Cal.App.3d 119, the court found insufficient corroboration of the accomplice testimony that the defendant participated in a robbery as the only independent corroboration provided at trial merely demonstrated “the commission of the offense or the circumstances thereof.” (*Id.* at p. 133.) In that case, no independent evidence established the defendant was the perpetrator of the crime. The defendant was never identified as one of the perpetrators, nor was any evidence presented linking him to the offense. Rather, the corroboration merely described the circumstances of the offense. (*Ibid.*)

Unlike the situation present in *People v. Martinez*, the prosecution here provided sufficient corroboration linking defendant to the crime apart from the accomplice testimony. Shoe prints matching defendant's shoes were found near the victim's body when he was discovered. Additionally, McSwain's testimony that defendant admitted to killing a person in the house, and the text messages to defendant's mother saying he "really did do it," he "went back and checked," and he would "die before I do life" all provided strong corroboration, independent of the accomplice testimony, that defendant committed the murder.

The case is also unlike *People v. Robinson* (1964) 61 Cal.2d 373. There, evidence established three men confronted the victim, one shooting him with a shotgun and killing him. The only evidence linking the defendant to the crime was his fingerprints found on a disabled car parked nearby with its license plate obscured, his evasive and conflicting replies to questions regarding his whereabouts at the time of the crime, and his denials to the police that he committed the crime. The court found the evidence either alone or in combination insufficient to corroborate the accomplice testimony. As to the fingerprints, there was no evidence as to when they were placed in the car. Furthermore, the prosecution presented evidence the defendant claimed he had recently used the car in which his prints were found. Thus, it was equally likely these prints had been placed on the car innocently. (*Id.* at p. 398.) The court concluded that at best, the fingerprints established the defendant had been in the car at some time prior to the car's discovery and therefore was insufficient to connect the defendant to the crime. (*Id.* at p. 399.)

As to his conflicting statements regarding his whereabouts over the time period in question, there was only one conflict in his statement and the evidence at most demonstrated he may have been hiding something from the police. (*People v. Robinson, supra*, 61 Cal.2d at pp. 400-401.) However, there was no evidence to demonstrate this conflicting statement was made to hide his connection to the crime. (*Ibid.*) Finally, the court found the claimed "admission" was not an adoptive admission at all; rather, it was a

denial as to any complicity. (*Id.* at pp. 401-402.) Consequently, there was insufficient corroboration of the accomplice testimony.

Unlike *People v. Robinson*, there was more evidence than a shoe print left at the scene of the crime to implicate defendant. While it is true a shoe print could have been made at any time, its proximity to the body coupled with defendant's statement to McSwain that he had killed the person in the home was sufficient to link him to the commission of the crime. Additionally, that defendant related details regarding the location of the body and items within the home—consistent with the scene of the crime and not publicly known—further corroborated his participation. Moreover, the text messages to defendant's mother relaying he “really did do it” and “I’ll die before I do life” can certainly be read as admissions to a crime. This additional corroboration distinguishes this case from *People v. Robinson*.

We also find *People v. Falconer* (1988) 201 Cal.App.3d 1540 distinguishable. There, several armed intruders attempted to steal marijuana plants from the victim. During the attack one of the intruders was wounded. That man was the defendant's son. The victim could not identify any of the intruders. (*Id.* at p. 1542.) An accomplice testified the defendant planned the robbery and also participated in the attack. The only independent evidence produced linking the defendant to the crime was the fact he was the father of one of the intruders and he visited the victim's residence in the past and knew the victim grew marijuana. (*Id.* at p. 1543.) This evidence was wholly insufficient to connect the defendant to the crime apart from the accomplice testimony. (*Ibid.*)

In contrast to the facts in *People v. Falconer*, independent evidence linked defendant to the crime scene and the murder. The shoe prints, defendant's text messages, and his statement to McSwain all directly tied defendant to the crimes. As we have already explained, additional evidence relating to the open window, the time frame of the crime, and the toolbox recovered from Anderson's father's home provided independent corroboration of defendant's intent, which supported both a felony-murder finding and the special circumstances. “Because the corroborating evidence does tend to connect

defendant with the commission of the crimes of which he has been convicted, we must uphold the jury's verdict. (*People v. Perry, supra*, 7 Cal.3d at p. 774.)” (*People v. Szeto* (1981) 29 Cal.3d 20, 29.)

Defendant further argues the evidence was insufficient to corroborate the accomplice testimony regarding premeditation and deliberation, which would support a first degree murder finding. We need not address the sufficiency of the evidence on this issue because we have concluded there was sufficient corroboration of the felony-murder theory of first degree murder. Thus, even if we were to assume there was insufficient evidence presented to the jury to support a finding on the premeditation and deliberation theory of first degree murder, there was sufficient evidence to support the felony-murder theory of first degree murder. Under such circumstances, reversal is not required. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1123-1128 [where evidence supports multiple factual theories, verdict will not be disturbed if even one of the factual theories was not supported by evidence as long as a factually valid theory remains on the record].) And if we were to assume the error in instructing the jury regarding a premeditation and deliberation theory of first degree murder constituted legal error, reversal would not be required because the jury's true finding on the special circumstances demonstrates the jury necessarily found the felony-murder rule applied.<sup>3</sup> (*Id.* at pp. 1128-1129 [where verdict rests upon both adequate and inadequate legal theories, reversal required unless record indicates verdict rested upon a legally valid ground].)

In a related argument, defendant contends the trial court erred in instructing the jury regarding the felony-murder theory of first degree murder because there was insufficient corroboration of that theory of murder. As we have already found the accomplice testimony was sufficiently corroborated on that point, the trial court did not err in instructing the jury regarding first degree felony murder.

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<sup>3</sup>We express no opinion as to whether the jury also found the murder was premeditated and deliberate. Rather, we simply note the finding on the special circumstances necessarily encompassed the elements of first degree felony murder.

## II. Defendant's Statement Was Erroneously Admitted

Prior to trial, defendant moved to exclude his pretrial statement to the police, arguing he had invoked his right to an attorney after being advised of his *Miranda* rights. After reviewing the tape and transcripts of the interview, the trial court explained that although defendant invoked his right to counsel initially, he answered questions without coercion. Viewing the totality of the circumstances, the court found defendant's statement invoking an attorney to be equivocal because he immediately began answering questions after invoking his rights.

Pursuant to *Miranda v. Arizona*, *supra*, 384 U.S. 436, a suspect who is subject to custodial interrogation must be informed of his right to silence and the presence of an attorney. After being advised of those rights, if a suspect invokes his right to counsel, all further interrogation must cease until an attorney is present. (*Id.* at pp. 473-474.) The invocation of the right to counsel pursuant to *Miranda* must be unambiguous and unequivocal. (*Davis v. United States* (1994) 512 U.S. 452, 459.) Once a suspect requests counsel,

“a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485, fn. omitted.)

This rule applies even when the substance of the second interrogation relates to a different offense than the initial interrogation. (*Arizona v. Roberson* (1988) 486 U.S. 675, 682-685.) The *Edwards*' presumption of involuntariness continues while the defendant remains in custody. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 104-107.)

Here, defendant clearly and unambiguously invoked his right to counsel. After being informed of his rights, defendant stated, “Yeah, I'd like to—I'd rather wait for an attorney actually. I don't want to incriminate myself in any way.” As the People concede, this statement articulates a desire to have counsel present with sufficient clarity

that a reasonable law enforcement officer, under the circumstances, would understand the statement to be a request for an attorney. (*Davis v. United States, supra*, 512 U.S. at pp. 459, 461-462.) At that point, the officer was required to cease questioning defendant. (*Edwards v. Arizona, supra*, 451 U.S. at pp. 484-485.) The officer failed to do so, thus the remaining statement should have been suppressed. (*Ibid.*)

After the initial interrogation on August 4, defendant was reinterrogated on August 9. There was no break in custody between the two interviews. Although defendant was readvised of his rights at that time, no express waiver was taken. Regardless, however, once defendant invoked his right to counsel on August 4, no further police interrogation could occur unless defendant initiated further conversation with the police or counsel had been made available to him. (*Arizona v. Edwards, supra*, 451 U.S. at pp. 484-485.)

Defendant contends, and the People concede, his statement was improperly admitted at trial. We agree. Thus the issue on appeal is one of prejudice. When a defendant's statement is admitted in violation of *Miranda*, we review the record to determine whether the error was harmless pursuant to *Chapman v. California* (1967) 386 U.S. 18. (*People v. Thomas* (2011) 51 Cal.4th 449, 498; *People v. Peracchi* (2001) 86 Cal.App.4th 353, 363.) Under this standard, reversal is required unless the People establish the error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra*, at p. 24.) "[T]he appropriate inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.' [Citation.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

The People contend the error was in fact harmless because defendant never confessed in his statement to killing the victim. Although they concede defendant did make conflicting statements that could be used as consciousness of guilt, they argue "the impact of the statements was minimal." The People point to other evidence implicating defendant as the perpetrator of the crime, namely, the shoe prints, the accomplice

statements, McSwain's testimony defendant admitted to the killing and his description of the scene, and the text messages sent from defendant's wife's phone. Because other evidence pointed to defendant's guilt, the People argue, the error was harmless.

The evidence at issue consisted of defendant's conflicting statements regarding when he had been in the victim's home. When defendant was initially interviewed, he stated he had been in the home in April before the victim ever moved in. He further described the condition of the home and noted no one was living there at the time. He also admitted to knowing the victim, who lived down the street, and described him as a "vulgar drunk." A few days later, defendant was reinterviewed. During that interview, the detective reminded defendant the police had seized his shoes. When asked why he thought his shoes had been taken, defendant replied, "Probably footprints." Deliman told defendant there were "shoe prints inside that house made by your shoes." Defendant replied, "Okay. I told you I was in the house before." The detectives questioned defendant as to when he was in the home, and he replied June or July; he was confronted with the fact he had previously said he had been in the home in April.

This evidence was significant in three respects. First, it demonstrated a discrepancy in defendant's statements. He initially stated he was last in the home in April, but when confronted by the fact shoe prints were found in the home, he stated he had been in the home more recently. Based on this evidence, the jury was instructed regarding consciousness of guilt, CALCRIM No. 362: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt." Indeed, the prosecutor used the evidence for this very purpose in closing argument, repeatedly referring to defendant's "changing his story when confronted with the evidence."

Second, defendant's statement was the only piece of evidence linking him to the murder scene that came from defendant himself. Defendant's statement was recorded and played for the jury. Unlike the testimony from the accomplices that was open to

dispute, there could be no dispute regarding defendant's own statement. Thus, there was no denying the statement was in fact made. This was in stark contrast to the remaining evidence in the case. At trial, defense counsel impeached Stephens, Anderson, and McSwain, pointing out their complicity in the crimes and their incentive to place blame on defendant. Defendant disputed the text messages were sent from him, noting they came from his wife's phone, and there were messages on the phone that his wife would not want defendant to see. Thus, the only evidence admitted in trial linking defendant to the crime came from defendant himself: his statement admitting he had been in the home and the discrepancy in dates when he entered the home.

Finally, defendant's statement seemed to concede the shoe prints found in the victim's home were made by him. This is particularly important here, where defense counsel strongly advocated through his questioning that the shoe prints could have been made by someone else. Hamiel testified that while the shoe prints were consistent with defendant's shoes in that they had the same tread pattern and size, he could not definitively say defendant's shoes made the prints. This was because there were no distinctive markings on the sole. Instead, the print could have been made by any shoe of the same size with the same tread pattern. Defendant pointed out shoes from others who had been in the house—including Anderson, McSwain, and the Riches—had not been collected by police. Defendant's statement undermined that strategy because it seemed to accept the detective's representation the shoe print was in fact his. Indeed, the prosecutor highlighted this difference in testimony when he asked Deliman what he had told defendant in the interview regarding the shoe prints. Deliman testified he told defendant "we found *his* shoe print in that house." (Italics added.) After receiving that information, defendant then gave a different account as to the last time he had been in the house. Ultimately, defense counsel had to concede the print could have belonged to defendant because he admitted he had previously been in the home.

The remainder of the case against defendant was primarily accomplice testimony. The main issue at trial was whether their testimony was corroborated. The corroboration

of the accomplice testimony took three forms: the testimony of McSwain, the text messages, and the shoe print evidence. Regarding McSwain, he was impeached with his significant criminal history and the fact he received a reduced sentence and had several charges dismissed in exchange for his testimony. Regarding the text messages, the messages were not sent from defendant's phone. While one of the messages referenced it was sent from "your son," the text messages themselves did not provide any explicit confession. Furthermore, defense counsel seemed to challenge the messages in their entirety and claimed they were taken out of context. Thus, the only piece of physical evidence tying defendant to the scene of the crime was the shoe print. Defendant's inconsistent statements regarding when he was in the home provided strong evidence the shoe print actually belonged to defendant and that he wanted to distance himself from the crime scene. Indeed, the prosecutor argued as much in closing, noting the

"statements made by the police on August the 4th and August the 9th are very important. They're another key piece. Because what did he say on August the 4th? The police asked him, were you in the house, and he said, I was in the house in April. They come back to him August the 9th, said were you in the house because we found your prints in there. Now, he says, oh, I was in the house in June or July to try to match what the police tell him the evidence is, trying to come up with an excuse to get out of it.

"But it wasn't as simple as that. Because on August the 4th, he was very clear, very specific, very distinct. He not only said, I was in the house back in April; he said, it was before Mr. Mora got there. The grass was, like, this high. You can see the video .... That's in evidence. And that house was abandoned at the time. Why is that significant? Well, Charles Swan told you what bad shape his house was in before Mr. Mora got there.

"And one of the things that was very important that he told you is that there was very stinky, smelly carpet in that house. Carpet, not wooden floors, that the footprints were found on. And the defendant was very, very specific on August the 4th until he got caught, until the police said, wait a minute, your foot print's in there. The important thing is how he responds. He immediately comes up with a wild goose chase, a story. It isn't true. He's trying to avoid his accountability for the murder of Mr. Mora. All of that supports the accomplice testimony of Sara Stephens and Christopher Anderson."

The prosecutor referenced defendant's statement three other times in his relatively short closing argument. We can infer the importance of the evidence from the fact the prosecutor referenced it in the opening sentence of his argument to the jury. In addition to the importance the prosecutor placed on defendant's statement, we note there was other evidence supporting defendant's theory that he was not present during the murder. No fingerprints or DNA matching defendant were found at the crime scene. Additionally, defendant was conclusively excluded from a mixture of DNA found on the murder weapon. No blood was found on defendant's shoes. No stolen property was recovered from defendant. Moreover, we must note the jury found the personal use of a weapon enhancement not true. This indicates the jury at least had a reasonable doubt as to some of the accomplice testimony.

Although the People's case was not weak, the error may only be considered harmless where the People prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.) The error must be "unimportant in relation to everything else the jury considered on the issue in question." (*People v. Song* (2004) 124 Cal.App.4th 973, 984.) In a case that rested upon the credibility and corroboration of accomplice testimony, we cannot say the defendant's statement linking him to the murder scene, evidence the prosecutor described as "very important," a "key piece" of evidence, and "significant," was "unimportant" in the context of the other evidence before the jury. (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1487 [erroneous admission of defendant's statement not harmless beyond a reasonable doubt where other evidence of defendant's involvement in the killing was mainly circumstantial and prosecutor relied upon defendant's statement to undermine defense case].) Therefore, the error was not harmless and we must reverse. (*Chapman v. California, supra*, at p. 24.) As we have found the error in admitting defendant's statement was prejudicial, we need not address defendant's remaining contentions.

**DISPOSITION**

The judgment is reversed, and the matter is remanded for a new trial.

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PEÑA, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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OLIVER, J.\*

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\*Judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.