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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN FITZGERALD DOZIER et al.,

Defendants and Appellants.

G049817

(Super. Ct. No. FSB1104013)

O P I N I O N

Appeal from judgments of the Superior Court of San Bernardino County,
Harold T. Wilson, Jr., Judge. Affirmed as modified.

Peter Gold, under appointment by the Court of Appeal, for Defendant and
Appellant John Fitzgerald Dozier.

Janice M. Lagerlof, under appointment by the Court of Appeal, for
Defendant and Appellant Antonio Eubanks.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

John Fitzgerald Dozier and Antonio Eubanks, who are brothers, beat, robbed, and killed a 29-year-old mentally disabled man. They were each charged with first degree felony murder and robbery. With respect to the murder count, the information alleged three special circumstances as to both defendants. Eubanks was also charged with two counts of forgery. The brothers were tried before separate juries. Dozier's jury found him guilty of both counts but only one special circumstance allegation. Eubanks's jury found him guilty of all counts and determined all the special circumstance allegations were true.

On appeal, Eubanks alleges the court erred in denying his motion to suppress statements he made to the police under the principles of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and the court should have excluded a witness's testimony. Dozier raises issues of prosecutorial misconduct, sentencing error, and whether there was sufficient evidence to support the jury's robbery-murder special circumstance finding. Eubanks joins in the arguments raised by Dozier. We conclude all the contentions lack merit except for the Penal Code section 654 sentencing error.¹ The judgment is affirmed but modified to stay sentencing on the robbery counts with respect to both defendants. In all other respects, the judgment is affirmed.

I

A. Background Facts

In July 2011, Matthew Cook was 29 years old. His mother described him as having the mental capacity of a 14-year-old, but he was academically at a third grade

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

level. She described him as friendly, generous, and trusting. She noted he could be easily manipulated because he wanted friends. She explained, “If you didn’t have shoes to wear he would give you his shoes. If you didn’t have a dollar he would give you his last dollar.”

Cook’s mother said her son started living on his own approximately two years prior to his murder. He worked through a vocational improvement program (VIP) for disabled adults. Through this program he could find employment in a group setting, working at a “warehouse, packing, sorting, and putting things together.” He also received social security benefits and supplemental income from his parents. Cook was able to afford low income housing in Rancho Cucamonga. He also owned a car, a gray Saturn Ion, which was fully paid.

Cook’s mother was worried about Cook living by himself and she maintained regular contact with him and closely watched over his finances. Cook visited his parents several times a week, and they frequently talked on the telephone. Due to Cook’s disabilities, Cook’s mother was the payee for his social security checks and his bank accounts were jointly held in her name. She monitored the bank accounts on a daily basis because it was a way to keep track of her son. He was also on the family’s shared cell phone plan so she could monitor his calls and pay the bill. Cook’s mother had a key to her son’s apartment, and she would go there periodically to bring food and visit him.

In May 2011, Cook stopped working at VIP and got a job selling perfume door to door. While working for the perfume company, Cook met Eubanks. Cook’s mother spoke to Eubanks on one occasion because he was using Cook’s cell phone. Shortly thereafter, Cook’s mother learned Eubanks had moved in with Cook, claiming he could no longer live with his brother. Cook also told his mother Eubanks was using his car. Eubanks did not help pay the rent or utility costs. Cook and Eubanks became roommates approximately three weeks before Cook’s murder.

B. The Forgery Counts

While monitoring Cook's bank accounts, Cook's mother noticed one morning three separate withdrawals of \$80 made while Cook was sleeping. Cook's mother transferred money into the account and then noticed another cash withdrawal. She also found two checks written to Eubanks (dated June 19, 2011, and June 27, 2011). The signatures on the checks resembled Cook's, but his mother suspected they had been forged. When she showed Cook the checks, he said he did not write them. Cook's mother also discovered unusual credit card charge transactions, including one from Oasis Dela Tessa (Oasis Club), a gay bar. Cook denied going to the bar.

On July 8, 2011, Cook and his mother reported the thefts to the police. Cook spent the next few days with his parents, and they discussed having him move back home when his lease expired at the end of July. Cook no longer worked for the perfume company, and he did not have enough income from social security to pay the rent and his credit card bills. Cook reluctantly agreed to move home. Cook's parents last saw their son at 6 p.m. on July 10 before he returned to his apartment.

C. Murder & Robbery

Cook's mother began to worry about her son when he did not return her text messages and telephone calls over the next few days. On July 14, 2011, she went to his apartment and discovered electronics and several other items were missing. The apartment also looked much cleaner than normal. She noticed Cook's car was gone. The next day she filed a missing persons report.

On August 26, 2011, police officers found Cook's car in Decatur, Illinois parked on the side of the road. Inside the vehicle, Illinois police detectives found a pawnshop receipt signed by Eubanks.

Eubanks was arrested the next day on an unrelated Illinois warrant. Details about his interrogation will be described anon. Suffice it to say, Eubanks initially denied

knowing anything about Cook but later admitted he knew Cook was dead and he was a witness to the murder.

On August 29, 2011, Decatur police detective Bradley Allen questioned Eubanks again. The interview was recorded and played for the jury. The following is Eubanks's account of the robbery/murder: When Cook confronted Eubanks about the forged checks, Eubanks admitted stealing the money and told Cook he was moving to Illinois. After this confrontation, Cook stayed with his parents for the weekend and Eubanks moved out of the apartment. Eubanks went to his brother's house in San Bernardino. The brothers then decided they needed to immediately leave California: Eubanks wanted to avoid the police and allegations of theft, and Dozier wanted to avoid child protective services.

They formulated a plan to lure Cook to drive to Dozier's house, steal his car and money, and then flee to Decatur, Illinois. Because Eubanks knew Cook was lonely and not popular with girls, they decided to trick him by pretending to be Ashley, a girl they told Cook he knew in high school. Eubanks text messaged Cook pretending to be Ashley. Eubanks then texted Cook and said Ashley wanted him to bring some clothes to Dozier's house. Cook agreed to immediately come to the house.

Eubanks recalled that soon after Cook arrived, Dozier locked the door and pulled down the shades. Eubanks confronted Cook about reporting him to the police. Dozier hit Cook and Eubanks claimed he pushed Dozier off Cook. Cook began to cry. Dozier left the room to put on gloves and then resumed beating Cook. Eubanks admitted he punched Cook in the face and told him not to fight back and to give Dozier what he wanted. Eubanks and Dozier tied Cook's hands together with an electrical cord. Dozier slammed Cook's head on the ground, cutting his face on some nails protruding from the floor. As Cook lay bleeding on the floor, Dozier put a pillow over Cook's face and suffocated him.

Eubanks helped Dozier wrap Cook's body in a tarp, and they placed the body in a large trash can. They then called Dozier's wife, Crystal Carmelo, who had been waiting outside, to help them clean the apartment and start packing. Dozier told Carmelo he had killed Cook.

Next, Eubanks, Dozier, and Carmelo went to Cook's apartment and stole several items. They spent the night wiping down everything to get rid of fingerprints and DNA. They next day they sold the stolen property and drove Cook's car to Illinois. On the way, they disposed of Cook's cell phone and wallet. They agreed to never talk about what had happened.

Eubanks told Allen that they were staying with relatives in Illinois. He added they called a neighbor in California and asked her to take their garbage can to the curb for trash pickup. They parked Cook's car on the street after a detective showed Eubank's grandmother a picture of the car and asked her about a missing person.

Dozier and Carmelo were arrested after Eubanks implicated them in the crime. During Dozier's interview, he blamed Eubanks for the murder. The following is a brief summary of Dozier's account of the robbery/murder.

Dozier told police he, Carmelo, and their son lived in San Bernardino for approximately two months. Eubanks lived with them for a few weeks and then stayed with Cook. Dozier knew Eubanks was using Cook's car and stealing his money. When Eubanks learned Cook's mother had reported the theft to the police, Eubanks told Dozier he was going to "whoop his ass."

Initially, Dozier claimed he did not know if Eubanks fought with Cook and believed Eubanks borrowed Cook's car to drive to Illinois. Later in the interview, Dozier admitted he knew Eubanks asked Cook to come over to the house, beat him, and then took his car. He explained the murder did not occur in his apartment. Rather, they made Cook go to a nearby abandoned apartment, "because that's where we would smoke weed[.]" Dozier admitted he knew his brother's plan to retaliate against Cook for

reporting the theft to the police, stating, “He told me that he was gonna whoop [*sic*] his ass. He told me I’m gonna fuck him up, that’s all he told me and I was like bro [*sic*] handle your business, that’s what you do, I thought he was just gonna whoop [*sic*] his ass because I don’t think [\$700 is] big enough to kill nobody [*sic*] about.”

Dozier said Eubanks confronted Cook in the abandoned apartment about reporting the stolen money. Dozier recalled Eubanks repeatedly hit Cook and tied his hands with an electrical cord. Dozier said Cook did not fight back.

Dozier claimed he did not touch Cook. However, Dozier also admitted, “I would have jumped in if my brother was losing but he wasn’t losing, it wasn’t even like [Cook] didn’t get no hit, [*sic*] not one and my brother just, he just had, man” Dozier also admitted he ignored Cook’s pleas for help, stating, Cook pleaded “[D]on’t let him do this to me and I’m like [Cook] I don’t [*sic*], I told [Cook] I said I don’t think you deserve it but if you [*sic*] calling the police on him, that’s on you all [*sic*]. I was talking to [Cook] why, [Cook] was asking me not to let my brother whoop [*sic*] him cause [*sic*] I told you me [*sic*] and [Cook] didn’t have problems like that, man, we never, nothing [*sic*].”

After watching his brother relentlessly beat Cook, and saw that Cook was not fighting back, Dozier claimed he told Eubanks to stop. He also said, “[Cook] could never fight back and I told him to stop but he ain’t stop [*sic*] and shit, [Cook] was just laying there and I’m like man, bro, [*sic*] he gonna [*sic*] call the, I told him, I say he gonna [*sic*] call the police on you anyway.” Dozier said Eubanks eventually stopped beating Cook and suffocated him with a pillow.

Dozier admitted he helped Eubanks wrap Cook’s body in a tarp, tie it with wire, and dump the body in a trash can. They took the trash can downstairs to the backyard and threw a few things on top of Cook’s body.

Dozier told the police that he and Eubanks picked up Carmelo, and she later asked a neighbor to take out the trash for them. Dozier said it was Eubanks’s suggestion to clean Cook’s apartment and steal his things before driving to Decatur.

The police also interviewed Carmelo several times. She testified at trial pursuant to a plea agreement.² The jury was instructed she was an accomplice as a matter of law to murder and robbery. She stated Eubanks lived with her and Dozier before moving in with Cook. She and Dozier sometimes visited Eubanks and Cook at their apartment. She noticed both of their belongings were in one bedroom. Since she and Dozier believed Eubanks was gay, they suspected he and Cook were in a relationship.

Carmelo testified Cook told her and Dozier that things were missing from his apartment and he thought Eubanks was stealing from him. She believed Eubanks was upset because Cook reported the theft and revealed Eubanks was gay. She thought Eubanks was not stealing and Cook had given him money as gifts. She did not know at the time that Cook was mentally disabled.

Carmelo said she knew Eubanks was going to confront Cook about making a report to the police and there was a plan to take Cook's car and money. She knew Cook might be beaten. She did not know Cook would be killed.

On the day of the murder, Carmelo left the apartment to go to the store with her infant son when Cook arrived. She thought something bad might happen. As she was walking home, Eubanks and Dozier picked her up in Cook's car and they drove to Cook's apartment. She did not see Cook again that night.

Carmelo confirmed Eubanks's and Dozier's accounts of stealing and pawning items from the apartment before driving to Illinois. Carmelo said she first learned about the murder during the car trip.

In summary, the brothers pointed an accusatory finger at each other and each only admitted to playing minor roles in the crime. Carmelo did not know who was the ring leader and would not specify the role played by each defendant in the crime. The

² She pled nolo contendere to voluntary manslaughter and was sentenced to the low term of three years.

Eubank's jury heard only Eubank's interview, and the Dozier's jury only heard Dozier's interview.

C. The Search for Cook

Dozier's neighbor, Siliais Reyeis Rivas, testified Carmelo asked her to take out her trash can because she was out of town. Rivas waited several weeks and then asked her husband to take out the trash because it smelled badly. Rivas's husband had to wear a mask and gloves to move the trash can and he noticed it was very heavy and a strange liquid was dripping from it.

On August 27, 2011, San Bernardino homicide detectives were searching the area around Dozier's apartment. In the carport they found items with Dozier's, Carmelo's, and Eubank's names. They also found a pool of a sludge-type liquid under a trash can and a trail of the liquid leading from the carport to the curb of the street. The detectives smelled the odor of a decomposing body emanating from the trash can. Detectives were unable to recover any DNA from the trash can or pool of liquid. They searched the county's refuse site but were unable to find Cook's body.

D. The Case

In July 2012 the brothers were charged with one count of first degree felony murder (§ 187, subd. (a) (count1)), and one count of robbery (§ 211 (count 2)). With respect to the murder count, the information alleged the following three special circumstances: (1) the victim was murdered during the course of robbery (§ 190.2, subd. (a)(17)(A)); (2) the murder was committed by means of lying-in-wait (§ 190.2, subd. (a)(15)); and (3) the murder was committed to prevent a witness from testifying (§ 190.2, subd. (a)(10)). The information also charged Eubanks with two counts of forgery (§ 470, subd. (d) (counts 3 & 4)).

E. The Defense Case

Detective Daniel Maddox interviewed Cook in July 2011 about his stolen checks, credit card, and unauthorized ATM withdrawals. Cook told the detective he was

mentally disabled and he suspected his roommate was stealing from him. Initially he was reluctant to give the detective any information about Eubanks. He denied that Eubanks was the name of his roommate, and he supplied an incorrect phone number for Eubanks. Cook would not describe his roommate, but upon further questioning, he said his roommate was a 21-year-old black male named Antonio Eubanks. Cook denied making charges on his credit card to the Oasis Club. Cook told the detective he had taken Eubanks to Dozier's home, and he believed they had gone to Illinois to attend a family funeral.

Defense witness Ericson McFadden testified he was gay and he had met Cook several times. McFadden believed Cook was also gay, although he did not know if Cook ever had a homosexual relationship. McFadden saw Cook at the Oasis Club in July 2011. He explained the Oasis Club was a gay bar but some straight people also went there. McFadden saw Cook with both women and a gay man he knew. McFadden also saw Cook at a restaurant with the same gay man and some women.

F. The Verdict and Sentencing

Eubank's jury found him guilty on all counts and found all the special circumstance allegations true. Dozier's jury determined he was guilty of counts 1 and 2 and found true the robbery-murder special circumstance allegation. It found not true the other charged special circumstance allegations.

The court sentenced Eubanks to a total term of life in prison plus two years and four months (a life sentence without the possibility of parole on count 1, plus a consecutive one-year term on count 2, plus consecutive eight-month terms on counts 3 and 4). The court sentenced Dozier to life in prison plus a consecutive one-year term (a life sentence without the possibility of parole on count 1 plus one-year term on count 2).

II

Eubank's Appeal

Eubanks makes three main arguments on appeal. He alleges the court erred in denying his motion to suppress statements he made to the police under the principles of *Miranda, supra*, 384 U.S. 436. He also contends the court should have excluded testimony violating his confrontation rights and because the statements were also inadmissible hearsay.

A. Motion to Suppress

Eubanks maintains his confession was taken in violation of *Miranda* and, therefore, the court erred in admitting his confession. He asserts police officers engaged in a deliberate two-step interrogation during his first police interview in order to avoid the requirements of *Miranda*, a process condemned in *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*). He concludes the subsequent waivers of his *Miranda* rights were invalid because the taint of the initial violation had not been dissipated. We find no error.

1. The Interviews

Eubanks was interviewed by Decatur police on August 27 and August 29, 2011 (but only the second interview was heard by the jury). Simply stated, an officer read Eubanks his *Miranda* rights after interviewing him for five hours, Eubanks waived his rights, and he was further questioned. Before the second interview on August 29, a different officer asked Eubanks if he remembered his rights and offered to read them again, but Eubanks said he remembered his rights and waived them.

Before ruling on the motion, the court considered testimony from Decatur police detective James William Atkinson. He testified his primary goal during the August 27 interview was to find out if Cook was still alive. Before the interview, Atkinson read some flyers regarding Cook's disappearance. The flyers stated Cook was mentally disabled, his Saturn vehicle was missing, and Eubanks was a known associate. Atkinson said he arrived at work at 3 p.m. that afternoon and he was asked to interview

Eubanks. He was aware members of his agency had been looking for Cook and Eubanks. Atkinson helped recover Cook's vehicle, but he had not participated in any other part of the investigation. The only reason he believed Eubanks might have information about Cook is because of the information contained in the flyer stating Eubanks was a known associate. Atkinson recalled Dozier was also listed as a known associate, but neither he nor his wife was in custody. They were arrested later that night.

Atkinson said he did not consider reading Eubanks his *Miranda* rights at the beginning of the interview because he did not consider him a suspect. He stated, "I was simply trying to obtain information about . . . Cook's whereabouts." To achieve this goal, Atkinson said he asked questions to obtain as much personal information as possible, such as locations and people Cook may have known and who could perhaps provide additional information about Cook. Atkinson denied following any policy or having any training on how to violate someone's *Miranda* rights to obtain a confession.

Atkinson began the interview by asking Eubanks some general friendly questions, however, Eubanks told the detective to get "down to the punch" and told the officer he bought his car from "[t]he person you all are looking for." When the officer asked, "Who's that?" Eubanks replied "Matthew Cook. I saw that shit in the paper man." Eubanks stated he paid Cook \$3,000 for the car and they had been roommates in California. Atkinson and Eubanks talked about how Eubanks met Cook. Eubanks complained Cook had not responded to any of his phone calls, texts, or Facebook messages. Eubanks said he recalled the last conversation he had with Cook was before he left for Illinois and Cook said he was staying with Ashley in Los Angeles.

After discussing what Eubanks had been doing in Illinois, his friendship with Cook, and the route he took from California to Illinois, Atkinson indicated he did not have any further questions. He stated, "Alright, okay, well um. Yeah, I can't think of anything else right now. Can you think of anything?" Eubanks asked if the police had brought Dozier and his wife into custody. When Atkinson said he did not know, Eubanks

said the only reason he came to Decatur was to “get them out of trouble.” When Atkinson replied “Oh,” Eubanks indicated the police needed “to do some more homework” on why he and Dozier came to Decatur.

Eubanks then discussed his brother’s troubles with child protective services. Eubanks described Dozier’s family situation and talked at length about his dislike for Carmelo. Eubanks explained he shared the car with Dozier and his wife. When Atkinson asked how Cook’s car ended up parked on the street, Eubanks admitted he parked it there over a week earlier because he found out the police were looking for it.

Atkinson asked Eubanks if there was anything else he could think of. Eubanks asked, “As far as?” Atkinson asked if Eubanks knew what might have happened to Cook. Eubanks stated the last thing he heard was Cook was going with Ashley and was “in good hands.” Eubanks indicated he was angry Cook had not replied to his efforts to contact him and that Ashley gave him a fake number. He stated he hoped everything was alright with Cook because Cook was “like one of my brothers.”

Atkinson told Eubanks, “Yeah, yeah they’re just trying to find out what happened to him, so. Alright, let me go uh do [*sic*] some checking here and see if there is anything else I need to ask you. But uh, [*sic*] I think that [*is*] everything I can think of right now. Um [*sic*] ...” Eubanks asked about the status of his warrants. After discussing the warrants, Eubanks went to the restroom, and Atkinson left the room. There was a long break.

When Atkinson returned to the room, he asked Eubanks for several phone numbers and if he had any nicknames. Atkinson asked Eubanks questions about whether he ever tried to sell the car or sell its parts. Eubanks replied he could not sell it because he did not have title. He admitted asking someone to store the car for him in a garage but denied trying to sell the parts. Atkinson questioned why Eubanks did not bring the car to the police station when he heard Cook was missing.

After another lengthy break, Atkinson told Eubanks that Cook was dead, and there was some forensic evidence. He stated, “[Y]ou know how this thing looks, alright, with you having this car and all that.” He also told Eubanks that Dozier had fled Decatur. Atkinson asked Eubanks if he was involved in Cook’s murder. Atkinson testified he made these statements not knowing Cook was dead. He thought it was a way to obtain more information about Cook. Atkinson sensed Eubanks was not being totally forthcoming.

Eubanks revealed he knew Cook was killed, placing full responsibility on Dozier and Carmelo. Atkinson said he kept asking Eubanks questions because he was not sure Eubanks was being truthful and it was possible Cook was still alive. However, after hearing the full story that Cook had been killed in Eubanks’s presence, Atkinson determined it was time to read Eubanks his *Miranda* rights.

Atkinson told Eubanks, “This is what I’m going to do here, um, [sic] yeah, based on what you told me, I don’t see that that you did anything wrong. Okay. I am gonna [sic] give you your *Miranda* rights just because you know of the circumstances and stuff. I can’t speak for California . . . but this is what I’m gonna [sic] tell ya, [sic] you[r] honesty and forthcoming in this deal has really saved you, okay.”

Atkinson read Eubanks his *Miranda* rights and Eubanks waived them. During the remainder of the interview, Eubanks continued to blame Dozier for Cook’s death. None of the statements from this interview were heard by the jury. The interview concluded at 7:46 a.m. on August 28.

The following day, August 29, Detective Brad Allen interviewed Eubanks starting at 9 a.m. Allen began by asking Eubanks if he had been read his *Miranda* rights. Eubanks stated Atkinson read him his rights and he recalled he initialed a piece of paper after he was read his rights. Allen asked, “You understand those rights still apply?” and “Do you still remember those rights?” Eubanks answered affirmatively to each question. Allen offered to read the rights again and Eubanks stated, “I remember em, [sic] I know

em. [sic]” Eubanks stated he was willing to talk to the officers some more. Over the course of this interview, Eubanks again blamed Dozier for the murder but also confessed to playing a role.

After considering Atkinson’s testimony and argument from counsel, the court ruled the rescue doctrine applied with respect to the first interview. The court found credible Atkinson’s testimony that when he questioned Eubanks, his knowledge about the case was limited to the flyer posted in the police department stating Cook was missing. The court concluded Atkinson’s questioning was directed at determining if the victim was dead or alive. The court determined Atkinson did not use a deliberate two-part interrogation in order to subvert the requirements of *Miranda*. As to the second interview, the court ruled additional *Miranda* warnings were not required because the statements were relatively contemporaneous to the previous interview where Eubanks voluntarily waived his rights.

2. *Standard of Review*

“On review of a trial court’s decision on a *Miranda* issue, we accept the trial court’s determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*. [Citation.]” (*People v. Davis* (2009) 46 Cal.4th 539, 586.)

3. *Eubank’s Argument*

Eubanks argues his *Miranda* rights were violated during the first interview because officers engaged in a deliberate two-part interrogation, invalidating his *Miranda* waiver. This interview (pre- and post-*Miranda* waiver) was not heard by the jury. Because Eubank’s confession from a subsequent interview was admitted at trial, Eubanks must invalidate the waiver to prevail on his *Miranda* claim. We conclude the *Miranda* waiver in the first interview was valid and not part of a deliberate two-part interrogation in violation of *Seibert*.

4. *Applicable Law*

Eubanks does not dispute the *Miranda* warning he was given in the middle of the first interrogation was adequate and he voluntarily waived his rights. Instead, he claims the statements he gave after waiving his *Miranda* rights were obtained as a result of an impermissible two-step interrogation.

A suspect's voluntary statement in custody, made after a waiver of *Miranda* rights, is not rendered inadmissible merely because he also made an incriminating in-custody statement before the *Miranda* warning. (*Oregon v. Elstad* (1985) 470 U.S. 298, 305-311 [rejecting application of “fruit of the poisonous tree” analysis and deciding suspect's awareness of having “let the cat out of the bag” was not dispositive].)

An exception arises where law enforcement initially interrogated the subject without a *Miranda* warning, and after getting an incriminating statement advised the suspect of his rights and elicited the same or additional statements for the purposes of evading *Miranda* protections. (*Seibert, supra*, 542 U.S. at pp. 604-606 [officer questioned suspect for 30-40 minutes and made a “conscious decision” to withhold *Miranda* warnings, following department protocol to “question first, then give the warnings, and then repeat the question ‘until I get the answer that she’s already provided once’”].) A deliberate intent to evade *Miranda* by this two-step procedure may render the statements inadmissible. (See *People v. Rios* (2009) 179 Cal.App.4th 491, 505.)

According to the plurality in *Seibert*, the circumstances to be considered in determining the effectiveness of the post-admission *Miranda* warnings include “the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.” (*Seibert, supra*, 542 U.S. at p. 615.) In his concurring opinion, Justice Kennedy narrowed the exception to circumstances where the two-step interrogation technique was used in a calculated way

to undermine *Miranda*, in which case the post-*Miranda* statement must be excluded in the absence of curative measures taken before the post-*Miranda* statement is made. (*Id.* at p. 622 (conc. opn. of Kennedy, J.)) Because Justice Kennedy's concurrence provided the narrowest rationale, it constitutes the holding of the case. (*United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1156-1157.)

5. Analysis

Substantial evidence supports the conclusion Atkinson did not engage in a two-step interrogation process for the purpose of evading *Miranda*. Unlike the interrogation in *Seibert*, there was no evidence Atkinson's police department had a policy of deliberately withholding *Miranda* warnings until a suspect confessed. Atkinson testified he was not trying to trick Eubanks into confessing, but rather he was focused on locating Cook, who Atkinson believed was a missing person. Atkinson stated he did not consider Eubanks a suspect at the time. Atkinson read Eubanks his *Miranda* rights after he determined Cook was actually dead and Eubanks saw his brother kill Cook. He did not read the *Miranda* rights with the deliberate intent to have Eubanks repeat the same story. To the contrary, the content of the two rounds of interrogation did not overlap significantly. The pre-warning interrogation focused on Cook's car, Cook's contacts in California, and questions designed to extract information about a missing person. The post-waiver questioning related to hearing Eubanks' story about how his brother killed Cook. We conclude there was substantial evidence to support the trial court's specific finding Atkinson initially questioned Eubanks to determine if Cook was alive or dead, not to obtain a confession.³

³ Based on this ruling, we need not address whether the court correctly determined Eubank's pre-warning statements also fell within public safety/rescue exception to *Miranda*. Absent a *Seibert* violation, Eubank's voluntary and informed waiver led to a second voluntary statement properly considered by the jury.

6. *Re-advisement Not Necessary*

Eubanks asserts the August 29 interrogation (referred to above as the second interview) should have been excluded because a re-advisement of his *Miranda* rights was necessary. We disagree.

As explained in more detail above, Eubanks was first interviewed on August 27 during which he blamed Dozier for Cook's murder, and after waiving his *Miranda* rights, offered details as a bystander to a horrible crime. On August 29, Eubanks was re-interviewed. The Attorney General calculates, and Eubanks does not dispute, the second interview occurred 44 hours after the first interview. At the start of the second interview, Allen asked Eubanks if he had been read his rights, and after Eubanks acknowledged he had, Allen informed Eubanks those rights still applied. Eubanks declined Allen's offer to re-read those rights. He said he knew and remembered his rights and was willing to speak to Allen.

“[R]eadvisement is unnecessary where the subsequent interrogation is “reasonably contemporaneous” with the prior knowing and intelligent waiver. [Citations.] The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights.” [Citations.]” (*People v. Pearson* (2012) 53 Cal.4th 306, 316-317.)

Considering the totality of the circumstances, we agree with the trial court's ruling the August 29 interview was reasonably contemporaneous with his advisement and waiver of *Miranda* rights approximately 44 hours prior. In *People v. Mickle* (1991) 54 Cal.3d 140, the court determined re-advisement was unnecessary before a hospital interview occurring 36 hours after defendant had twice received and twice waived his *Miranda* rights. Our Supreme Court reasoned, “It was clear from the circumstances that

defendant was still in official custody. He was familiar with the criminal justice system and could reasonably be expected to know that any statements made at this time might be used against him in the investigation and any subsequent trial. Indeed, the hospital interview was conducted by the same two officers who had interrogated defendant and placed him under arrest at the police station. By asking whether he ‘remembered’ them and the prior ‘conversation,’ the officers implied that they were simply tying up loose ends from the earlier ‘*Mirandized*’ session. Nothing in the record indicates that defendant was mentally impaired or otherwise incapable of remembering the prior advisement and deciding to answer a few more questions. Under these facts, no *Miranda* violation occurred.” (*Id.* at p. 171.)

In this case, although the interviewer and the location changed, Eubanks remained in custody and there was nothing that would have suggested to Eubanks the uniformed detective was not seeking to obtain incriminating evidence. Eubanks had a criminal record and was familiar with the justice system. He was aware of his outstanding warrants in Illinois and left California to avoid being questioned by the police. Despite Eubanks’s past experiences with law enforcement he “evinced no reluctance to be interviewed [again].” (*People v. Williams* (2010) 49 Cal.4th 405, 435 [no re-advisement required after 40 hours and where defendant had experience with the criminal justice system].)

By asking if Eubanks remembered his rights, telling him those rights still applied, and offering to read them again, Allen implied he was continuing the earlier interview. Nothing in the record suggests Eubanks was mentally impaired or otherwise unable to remember the prior advisement before he answered more questions. To the contrary, he told Allen, “I remember em, [*sic*] I know em. [*sic*]” He proclaimed, “I’m willing with all of this. Whatever you want to hear.” Under these facts, we agree with the trial court’s conclusion no *Miranda* violation occurred.

B. The Mistrial Motion Based on Violation of the Confrontation Clause

Eubanks's second argument is Carmelo's testimony violated his Confrontation Clause rights. (See *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).) We disagree.

Carmelo testified before both juries. She testified she told police she was aware of the plan to rob Cook before he visited her apartment the night he was killed. When questioned about when she learned Cook had been killed, Carmelo answered she was told about the murder during a stop when Eubanks was not in the car. The prosecutor repeatedly questioned Carmelo about who told her about the murder. She denied there was ever any conversation about the murder in the car, and indicated she did not speak with Eubanks. The prosecutor asked Carmelo if she told the police Eubanks told her information. She said she told the police Eubanks beat and punched Cook because her husband told her that was what happened.

After a brief recess and an unreported discussion between counsel and the trial court, the prosecution proceeded with further direct examination. The prosecutor again asked questions about what Eubanks told Carmelo, and what she had told the police about Eubanks giving her information. Carmelo continued to deny she learned information about Cook from Eubanks or that she told the police Eubanks gave her information.

The prosecutor asked Carmelo to confirm making a statement to the police about how Cook was killed. Carmelo confirmed she told the police what happened. She did not explain how she learned the information. She admitted telling police Eubanks said he was involved in "beating and punching" Cook but denied telling police Eubanks also admitted handcuffing and flipping Cook over. Despite her denials, the prosecutor pressed on, questioning what Carmelo told police about the information she learned from Eubanks, such as whether he told her about placing a pillow over Cook's face. Carmelo

replied she told the police about the pillow but never said Eubanks had given her that information.

When the court recessed for the afternoon, Eubanks's counsel moved for a mistrial on the grounds the jury would infer from Carmelo's testimony Dozier had made the statements about Eubanks's involvement in the murder in violation of *Aranda* and *Bruton*. Counsel explained there were only four people in the car driving to Illinois, and one was a small child. If Eubanks did not tell Carmelo the details of the murder, it was likely Dozier had told her about it. The prosecutor argued he was not trying to admit Dozier's statements but was attempting to make Carmelo admit Eubanks made statements to her, as she had reported previously to the police. In short, the prosecutor claimed he was trying to impeach Carmelo.

The court denied the mistrial motion, concluding the statements had not been attributed to Dozier. It stated, "There's a great deal of ambiguity at this stage. However, the [c]ourt is very cognizant of the issues of *Aranda-Bruton*."

On appeal, Eubanks argues Carmelo's testimony about statements made to her about the murder should not have been admitted because they violated the *Aranda-Bruton* rule. He argues, "This testimony was a backdoor way to get before [Eubanks's] jury statements about the incident made by his non-testifying codefendant . . . Dozier. Because the evidence went to the heart of the prosecution's case for felony murder and robbery, the [Attorney General] cannot establish that the error was harmless" and reversal is required.

The main and essential purpose of the confrontation clause is to secure for a defendant an opportunity to cross-examine any witness who gives testimony against the defendant. (See *Davis v. Alaska* (1974) 415 U.S. 308, 315.) "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.)

“In *Bruton*, the high court held that the introduction of a codefendant’s confession implicating defendant in a joint trial violated the right of cross-examination secured by the confrontation clause of the Sixth Amendment, even if the jury is instructed to consider the confession only against the codefendant. [Citation.] . . . In *Aranda, supra*, 63 Cal.2d 518, which preceded *Bruton*, the California Supreme Court adopted an approach similar to the *Bruton* rule as ‘judicially declared rules of practice.’ [Citations.]” (*People v. Arceo* (2011) 195 Cal.App.4th 556, 572, fn. omitted (*Arceo*)). Accordingly, since *Bruton*, the rule for joint trials ordinarily followed has been to exclude evidence of one defendant’s out-of-court statement implicating a codefendant unless the trial court redacts the part implicating the codefendant. (See, e.g., *People v. Fletcher* (1996) 13 Cal.4th 451, 455.)

Nearly 40 years after *Bruton*, the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), clarified the right of confrontation only applies to an out-of-court statement that is “testimonial” in nature. (*Id.* at pp. 56-68.) “Where nontestimonial hearsay is at issue,” the Sixth Amendment affords the states “flexibility in their development of hearsay law,” and “exempt[s] such statements from confrontation clause scrutiny altogether.” (*Id.* at p. 68.) The court did not define when an out-of-court statement should be considered “testimonial” for purposes of Confrontation Clause analysis, stating, “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’ Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” (*Ibid.*, fn. omitted.)

In two subsequent companion cases, *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), and *Hammon v. Indiana* (2006) 547 U.S. 813 (*Hammon*), the United States Supreme Court offered some clarification regarding when an out-of-court statement would be considered “testimonial” for purposes of the confrontation clause. In *Davis*, the victim told a 911 operator that her boyfriend assaulted her. The victim answered the

operator's questions about her boyfriend, the defendant. The trial court admitted a recording of this portion of the 911 call. The Supreme Court reversed, concluding the conversation was an interrogation because 911 operators are law enforcement agents. (*Davis, supra*, 547 U.S. at p. 823, fn. 2.) The court reiterated that only a statement that is testimonial in nature will "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. . . . It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Id.* at p. 821.) The Court in *Davis* explained that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822.)

In *Hammon*, police responded to a domestic disturbance report and saw defendant's wife alone on the front porch. She appeared frightened but told the officers nothing was the matter. Defendant, who was in the kitchen, said there was an argument but it had never become physical. An officer asked defendant's wife additional questions and she explained defendant had assaulted her. (*Hammon, supra*, 547 U.S. at pp. 819-820.) At that time, there was not an ongoing emergency and the officer's clear intent was to conduct an investigation. (*Id.*, at pp. 829-830.) At trial, defendant's wife did not testify and the officer was asked to recount what she had told him. The Supreme Court held the hearsay use of the wife's police statement violated the Confrontation Clause.

Since *Davis* and *Hammon*, several California cases have held out-of-court statements made to friends, family members, or others whom the declarant did not believe to be law enforcement officials, and which the declarant did not expect would be

used to prosecute him or her, were not testimonial, even if the out-of-court hearsay statements were used as proof of a disputed fact at trial. (See 3 Witkin, Cal. Evidence (5th ed. 2014) Presentation at Trial, § 26, p. 72 [and cases cited therein].) The *Arceo* case is instructive. In that case, a gang member was charged with two murders and conspiracy to commit those murders. (*Arceo, supra*, 195 Cal.App.4th at p. 562.) Defendant objected to a witness's testimony that an accomplice was bragging about the murders and described how defendant shot one of the victims. (*Id.* at p 576.) The court held the confrontation clause had no application to nontestimonial out-of-court statements by codefendants. (*Id.* at p. 571.)

In the case *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174, the court explained when it was not reasonably anticipated that a statement would be used at trial, the statement was not “testimonial” within the meaning of *Crawford*. Simply stated, the confrontation clause does not require exclusion of out-of-court statements that are not testimonial.

In the case before us, Dozier's statements to his wife about Cook's murder were not made with the anticipation they would be used at trial. The statements would not be considered testimonial under *Crawford*, *Davis*, or *Hammon*. The police were not present and Dozier's statements to his wife while they were fleeing to Illinois are not circumstances “that imparted, to some degree, the formality and solemnity characteristic of testimony.” (*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. omitted.) “[T]he confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.” (*Ibid.*)

C. Hearsay Evidence

Eubanks's third argument is Carmelo's testimony constituted inadmissible hearsay. As correctly noted by the Attorney General, this argument is forfeited as there was no hearsay objection below. (See *People v. Partida* (2005) 37 Cal.4th 428, 431;

Evid. Code, § 353.) Despite this forfeiture, we will address his claim in anticipation of a claim of ineffective assistance of counsel.

Assuming the statements were inadmissible hearsay, we conclude any error was harmless. Carmelo's testimony about Eubanks was cumulative to his own confession to the police in the second interview when he admitted he punched Cook. Carmelo testified Dozier told her that Eubanks punched Cook. Although she provided other details about the murder, she did not say Eubanks was the responsible party. Her statements reflected she knew details about how Cook was killed but not specifically the roles of Eubanks and Dozier in the crime. And despite the prosecutor's best efforts during her examination, Carmelo steadfastly maintained she learned about how Cook was killed from her husband, and not from Eubanks. She was adamant that Eubanks did not tell her anything about the murder or admit responsibility.

Moreover, there was other evidence that implicated Eubanks. Carmelo stated she saw Cook arrive at the apartment complex and he was gone when she returned. She said they used Cook's car to drive to his apartment and steal everything of value. They all fled to Illinois and during the drive she learned there was a dead body in her trash can in California. A few weeks later, she asked a neighbor to move the trash can, smelling of decomposing flesh, to the curb for pick up. Moreover, the jury learned Eubanks had a motive to kill Cook, i.e., to escape prosecution for robbing Cook. In light of all of the above, we conclude any error in admitting the statements was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836.

III

Dozier's Appeal

Dozier raises issues of prosecutorial misconduct and sentencing error. He questions whether there was sufficient evidence to support the jury's robbery-murder special circumstance finding. (Eubanks joins in the arguments raised by Dozier.)

A. Prosecutorial Misconduct

Dozier contends there was prosecutorial misconduct when the prosecutor misstated the law regarding aiding and abetting liability and regarding reckless indifference to human life (required for the special circumstance allegation). Not so.

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).

“Regarding the scope of permissible prosecutorial argument, we recently noted ““a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ [Citation.] ‘A prosecutor may “vigorously argue his case and is not limited to ‘Chesterfieldian politeness’” [citation], and he may “use appropriate epithets”” [Citation.]’ [Citation.]” (*Hill, supra*, 17 Cal.4th at p. 819.)

“Prosecutors, however, are held to an elevated standard of conduct. ‘It is the duty of every member of the bar to “maintain the respect due to the courts” and to “abstain from all offensive personality.” [Citation.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] As the United States Supreme Court has explained, the prosecutor represents

“a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” [Citation.] Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]” (*Hill, supra*, 17 Cal.4th at pp. 819-820.)

1. Prosecutor’s Statements Regarding Aiding and Abetting

Dozier’s theory of defense at trial was that Eubanks acted alone when he beat and killed Cook. Dozier claimed his mere presence at the scene of the crime did not make him liable for murder because he did not aid or abet Eubanks and he did not conspire to commit the killing.

The prosecutor argued Dozier was guilty either as a co-conspirator or as an aider and abettor. During closing arguments the prosecutor attempted to explain the concept of aiding and abetting liability by using an example of a hypothetical bank robbery. The prosecutor explained that a lookout or a getaway driver would be guilty as an aider and abettor because he assisted the perpetrator in robbing the bank. He added, “How do you become an aider and abettor? Okay? Now, you’re not the guy who goes to the bank and actually does the crime, you know that he, that person, intends to commit the crime. You intend to assist that person—quote, unquote—‘aid and abet’ that person, and by some word or conduct you actually do aid and abet. Okay? So you have to know what they’re doing. You have to intend to help them out, and you have to actually do something that helps them out.

The prosecutor further explained, “But what is it that you have to do? It doesn’t have to be much. Aiding and abetting is anything that you aided, you simply facilitate, promote, encourage, or even instigate. So even if you say, ‘Go do it,’ which is encouragement, you’re an aider and abettor. Okay?”

The prosecutor explained the facts of this case show Dozier aided and abetted Eubanks. During his police interview, Dozier admitted he told Eubanks, “Bro, [sic] handle your business” after Eubanks said he planned to “whoop” Cook. The prosecutor argued this amounted to encouragement. The prosecutor also noted Dozier admitted he knew of the plan to “whoop” and then steal Cook’s car. After addressing the issue of conspiracy, the prosecutor asserted Dozier was guilty of more than just conspiracy but also was guilty as an aider and abettor, stating, “[I]n addition to just agreeing and staying back and away, he was there. The question is: Was he aiding and abetting? Was he assisting, encouraging, facilitating, whatever you want to call it?”

The prosecutor next argued, “[F]acilitating could be simply giving him the home or the apartment in which to commit this crime, allowing him to be lured to his apartment Not only that, he encouraged him. Like one of the quotes I showed you, he told his brother ‘Bro, [sic] you do it. Handle your business. Whoop him. [sic]’” He told the jury, “When [Cook] was lured there, it was Eubanks and Dozier against . . . Cook. His mere presence under these circumstances adds to his assistance.”

Following this statement, defense counsel objected on the grounds the prosecutor misstated the law. The court overruled the objection, stating the jury was to determine the facts and apply those facts to the law as instructed by the court.

The prosecutor continued closing argument, clarifying the aiding and abetting issue for the jury. He stated, “I think you will all agree if you are walking down an alley . . . and you have to confront one person, you—you might be concerned. . . . If [you have to] confront three people, it rises even more. The mere presence of additional people who seem to be against you is a position of power and advantage that they have, and he was there for that. And was he there just out of luck? No. He knew what was going on. Was he there just to watch? No. He . . . had a benefit from this at the end of it. He was wanting something: the robbery, the money, the car. And more importantly, he says, [¶] “. . . I would have jumped in if my brother was losing, but he wasn’t”

During his rebuttal closing argument, the prosecutor agreed with defense counsel's statements that watching someone commit a crime does not make that person guilty. The prosecutor clarified Dozier did more than just watch, stating, "[Defense] counsel said that, 'Just because . . . Dozier is present or watches and does nothing that he's not guilty, that that does not make him guilty;' and that's true. You can watch a crime happen, and you're not guilty of the crime. . . . But that's not what . . . Dozier did. He was part of the planning. He was part of the reason. He allowed it to happen in his own room, apartment. He let it happen. He was ready to jump in. He pawned . . . Cook's property. He got financial benefit from it, because he needed to get out of town, and he had no money. Is that a man who just was there? Or is that a man who, based on the evidence of what he did before the crime, during the crime, and after the crime, tells you that he was an aider and abettor and co-conspirator?"

On appeal, Dozier argues the prosecutor committed misconduct when he told the jury Dozier's mere presence during the crime was sufficient to support the finding he aided and abetted Eubanks. We disagree.

It is well settled "that mere presence at the scene of a crime is insufficient to establish aider and abettor liability. [Citation.] Aiding and abetting requires a person to promote, encourage or instigate the crime with knowledge of its unlawful purpose. [Citations.]" (*People v. Salgado* (2001) 88 Cal.App.4th 5, 15.) "Factors to be considered by the trier of fact in determining 'whether one is an aider and abettor include presence at the scene of the crime, failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime.' [Citation.]" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 273.)

The record belies Dozier's claim the prosecutor told the jury that guilt could be based on Dozier's mere presence at the murder. As described in detail above, the prosecutor repeatedly stated it would take *more* than mere presence, and he recited the correct definition of aiding and abetting. One must read in context the prosecutor's

comment that under the circumstances of this offense Dozier's presence added to the assistance he gave Eubanks. The prosecutor explained Dozier's presence changed the nature of the attack because it meant Cook was outnumbered and Dozier admitted he was willing to fight in his brother's defense if needed. He was not there to assist or help the victim. The prosecutor repeatedly stated there were several ways Dozier facilitated, assisted, and encouraged his brother, and offered different examples of how those elements were satisfied. Based on our review of the entire closing argument, we conclude the concept of aiding and abetting liability was properly argued and find no prosecutorial misconduct.

2. Prosecutor's Statements Regarding Reckless Indifference to Human Life

A defendant found guilty of first degree murder will be sentenced to death or life imprisonment without the possibility of parole under certain special circumstances. To support a finding of special circumstance murder, based on a murder committed during the course of a robbery (§ 190.2, subd. (a)(17)), and against an aider and abettor who is not the actual killer, the prosecutor must prove defendant intended to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony. (§ 190.2, subs. (c) & (d).)

During closing argument, the prosecutor addressed the element of reckless indifference to human life. He told the jury it could find Dozier guilty of first degree felony murder but find him not guilty of the robbery-murder special circumstance. He explained that to convict Dozier of a special circumstance murder, the jury first must decide if he was the actual killer, and if it determined Dozier was not the actual killer, it would have to find Dozier was a major participant in the robbery and his actions showed reckless indifference to human life.

The prosecutor argued there was evidence to support the conclusion Dozier was a major participant. He noted Dozier provided a location for the crime, he encouraged Eubanks, he "was ready to jump in," he attempted to hide the body and

helped dispose of the body, and he “reaped the benefits of this.” The prosecutor added Dozier had a financial motive to kill and get everything from Cook.

The prosecutor also argued the evidence supported the finding Dozier’s conduct showed reckless indifference to human life. He noted it was a violent robbery, and Dozier knew his brother planned to attack a disabled man. He stated Dozier, at a minimum, watched as Cook “was getting whapped, [*sic*] beaten, handcuffed. He sat there or stood there and watched as . . . Eubanks put a pillow over his face, and he sat there or stood there and watched as he slowly died. Sounds like reckless indifference to human life, and I would suggest that it’s not--”

Defense counsel interrupted the prosecutor by making an objection on the grounds the prosecutor misstated the law. Counsel and the trial judge held a conversation off the record at the bench. Once back on the record, the court then told the prosecutor he could continue.

The prosecutor stated, “And then I would suggest to you that his action not only show reckless indifference, it showed that he had adopted an intent for . . . Cook to die. He had adopted the intent to kill.” The prosecutor then discussed the evidence supporting an intent to kill. Later in the proceedings, the court stated that during the sidebar discussion off the record it instructed the prosecutor to “move on, and he did.”

““The term “reckless indifference to human life” means “subjective awareness of the grave risk to human life created by his or her participation in the underlying felony.” [Citation.]” (*People v. Smith* (2005) 135 Cal.App.4th 914, 927 (*Smith*), overruled on another ground as recognized in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291-292.) We conclude the prosecutor provided a confusing and ambiguous explanation of the concept of reckless indifference to human life. The Attorney General interprets the prosecutor’s statements as merely suggesting that because Dozier was an active participant in a violent robbery he was certainly aware of Cook’s impending death. Dozier argues the jury would have construed the prosecutor’s

comments as suggesting mere presence during the commission of a violent crime shows reckless indifference to human life. Both interpretations of the prosecutor's comments are plausible. However, any possible error was harmless because the jury was later properly instructed on the concept of reasonable indifference.⁴ Moreover, as described above, there was ample evidence Dozier was more than merely present.

B. Insufficient Evidence Argument

Dozer asserts there was insufficient evidence he aided and abetted the robbery with reckless indifference to human life. He claims the evidence “is devoid of any indication [his] state of mind was more culpable than that of any other felony murderer.” We disagree.

“In reviewing the sufficiency of the evidence for a special circumstance, as for a conviction, we ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.” (*People v. Dickey* (2005) 35 Cal.4th 884, 903; accord *People v. Lindberg* (2008) 45 Cal.4th 1, 37-38.)

As stated earlier in this opinion, “In order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony. (§ 190.2, subs. (c), (d).) [Citation.]” (*Smith, supra*, 135 Cal.App.4th at p. 927.)

⁴ “[W]e presume that the jury relied on the instructions, not the arguments, in convicting defendant.” (*People v. Morales* (2001) 25 Cal.4th 34, 47.) “The trial court emphasized this rule when it instructed the jury to follow its instructions and to exalt them over the parties’ arguments and statements. (*Ibid.*)

We begin by noting the prosecution presented evidence Dozier was the actual killer, or alternatively had the intent to kill. The jury did not have to accept Dozier's self-serving testimony that he did not intend to kill Cook. Moreover, the prosecution also presented evidence Dozier acted with "reckless indifference to human life while acting as a major participant" in the robbery of Cook. Contrary to Dozier's contention, the latter theory was supported by substantial evidence to affirm the conviction.

We find the *Smith* case, written by a different panel of this court, instructive. In *Smith*, this court determined substantial evidence supported a robbery-murder special circumstances finding as to defendant, who played the role of lookout in an attempted robbery. (*Smith, supra*, 135 Cal.App.4th at p. 927.) Defendant remained outside the victim's motel room while a codefendant entered the room to commit the robbery and another man went to get his car to act as the getaway driver. (*Id.* at p. 920.) Inside the motel room, codefendant stabbed the victim multiple times, beat her repeatedly in the face with an iron, and slammed her head through a wall. (*Id.* at pp. 927-928.) This court concluded there was substantial evidence defendant acted with reckless indifference to human life, stating, "[T]he jury could have found [defendant] gained a 'subjective awareness of a grave risk to human life' during the many tumultuous minutes it would have taken for [the victim] to be stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed *through* the wall. In addition, when [codefendant] emerged from [the victim's] room covered in enough blood to leave a trail from the motel to McFadden Street, [defendant] chose to flee rather than going to [the victim's] aid or summoning help. [Citations.]" (*Id.* at pp. 927-928.)

With respect to the major participant requirement, the court explained: "The jury could have found beyond a reasonable doubt that [defendant's] contributions were 'notable and conspicuous' because he was one of only three perpetrators, and served as the only lookout to an attempted robbery occurring in an occupied motel complex.

[Citation.] Unlike the hypothetical ‘non-major participant’ in *Tison v. Arizona* (1987) 481 U.S. 137, 158—who ‘merely [sat] in a car away from the actual scene of the murders acting as the getaway driver to a robbery’—[defendant] stood sentry just outside [the victim’s] room, where the jury could infer he monitored and guarded the increasingly lengthy, loud, and violent attempted robbery-turned-murder. [Citation.]” (*Smith, supra*, 135 Cal.App.4th at p. 928.)

As illustrated by *Smith*, a defendant need not assume a direct violent role in the underlying felony as long as that role is undertaken with a knowledge of a reasonable probability of violence by another person. Here there was evidence Dozier knew beforehand that his brother was planning great violence. The brothers hatched a scheme to lure a mentally disabled man to an abandoned apartment by using the guise a woman was interested in Cook. Dozier admitted he knew his brother was extremely angry with Cook for making a police report and he planned to “whoop” and “fuck up” Cook before taking his cash and car. Dozier encouraged Eubanks to retaliate and “handle his business.” Dozier admitted he was instrumental in arranging for a safe place for Eubanks to attack Cook undisturbed. He was also willing to serve as his brother’s back up, stating he would have jumped into the fight and assisted his brother if necessary. Based on these facts, there can be no question as to the “major participant” element.

And even if we were to assume the jury believed Dozier’s statement he did not intend for Cook to be killed, his statements did not negate reckless indifference to life. In helping Eubanks plan a place to exact his revenge and commit the robbery, Dozier had to have anticipated there was a grave risk of death to a mentally disabled man. If Cook had resisted Eubanks’s attack, Dozier would have jumped in to assist and Cook would have been outnumbered two to one. As it turns out, Cook did not fight back and the jury could have inferred Dozier certainly gained an awareness of a grave risk to Cook’s life during the lengthy period of time it must have taken Eubanks to pummel Cook to a near-death state. Dozier saw Cook on a nail ridden floor, unresisting, tied up,

bleeding, and helpless. Ignoring Cook's pleas for help, Dozier callously advised his brother the severe beating would not stop Cook from making a police report. Eubanks's solution to this dilemma was to suffocate Cook with a pillow. The brothers together then devised a way to dispose of the body. Dozier's attempts to minimize his culpability by claiming he was a silent bystander is simply not supported by the record. The conviction was based on much more evidence than his mere presence at the scene.

C. Sentencing

Eubanks and Dozier contend the court erred in sentencing each of them to a consecutive one-year term for robbery. They maintain they were convicted and punished for first degree murder under a felony murder theory, and they cannot be separately punished for both robbery and murder. When sentencing the defendants, the court concluded consecutive sentences were appropriate because “[t]he objectives were predominantly independent of one another; the crimes involved separate acts of violence; [and] the crimes were committed at different times.”

“Section 654 prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. [Citation.] Whether a course of conduct is indivisible depends on the intent and objective of the actor. [Citations.] ‘If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.] On appeal, the court may stay the effect of the judgment as to the lesser offense so far as the penalty alone is involved. [Citation.]” (*In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1743-1744.)

“Each case must be determined on its own circumstances. [Citations.] The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.]” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

The Attorney General fails to discuss or distinguish the case authority supplied by Dozier explaining the well-settled rule that when felony murder is the sole theory of murder under which the case was prosecuted, section 654 precludes imposition of separate terms for the murder and the felony. (See *People v. Boyd* (1990) 222 Cal.App.3d 541, 576 (*Boyd*); *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 547.) This is because the underlying felony “is a statutorily defined element of the crime of felony murder” (*Boyd, supra*, 222 Cal.App.3d at p. 576). Thus, the underlying felony is “the same act which made the killing first degree murder.” (*Id.* at p. 575.)

The Attorney General acknowledges the murder was charged as a felony murder, but nevertheless contends the prosecutor presented evidence the offenses were incident to two objectives. It cites general case law discussing section 654 but no relevant or applicable felony murder cases.

We recognize there are cases holding section 654 need not apply if the jury was instructed on murder under felony murder and premeditation and deliberation theories. In those cases, the trial court is not precluded from finding defendant had separate objectives in committing the killing and the underlying felony because the jury could have convicted defendant under either theory. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Those cases involve scenarios, unlike this case, where the act constituting the felony is not the only act that makes the homicide first degree murder. (See *People v. Montes* (2014) 58 Cal.4th 809, 898 [“People properly concede, felony murder was the sole theory of murder under which the case was prosecuted, and section 654 precludes imposition of separate terms’].) Accordingly, we will modify the judgment by staying execution of the terms imposed on the robbery counts.

DISPOSITION

The judgment is modified by staying execution of the sentences on count 2 with respect to both Eubanks and Dozier. The clerk of the superior court is directed to prepare an amended abstract of judgment that reflects the modified judgment and forward

a copy to the Department of Corrections and Rehabilitation, Division of Adult Operations. As so modified, the judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.