IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RONALD WAYNE MOORE,** Defendant and Appellant.	S081479 **CAPITAL CASE**

Monterey County Superior Court No. SS980646
The Honorable Wendy Clark Duffy, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

ALICE B. LUSTRE
Deputy Attorney General

CATHERINE MCBRIEN
Deputy Attorney General
State Bar No. 120873

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5760
Fax: (415) 703-1234
Email: Catherine.McBrien@doj.ca.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RONALD WAYNE MOORE,** Defendant and Appellant.	S081479 **CAPITAL CASE**

STATEMENT OF THE CASE

On May 15, 1998, the Monterey County District Attorney filed an information charging appellant with the first degree murder of Nicole Carnahan, with the special circumstances that the murder occurred during the commission of first degree burglary and robbery (Pen. Code, §190.2, subd. (a)(17)(A), (G)). The information further alleged that appellant had committed residential robbery (Pen. Code, § 212.5, subd. (a)) with the use of a deadly weapon (Pen. Code, § 12022, subd. (b)), and had also committed residential burglary (Pen. Code, § 459). In addition, the information alleged that appellant had served two prior prison terms (Pen. Code, § 667.5, subd.(b)). (1 CT 65-69.)

On April 7, 1999, the trial court denied appellant's motion to suppress statements he made to the police. (2 CT 364.)

On June 10, 1999, the jury found appellant guilty of all charges, and found true all special circumstances and enhancements. (2 CT 441-443.) After the penalty phase, the jury returned a verdict of death on June 22, 1999. (2 CT 459.)

On August 16, 1999, the trial court denied appellant's motion to modify the verdict, and sentenced appellant to death. It also imposed a suspended sentence

of 11 years and four months on the robbery and burglary charges, together with the related enhancements. (2 CT 505-506.)

STATEMENT OF FACTS

On March 4, 1998, appellant murdered Nicole Carnahan, a young child. Nicole's mother, Rebecca Carnahan, testified that Nicole was "11 years, five months and 26 days" old when appellant murdered her. (27 RT 5239.) At trial, Mrs. Carnahan described Nicole's customary routines, and explained that on weekdays, the school bus dropped Nicole off at 3:00 p.m. Nicole would let herself into the home with a key to the front door. She then fed her farm animals and had a snack before beginning her homework. (27 RT 5243.) Mrs. Carnahan instructed Nicole to lock the front door when she got home, and not to answer the door or phone when she was home alone. (27 RT 5244.) Nicole normally followed instructions to lock the front door, but often left the back door unlocked after she fed her animals. (27 RT 5244-5245.) Nicole was a "very responsible" child and usually finished her homework by the time Mrs. Carnahan returned home after work. Mrs. Carnahan would check Nicole's homework and then the two would prepare dinner together. (27 RT 5245.)

According to Mrs. Carnahan, appellant had lived at the property behind her since 1984. (28 RT 3411.) Their relationship was not amicable. Mrs. Carnahan had been involved in disputes with appellant's mother regarding property line issues, and specifically recalled a quarrel in 1994 when a fence had blown down in a storm. Mrs. Carnahan would also shout at appellant's family to quiet down when their yelling disturbed Nicole's naps. During the 14 years that Mrs. Carnahan had lived next to appellant, Mrs. Carnahan had never invited appellant to her home. (28 RT 5413.) Appellant's dog often got loose and Mrs. Carnahan would call Animal Control to pick it up. (28 RT 5414.) Nicole was afraid of appellant "because he had made comments to her through

the fence" when she had been feeding her animals. Mrs. Carnahan told Nicole to avoid appellant. (28 RT 5415.)

On the morning of the murder, Mrs. Carnahan let the family dogs out of their kennels so they could get some exercise in the backyard. Mrs. Carnahan watched the dogs run around the perimeter of her property along the fence line which separated her property from appellant's property. At the time Mrs. Carnahan let the dogs out, there were no boards missing from her fence. (27 RT 5254-5255, 5265.)

However, at 2:15 p.m., the Carnahans' neighbor, Ronald Ruminer, came home from work and saw that two or three boards were missing from the Carnahans' fence. Ruminer specifically recalled noticing this because the fence was only one or two years old and was in good repair. (33 RT 6464-6467.)

About 45 minutes after Ruminer noticed the missing boards, appellant appeared at the home of another neighbor, Dennis Sullivan. (31 RT 6018.) Sullivan testified that it was approximately 3:00 p.m. when appellant arrived. Appellant was wearing a multi-colored poncho, and was visibly intoxicated. (31 RT 6031, 6042.) Appellant told Sullivan that he wanted to buy a pack of cigarettes. After Sullivan retrieved some cigarettes, he returned to the front porch where he found appellant sitting on the ground with several items next to him. (31 RT 6020-6021.) The items included: a butcher knife approximately 12 inches long; a round cylinder which was also about 12 inches long; some one dollar bills; and a fanny pack. (31 RT 6022-6023, 6027-6035.) Appellant also had a carved cane which had the handle broken off of it. (31 RT 6027.) Appellant said he had broken the cane when "he had swung [it] at a Mexican the day before." (31 RT 6027.) Sullivan never told appellant that he had fired a gun at some Mexicans who had tried to break into his home. (31 RT 6039.) Sullivan did, however, say that a field worker had come knocking on his

window asking for work. (31 RT 6039.)[1/]

That evening, Mrs. Carnahan came home from work around 5:00 p.m. She was unable to open the front door with her key because it was locked from the inside with a deadbolt. (27 RT 5246.) Upon finding the door locked in this "extremely" unusual manner, Mrs. Carnahan grew very worried because there was no sign of Nicole, even though Nicole typically came outside to give Mrs. Carnahan a kiss and hug in the driveway. (27 RT 5257-5258.) Mrs. Carnahan began yelling for Nicole and banged on the front door. (27 RT 5259.) When she received no response to her cries, Mrs. Carnahan went to the back door and found that it was shut, but not latched. Mrs. Carnahan opened the door and saw that her home had been ransacked, with her belongings strewn everywhere. (27 RT 5259-5260.) Mrs. Carnahan immediately began frantically searching for Nicole. Mrs. Carnahan looked for Nicole in her room but did not see her. She then proceeded to her own bedroom which she found had been "turned upside down." (27 RT 5261.)

When Mrs. Carnahan went to her backyard, she saw appellant running away towards her rear pasture. Appellant had what appeared to be a small bundle in his arms. (27 RT 5262-5263, 5266.) Mrs. Carnahan yelled out, "Ronny, what are you doing? Where is Nicole?" (27 RT 5264.) Appellant did not respond and continued running away. Mrs. Carnahan saw appellant run through a hole in her fence which had not been present at the time she had let the dogs out in the morning. (27 RT 5265.) After appellant got through the hole in the fence, Mrs. Carnahan heard him say, "I didn't do it. I didn't do it." (27 RT 5266.)

Mrs. Carnahan went back inside the house to call the police, but discovered that the three phones in the house had been ripped out of the walls and were

---

1. This testimony contradicted appellant's statement to the police in which he asserted he had gone to the Carnahan residence to warn them that Sullivan had fired shots at a Hispanic intruder. (30 RT 5905.)

gone. (27 RT 5268.) Mrs. Carnahan thus decided to run to her neighbor's house to use their phone. (27 RT 5268-5269.) After calling the police, Mrs. Carnahan returned home. When she went into her backyard, she saw appellant in his backyard. Mrs. Carnahan asked appellant if he had seen Nicole. Appellant responded that he had seen "two Mexicans" fleeing from her backyard, and that he had tried to chase them away. (27 RT 5272.) Mrs. Carnahan then went to the front of her home where she and other neighbors were gathering while waiting for the police to arrive. (27 RT 5275.)

About 20 minutes later, appellant approached the group. Appellant was carrying a can of Budweiser beer, a brand of beer Mrs. Carnahan had in her refrigerator. (27 RT 5277-5278.) Appellant told Mrs. Carnahan that he had been to her home and had asked Nicole for a glass of water. (27 RT 5278.) When Mrs. Carnahan asked why appellant had been at her home, appellant said, "I was thirsty. I didn't have no water." (27 RT 5278.)

Deputy Larry Robinson responded to Mrs. Carnahan's 911 call. (28 RT 5452.) When he arrived, Mrs. Carnahan showed Robinson the hole in her fence which had not been there previously. (28 RT 5460.) Robinson noted that the grass in the backyard was about one-foot high, and that there was a "definite trail" through the grass leading to the hole. Robinson went through the hole. He knocked on the front door of appellant's trailer, but received no response. (28 RT 5462-5465.)

After conferring with other deputies, Robinson returned to appellant's trailer and knocked on the front door again. This time appellant responded to the knocking. Appellant called out that his door was locked and that Robinson would have to come to the front window. (28 RT 5467-5469.) Appellant said that there was no light in the trailer because the electricity had been turned off. (28 RT 5470-5472.) Robinson told appellant that he was searching for Nicole, and asked if he could look for her inside the trailer. Appellant responded that

he had seen Nicole earlier that day when she was in her backyard. Appellant said that he had asked Nicole for a glass of water, and that Nicole had held him up when he became dizzy and started to fall down. After relating the foregoing information, appellant allowed Robinson to crawl through a front window to get inside the trailer. Appellant's trailer was extremely dirty and cluttered, with large piles of clothing everwhere. (31 RT 6094.) While looking for Nicole inside appellant's trailer, Robinson noticed that appellant had a cold can of Budweiser beer in the kitchen area. Robinson found this odd because the trailer had no electricity. (28 RT 5476-5477.)

When Robinson failed to find Nicole in the trailer, he began searching for her in appellant's backyard which was filled with large junk piles. Robinson saw a guitar case next to one of the junk piles. The guitar case was very noticeable because it appeared clean and new in contrast to the weathered items around it. (28 RT 5476-5477.)

Following his initial search for Nicole, Robinson decided to interview appellant inside his patrol car because appellant's trailer was cold and had no light. (28 RT 5481.) As appellant was talking to Deputy Robinson in the patrol car, Nicole's body was found. (28 RT 5498.) Upon the discovery of Nicole's body, Mrs. Carnahan began screaming hysterically. Appellant, who heard Mrs. Carnahan's loud cries of anguish, initially "appeared to be ignoring her," but then asked, "Did they find her?" (30 RT 5873; 3 CT 1818.)

Nicole was found "stuffed between the head board of a bunk bed and the wall in her bedroom." (30 RT 5882.) At the time of her murder, Nicole was wearing Levis and a maroon 49er's sweatshirt. (29 RT 5650-5651.) One arm was clutched against her chest; the other arm rested above her head. Nicole had "a gaping wound" to her throat, with a broken knife lodged in her neck. (30 RT 5842.) Nicole also had wounds on top of her head, and below her right eye. The right side of her face was crushed. (29 RT 5651-5652.) Blood spatter

covered her clothes. (29 RT 5654-5655.)

The Autopsy

Dr. Fred Walker performed Nicole's autopsy. Nicole was five-feet, one-inch tall, and weighed 89 pounds. (36 RT 7099.) Dr. Walker needed to shave most of Nicole's head in order to examine the numerous wounds in that location. (36 RT 7099.) Dr. Walker found "a cluster of lacerations" on the top of her head in an area "measuring about six inches by three inches." (36 RT 7100.) The number of the lacerations indicated that appellant had likely inflicted about "seven blows to the head." (36 RT 7100.) The lacerations to Nicole's head were sufficiently deep to expose her skull. (36 RT 7102.) Dr. Walker examined a metal cylinder recovered from appellant and opined that the ridges and knobs on the cylinder were consistent with the wounds to Nicole's skull. (36 RT 7103-7104.)[2/]

Nicole's face had numerous lacerations and bruises. According to Dr. Walker, the metal cylinder had been used to bludgeon Nicole's forehead, right eye, nose, and right ear, causing many individual bruises to blur into one large bruise. Evidence of individual blows could be seen by separate indentations within the large bruise. Two linear depressions within the large coalesced bruise matched the ridges and indentations on the metal cylinder. (37 RT 7204-7207.)

In addition to the extensive bruising, Nicole's face also had four lacerations over her eyebrows and lips. The lacerations went all the way to the bone. (37 RT 7207-7209.) The tops of Nicole's hands, as well as her wrists, were covered with bruises, as if she had sought to shield herself from appellant's blows. (37 RT 7211.) Based on the shapes of the bruises in those locations, it

---

2. The cylinder in question was the object Dennis Sullivan had seen when appellant came to his house.

appears that appellant had repeatedly struck them with a cane recovered from his trailer. (37 RT 7211-7213.) Bruises were also found on Nicole's right elbow and right shoulder. Nicole's chin bore multiple abrasions which appeared to have been inflicted by fingertips. (37 RT 7214-7215.) Nicole's throat had a four-inch slash wound which severed Nicole's jugular and carotid arteries. (37 RT 7215.) A knife blade was lodged inside the wound severing Nicole's jugular and carotid arteries. The blade protruded "about two inches out the left side of the neck." (37 RT 7215.) In addition to the primary stab wound, there were six "very shallow slicing wounds" which were "more or less parallel to the main slicing wound on the neck." (37 RT 7216.)

Nicole also had a depressed skull fracture. Based on "the complexity of the fracture," as well as the depression to the skull, Dr. Walker believed it resulted from multiple blows consistent with an object such as the metal cylinder recovered from appellant. The skull fracture alone was fatal in nature. (37 RT 7220-7221.)

Appellant's Interview With Police

Following the discovery of Nicole's body, the police drove appellant to the police station for an interview. During the interview, appellant told the police that he received disability income, because he had Lou Gehrig's disease. (30 RT 5887.) When asked to describe his whereabouts that day, appellant said he had gone to a neighbor's house to buy a pack of cigarettes around 1:30 p.m. (30 RT 5887.) After getting the cigarettes, appellant went home and then noticed that some boards were missing in the fence that separated the Carnahan property from his residence. Appellant wanted to notify Mrs. Carnahan about the missing boards so he went to her home. Nicole answered the door. Appellant became dizzy, so he asked Nicole for a glass of water, which she subsequently brought him. (30 RT 5888-5889.) Nicole held him up when he stumbled. Appellant told Nicole to have her mother contact him when she

returned home from work. Later that afternoon, appellant decided to repair the hole in the fence. When he looked through the hole, he saw a Mexican man in his late twenties sporting slicked-back hair in a "low rider" style. (30 RT 5890-5892.) The man was in the Carnahans' yard near a tool shed. Appellant yelled at the man and chased him out of the yard. Appellant could not keep up with the man, however, because of his Lou Gehrig's disease. (30 RT 5896-5897.) When Mrs. Carnahan came home, appellant was out in his backyard. He heard her yell, "What's going on?" (30 RT 5898.) Appellant yelled back, "I'm chasing this guy. Call the sheriff." (30 RT 5898.)

When asked if he had carried any weapons on the day of the murder, appellant said that he had a cane, the handle of which had a large cobra head carved onto it. (30 RT 5902.) Appellant stated that he had dropped the cane a couple of weeks earlier, breaking the cobra head off the cane. Appellant further stated that he carried a "butcher's" knife which he carried stuffed between his waistband and belt. Appellant also carried a piece of pipe which he described as his "club." (30 RT 5903.) The police asked appellant if they could see the knife. Appellant responded that the knife was in his kitchen, but that he did not want the police in his trailer because "it was real messy and it would be hard to find things." (30 RT 5904.) Appellant explained that he had been carrying a knife because he had heard about burglaries occurring in the neighborhood. Appellant said that his neighbor, Dennis Sullivan, had told him about an attempted burglary at his home that very day and had fired a couple of gunshots at the intruder. (30 RT 5905.) Appellant, however, indicated that he had not been carrying his butcher knife when he saw Nicole. (30 RT 5906.)

After the police told appellant that Nicole had been found dead, they asked appellant if he had murdered her. Appellant replied that he was incapable of having committed the murder because of his Lou Gehrig's disease. Appellant stated that he did not have the strength to commit the murder because his

disease had been getting progressively worse over the past five years, and that he would fall over if he was given a slight push. (30 RT 5906-5907.)

During the interview, appellant appeared to have been drinking, but did not seem drunk or impaired in any way. Appellant indicated that he had drank two or three beers that day. Appellant's answers during the interview were coherent and responsive. (30 RT 5907-5908.) Appellant stated that he was in a methadone program and took heroin only once in a while. (30 RT 5909.) Appellant added that he had a good relationship with Mrs. Carnahan, and that Mrs. Carnahan had been to his house to visit him. (30 RT 5910.)

As the interview progressed, the police asked appellant if they could take his clothes and swab his hands. Shortly thereafter, appellant was arrested for the murder of Nicole, and was read his *Miranda*[3] rights. (30 RT 5909.)

Blood Evidence

During a search of the Carnahan home, a single, one-inch spot of Nicole's blood was discovered in the living room. (35 RT 6884-6885, 6691; 36 RT 7073.) In addition to the single blood stain in the living room, the police discovered Nicole's blood spattered throughout her bedroom. Blood was found just inside the bedroom's doorway, by the shelves next to her bed, on top of her bed's comforter, inside her school backpack, underneath her backpack, on clothes lying on top of her clothes hamper, on the closet doors, and on the wall by the closet. Blood was also found on the ceiling, next to a light switch, on storage crates, on a red 49er's jacket, and on the carpet. (29 RT 5614-5617, 5630-5638.)

Blood drops ran down the legs of wooden chairs; blood also ran down the walls and covered school papers. (29 RT 5630-5638.) Large blood drops were located on the dresser's drawer pulls, as well as on a video holder where

---

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

numerous videos were strewn all over the floor. (29 RT 5618-5622.) Blood drops were located on additional videos found below the pillows, as well as on a Walmart bag on the floor. (29 RT 5622-5625.) Numerous blood drops were located on Nicole's bean bag chair. (29 RT 5638-5639.) Blood spatter was on the left side of Nicole's bunk bed, on a box holding dolls, on a rodent cage, and on a toy rabbit. (29 RT 5638-5640.)

Misted blood was on a baseball cap on the floor. Smeared blood was on the corner of a small dresser, and on Nicole's pillow. Additional smeared blood was found on a box of skates which looked as if bloody hair had brushed against the box. The window sill near the skates had transfer stains which also appeared as if they had been brushed by bloody hair. (29 RT 5626-5628.)

The police also found a knife handle on the floor. (29 RT 5641.) Police noticed that the concentration of blood found in the room became greater and greater as they got closer and closer to the area where Nicole's body was found. (29 RT 5642-5643.) Nicole's bunk bed, and her toys located near the bed, were covered with blood spatter. (29 RT 5644-5645.)

Blood was also found in appellant's trailer. A bloody, broken cane was found next to a recliner. The blood on the cane was so fresh that it was damp at the time of the search. (31 RT 6071.) Blood smears were found in the bathroom, in the hallway, and on a light switch. (31 RT 6075.) Blood drops were located on the bathroom sink and vanity. The blood drops appeared wet, whereas the smeared blood seemed dry. (31 RT 6076-6077.) Bloody gloves and bloody paper towels were also found in appellant's trailer. (31 RT 6110-6113.)

DNA Evidence

DNA testing was performed on the numerous bloody items found in appellant's trailer, including his broken cane, a pair of gloves, a folding knife, a metal cylinder, a poncho, and blue jeans. Test results reflected that blood

found on those items came from Nicole. Only one in 96 million people would have shared the same DNA profile as Nicole. (36 RT 7047-7079, 7086.) DNA could not be extracted from blood stains found in appellant's bathroom, but testing revealed that the blood came from a female. (36 RT 7083-7085.)

Trace Evidence Linking Appellant To The Murder

In addition to the blood and DNA evidence, other trace evidence linked appellant to Nicole's murder. Nicole's hair was found on appellant's blood-stained poncho, and on his white T-shirt. (32 RT 6278-6281.) Some of the hairs were twisted, as if they had been removed during a struggle. (32 RT 6282.) Fibers matching the clothing worn by Nicole at the time of her murder were consistent with fibers found on appellant's poncho, on his shirt, and on the bloody paper towels. (32 RT 6290-6293.) Fibers taken from the hole in the fence were consistent with those from appellant's poncho. (32 RT 6294-6295.) Fibers consistent with the poncho were also present on Nicole's sweatshirt. (32 RT 6295.) In addition, the bags placed on Nicole's hands after the murder contained fibers consistent with the poncho. (32 RT 6294-6296.)

Stolen Property Recovered From Appellant's Trailer

Approximately 30 to 35 items of Mrs. Carnahan's property were found in appellant's filthy trailer. (31 RT 6089, 6094.) Several two dollar bills taken from Nicole's bedroom were found on appellant's bathroom floor. (31 RT 6118.) Mrs. Carnahan's portable telephone and answering machine were found hidden under a shower curtain. (32 RT 6218-6219.) A red nylon bag, which was hidden under a cushion and rug, contained numerous items of stolen property. (29 RT 5670-5672.) Additional stolen property found inside appellant's trailer included: Mrs. Carnahan's stereo and VCR, a pie dish, her guitar, a camcorder, jewelry, bubble bath, Bud Light, a padlock, an antique knife, and pork chops. (27 RT 5299, 5303, 5307; 28 RT 5402, 5406-5409.)

A trunk that had been at the foot of her bed had been moved out into her backyard. (27 RT 5297.) In addition to the stolen property, appellant's trailer also contained about 25 or 30 syringes, and burnt cotton balls, items normally associated with shooting heroin. (31 RT 6096-6097.)

Testimony Regarding Appellant's Physical Condition [4/]

Richard Grimes had lived across the street from appellant for about 16 years. (28 RT 5419.) At times, appellant appeared to have difficulty walking and walked "like he was an elderly person, kind of hunched over, and other times he was kind of straight." (28 RT 5431.) Other neighbors made essentially the same observations regarding appellant's ambulation. (28 RT 5442-5445.)

Paula Husman, a clerk at a grocery store frequented by appellant, testified that appellant normally carried his cane with him on his arm but rarely used it. (33 RT 6500-6501.) Appellant usually rode his bicycle to the store and did not appear to have any difficulty in doing so. However, when he came to the store late in the afternoon, Husman observed that he occasionally had trouble riding his bicycle. (33 RT 6501-6502, 6509-6510.) Husman recalled that on the day before the murder, she went outside the store to throw some trash away; she found appellant standing inside the store's garbage dumpster where he was rooting around in the trash. Appellant's presence inside the dumpster scared Husman, prompting her to ask her co-workers to take care of throwing away the trash. (33 RT 6504.) In the past, Husman had seen appellant climbing into the dumpster on a number of occasions, and noticed that he had not had any trouble in doing so. (33 RT 6506-6508.)

---

4. This evidence was relevant to appellant's claim that he was too weak to have committed the murder.

Appellant's neighbor, Robert Hooper, testified that appellant sometimes used his cane when walking, and sometimes did not use it. Hooper never saw appellant have any difficulty riding his bike. (34 RT 6622-6623.) Hooper further testified that appellant did not have an amicable relationship with the Carnahans and that he had heard "many" loud arguments between them. (34 RT 6628-6629.) On the day of the murder, one neighbor saw appellant riding his bicycle without difficulty at about 3:30 p.m. (34 RT 6634-6636.)

Deputy Steve Ortmann testified that on March 11, 1998, one week after the murder, he observed appellant walk back and forth in his jail cell with no difficulty. Appellant did not limp, and had no problems with his balance. Ortmann also saw appellant easily lifting his mattress about four feet off the bed frame. (36 RT 7011-7014.)

During his incarceration in county jail, appellant normally used a wheelchair. However, on March 21, 1998, no wheelchair was available so appellant walked to his attorney visit. Appellant walked with a "little difficulty," but did not require a cane or walker. A couple of months later, correctional staff observed appellant in the exercise yard where he was videotaped doing push-ups. (34 RT 6654-6657.)

Defense Case

Barbara McCrobie testified that on the day of the murder, she observed a young, male, Hispanic teenager in the vicinity of Nicole's home around 3:00 p.m. (37 RT 7246-7248.)

Toxicology results of appellant's blood revealed that appellant had taken methadone, valium, morphine, and codeine. Codeine and morphine are metabolites of heroin. The results of appellant's urine test showed evidence of heroin and marijuana. (37 RT 7256-7257.)

Ronald True, an HIV educator, testified that he saw appellant on March 3, 1998, the day before the murder. Around 4:30 p.m., True observed appellant

talking to a deputy sheriff. True put appellant in his car and drove appellant back to appellant's residence. At the time he picked up appellant, appellant was agitated and appeared to be under the influence of opiates such as heroin, methadone, and cocaine. (37 RT 7262-7263.)

Chuck Bardin interviewed Rebecca Carnahan after the murder. Mrs. Carnahan said Nicole was not afraid of her neighbors, and gave the impression that Nicole was not afraid of appellant. (37 RT 7267-7268.)

Rebuttal

Dr. Reese Jones, an expert on psychopharmacology—the science of how drugs affect the brain—reviewed appellant's medical records, including the toxicology report introduced by the defense. (39 RT 7627-7632.) According to Dr. Jones, the toxicology report demonstrated that appellant had used a "substantial"amount of heroin. However, it was not "particularly high for someone who has been using heroin and other opiate drugs regularly." (39 RT 7636.) Dr. Jones found no evidence "whatsoever" that appellant had suffered from any kind of drug induced delirium or psychosis. (39 RT 7638-7647.)

Penalty Phase

At the penalty phase, the prosecution introduced evidence regarding appellant's prior crimes and acts of violence. Dennis Winfrey testified about the 1983 burglary of his wholesale nursery business. On November 26, 1983, Winfrey woke up around 1:00 a.m. when his burglar alarm went off. Winfrey retrieved a rifle and headed for the nursery greenhouses. (44 RT 8622-8625.) Winfrey saw a man exiting the boiler room and ordered him to get on the ground. As the man complied, Winfrey saw a muzzle flash and two shots rang out. Winfrey returned fire in the direction where the shots came from. (44 RT 8627-8629.) Winfrey saw the silhouettes of three people running away, and then heard the sound of somebody groaning. (44 RT 8630-8632.) Appellant

was found lying on the ground with a portion of a rifle butt next to him. (44 RT 8667-8668.) After the police arrived, Winfrey discovered that the lock on this tool shed, which contained expensive power tools, had been pried open. (44 RT 8634-8635.)

When appellant was hospitalized for treatment of his gunshot wounds, he began shouting that he had not tried to hit Winfrey, and that Winfrey should not have shot him. (44 RT 8683.) About a week later, appellant said something like, "I capped off two rounds with my .25, and he shot me." (44 RT 8685-8686.) Appellant repeated this sentiment, stating: "I wasn't trying to hit him. You can't hit anyone from that kind of distance with that small a gun." (44 RT 8687.)

Paul Garcia testified regarding an incident in which he took his wife to a methadone clinic in December 1997. Garcia's wife went inside the clinic as Garcia waited outside by his car. Appellant approached Garcia's car and began "cussing" and calling Garcia's wife a "bitch." Appellant was yelling something about Garcia's wife owing him money for Avon products. (45 RT 8803-8807.) Appellant was holding a collapsible cane which had a piece of chain in the middle. When appellant first approached Garcia, the cane was in one piece. Then appellant "broke it up" and told Garcia to follow him around the building. Appellant was yelling that he was not afraid of Garcia and wanted to fight him. Appellant held the cane in one hand, and then pulled a switch blade from his back pocket. While only about two feet away from Garcia, appellant pressed a button on the knife, causing the blade to open. Just as appellant opened the switchblade, Garcia's wife came out of the clinic. When Garcia turned to get back into the car, Garcia's wife kicked the knife out of appellant's hand. (45 RT 8808-8814.)

As the knife flew out of appellant's hand, Alonzo Gonzales, the director of the clinic emerged from the building. (45 RT 8815.) Gonzales saw that Garcia

"was trying to ignore" appellant, and "walk away from the situation." (45 RT 8851-8853.) Despite Gonzales's order for appellant to stop yelling, appellant "continued to scream obscenities." (45 RT 8854.) After about 45 seconds, appellant calmed down, and heeded Gonzales's directions to cease screaming. (45 RT 8855-8856.)

On March 2, 1988, two days before the murder, appellant's next door neighbor, Robert Hooper, heard the sound of people yelling coming from appellant's house. Between 8:30 and 9:30 p.m., Hooper heard appellant arguing with two women. Hooper came out of his house to see what was happening. One woman left appellant's home, but appellant grabbed her by the arm and began pulling her back towards the house. Hooper momentarily lost sight of the two as they passed by a tree. Hooper then saw appellant and the woman on the porch where appellant was dragging the woman by one of her legs. (45 RT 8863-8866.) Hooper did not call 911 because he had done so many times in the past and the police had usually handled it as a "domestic problem." (45 RT 8868-8869.)

Robert Avilez, the blood spatter expert, testified about the nature of the blood spatter found in Nicole's bedroom. (45 RT 8871-8873.) Avilez explained that low velocity spatter occurs when blood drips from a bleeding person, and tends to make large drops. Medium velocity spatter is usually seen when someone is struck with an object and makes smaller more widely dispersed drops. High velocity spatter would cause a very fine misting and usually resulted from a gunshot wound. (45 RT 8874-8875.) Avilez opined that the blood spatter located all over Nicole's bedroom had cast off patterns typical of blood flying off a blood-soaked object. (45 RT 8876-8877.) Avilez noted that the blood on the hamper in Nicole's room was consistent with a transfer from some other object. The transfer stain had blood-encrusted hair in it, indicating that Nicole's head was approximately three feet off the ground

when it came in contact with the hamper. (45 RT 8879.) Nicole's yellow pants, and the dresser also had transfer stains. (45 RT 8879-8880.)

Transfer stains containing Nicole's hair were also found on Nicole's skate box, indicating her head had come into contact with that object which was on the ground. The end of the skate box exhibiting the smear was crushed, as if weight had fallen onto it. (45 RT 8881-8882.) Feathered hair swipe blood patterns were also found on the windowsill. (45 RT 8882.)

Numerous medium velocity spatters were found behind the bunk bed, where Nicole's body was wedged. The spatters surrounding Nicole's head "almost took on a halo effect," indicating that she had been bludgeoned as she laid behind the bunk bed. (45 RT 8882-8883.) Based on the blood spatter, Avilez opined that "at least one blow was delivered near the closet," and that numerous blows were inflicted in the bed area. (45 RT 8884.)

Mrs. Carnahan testified regarding Nicole's life. Nicole had participated in 4-H programs for about three years, and had many animals, including rabbits, pigs, cats, dogs, and turtles. (45 RT 8886.) Nicole also participated in craft and cake decorating projects. Mrs. Carnahan would take Nicole to after-school activities about three times a week. (45 RT 8887-8888.) Because she loved animals, Nicole had wanted to become a veterinarian, but was worried she could not become one because of her difficulty with math. (45 RT 8891.) Since Nicole's murder, Mrs. Carnahan no longer celebrated any holidays. Instead, Mrs. Carnahan would just stay in bed. (45 RT 8894.) Following the murder, Mrs. Carnahan had tried to get pregnant, but had been unable to conceive. (45 RT 8896.)

Roger Carnahan, Nicole's father, testified regarding his memories of Nicole. When Nicole was a baby and could not sleep, Mr. Carnahan would place Nicole on his chest so that Nicole would hear his heart beating, which would make "her go to sleep a lot quicker." (45 RT 8898.) After the divorce, Mr. Carnahan

had Nicole with him every other weekend, and on alternating Wednesdays. (45 RT 8898.) Mr. Carnahan fondly recalled going to two father-daughter Valentine dances with Nicole a few years before appellant murdered her. At the first dance, there was a 50's type theme so Mr. Carnahan wore a letterman jacket, while Nicole wore "an old-fashioned type hat." (45 RT 8900.) The other dance had a western theme. Nicole "was dressed up in her cowgirl outfit, with a straw hat that was spray painted blue with the feathers in the front." (45 RT 8901.) Mr. Carnahan wore jeans, boots, and a Southwestern style jacket which he specially bought for the occasion. (45 RT 8900-8901.)

Nicole had visited her father on the last weekend before appellant had murdered her. The two went to the movies together, and took the dogs for a walk. Nicole was riding her father's bike when she had a bad crash, causing her to receive numerous scrapes and bruises. Nicole was "more concerned" about damaging her father's bike than her injuries. Nicole had always wanted a basketball hoop so Mr. Carnahan bought her one, even though he "didn't have the money to buy that." Mr. Carnahan was planning to surprise her with the hoop on the next visit, but was told by Mrs. Carnahan that Nicole had been murdered. (45 RT 8905-8906.)

Defense Evidence

Appellant's sister, Louise DeMateo, testified that appellant was the oldest of the three children. Appellant's parents were happily married, and the children were never abused. Their father initially was in the Navy. After retiring from the military, he began working at Soledad prison. (46 RT 9005-9007.) Appellant started using drugs when he was around 19 or 20 years old. Appellant's parents tried to help appellant and keep him away from people who were using drugs. DeMateo drove appellant to the methadone clinic every day. (46 RT 9009.)

According to DeMateo, appellant married Marianne Parr Moore in 1976, and had four children with her. Like appellant, Marianne had substance abuse problems. When appellant and Marianne got divorced, appellant went to live with his mother on Middlefield Road. (46 RT 9010-9012.) Appellant's mother did volunteer work for a hospice organization, and appellant would help her deliver food from the food bank. Appellant still used drugs while living with his mother, and DeMateo continued taking him to the methadone clinic. (46 RT 9013.)

A few years before the murder, appellant began having trouble walking and would lose his balance easily. DeMateo took appellant to the doctor and became the payee of his disability benefits. (46 RT 9014.) DeMateo became estranged from appellant after appellant wanted to become the payee of his benefits, and his girlfriend began threatening DeMateo. (46 RT 9015.)

Appellant's daughter, Veronica Rodriguez, testified that appellant never hit her or abused her. Although Rodriguez had not seen appellant for approximately five years, she invited him to her high school graduation which appellant attended. Rodriguez loved appellant very much and visited him in jail almost every week. (46 RT 9022-9024.)

Dr. Arthur Kowell, a neurologist, examined appellant in March 1999, approximately one year after the murder. Appellant informed Dr. Kowell that at age 17, he had started using numerous illicit drugs including barbituates and marijuana. Appellant also stated that he had become a heroin addict and alcoholic by age 18. In 1983, appellant received a head injury when he was shot in the buttocks and then struck his head. (48 RT 9409.) Appellant claimed that in 1997, he had been in a car accident and had struck his head on the windshield, causing him to lose consciousness for two or three minutes. (48 RT 9407-9408.)

Brain scans of appellant showed abnormalities in the frontal and temporal lobes. Damage to these areas can cause problems with impulse control and memory. Dr. Kowell opined that the abnormalities in appellant's brain function "might" impair appellant's ability to appreciate the criminality of his conduct, and his ability to conform his conduct to the law. (48 RT 9422-9425.)

On cross-examination Dr. Kowell conceded that he found no evidence that appellant suffered from hallucinations or any type of thought disorder. (48 RT 9447-9448.) Dr. Kowell also agreed that an MRI taken of appellant in 1995 did not reflect any abnormalities in appellant's brain. A spinal tap taken in the same period also did not reflect any abnormalities. (48 RT 9454-9455.)

Dr. Kowell also agreed that appellant's neurological issues were not related to any brain abnormalities, but likely stemmed from his heroin addiction. (48 RT 9470, 9482-9484.) Although Dr. Kowell believed that appellant's substance abuse affected his impulse control, he did not review any police reports to examine how appellant's behavior during the crime may have been altered by brain abnormalities. (48 RT 9478-9481.) Dr. Kowell acknowledged that appellant's brain abnormalities did not cause him to have "some pre-programed pathway" which would cause him to murder an 11-year-old child. (48 RT 9471-9472.)

Dr. Dale Watson, a neuro-psychologist, conducted a neuro-psychological evaluation of appellant. (49 RT 9611.) Based on tests he administered, Dr. Watson opined that appellant had "mild brain dysfunction." (49 RT 9626.) Dr. Watson, however, saw no evidence that appellant had ever been psychotic. (49 RT 9649-9651.) Dr. Watson conceded that appellant's mild brain deficits did not cause him to murder a child. (49 RT9683-9684.)

Prosecution Rebuttal

Dr. Michael Mega, testified regarding the science of neural imaging, a discipline which studies how brain function affects behavior. (49 RT 9688-

9690.) He reviewed appellant's brain scans and concluded that there was no evidence of any significant brain damage. However, he did see some mild abnormalities affecting executive function. Those deficits might cause a person to have "problems sequencing multiple tasks at once, such as cooking a large meal for a dinner party, or being able to handle a business conference and at the same time deal with signing papers." (49 RT 9693, 9700.) Appellant's mild brain deficits would not cause him to be unable to differentiate right from wrong, or to murder a child. (49 RT 9700.)

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS

Appellant asserts that his statements to the police should have been suppressed because he was subjected to custodial interrogation without having first been advised of his rights under *Miranda v. Arizona, supra*, 384 U.S. at p. 436. (AOB 20-35.) In claiming that he was subjected to custodial interrogation, appellant argues that a reasonable person would not have felt free to leave when the police allegedly disregarded his requests to be driven home, and directed him to sit down.

Appellant's claim is meritless. Appellant was repeatedly informed that he was not under arrest, and his requests to be driven home established that he felt free to leave. Accordingly, no abuse of discretion has been shown.

A. Background

Before trial, appellant moved to suppress statements he made: (1) in the parked patrol car; (2) during the ride to the police station; and (3) at the station

itself. (10 RT 1805-1807.)[5] The trial court held an evidentiary hearing on the motion, and heard testimony from police witnesses who had interviewed appellant. Deputy Larry Robinson testified about the circumstances surrounding his interview of appellant in the patrol car. Deputy Michael Shapiro and Detective John Hanson testified regarding appellant's statements made during the ride to the police station, and at the police station.

1. Questioning Inside Patrol Vehicle

Deputy Robinson testified that the police decided to interview appellant based on appellant's statements that he had been at the Carnahan residence, and had spoken to Nicole that day When deputy Robinson knocked on the door of appellant's trailer, appellant said he would "invite" him into his house if he had power. (3 CT 1803.) Because appellant's residence was dark and cold, Deputy Robinson asked appellant if he minded being interviewed inside the patrol car. At the time Robinson made the request, he was armed and in uniform. When appellant agreed to be interviewed in the patrol car, Robinson did not pat search or handcuff appellant prior to appellant getting into the car. If appellant had declined to be interviewed, he would have been free to leave. (10 RT 1809-1816.)

The interview in the patrol car lasted about 15 minutes. During the interview, Robinson asked appellant if he knew when the boards on the Carnahans' fence had been removed. Appellant said he did not know when the boards were removed, but that he had noticed they were missing after going to Dennis Sullivan's house for cigarettes. Because Sullivan had told appellant about a robbery attempt that had happened that day, appellant decided to warn Mrs. Carnahan about the nefarious activities occurring in the neighborhood.

---

5. Appellant did not seek to suppress any statements he made before being interviewed inside the patrol car. (10 RT 1806.)

When appellant arrived at the Carnahan residence, Nicole answered the door, and gave him a glass of water when he became dizzy. After leaving the Carnahan residence, appellant returned home. About an hour later, appellant saw a Mexican man in the Carnahans' yard who ran away when appellant called out to him. Appellant then saw Mrs. Carnahan and told her he had been trying to chase the man away. Mrs. Carnahan subsequently went inside to call the police. (3 CT 1805-1815.)

While appellant was relating the foregoing story, Robinson briefly left the patrol car to consult with other deputies. When Robinson returned to the vehicle with Detective Hanson, appellant was sitting on the patrol car's back seat with his legs outside the car. (10 RT 1809-1816.) As Robinson and appellant sat in the car together, they both heard Mrs. Carnahan screaming loudly. Appellant asked, "Did they find her?" (3 CT 1818.)

Detective Hanson subsequently came to the patrol car and asked appellant if he would "volunteer" to go to the police station where they could take "a detailed statement." (3 CT 576.) When appellant asked if he could do the interview the next morning, Hanson stated that it was necessary for him to conduct the interview now. Had appellant said he did not want to be interviewed, Hanson would have complied with appellant's wishes, and allowed him to leave. (10 RT 1881.) Appellant subsequently agreed to go to the police station if the police promised to drive him home. (3 CT 576.)

2. Trip To The Police Station

Deputy Michael Shapiro drove appellant to the police station. Shapiro did not frisk or handcuff appellant before appellant entered his patrol vehicle. If appellant had said he did not want to go to the sheriff's office, he would have been free to leave. (10 RT 1849-1852.) During the drive, Shapiro did not interview appellant. However, appellant made numerous spontaneous statements. Appellant asked why Mrs. Carnahan was "screaming so bad." (3

CT 578.) Deputy Shapiro said he did not know why Mrs. Carnahan was so upset. Appellant remarked that Mrs. Carnahan had "a temper," and said that he had "been staying away from them." (3 CT 578.) Appellant proceeded to describe loud fights he had heard Mrs. Carnahan have with her boyfriend, and began recounting all the physical problems he was currently enduring as a result of having Lou Gehrig's disease. (3 CT 579-581.) According to appellant, it was a "neurological disease" which made it "hard for [him] to get around, and also caused him to "fall down." (3 CT 580-581.) Appellant added that he could "hardly walk." (3 CT 588.)

Appellant also discussed crime problems in the neighborhood, contending that there were "a couple of guys going around doing burglaries . . . ." (3 CT 581.) Appellant then began telling Shapiro about the time he had spent in prison, and how he had been shot with a mini-14 rifle while burglarizing a flower business. (3 CT 582-586.) Appellant claimed that he had only committed "petty thefts" and commercial burglaries, "nothing like . . . a strong arm robbery. That's not me you know." (3 CT 585.)

3. Statements Made At The Police Station

When appellant arrived at the police station, he was placed in an interview room, but was not handcuffed or restrained in any way. (10 RT 1885.) After being placed in the interview room, appellant was interviewed by Detectives Hanson and Lorenzana, with Hanson asking most of the questions. Hanson told appellant that he was being questioned because he was apparently the last person to see Nicole alive. Hanson then stated, "You understand you're not under arrest or anything?" Appellant responded, "Yeah, that's what they said." (3 CT 595.) After Hanson reiterated that appellant was at the station just to give a statement, appellant replied, "I understand, I'm not under arrest." (3 CT 596.) When Hanson repeated for a third time that appellant had been brought to the station because "it would be best to get a statement," Hanson again

stated: "Just so you know you're not under arrest. You're free to go or whatever, right?" Appellant indicated he understood this, and replied, "Right." (3 CT 596.)

After repeatedly informing appellant that he was not under arrest, Hanson told appellant that the Carnahan home had been "ransacked." Upon hearing this, appellant repeated his earlier statements that he had gone to the Carnahan residence in order to warn the Carnahans about robberies and burglaries taking place in the neighborhood, and that he had seen a Mexican man in the Carnahans' backyard. (3 CT 598- 599.) Appellant then answered various questions about the Mexican man he claimed to have seen running from the Carnahan residence. After discussing various details regarding the purported Mexican intruder, the police began asking appellant about his drug addiction and his criminal history. Appellant stated that he had been shot during a commercial burglary of a flower business. Detective Hanson asked appellant how he would know that appellant had not burglarized the Carnahan residence. Appellant responded that he was "not physically able to do it." (3 CT 638.)

Following a lengthy discussion about appellant's activities and observations that day, Hanson again asked appellant whether he had burglarized the Carnahan home, and whether he was being honest during the interview. (3 CT 649-650.) Appellant denied burglarizing the house, and said he was being truthful. (3 CT 649-650.)

Hanson changed the subject of the interview, and began asking appellant about his claim that there were ongoing problems with Mexicans in the neighborhood. Appellant said he had a knife and club with him when he went to Dennis Sullivan's house, and that he had armed himself in this manner because "of all the trouble going around." (3 CT 658.) Appellant wanted those items for protection "in case someone broke in the house and came after" him. (3 CT 659.) Appellant admitted that Dennis Sullivan had seen him with a knife

that very day. (3 CT 660.) When Hanson asked appellant additional questions about the knife, appellant became upset, and the following colloquy ensued:

"[Moore]: You guys are trying to trick me, you know.
"[Lorenzana]: No.
"[Moore]: Yeah, you are. Yeah, you are.
"[Lorenzana]: We just want to get things straight.
"[Moore]: Yeah.
"[Hanson]: We just want to make sure that you didn't break into that house.
"[Moore]: I didn't break into it.
"[Hanson]: Okay. And then while you were in the house maybe, un, maybe Nikki [Nicole] surprised you and because you carried that knife with you – You were seen earlier. You didn't want to get caught, so, you hurt Nikki. And maybe in the process of hurting Nikki, you didn't mean to hurt her as bad as you did.
"[Moore]: Huh-uh.
"[Hanson]: And, uh, and –
"[Moore]: Am I under arrest?
"[Hanson]: No, you're not under arrest.
"[Moore]: I'd like to . . .(Tape Inaudible) . . . Can I get a ride home please? I've told you everything I know.
"[Hanson]: Right.
"[Moore]: I've told you the best I can, and you –you're trying to twist words. I'm being honest with you.
"[Hanson]: Well, you can see where we're–we're, you know, we're a little suspicious, you know–
"[Moore]: Yeah.
"[Hanson]: Because of, um, uh, you were seen with that knife.
"[Moore]: Why did I tell you about Dennis if . . . I went and did a burglary and did that__
"[Hanson]: Yeah.
"[Moore]: Why would I tell you about Dennis? I went down–Why would I say that?
"[Hanson]: Okay."

(3 CT 661-662.)

After the foregoing exchange, Hanson then proceeded to ask appellant about scratches on his arm. (3 CT 663.) Had appellant declined to answer additional questions, he would have been free to go because Hanson did not believe he had probable cause for an arrest. (10 RT 1891.) Appellant subsequently

reiterated that he was physically incapable of committing the murder, and that he had acted as a concerned citizen when he went to the Carnahan residence. (3 CT 664-665.) When Hanson noted that appellant had been the last person to see Nicole, appellant again became upset, giving rise to the following exchange:

"[Moore]: Each time I say something boy you just write that down. You throw another question at me to see if you can trick me up, you know.

"[Hanson]: Well, we're–

"[Moore]: That's not right.

"[Lorenzana]: We're not tricking you.

"[Hanson]: We're not trying to trick you.

"[Moore]: Yeah, you guys are. Man I— Can I get a ride home please? Can I please get a ride home? You going to charge me or what, you know? I got my rights. I'm not on . . . on probation.

"[Hanson]: Right.

"[Moore]: I told you everything I know, you know.

"[Hanson]: Right.

"[Moore]: I'll give you my doctor–I'll give you my doctor's, uh–uh–and name. You can call up him, and he'll tell you how messed up I am, you know.

"[Hanson]: Uh-hum.

"[Moore]: All you have to do is just push me like that, and I'll fall down, down, you know.

"[Hanson]: Uh-hum.

"[Moore]: Anybody could do it, you know.

"[Hanson]: I— We just want you to be — I want to make sure that you're being up front and honest with us that's all.

"[Moore]: Oh, man.

"[Hanson]: You're the last one to see Nikki, you know, uh—

"[Moore]: How do you know I am? How do you know that?

"[Hanson]: Yeah.

"[Moore]: How do you know that? Because I volunteered and told you that, right?

"[Hanson]: Uh-hum.

"[Moore]: Isn't that how come you know that?

"[Hanson]: Uh-hum.

"[Moore]: Yeah, not because you guys tricked me into say it. You guys going to give me a ride home, or am I going to have to walk home like I always do when I come down here to–to–be honest with you

...(Tape Inaudible)...

"[Hanson]: Well–well, what I'm going to have–to ask you to do, Ron—

"[Moore]: Yeah.

"[Hanson]: Have a seat here.

"[Moore]: Okay.

"[Hanson]: Is— You didn't do this then, right?

"[Moore]: No, I did not do it.

"[Hanson]: You didn't do anything?

"[Moore]: No, I got four daughters. I'd never to something like that to anybody.

"[Hanson]: Okay. Why don't you have a seat just for a minute?

"[Moore]: Yeah, sure.

"[Hanson]: I would like you to voluntarily give us your clothes. We will—

"[Moore]: What am I going to wear home?

"[Hanson]: We will give you some clothes back.

"[Moore]: Will I get these clothes back?

"[Hanson]: We'll put you in a jumpsuit.

"[Moore]: Well–

"[Hanson]: Will you–Are you willing to do that?

"[Moore]: If you take me home, I will, yeah.

"Hanson]: We're going to take you home.

"[Moore]: Take me home and I'll give you the clothes then in the driveway.

"[Hanson]: Why don't I, uh, get you a jumpsuit, and we're going to grab your clothes, okay?

"[Moore]: All right.

"[Hanson]: Okay. And you didn't do anything wrong then, right?

"[Moore]: No. Will I get my clothes back?

"[Hanson]: Yeah."

(3 CT 666-668.)

Hanson testified that he was not lying when he told appellant that he would take him home after giving up his clothing. (10 RT 1892-1893.) In fact, after appellant undressed and had pictures taken of various injuries on his body, Hanson told Detective Lorenzana to get a patrol unit to drive appellant home. (10 RT 1894-1896.) When the photographer told appellant that he had to make a phone call to find out whether there was anything else he needed to do, Hanson stated: "Why don't you take a seat and we'll get you out of here soon.

As soon as I get this patrol guy to take you back again, okay." (3 CT 689.)

While appellant's clothes were being inventoried, Hanson again mentioned that they had to get the "patrolman back here" so they could give appellant a "ride back." (3 CT 695.) When appellant said he thought that Hanson could give him the ride home, Hanson responded, "I guess we can do that." (3 CT 695.) Hanson also told appellant to wait a moment until a deputy came in, and said he would tell the deputy to give him the ride. (3 CT 696.) After appellant and Hanson spoke about Mrs. Carnahan's boyfriend for a brief period, Hanson asked appellant if he would allow them to swab his hands. Appellant responded, "I want to go home right now. I want to go home." (3 CT 698.) Hanson then told appellant that there was information being developed at the crime scene which linked him to the murder, and that consequently, he would read appellant his *Miranda* rights. (3 CT 699.)

Once Hanson read appellant his *Miranda* rights, appellant agreed to continue the interview. (3 CT 700.) After vociferously proclaiming his innocence, appellant stated, "I've got nothing more to say until I get a lawyer here. You're trying to screw me." (3 CT 717-718.) Following appellant's invocation of his right to counsel, the interview was terminated. (3 CT 718.)

B. The Trial Court's Ruling

Following the evidentiary hearing, the trial court denied appellant's motion to suppress. When ruling on the admissibility of the statements made in the parked patrol car, the trial court noted that appellant was not searched prior to getting into the patrol car, and that he had told the deputies that he would have "invited" them into his home if he had electricity. (11 RT 2010.) The court found that the questioning inside the patrol car

> was not a custodial interrogation. The defendant was asked if he would sit in the patrol car; asked if he would give a statement. He consented to that. He was not considered a suspect by Deputy Robinson but considered a witness. The statement was brief. The questioning was

> non-confrontational. The defendant was not handcuffed or searched. Deputy Robinson was the only police officer asking the questions, although there was evidence that the police officers or deputy sheriffs were nearby. Based on all those circumstances, it does not appear to me this was a custodial interrogation.

(11 RT 2010-2011.)

Utilizing the same reasoning, the trial court also found that no custodial interrogation occurred during the ride to the sheriff's station. The court first observed that based on the testimony of deputies Robinson and Shapiro, appellant was not handcuffed or considered a suspect at that time. The court stated:

> There was very little questioning. The conversation was really dominated by the defendant and covered topics other than the offense, particularly the defendant's illness and his physical condition. I do not find that there was any interrogation. If there were interrogation, I do not find that it was custodial.

(11 RT 2012.)

With respect to the questioning at the police station, the trial court relied on numerous factors to determine that appellant was not subjected to custodial interrogation until the very end of the interview. The trial court first noted that "detective Hanson testified that he intended to bring the defendant back home after the statement and that if the defendant had said he did not want to go to the sheriff's office, he would have allowed him to leave." (11 RT 2015.)

After listening to an audiotape of the interview, the trial court further found that it was "apparent that Detective Hanson, who was the primary person asking the questions, was soft spoken, low key, [and] non-confrontational throughout the taking of the statement. Detective Lorenzana was not as soft spoken but was also non-confrontational during the taking of the statement." (11 RT 2016)

Of particular importance to the court were the statements indicating appellant's awareness that he was not under arrest. Thus, the court noted the following colloquy:

> Detective Hanson states, "You understand you're not under arrest?" Defendant, "Yeah." On page four, Detective Hanson tells the defendant, "You're just here for a statement." The defendant states, "I understand I'm not under arrest." Detective Hanson states, "You're not under arrest. You're free to go or whatever; right?" Defendant states, "Right."

(11 RT 2016.)

The court concluded its ruling by emphasizing that appellant's conduct demonstrated that his interaction with the police was voluntary, and that he knew he was not under arrest. The court stated:

> It is clear, of course, that the contact here was initiated by the police. It is also clear that the defendant readily and voluntarily consented to and agreed to the interview. The Court is satisfied that the express purpose of the interview was, in fact, to question the defendant as a witness. That was Detective Hanson's testimony. That was stated several times, and the Court finds that testimony to be credible. The interview did take place in a secure area of the sheriffs office; however, there's no evidence that the door was actually locked, or if it were locked, that the defendant knew that the door was locked. In looking at the fifth criteria cited in [*People v.*] *Aguilera* [(1996) 51 Cal.App.4th 1151] where the police informed the person he was under arrest or in custody, in fact, just the opposite occurred here. Repeatedly the defendant was advised that he was not under arrest. Also the defendant was advised that he was free to leave. The defendant's conduct indicated an awareness that he was free to leave when he asks for a ride home and then says words to the effect, if you don't give me a ride home, I'll have to walk home. The interview lasted, by stipulation, until the advisement of *Miranda* rights, an hour and 45 minutes. Two police officers participated. Mr. Lurz came in as an evidence technician. He did not actually participate in the interrogation. The police officers did not overtly dominate or control the course of the interrogation. The detectives here did not manifest a belief that the defendant was guilty. They did not manifest any belief that they had evidence to prove the defendant was guilty until it reached a point where, Detective Hanson said, this is being developed at the scene and, therefore, you were not free to leave at the conclusion of the statement. The police were not aggressive, confrontational or accusatory. They were, in fact, just the opposite.

(11 RT 2020-2021.)

C. Standard Of Review

The standard of review for a claimed *Miranda* violation is well established. The reviewing court accepts the trial court's resolution of disputed facts and inferences, and its credibility evaluations, if supported by substantial evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128; *People v. Wash* (1993) 6 Cal.4th 215, 235.) From the undisputed facts and those properly found by the trial court, the reviewing court independently determines whether the challenged statement was illegally obtained. In doing so, it will "give great weight to the considered conclusions" of the trial court. (*People v. Wash*, *supra*, 6 Cal.4th at p. 236, internal quotation marks omitted; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 401-402 [whether a defendant is in custody for *Miranda* purposes is a mixed question of law and fact].)

D. Applicable Law

In *Miranda v. Arizona*, *supra*, 384 U.S. 436, the United States Supreme Court held that a person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Id.* at pp. 473-474.) *Miranda* warnings are only required during "custodial interrogation." (*Id.* at pp. 444-445, 473-474; *People v. Mickey* (1991) 54 Cal.3d 612, 648.) Consequently, the police need not "*Mirandize*" a suspect if he is not being subjected to a custodial interrogation. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 401.)

"Custody" means a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1122-1125.) To determine if a person is in custody for *Miranda*

purposes, the trial court must apply an objective legal standard and decide if a reasonable person in the suspect's position would believe his freedom of movement was restrained to a degree normally associated with formal arrest. (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088-1089; see also *People v. Ochoa*, *supra*, 19 Cal.4th at p. 401 [test for whether a defendant is in custody is objective]).

E. Discussion

Here, appellant argues that a reasonable person would have believed himself to be in custody because he reluctantly agreed to be interviewed at the police station, and was then identified "as a suspect rather than a mere witness." (AOB 28.) Appellant further observes that "the officers repeatedly expressed their disbelief in appellant's story and told him they thought he was involved in the crime." (AOB 28.) Appellant also observes that when he twice asked for a ride home, "officers told him to sit down and continued to question him rather than immediately stopping the interrogation." (AOB 29.) Relying on *People v. Boyer* (1989) 48 Cal.3d 247, appellant asserts that "a reasonable person would have understood that he was in custody by the time that the officers treated him as a suspect, ignored his request for a ride home, told him to sit down, and continued to question him." (AOB 30.)

Appellant's reliance on *Boyer* is misplaced. In *Boyer*, the defendant was accosted by the police when he exited the rear of his residence in response to the police knocking on his front door. (*Id.* at p. 264.) With the defendant's reluctant consent, the police transported the defendant to the police station where one of the detectives "repeatedly proclaimed that the police knew and could prove defendant had committed the homicides, and that defendant was 'gonna fall on this one.'" (*Id.* at p. 265.) During this same period, the defendant asked several times if he was under arrest, but the interrogating officers evaded the questions and continued the interview despite the

defendant's repeated invocations of his right to counsel. The defendant, however, ultimately gave permission to search his residence, after which he confessed to the murders. (*Ibid.*)

In analyzing whether the defendant had been subjected to custodial interrogation, the Court found that "the totality of circumstances is relevant, and no one factor is dispositive. (Citation.) However, the most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." (*People v. Boyer*, *supra*, 48 Cal.3d. at pp. 267-268.) Based on the foregoing criteria, the Court concluded that the defendant was subjected to custodial interrogation, stating:

> We agree with defendant . . . that many of the formal indicia of detention or arrest were present during the initial encounter with the officers, his transportation to the Fullerton station, and the ensuing interview. The manner in which the police arrived at defendant's home, accosted him, and secured his "consent" to accompany them suggested they did not intend to take "no" for an answer. Indeed, as previously noted, Lewis testified that the officers intended to detain defendant if he attempted to leave before speaking with them. Whatever defendant's status before arriving at the Fullerton station, however, the situation quickly ripened into a full-blown arrest inside the station house. Defendant was confronted by two officers in a small interrogation room. He was informed of his *Miranda* rights, an indication that the officers themselves believed the situation might be tantamount to custody. Thereafter, he was subjected to more than an hour of directly accusatory questioning, in which Lewis repeatedly told him — falsely — that the police knew he was the killer, had all the necessary evidence, intended to charge him with the crimes, and would prove his guilt in court. According to Lewis, they sought only to learn "why" he had done it, in order to establish the precise degree of culpability. While Lewis never expressly told defendant he was under arrest, his response to defendant's pointed inquiries on that issue furthered the impression of official restraint. Lewis first ignored defendant's questions about arrest. Then, in what appeared an immediate answer to another such question, Lewis said, "That's where you're at right now." When defendant then asked

> if he could have a telephone call "later" — an obvious indication that he believed himself in custody — Lewis simply responded, "Uh-huh." (*Ibid.*) Under such circumstances, a reasonable person could only conclude that the police deemed him their sole suspect in a double murder and would restrain and formally arrest him if he tried to leave.

(*Id.* at pp. 267-268.)

In this case, a review of the factors cited in *Boyer* demonstrates that no custodial interrogation occurred.

1. Interview Site

Here, unlike *Boyer*, the record demonstrates that appellant's contact with the police was voluntary, and that the location of the interviews was dictated by the lack of electricity in appellant's trailer and the need for a place where a detailed statement could be obtained. As found by the trial court, appellant "readily and voluntarily consented to be interviewed." (11 RT 2020.) The initial interview took place in the patrol car, not because appellant was being detained, but because his trailer was cold and dark due to a lack of electricity. Indeed, appellant informed officers that, if he had electricity, he would have "invited" them to interview him in his home. (3 CT 1805.) Moreover, appellant was neither searched nor handcuffed before getting into the patrol car; and when left there by deputies, sat on the back seat of the patrol car with his feet outside the car. (10 RT 1809-1816.) Under these circumstances, the location of the interview did not render it coercive.

For the same reasons, appellant's subsequent interview at the police station was equally non-coercive. Once it became apparent that appellant may have been the last person to see Nicole alive, the police obviously needed to conduct an in-depth interview—a procedure which could not readily be accomplished inside a patrol car. Although appellant initially asked whether he could be questioned the following day rather than that evening, the trial court found that he had displayed a general willingness to speak to the police and to cooperate

in their investigative efforts. (11 RT 2020-2021.)

Furthermore, the trial court also found that, even though the interview was conducted in a secure area of the police station, there was "no evidence that the door was actually locked, or if it were locked, that the defendant knew that the door was locked." (11 RT 2020-2021.) (*People v. Stansbury* (1995) 9 Cal.4th 824, 833 ["police officers are not required to administer *Miranda* warnings . . . simply because the questioning takes place in the station house"]; *Green v. Superior Court* (1985) 40 Cal.3d 126, 136 [no finding of custody where "the record did not reveal whether the defendant realized that the interview room was locked"].) Accordingly, the circumstances in this case bear no resemblance to the situation in *Boyer* where the police corralled the defendant as he was attempting to leave through the back door, and where it was clear that the police were not going to take no for an answer when asking to take him to the station for questioning.

2. Focus Of Investigation

According to Detective Hanson's testimony at the suppression hearing, appellant was initially treated as a witness based on his statements that he had gone to the Carnahan residence on the very afternoon of the murder and had talked to Nicole.[6/] Indeed, the record reflects that Hanson explicitly told appellant that "the reason why you're here is that apparently you were the last one that saw Becky,[7/] I guess?" (3 CT 595.) The trial court evaluated the

---

6. As stated in *People v. Stansbury, supra*, 9 Cal.4th 824, "[a]n officer's knowledge or beliefs may bear upon the custody issue" only "if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave" (*Id.* at p. 830.)

7. It is apparent that detective Hanson mistakenly said "Becky"—the name of Nicole's mother—when he meant to refer to Nicole.

credibility of Hanson's testimony, and specifically found that "the express purpose of the interview was, in fact, to question the defendant as a witness." (11 RT 2020-2021.) The court further noted that the "detectives here did not manifest a belief that the defendant was guilty. They did not manifest any belief that they had evidence to prove the defendant was guilty until it reached a point where, Detective Hanson said, [evidence] is being developed at the scene and, therefore, you were not free to leave at the conclusion of the statement." (11 RT 2021.)

The trial court's findings in this regard stand in stark contrast to *Boyer* where the defendant "was subjected to more than an hour of directly accusatory questioning" in which the police falsely told the defendant that they "knew he was the killer, had all the necessary evidence, intended to charge him with the crimes, and would prove his guilt in court." (*People v. Boyer*, *supra*, 48 Cal.3d 247, 267-268.) Although Hanson asked appellant several times whether he had committed the crimes, he did so in a low key, non-confrontational manner, stating, for example: "Did you burglarize the house?" (3 CT 636, 638, 649, 655, 657.). Hanson further stated: "You don't know what happened to Nikki?" (3 CT 649.) Hanson also expressed some skepticism in appellant's veracity, and said: "Well, I'm just thinking maybe you're not being totally honest with me, and that you were in that house when it was burglarized." (3 CT 650.) It is therefore apparent that Hanson's polite queries certainly did not rise to the level of the accusatory questioning in *Boyer,* and were manifestly insufficient to make appellant believe he was under arrest. (See, e.g., *Oregon v. Mathiason* (1977) 429 U.S. 492, 495-496 [no custody even though the defendant was informed he was a suspect and was falsely told that his fingerprints were found at crime scene]; *People v. Stansbury*, *supra*, 9 Cal.4th 824, 833 [*Miranda* warnings are not required just "because the questioned person is one whom the police suspect"].)

3. Objective Indicia Of Arrest

Furthermore, the statements of both Detective Hanson and appellant demonstrated that appellant was not in custody. Here, Detective Hanson specifically informed appellant on four occasions that he was not under arrest. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1401[detective's repeated statements informing the defendant that he was not under arrest supported finding that the defendant was not in custody]; accord, *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 65 [same].) On each of the first three occasions at the beginning of the interview, appellant responded, "I understand." (3 CT 596.) And when appellant subsequently became agitated, and asked if he was under arrest, Hanson responded, "No, you're not under arrest." (3 CT 662.) Hanson reiterated this later in the interview when he told appellant, "Well you don't see us hooking you up, right?" (3 CT 676.) Given appellant's explicit acknowledgments that he was not under arrest, as well as Hanson's explicit reminders that appellant was not under arrest, appellant has no basis to contend that a reasonable person would have believed he was in custody. (*People v. Leonard, supra*, 40 Cal.4th at p. 1401[although test for determining custody is objective, the defendant's comments may "reinforce" court's view "that a reasonable person in his position would have felt free to leave"].)

Moreover, as found by the trial court, appellant's awareness that he was not in custody was further demonstrated by his statements asking for a ride home. (11 RT 2020-2021.) Had a reasonable person believed himself to be under arrest, he would not have asked for a ride home. Nor would he have wondered out loud whether he would need to walk home as he "always" did when he came to the police station. (3 CT 667 ["You guys going to give me a ride home, or am I going to have to walk home like I always do when I come down here to–to–be honest with you"].) Indeed, appellant's knowledge that he was not under arrest was also demonstrated by his statement, "Are you going to

charge me? I got my rights. I'm not on probation." (3 CT 666.) In addition, any notion that appellant was cowed by authority was completely dispelled by his refusal to accede to requests that the police be allowed to search his trailer for the knife he admitted carrying with him to Dennis Sullivan's house. (3 CT 660.)

Nevertheless, appellant draws contrary inferences from the foregoing evidence. Appellant argues that his requests for a ride home were ignored, and that he was ordered to sit down—thereby leading a reasonable person to believe he was in custody. (AOB 27-28.) It is established, however, that the Court must "accept factual inferences in favor of the judgment . . . below, even when [it] must independently review the legal conclusion the trial court has drawn." (*People v. Stansbury, supra*, 9 Cal.4th at p. 833.) Consequently, since the factual inferences drawn by the trial court were reasonable, appellant's contrary view of the same evidence does not undermine the trial court's factual findings. (*People v. Woods* (1999) 21 Cal.4th 668, 673 ["all factual conflicts must be resolved in the manner most favorable to the [superior] court's disposition on the [suppression] motion"].)

Furthermore, even if the trial court's findings were disregarded, the record does not support appellant's assertion that his requests for a ride home were ignored, and that he was *ordered* to sit down. Instead, the record reflects that appellant made three references to getting a ride home. On the first occasion, appellant asked, "Can I get a ride home please?" (3 CT 666.) Hanson responded to the request by saying "right," after which appellant vociferously proclaimed his innocence. (3 CT 666-667.)

On the second occasion, appellant stated, Can I get a ride home please? Can I please get a ride home? You going to charge me or what, you know? I got my rights. I'm not on . . . on probation." (3 CT 667-668.) Hanson again responded "right,"after which appellant voluntarily continued to proclaim his

innocence. (3 CT 667-668.)

On the third occasion, appellant became agitated and stated, "You guys going to give me a ride home, or am I going to have to walk home like I always do when I come down here to–to–be honest with you." (3 CT 668.) Hanson responded by stating that he was "going to have to ask" appellant "to have a seat." (3 CT 668.) Appellant stated, "okay" and professed his innocence. (3 CT 668.) As appellant continued to deny involvement in the murder, Hanson stated: "Okay. Why don't you have a seat just for a minute?" Appellant replied, "Yeah, sure." (3 CT 668.)

While the interview continued, Hanson stated: "Why don't you take a seat and we'll get you out of here soon. As soon as I get this patrol guy to take you back again, okay." (3 CT 689.) Hanson later reiterated that they had to get the "patrolman back here" so they could give appellant a "ride back." (3 CT 695.) And when appellant said he thought that Hanson could give him the ride home, Hanson responded, "I guess we can do that." (3 CT 695.) It is thus apparent that appellant's requests for a ride home were not ignored, and that he was not *ordered* to sit down. Rather, the context of the interview demonstrates that the issue of giving appellant a ride home was discussed on multiple occasions, and that appellant was invited to sit down as a way of defusing his apparent agitation. Accordingly, because a reasonable person would not have believed he was in custody under these circumstances, there was no objective indicia of arrest within the meaning of *Boyer*. (*People v. Boyer*, *supra*, 48 Cal.3d. at pp. 267-268.)

4. Length And Form Of Questioning

Here, the parties stipulated that the interview at the police station lasted approximately one hour and 45 minutes. (11 RT 2007-2008.) After listening to a tape recording of the interview, the trial court concluded "that Detective Hanson, the primary person asking the questions, was soft spoken, low key,

[and] non-confrontational throughout the taking of the statement." (11 RT 2016.) The court further observed that Detective Lorenzana was not as soft spoken but was also non-confrontational during the taking of the statement." (11 RT 2016) As recognized by the trial court, detective Hanson was not overbearing, and merely asked questions like, "You didn't do this then, right?" (3 CT 666-668 ["We just want you to be — I want to make sure that you're being up front and honest with us that's all"].) The questioning in this case thus stands in sharp contrast to the questioning in *Boyer*, where the police repeatedly told the defendant that they "knew he was the killer, had all the necessary evidence, intended to charge him with the crimes, and would prove his guilt in court." (*People v. Boyer*, *supra*, 48 Cal.3d. at pp. 267-268.) Therefore, because the length and form of questioning in this case bears no resemblance to *Boyer*, where the police subjected the defendant to harsh and accusatory interrogation, *Boyer* is inapposite and does not advance appellant's position.

Appellant next cites *Missouri v. Seibert* (2004) 542 U.S. 600, and *Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3d 235, in support of his claim that he was subjected to custodial interrogation. Neither case helps appellant.

In *Seibert*, the police followed an intentional strategy designed to circumvent *Miranda*. The police woke the defendant in the middle of the night, at a hospital where her son was being treated. They followed official instructions not to give her *Miranda* warnings. She was arrested and taken to the police station where, according to plan, she was not given *Miranda* warnings and was questioned for 30 to 40 minutes. When the defendant finally admitted the crime, she was given her *Miranda* warnings. She waived her rights and provided a second statement when an officer reminded her of the previous conversation and confronted her with her previous statements. (*Seibert*, *supra*, 542 U.S. at pp. 604-605.)

The Supreme Court concluded that the deliberate "question first" strategy effectively undermined the purpose of *Miranda* warnings, stating:

> The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

(*Id.* at pp. 616-617.)

In *Tankleff*, detectives started interviewing the defendant about his parents' murder around 6:00 a.m., after which they decided to take him to police headquarters where they questioned him continuously for the next two hours. The detectives "openly expressed their disbelief" regarding the defendant's version of events, and loudly told him that his statements were "'ridiculous and unbelievably absurd.'" (*Id.* at p. 240.) In addition, detectives falsely informed the defendant that his father had awakened from a coma and had identified the

defendant as his assailant. They also asked the defendant if his father was conscious when he had "'beat and stabbed him.'" (*Id.* at pp. 240-241.) The police did not give the defendant *Miranda* warnings until 11:54 a.m., after they had been questioning him on and off for nearly four hours. The Court of Appeals held that, under the totality of the foregoing circumstances, a reasonable person would not have felt free to leave. Consequently, the court concluded that defendant was subjected to custodial interrogation in violation of his *Miranda* rights, thereby mandating the suppression of his un-warned statements. (*Id.* at p. 241.)

Seibert and *Tankleff* do not assist appellant. *Seibert* has no bearing on this case because the defendant in *Seibert* was already under arrest at the time she gave the unwarned statements. (*Seibert, supra*, 542 U.S. at p. 604 ["this case tests a police protocol for custodial interrogation"]; *Miranda v. Arizona, supra*, 384 U.S. 436, 444-445, 473-474 [*Miranda* warnings are only required during "custodial interrogation"].) Consequently, since the *Seibert* court never discussed the issue of whether the defendant was subjected to custodial interrogation, it sheds no light on the issue at hand in this case.

Tankleff is also inapposite Unlike the circumstances in *Tankleff*, the detectives in this case did not browbeat the defendant, or falsely tell him they had proof of his guilt. Instead, appellant was repeatedly informed that he was not under arrest, and was questioned in a low-key, non-confrontational manner. (11 RT 2016.) Accordingly, neither *Seibert* nor *Tankleff* supports appellant's claim that his *Miranda* rights were violated.

In conclusion, because the trial court did not abuse its discretion in denying appellant's motion to suppress, appellant was not deprived of his federal constitutional rights to a fair trial and to a reliable penalty determination. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1382.)

F. Any Alleged Error In Admitting Appellant's Statements Was Harmless Beyond A Reasonable Doubt

Even if appellant were able to show that his statements were obtained in violation of *Miranda*, any error in admitting the statements was harmless beyond a reasonable doubt and did not violate appellant's due process right to a reliable verdict. (*Arizona v. Fulminanate* (1991) 499 U.S. 279, 310 [improper admission of a confession is subject to harmless error analysis]; *Chapman v. California* (1967) 386 U.S. 18, 24; accord, *People v. Bradford, supra*, 15 Cal.4th at p. 1382; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

Appellant claims that the use of his statements adversely "affected the jury's verdict on the nature of the homicide and the allegations of robbery and burglary" because they "undercut" his attempts to present a "defense related to his intoxication and mental state." (AOB 33.) According to appellant, his statements during the ride to the station were "rambling and disjointed," in contrast to the statements made at the station "which were organized and contradicted by other witnesses." (AOB 33.) Appellant thus believes that his demonstrated ability to lie and dissemble while speaking with the police at the station caused the jury to reject defense evidence that he "was intoxicated and had taken numerous drugs before the crime was committed." (AOB 34.) Appellant also notes that during closing argument, the prosecutor referred to his statements when asserting that he was not too intoxicated to have formed the mental intent necessary to commit murder and robbery. (AOB 33.)

Appellant overstates the materiality and significance of his unwarned statements to the police. A review of the record reflects that when rebutting appellant's intoxication defense, the prosecutor made only a brief reference to appellant's statements to the police during her final closing argument. When addressing this defense, the prosecutor first discussed appellant's *actions* before and after the murder, stating:

> You have to look at the defendant's behavior, and then you begin to see how this intoxication defense falls apart. Look at it all. But don't leave out the defendant's behavior, because that's the most telling. If the defendant were so intoxicated, how on earth could he ride his bike down to Dennis Sullivan's house? Find his way back home? Plan burglary? Take the fence boards off? Steal these things inside the house? We know from Dr. Jones he was not in any kind of delirium. He was not in any kind of drug psychosis. That's the case where you say they have no clue what's going good on. They don't know if that's a wall or a person or a dog or a tree. We can't hold someone like that responsible, because clearly there's a serious issue of whether they can form the required mental state, the required intent.

(40 RT 7837-7838.)

The prosecutor also observed that appellant's actions while stealing the Carnahans' property were "very goal-directed," and that he was not too intoxicated to have dragged a large trunk out of the house into the backyard. (40 RT 7838.) Finally, the prosecutor concluded her argument by discussing appellant's behavior after the murder, stating:

> What you are left with when you look at the defendant's behavior after when he's caught by Mrs. Carnahan? This is someone who's thinking very clearly and very self-servedly. If you are so intoxicated, how on earth could you come up with seeing someone in the backyard? How on earth could you come up with, you know, "Becky and I were getting along pretty well since my mom left." This man's thinking ahead. He is saying and doing so many things to divert the attention away from him. When you go back and you listen to the audiotape, he's volunteering stuff nobody's even asking about. He's not even -- he's not the suspect at that point. He's a witness. And he's telling them out of the blue unrelated to anything going on, you know, "I'm too weak. I can't even run. I can barely walk. Becky and I have been getting along great, you know. We just had a conversation not too long ago, and we were talking about boyfriends and girlfriends. We're just pals, and when I went over there, that was out of concern for the Carnahans." Those are the types of things that tell you that he was not impaired to the extent that he couldn't form these mental states. Everything he did and everything he said tells you just the opposite. He attempted on March 4th to divert the attention away from himself, and this is just another ruse. Please do not be diverted from the truth.

(40 RT 7838-7839.) It is apparent from the foregoing that when refuting appellant's intoxication defense during the guilt phase, the prosecutor primarily relied on appellant's conduct, rather than his un-warned statements to the police.

Furthermore, even had the prosecutor extensively relied on appellant's un-warned statements, appellant would nonetheless be unable to make the requisite showing of prejudice because the evidence overwhelmingly showed that appellant acted with the necessary intent, and that he got more than he deserved when he was allowed to present an intoxication defense. "When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter." (*People v. Heard* (2003) 31 Cal.4th 946, 981.) "Unconsciousness does not mean that the actor lies still and unresponsive. Instead, a person is deemed 'unconscious' if he or she committed the act without being conscious thereof." (*People v. Haley* (2004) 34 Cal.4th 283, 313.) Instruction on involuntary manslaughter based on such a theory is only required where substantial evidence supports a finding of unconsciousness. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 981-982 [no error for failure to instruct on involuntary manslaughter where record did not support a finding of unconsciousness].)

Here, there was not a whit of evidence that appellant murdered and robbed Nicole while in a state of unconsciousness. Evidence that appellant had planned the robbery/burglary was demonstrated by Ronald Ruminer's testimony that boards from the Carnahan fence had been removed by 2:15 p.m., substantially before appellant showed up, intoxicated, at Dennis Sullivan's house around 3:00 p.m. (33 RT 6464-6467.)

Not only had appellant prepared a route to facilitate his transport of stolen property, he had also donned a pair of gloves, in an apparent effort to avoid

leaving fingerprints.[8] (*People v. Abilez* (2007) 41 Cal.4th 472, 516 [defendant's acts of ransacking home and trying to sell stolen property did not remotely suggest that he was intoxicated to the point of unconsciousness].) In addition, appellant had armed himself with two knives and a club, weapons he then used to effectuate the planned crimes.[9] (*People v. Ochoa*, *supra*, 19 Cal.4th 353, 424 [defendant's "methodical, calculated approach to the crimes" precluded any duty to instruct on voluntary intoxication].) Moreover, it also appears that appellant had locked the front door with a dead bolt to prevent entry into the Carnahan residence during the murder and burglary. (27 RT 5257-5258 [Mrs. Carnahan found it "extremely" unusual to find the door locked with the dead bolt].) Appellant's sophisticated planning activities prove that whatever level of intoxication he was experiencing at the time of the crimes, it was patently insufficient to prevent him from forming criminal intent.

Likewise, the grotesque nature of Nicole's numerous injuries only reinforced the conclusion that appellant acted with the requisite criminal intent. According to the autopsy report, Nicole's skull had literally been caved in as a result of numerous blows appellant inflicted with the metal cylinder he brought to the Carnahan residence. Although the depressed skull fracture was lethal in nature, appellant also used his two knives to slash Nicole's throat a total of seven times, thereby severing her jugular and carotid arteries. (37 RT 7215-7221.) In fact, appellant's savagery was so extreme that he actually broke the butcher knife, leaving the blade embedded in Nicole's neck. Since appellant's switchblade knife also had Nicole's blood on it, appellant must have inflicted

---

8. DNA testing revealed that Nicole's blood was found on the gloves located in appellant's trailer, thereby showing that appellant was wearing the gloves during the murder. (36 RT 7047-7049.)

9. One knife was lodged in Nicole's neck; the other folding knife was found in appellant's trailer stained with Nicole's blood. (36 RT 7047-7079, 7086.)

additional stab wounds with that weapon after the butcher knife broke in Nicole's throat. Given the horrific injuries he inflicted upon Nicole, as well as the blood spatter evidence demonstrating that he had chased her around her room as she desperately tried to flee him, appellant had no hope of showing that he was intoxicated to the point of unconsciousness, and was incapable of formulating the requisite intent.

Furthermore, the evidence also demonstrated that appellant was perfectly coherent after the murder. Thus, Mrs. Carnahan testified that when she came home that evening, she saw appellant running away from her home, yelling, "I didn't do it. I didn't do it." (27 RT 5266.) This evidence established that appellant was not too intoxicated to run, and that he was also sufficiently in possession of his faculties to immediately make "exculpatory" statements reflecting a consciousness of guilt. Indeed, it appears that after yelling, "I didn't do it," appellant soon recognized the need to provide an explanation for his presence on the property, and thus fabricated the story about asking Nicole for a glass of water and later seeing a Mexican man fleeing. Accordingly, given the physical evidence connecting appellant to the murder, as well as other evidence showing that he was in possession of his faculties and was not too impaired to have formed criminal intent, any possible error in the guilt phase was harmless beyond a reasonable doubt. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1129 ["If the properly admitted evidence is overwhelming and the . . . extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless"].)

Appellant next asserts that the admission of the un-warned statements was also prejudicial in the penalty phase because his penalty defense "focused largely upon his mental condition and he presented mental health experts to show that he had brain abnormalities and deficits, including impairments that affected his judgment and his ability to change his course of conduct." (AOB

34.) Appellant further observes that, as in the guilt phase, the prosecutor relied on his statements to argue that his "lies" showed he was "thinking very clearly and self-servedly." (40 RT 7837; 50 RT 9914-9922.)

As discussed above, the sophisticated nature of appellant's conduct and planning activities directly refuted any claim that he lacked the ability to plan the crimes or to control his conduct. Furthermore, appellant's own experts acknowledged that appellant's minor brain deficits did not cause him to go out and savagely murder an 11-year-old child. (48 RT 9471-9472; 49 RT 9683-9684.) Consequently, because there is no reasonable possibility that the admission of his statements adversely affected the penalty verdict, his claim must be rejected. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1223-1224.)

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE CRIMINALIST TO TESTIFY REGARDING THE LIKELY MANNER IN WHICH A BLOOD STAIN WAS DEPOSITED

Appellant claims the trial court erred by allowing criminalist Greg Avilez to answer hypothetical questions regarding the likely manner in which a single blood stain on the living room floor was deposited. (AOB 36.) At trial, Avilez was permitted to testify that, based on the size and concentrated nature of the stain at issue, the person who deposited the blood stain (Nicole) was likely in a prone position. Appellant claims the foregoing opinion lacked an adequate foundation because Avilez could not exclude the possibility that the stain could have been deposited by a bloody club, such as the one appellant used to bludgeon Nicole. Appellant further claims that, even if the opinion were not speculative, the evidence should have been excluded as more prejudicial than probative. (AOB 38-40.)

Appellant is wrong. The trial court did not abuse its discretion in admitting this evidence because the expert's opinion was amply supported by the

evidence at trial, as well as his expertise in analyzing blood stains. Furthermore, because the evidence was directly relevant to the issue of premeditation and deliberation, there was no basis to exclude the evidence as being more prejudicial than probative.

A. Background

Greg Avilez, a senior criminalist with the California Department of Justice, testified regarding some of the blood evidence found at the crime scene. Avilez had processed "at least 25 homicide scenes" and had previously testified as an expert on blood spatter evidence. (34 RT 6862-6863;35 RT 6864.) According to Avilez, blood "makes a very characteristic dispersion pattern based on the type of energy and actions that occurred." (35 RT 6862-6864.) During the course of his experience, Avilez had reconstructed homicides, and had determined what actions had occurred during the homicide. (35 RT 6862-6864.)

While conducting direct examination, the prosecutor asked Avilez a hypothetical question regarding the manner in which a single blood stain was deposited on the living room carpet. (36 RT 7051.) The stain measured one inch by three quarters of an inch, and DNA tests established that the blood in question came from Nicole. (35 RT 6875; 36 RT 7073.) When the prosecutor asked Avilez whether the person who deposited the stain was standing or lying down, defense counsel objected, arguing that there was an inadequate foundation for Avilez to provide an opinion on that subject. (35 RT 6865.)

In response to defense counsel's objection, the court held a hearing outside the presence of the jury. At the hearing, the prosecutor made an offer of proof that Avilez would testify that, "based on the saturation and size of this blood stain, and the lack of any other blood drops anywhere near it, that it is far more likely the person would have been lying down at the time the blood was deposited." (35 RT 6865.) The prosecutor stated that Avilez "could explain

what would happen if the person was standing up and how the stains would look very different. There would be different drops and spacing . . . and not the concentration in one area." (35 RT 6866.) The prosecutor further expected Avilez to testify regarding the length of time it could take to deposit the amount of blood present. (35 RT 6866.)

After the foregoing offer of proof, the court allowed defense counsel to question Avilez regarding his expertise in crime scene reconstruction. Avilez explained that, during his training on crime scene reconstruction, he had conducted experiments in which blood would be dropped from different heights onto various types of surfaces. When conducting the experiments, Avilez started by dropping blood from very low heights, and gradually moved the distance up to a height of about eight feet. (35 RT 6870-6871.) During the experiments, "the types of patterns" deposited from different distances would be observed to determine whether there were "satellite types of blood drops," or whether there was a concentrated, solid blood stain. (35 RT 6871.) The higher the distance from which the blood is dropped, the more dispersed it would be upon landing. (35 RT 6871.)

Avilez opined that the blood stain in the living room "was deposited at or near the surface of the carpet" because the blood stain was "very localized into a small area." (35 RT 6874.) Had the blood been dropped from somebody's head while in a standing position, "you would not have that type of pattern."[10] However, Avilez agreed with defense counsel that he could not definitively determine whether the blood had been left by an object or a person. (35 RT 6874.)

---

10. The hypothetical question referred to a head wound because all of Nicole's wounds were to her head. (35 RT 6876.)

After considering appellant's objections that the opinion lacked an adequate foundation and was more prejudicial than probative, the trial court subsequently ruled that Avilez would be permitted to testify regarding Nicole's likely position when she deposited the blood stain. The court stated:

> I'm going to rule Mr. Avilez's expertise is more than sufficient to testify about the height . . . from which the blood [was] deposited, and he has indicated that he has reviewed studies on that, [and] he's analyzed at least 15 crime scenes and has testified as an expert in one of those matters as to the position of a body and [how] the blood was deposited. So I am going to permit him to answer that question.

(35 RT 6883.)

The court, however, precluded Avilez from testifying how long it would take for the blood to be deposited because Avilez could not identify which wound caused the blood stain, or when that wound occurred during the course of the attack. (35 RT 6883.)

When defense counsel objected that Avilez's opinion was speculative, the trial court stated that "one logical inference" "is that the blood was deposited by a human being, and another logical inference would be that it was deposited by an object. So I can't necessarily find asking him to assume for purposes of a hypothetical that the blood came from a person would necessarily be something that the People couldn't prove." (35 RT 6884-6885.)

Following the court's ruling, Avilez testified before the jury that, "based on the localization of the blood stain, that the person who deposited that stain was either at or near the surface of that carpeting when they [sic] deposited the blood stain." (35 RT 6890.) Avilez explained that if a person had been standing up when the stain was deposited, one "would see more small spots sprayed over an area." (35 RT 6890-6891.) Avilez, however, saw no other blood spots in that living room area. (35 RT 6891.)

On cross-examination, defense counsel asked Avilez if the blood stain in the living room "could have just been as easily deposited by an object" such as the

"brass rod" that Avilez had examined. Avilez responded that, if the cylinder "just had blood possibly on one end, that would be true." (35 RT 6891-6892.)

B. Applicable Law

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) In *People v. Lucas* (1995) 12 Cal.4th 415, this Court described the standard for determining whether an adequate foundation had been laid to admit evidence. The Court stated:

> Of course, only relevant evidence is admissible. (Evid. Code, § 350.) Sometimes the relevance of evidence depends on the existence of a preliminary fact. (Evid. Code § 403, subd. (a); 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1718, p. 1677; see, e.g., *People v. Collins* (1975) 44 Cal.App.3d 617 [identity of person who made threatening telephone call to witness is preliminary fact proponent of offered testimony has burden of establishing before fact of telephone call is relevant].) The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury." (3 Witkin, Cal. Evidence, *supra*, § 1716, p. 1675; see Evid. Code, § 403, subd. (a); *People v. Simon* (1986) 184 Cal.App.3d 125, 131.) The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. (*Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 178; see also *People v. Rowland* (1992) 4 Cal.4th 238, 264 [admission of evidence challenged on relevancy grounds reviewed for abuse of discretion].)

(*People v. Lucas*, *supra*, 12 Cal.4th 415, 466; accord, *People v. Guerra* (2006) 37 Cal.4th 1067, 1120.)

With respect to expert witnesses, it is established that "an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]" (*People v. Ward* (2005) 36 Cal.4th 186, 209; accord, *People v. Gardeley* (1996) 14 Cal.4th 605, 619.) Accordingly, when asking a hypothetical question, the

"'statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question.' (Citation.)" (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.) Conversely, "the expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . .'" (*Ibid.*)

C. Discussion

In this case, the hypothetical question posed to Avilez was firmly "rooted in facts shown by the evidence . . . ." (*People v. Ward, supra*, 36 Cal.4th at p. 209.) At trial, it was undisputed that Nicole had suffered numerous wounds to her head and throat as a result of appellant repeatedly stabbing and bludgeoning her. It was also undisputed that the blood stain on the living room carpet came from Nicole. (36 RT 7073.) Given the foregoing evidence, the prosecutor was more than entitled to ask Avilez the hypothetical question whether the person who left the blood stain was in a standing or lying position. Such evidence was highly relevant to demonstrate the sequence of events and the manner in which the murder was committed.

Avilez's opinion was rooted not just in evidence presented at trial, it was also amply supported by his expertise on blood spatter and crime scene reconstruction. Avilez had testified as a crime scene expert on at least 15 prior occasions, and had personally conducted experiments dropping blood from various heights to determine the patterns formed from different distances. Unsurprisingly, Avilez found that the greater the height from which the blood is dropped, the greater the dispersal of the blood spatter. Conversely, blood dropped from shorter distances leaves a more concentrated pattern. (35 RT 6870-6871.) Based on his training and experience, Avilez was amply qualified to opine that the one-inch blood stain in the living room could not have dropped

from the head of a standing person, because that amount of blood would have dispersed into smaller drops had it come from that height.

Nevertheless, appellant claims the foregoing opinion lacked an adequate foundation and cites *People v. Halvorsen* (2007) 42 Cal.4th 379 [64 Cal.Rptr.3d 721], in support of that proposition. In *Halvorsen*, the defendant argued that the trial court arbitrarily prevented defense counsel from asking a defense expert witness a hypothetical question that "assertedly was not supported by the evidence, while permitting the prosecutor (over defense objection) to ask the same witness a different hypothetical question that was similarly unsupported by the evidence." (*Id.* at pp. 748-749.) The Court rejected the claim, stating:

> [T]the prosecutor's question embraced facts already in evidence (the time of defendant's blood test and his blood-alcohol level) and simply asked Dr. Lykissa if those known facts were inconsistent with the possibility (or hypothesis) that the individual in question had nothing to drink until after 6:15 p.m. In contrast, the defense question to which the court sustained the prosecutor's objection asked Dr. Lykissa to assume a fact not yet in evidence, i.e., that defendant had nothing to drink after 10 minutes to 7:00 p.m. Therefore, the trial court properly excluded defendant's hypothetical and allowed the prosecutor's; hence, no differential treatment appears.

(*Id.* at p. 750.)

Appellant argues that "the hypothetical question asked by the prosecutor in this case was similar to the improper question [asked by defense counsel] in *Halvorsen*. It asked the expert to offer an opinion based on an assumption not in evidence: that the blood stain was deposited directly by a human being." (AOB 39.) Appellant is wrong. Unlike the circumstances in *Halvorsen*, where the hypothetical question was based on facts that had not yet been adduced, the expert in this case testified that the blood stain was deposited by a human being who was at or near the floor. Since it was undisputed that the blood came from Nicole, and that Nicole had bled from numerous wounds to her head and neck,

the evidence adduced in the case fully supported the expert's logical conclusion that the blood was directly deposited by Nicole. Accordingly, the question in this case bears no resemblance to defense counsel's improper question in *Halvorsen*, which was unsupported by any evidence presented at trial.

Appellant, however, argues that the presence of a single blood stain in the living room—in contrast to the plethora of blood found in Nicole's bedroom—"suggests that it was transferred from an object rather than [being] left during the course of a violent attack." (AOB 40.) In other words, even though the blood on the floor indisputably came from the stabbed and bludgeoned murder victim, appellant argues that "no basis" existed to conclude it came directly from the victim. (AOB 39.)

Appellant's assertions are unsupported by the law or common sense. Although not stated directly, appellant's claim of error rests on the mistaken notion that Avilez's opinion about the manner in which the blood was deposited was impermissibly speculative because he could not *exclude* the possibility that the blood was deposited by an object, such as the club appellant used to bludgeon Nicole. An expert's opinion is not rendered speculative simply because the event at issue could theoretically have occurred in different ways. Indeed, the very nature of circumstantial evidence necessarily contemplates that multiple inferences may be drawn from a particular piece of evidence. (*People v. Earp* (1999) 20 Cal.4th 826, 887-888 [when jury's findings rely on circumstantial evidence, court "must decide whether the circumstances reasonably justify those findings, 'but our opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial"].) So long as the inference drawn is reasonable, it is immaterial that the same evidence could have been construed in a different manner. (See, e.g., *People v. Hinton* (2006) 37 Cal.4th 839, 885 ["Conflicting evidence . . . does not establish that the evidence on one side or the other was

insufficient"]; *People v. Ochoa, supra*, 19 Cal.4th 353, 407 ["corpus delicti may be established 'even in the presence of an equally plausible noncriminal explanation of the event'"].)

As stated by the trial court, "one logical inference" was "that the blood was deposited by a human being, and another logical inference" was "that it was deposited by an object. So I can't necessarily find asking him to assume for purposes of a hypothetical that the blood came from a person would necessarily be something that the People couldn't prove." (35 RT 6884-6885.) In other words, Avilez's testimony that Nicole directly deposited the blood constituted a reasonable inference from the evidence. Accordingly, Avilez's acknowledgment that appellant's bloody club might "possibly" have left the blood stain did not render his testimony speculative. (35 RT 6891-6892.)

Appellant next asserts that, even if Avilez's testimony regarding the blood stain "had some evidentiary value," the evidence should have been excluded because it was more prejudicial than probative under Evidence Code section 352. (AOB 40.) Appellant's claim is meritless. Appellant has no right to sanitize the vicious nature of his crime, or to prevent the prosecution from proving premeditation and deliberation. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1170 [prosecution need not "seek stipulations or use other 'sanitized' method[s] of presenting its case"]; *People v. Osband* (1996) 13 Cal.4th 622, 675 ["As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim"].)

Under Evidence Code section 352, the "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) A trial court's decision to admit or exclude

evidence under section 352 is reviewed for an abuse of discretion. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453.)

Here, appellant contends that the probative value of Avilez's testimony regarding the stain was "minimal" because "it did not establish any particular type of nexus between the stain and the crime." (AOB 41.) Appellant further claims the blood stain evidence was highly prejudicial because it "allegedly showed a break in the violence against the victim, giving appellant time to wilfully and deliberately complete the crime." (AOB 43.) Appellant also observes that "the jury could have found during that same break in violence, appellant formed an intent to rob, making the felony-murder convictions more likely as well." (AOB 43.)

In so arguing, appellant misapprehends the nature of the prejudice contemplated by Evidence Code section 352. The prejudice Evidence Code section 352 seeks to avoid is not the effect of damaging evidence on the defense. (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.) Rather, evidence is unduly prejudicial when it causes the jury not to consider it in connection with the point on which it is relevant, but to reward or punish one side because of the jury's emotional reaction. (*Ibid.*; accord, *People v. Carey* (2007) 41 Cal.4th 109, 128 [evidence is prejudicial under section 352 if it has only slight probative value, and "tends to evoke an emotional bias against a party as an individual"].)

Ironically, appellant's description of prejudice from testimony regarding the blood stain actually demonstrates the evidence's probative value on the issue of premeditation. Thus, the prosecutor argued that appellant likely struck his first blow in the living room, causing Nicole to fall to the ground and bleed on the carpet. During the time it took for Nicole to leave a blood stain of that size, appellant had ample time to premeditate and deliberate his next course of action. As the prosecutor stated, the time appellant spent in the living room

constituted the "turning point" of the crime when appellant had two choices: abandon the robbery, or commit murder. (39 RT 7703.) Accordingly, since appellant himself effectively admits that the evidence was probative on the issues of premeditation, as well as felony murder, he has necessarily refuted his claim of improper prejudice within the meaning of Evidence Code section 352.

Finally, even if the trial court abused its discretion in allowing the testimony at issue, there is no reasonable likelihood that it affected either the guilt or penalty verdict. (See *People v. Williams* (2008) 43 Cal.4th 584, 640.) Respondent first observes that, with or without Avilez's testimony about the hypothetical manner in which the stain was deposited, the jury would have learned that Nicole's blood had been found in the living room. Given the fact that there was a single stain in the living room, in contrast to the large amount of blood in Nicole's bedroom, the jury would necessarily have inferred that appellant struck his first blow in that room. Consequently, even without Avilez's challenged testimony, the jury would doubtless have formed its own conclusions regarding the sequence of events and would likely have conjured up its own "vivid and unsettling image of Nicole" bleeding as she tried to escape from appellant. (AOB 42.) Although it was slightly more prejudicial for the jury to hear that Nicole was lying down, rather than standing up as she bled, the additional degree of prejudice resulting from that testimony was minimal.

Given the incredibly grisly nature of the murder, evidence regarding the blow struck in the living room simply constituted one of many gruesome acts perpetrated by appellant. The evidence established that Nicole's bedroom was covered in blood spatter. Blood spatter was found on Nicole's toys, on her dresser, on her bean bag chair, and on her bed—thereby establishing that appellant chased Nicole—an 89-pound child— throughout her room as she desperately sought to escape appellant's repeated blows.

Not only was there blood spatter all over the room, there were also blood smears showing that Nicole's hair had brushed against the windowsill and objects lying on the ground , thus demonstrating that Nicole had been knocked to the ground during the course of the struggle. In addition to the foregoing blood evidence, Nicole's stabbed and bludgeoned body demonstrated the extreme depravity of the murder. Accordingly, given the extraordinarily heinous nature of the crime itself, as well as DNA evidence conclusively establishing appellant as Nicole's murderer, Avilez's testimony about the blood stain in the living room was necessarily harmless and could not have affected the reliability of either the guilt or penalty verdicts. (See *People v. Williams*, *supra*, 43 Cal.4th 584, 640; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1382.)

III.

SUFFICIENT EVIDENCE SUPPORTS APPELLANT'S ROBBERY AND BURGLARY CONVICTIONS AS WELL AS THE SPECIAL CIRCUMSTANCE FINDINGS THAT HE COMMITTED MURDER DURING THE COURSE OF A BURGLARY AND ROBBERY

Appellant argues that insufficient evidence supports his robbery and burglary convictions. He further claims that the special circumstance findings that he committed a murder during the course of a robbery and burglary were similarly unsupported by sufficient evidence. In making the foregoing assertions, appellant argues that, while there was evidence "that a theft occurred," no evidence established "that the intent to steal was formed when appellant entered the Carnahan house and before or during the application of force." (AOB 49.) Appellant claims that, if he killed Nicole, it is "just as likely" that "something tripped inside him, causing an explosion of violence followed by an opportunistic theft." (AOB 52.)

Appellant is wrong. The jury's finding that appellant entered the Carnahan residence with the intent to rob and steal was supported by evidence that

appellant, an impoverished heroin addict: (1) removed boards from the Carnahans' fence *before* the murder; (2) wore gloves in an apparent effort to avoid leaving fingerprints; (3) armed himself with two knives and a metal cylinder when he entered the residence; (4) used the weapons he brought into the house to bludgeon and stab Nicole; (5) stole copious amounts of property; and (6) transported the stolen property through the opening in the fence he made.

In *People v. Tafoya* (2007) 42 Cal.4th 147, this Court summarized the law regarding the defendant's claim that insufficient evidence supported the special circumstance findings that the defendant committed a murder during the course of a robbery and burglary. The Court stated:

> To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 790-791 [same standard of review applies to determine the sufficiency of the evidence to support a special circumstance finding].) "Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, 'but our opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial." (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.) Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) If the other elements are satisfied, the crime of robbery is complete without regard to the value of the property taken. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 ; *People v. Coleman* (1970) 8 Cal. App. 3d 722, 728.) The intent to steal must be formed either before or during the commission of the act of force. (*People v. Kipp*, *supra*, 26 Cal.4th at p.1128; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Frye* (1998) 18 Cal.4th 894, 956.) With respect to burglary, that crime requires an entry into a specified structure with the intent to commit theft or any felony. (*People v. Horning* (2004) 34 Cal.4th 871, 903; *People v. Davis* (1998) 18 Cal.4th 712, 723-

> 724, fn. 7; § 459.) Under the felony-murder rule, a murder "committed in the perpetration of, or attempt to perpetrate" one of several enumerated felonies, including robbery and burglary, is first degree murder. (§ 189.) The robbery-murder and burglary-murder special circumstances apply to a murder "committed while the defendant was engaged in . . . the commission of, [or] attempted commission of" robbery and burglary, respectively. (§ 190.2, subd. (a)(17)(A), (G).) "[T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

(*Id.* at pp. 187-188.)

The "intent required for robbery and burglary . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime." (*People v. Lewis* (2001) 25 Cal.4th 610, 643; accord, *People v. Crittenden, supra*, 9 Cal.4th at p. 141 ["intent is a state of mind which, unless established by the defendant's own statements . . . must be proved by the circumstances surrounding the commission of the offense.) This Court has also "stated that 'when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery.' [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 357.) Likewise, "'[i]f a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money.' [Citation.]" (*Ibid.*)

Here, abundant evidence supported the jury's findings that appellant murdered Nicole during the course of a burglary and robbery. Mrs. Carnahan testified that, when she let her dogs out of their kennels on the morning of the murder, there were no boards missing from her fence. (27 RT 5254-5255, 5265) However, Mrs. Carnahan's neighbor, Ronald Ruminer, testified that, on that same day, he saw boards missing from the Carnahans' fence when he drove

by at around 2:15 p.m. (33 RT 6464-6467.)

Not coincidentally, the evidence further established that appellant transported the Carnahans' stolen property through the hole in the fence. Deputy Robinson testified that a path was clearly visible in the grass which led from the Carnahan home to the opening in the fence. (28 RT 5462-5465.) Since Nicole did not arrive home from school until 3:00 p.m., and the fence had been vandalized prior to her arrival home, the only reasonable inference is that appellant had already planned to steal from the Carnahans at the time he murdered Nicole. (*People v. Depriest* (2008) 42 Cal.4th 1, 47-48 ["Where a person is left dead or dying in relative proximity to property that was taken, and such property is later found in the defendant's possession, the jury is entitled to infer that the victim was robbed and that the defendant committed the crime"]; *People v. Turner* (1990) 50 Cal.3d 668, 688 ["Since property was taken, and nobody else was present, the jury could infer that defendant killed to prevent Savage from summoning help or later identifying defendant as the robber"].)

Appellant's pre-existing intent to steal was also demonstrated by evidence that he entered the Carnahan residence wearing gloves, while armed with two knives and a bludgeoning instrument—weapons he subsequently used to bludgeon and stab Nicole to death. Appellant's act of donning gloves, in an apparent effort to avoid leaving fingerprints, constitutes proof positive that he entered the residence with an illicit purpose. And evidence that he armed himself in advance with weapons he then used to murder the victim clearly demonstrated a pre-existing willingness to use force or fear to steal the property. (See *People v. Lewis, supra*, 25 Cal.4th at p. 643 [evidence that the defendant armed himself prior to entering the murder victims' apartment showed a pre-existing intent to steal]; *People v. Turner, supra*, 50 Cal.3d 668, 688 [defendant's act of arming himself with a buck knife supported inference that he went to victims' home for the purpose of robbery].)

In addition to arming himself and preparing a route through which stolen property could be transported, the sheer volume of property stolen also belies any notion that appellant had no pre-existing intent to steal. Appellant did not hurriedly take a few items from the residence after repeatedly bludgeoning Nicole and stabbing her in the throat. Instead, he literally ransacked the place and "turned Mrs. Carnahan's bedroom "upside down." (27 RT 5261.) Several two dollar bills taken from Nicole's bedroom were found on appellant's bathroom floor. (31 RT 6118.) Mrs. Carnahan's portable telephone and answering machine were found hidden under a shower curtain. (32 RT 6218-6219.) Additional stolen property found inside appellant's trailer included Mrs. Carnahan's stereo and VCR, a pie dish, her guitar, a camcorder, jewelry, bubble bath, Bud Light, a padlock, an antique knife and pork chops. (27 RT 5299, 5303, 5307; 28 RT 5402, 5406-5409.) A trunk that had been at the foot of her bed had been moved out into her backyard. (27 RT 5297.)

As stated in *People v. Turner*, *supra*, 50 Cal.3d 668, "[a] jury could deem it doubtful that after committing a sudden, unexpected, and gruesome homicide against a friendly acquaintance, one would remain and, for the first time, decide to force open doors and cabinets, and strip the house of valuable clothing and electronic equipment." (*Id.* at p. 688.) Given appellant's heroin addiction, as well as evidence that the electricity had been turned off at his residence, the jury could well infer that appellant was stealing property in order to finance his heroin addiction. (See *People v. Abilez, supra*, 41 Cal.4th at p. 514 [evidence that the defendant needed money and then sold stolen property supported inference that defendant murdered the victim for the purpose of robbery]; *People v. Lewis*, *supra*, 25 Cal.4th 610, 642-643 [sufficient evidence of pre-existing intent to steal based on evidence that the defendant, who needed money to support drug activity, entered the victim's apartment armed with a knife].)

Despite the foregoing, appellant claims there was no evidence that "the intent to steal was formed" when he "entered the Carnahan home and before or during the application of force." (AOB 49.) In making this assertion, appellant notes that, if he had intended to steal, he "could have broken into the Carnahan home when no one was at home," rather than deciding to break in at a time when Nicole or Mrs. Carnahan would be at home. (AOB 49.) He also contends that the haphazard trail of property leading to his home further demonstrates that the theft was an afterthought. Appellant argues that, if he did murder Nicole, "it is just as likely that it was the result of a spontaneous explosion of violence,"consistent with his agitated behavior observed by his drug counselor on the day before the murder. (AOB 50.)

Appellant's arguments are based on a fundamental misconception of controlling law. In determining whether sufficient evidence supports a conviction, the court "reviews the entire record in the light most favorable to the prosecution to determine whether . . . a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) When the conviction rests on circumstantial evidence, the fact that the evidence was susceptible to differing interpretations does not render the evidence insufficient. (*People v. Lewis, supra*, 25 Cal.4th 610, 643-644 ["If the circumstances reasonably justify the jury's findings as to each element of the offense, the judgment may not be overturned when the circumstances might also reasonably support a contrary finding"].) Accordingly, appellant's bad planning in breaking into an occupied residence, as well as his poor choice of property to steal, in no way rendered the evidence insubstantial.

Likewise, appellant's fit-of-rage claim is equally meritless. *People v. Zamudio* (2008) 43 Cal.4th 327, supports this conclusion. In *Zamudio*, the defendant claimed that his robbery conviction should be reversed because there

was insufficient evidence "to show he 'had a larcenous intent either prior to or during the application of force or fear against the victims, or that the force was used for the purpose of perpetuating the robbery.'" (*Id.* at p. 357.) There, as here, the defendant claimed that "the 'more reasonable' interpretation of the evidence" was that he simply killed the victims "in a fit of 'uncontrollable rage'" and then took the victims' property only as an "an afterthought." (*Ibid.*)

The *Zamudio* Court soundly rejected this assertion, stating:

> [D]efendant's argument that the evidence is insufficient to show he had a larcenous intent either before or during the killings necessarily fails. "From evidence that a defendant killed another person and at the time of the killing took substantial property from that person, a jury ordinarily may reasonably infer that the defendant killed the victim to accomplish the taking and thus committed the offense of robbery. [Citations.]" [Citation.] Thus, the evidence that supports the finding defendant took the Bensons' property when he killed them also supports the finding he had the intent required for robbery. Also supporting the latter finding is the evidence defendant recently borrowed money from the Bensons, spent all of his money at a bar only hours before the killings, did not want his wife to know about the loan, and did not want to ask his wife for money. Taken together, this evidence amply supports the jury's finding regarding defendant's intent. Contrary to defendant's argument, that the evidence does not conclusively rule out his proposed alternative scenario--that he killed the Bensons in a fit of uncontrollable rage when Gladys rejected his request for another loan and harshly criticized him for wasting his money on alcohol—"does not render the evidence insufficient to support the [jury's] verdict." (*Ibid.*)

(*Id.* at p. 359.)

Similarly, appellant's possession of large quantities of the Carnahans' property, together with the planning evidence demonstrated by the use of gloves, the removal of the fence boards, and the carrying of weapons, amply demonstrates that appellant had a pre-existing intent to steal when he murdered Nicole. Likewise, here, just as in *Zamudio*, there was not a shred of evidence supporting the quixotic notion that appellant murdered Nicole in an inexplicable "fit of rage," and only then decided to steal vast quantities of property which he

transported through the convenient hole which coincidentally happened to be in the fence. Given the strong evidence of planning, testimony that appellant was both intoxicated and agitated on the day before the murder in no way undermines the jury's findings that he murdered Nicole during the course of a robbery and burglary.

On the contrary, such evidence showed that appellant—a junkie in need of a fix—would be precisely the type of person who would hatch a poorly planned plot to rob his neighbors. Indeed, appellant's long-standing hostile relationship with the Carnahans only reinforced evidence of a pre-existing intent to steal by use of force or fear, and simply negates the fanciful notion that appellant put on a pair of gloves before innocently visiting Nicole to get a glass of water, and then suddenly flew into a murderous rage and decided to slaughter her with the butcher knife and club he just happened to have with him. In light of the foregoing, ample evidence supported appellant's burglary and robbery convictions, as well as the findings that he murdered Nicole during the course of a burglary and robbery. (*People v. Lewis* , *supra*, 25 Cal.4th 610, 643 [evidence of defendant's drug addiction and need for money supported inference of larcenous intent prior to application of force]; *People v. Tafoya*, *supra*, 42 Cal.4th 147, 171 [the defendant's need for money to make truck payment helped establish pre-existing intent to steal]; *People v. Turner*, *supra*, 50 Cal.3d 668, 688 [it "is settled that when a person is shown to be in possession of recently stolen property slight corroborative evidence of other inculpatory circumstances which tend to show guilt supports the conviction of robbery"].)

Appellant next argues that "the lack of evidence to support the burglary and robbery charges also requires that his murder conviction be reversed," because there is no way to know whether the murder conviction was based on an invalid felony murder theory, or on a valid theory that the killing was premeditated and

deliberate. (AOB 55.) Appellant is incorrect, because there was abundant evidence supporting both theories of murder. With respect to the issue of premeditated murder, the evidence shows that appellant struck his first blow in the living room, before ultimately chasing Nicole into her bedroom where he bludgeoned her repeatedly as she sought to escape him. Testimony established that Nicole had received a total of seven blows to her head with the metal cylinder, and six blows to her face with appellant's cane and metal cylinder. (36 RT 7103-7104; 37 RT 7211-7216.)

In addition to the repeated bludgeoning, appellant sliced Nicole's throat no fewer than seven times. (37 RT 7211-7216.) Given the amount of time it took to inflict those numerous wounds, the evidence overwhelmingly supported the conclusion that the murder was premeditated and deliberate. (See, e.g., *People v. Beames* (2007) 40 Cal.4th 907, 929-930 [sufficient evidence of premeditated murder where 15-month-old victim "suffered a multitude of injuries and was hung by the neck in the minutes and hours before the fatal blow that transected her liver"].) Consequently, even if the robbery and burglary special circumstance findings were reversed, there is no basis to reverse appellant's murder conviction.

Appellant's final assertion is that his substantial evidence claim deserves "particular scrutiny because the trial court's incomplete instructions and counsel's misleading argument left the jury with no alternative but to convict appellant of the charged crimes." (AOB 52.) Appellant argues that the trial court erroneously failed to instruct on the lesser included offense of theft, as well as the concept of after-acquired intent. Defense counsel purportedly exacerbated the effect of these omissions by equating burglary with theft when he stated that it almost appeared as if "this burglary was done to cover up a homicide." (40 RT 7813.)

These claims are meritless. As will be shown in Argument IV, *infra*, there was no basis to give a theft instruction, and the robbery and burglary instructions adequately explained the requirement that an intent to steal must exist at the time appellant entered the home and used force against the victim. (*People v. Zamudio*, *supra*, 43 Cal.4th 327, 359-360.) Finally, given the overwhelming evidence of a pre-existing intent to steal, counsel's argument could not have influenced the verdicts. (See *People v. Valdez* (2004) 32 Cal.4th 73, 134 [jury instruction that statements of attorneys do not constitute evidence "mitigate any possible prejudice" from improper closing argument]; *People v. Sanchez* (2001) 26 Cal.4th 834, 852 [jurors presumed to follow instructions].) Accordingly, appellant was not deprived of his federal constitutional rights to a fair trial and to a reliable guilt and penalty verdict. (See *People v. Bradford*, *supra*, 15 Cal.4th 1229, 1382.)

IV.

THERE WAS NO EVIDENCE SUPPORTING A THEFT INSTRUCTION

Appellant argues that because there was no "direct evidence to establish that" he murdered Nicole in order to facilitate a robbery, the trial court had a sua sponte duty to instruct the jury on the lesser included offense of theft. In making this assertion, appellant claims that the "jurors could have believed that" he inexplicably murdered Nicole in a fit of rage, and then stole copious amounts of property simply as an afterthought. (AOB 61-62.) Respondent disagrees. A theft instruction was unwarranted because there was no evidence to support it. Furthermore, since appellant's burglary conviction demonstrated that he entered the Carnahan residence with a pre-existing intent to steal, and Nicole was killed during the course of a burglary—thereby establishing the elements of felony murder—the lack of a theft instruction was necessarily harmless.

It is established that the trial court has a sua sponte duty to give "'instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715-716, fn. omitted; see *People v. Barton* (1995) 12 Cal.4th 186, 194-198.) Thus, there is no obligation to instruct on lesser included offenses where the evidence is merely minimal, and such instructions are warranted only when evidence that the defendant is guilty of the lesser offense is "substantial enough to merit consideration by the jury." (*People v. Breverman, supra*, 19 Cal.4th at p. 154; *People v. Jones* (1992) 2 Cal.4th 867, 870.) "Substantial evidence" is defined as "evidence that a reasonable jury could find persuasive." (*People v. Benavides* (2005) 35 Cal.4th 69, 102; *People v. Heard, supra*, 31 Cal.4th at p. 981.)

As discussed previously, robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Theft is a lesser included offense of robbery and does not require a showing that the property was taken from the victim's person or immediate presence through the use of force or fear. (*People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308; see *People v. Avery* (2002) 27 Cal.4th 49, 53, fn. 4.) "If the intent to steal arose only after force was used, the offense is theft, not robbery." (*People v. Kelly* (1992) 1 Cal.4th 495, 528.)

In *People v. Zamudio, supra*, 43 Cal.4th 327, the defendant asserted that the trial court committed reversible error by refusing to give an instruction on the lesser included offense of theft, as well as a pinpoint instruction on the concept of after-formed intent. This Court rejected both assertions, finding that no evidence supported a theft instruction, and that the issue regarding the timing

of the intent to steal was adequately explained in the robbery instructions. The Court stated:

> Defendant's argument fails for a basic reason: the absence in the record of evidentiary support for a finding that he formed the intent to steal only after killing the Bensons. Instructions on after-acquired intent and theft as a lesser included offense of robbery are unwarranted absent "substantial evidence" that the defendant first formed the intent to take the victim's property after applying force. [Citation.] As previously explained, there was ample evidence here that defendant killed the Bensons and took their property because he needed or wanted money. To counter this strong evidence of his larcenous intent, defendant cites no evidence at trial that he asked for more money, that Gladys denied such a request and criticized him for spending his money on alcohol, and that he went into an uncontrollable rage. Instead, he offers only generalities about his character and his relationship with the Bensons, citing evidence that he "was on friendly terms with [them] and often did household chores for them at no charge, and that he was a good person who respected the property rights of others, had a reputation for peacefulness and nonviolence, and had no prior criminal record." But "'the existence of "any evidence, no matter how weak" will not justify instructions on' "theft as a lesser included offense of robbery. [Citation.] Defendant offers nothing but sheer speculation to support his theory that the idea of taking the Bensons' property did not arise until after he killed them. Instead, all of the evidence points to a robbery as the motivating factor for the murders. Under such circumstances, the trial court did not err in refusing to give the requested instructions. [Citation.]

(*Id.* at pp. 360-361.)

Here, there was not one iota of evidence that appellant innocently entered the Carnahan residence while wearing gloves, suddenly decided to murder Nicole in a fit of rage with the knives and club he just happened to have, and then stole vast amounts of property simply as an afterthought. As discussed previously, the evidence overwhelmingly demonstrated that appellant formed a pre-existing intent to steal property when he removed boards from the Carnahan fence in order to facilitate his planned transport of Carnahan property. Since those boards had been removed by 2:15 p.m., well in advance

of Nicole's arrival home from school at 3:00 p.m., appellant necessarily had hatched a plan to steal before he committed the murder. Given this evidence establishing a pre-existing intent to steal, there was no basis, whatsoever, for the court to have given a theft instruction. (*People v. Abilez, supra*, 41 Cal.4th 472, 514-515 ["because defendant presented no evidence that he decided to steal only after the murder, there was no substantial evidence of after-acquired intent and thus no factual predicate for instructing the jury on theft as a lesser included offense"] .)

Appellant, however, argues that a sua sponte theft instruction was required under the rationale of *People v. Kelly, supra*, 1 Cal.4th at p. 495. In *Kelly*, the defendant was found guilty of raping, robbing, and murdering one of his victims. On appeal, he argued that the trial court prejudicially erred by failing to give a theft instruction based on his statements to the police, in which he claimed that he had found the murder victim's jewelry in a garbage can, and had not robbed her of the property. This Court agreed, finding that "since there was evidence that defendant was guilty only of theft rather than robbery, the court had a sua sponte duty to instruct on theft as a lesser included offense." (*Id.* at pp. 529-530.) In finding the instructional omission prejudicial, the Court specifically noted that the jury had not been given an after-formed intent instruction telling the jurors "that if defendant formed the intent to steal only after the killing, he was guilty at most of the lesser included offense of theft." (*Id.* at pp. 529-530.)

Kelly is unpersuasive. Here, unlike the circumstances in *Kelly*, appellant never made any statement in which he claimed to have stolen the Carnahans' property as an afterthought. Indeed, overwhelming evidence proved the opposite. Moreover, contrary to the situation in *Kelly*, the jury in this case was given an after-formed intent instruction which specifically informed the jury about the timing of the intent necessary to constitute robbery. (40 RT 7866-

7867; 3 CT 769.) Accordingly, because there was no factual basis to give a theft instruction, and the jury was given an after-formed intent instruction, *Kelly* does not assist appellant. (*People v. Abilez, supra*, 41 Cal.4th at pp. 514-515.)

Appellant next argues that the failure to give a theft instruction was prejudicial because the jury never properly considered the issue of after-formed intent. According to appellant, the robbery instructions focused on the intent to take property, "rather than the timing of the intent (CALJIC No. 9.40.2)." (AOB 62.) First, this claim must be rejected since this Court has already concluded that the standard robbery instructions given in this case adequately explain the timing of the intent necessary to convict a defendant of robbery. (*People v. Zamudio, supra*, 43 Cal.4th 327, 361; *People v. Silva* (2001) 25 Cal.4th 345, 371 ["standard instructions on felony murder and robbery, CALJIC Nos. 8.21 and 9.10, 'adequately cover the issue of the time of the formation of the intent to steal'"].)

Second, as discussed above, the jury was indeed given CALJIC No. 9.40.2, which specifically informed the jury that appellant's specific intent to deprive the victims of property had to exist before or during the taking, and that, if his intent was not formed until after the taking of property from the person or immediate presence of the victim, a robbery had not occurred. (3 CT 769.)

Third, even if CALJIC 9.40.2 had not been given, appellant still could not establish any error, because CALJIC No. 9.40.2 is a pinpoint instruction for which no sua sponte duty to instruct exists. (*People v. Silva, supra*, 25 Cal.4th 345, 371 ["an after-formed intent instruction is a pinpoint instruction that a trial court has no obligation to give when neither party has requested that it be given"]; accord, *People v. Jones* (2003) 29 Cal.4th 1229, 1258 .) Accordingly, contrary to appellant's contention, the robbery instructions properly explained the issue regarding the timing of an intent to steal, and the trial court did, in fact, give an instruction highlighting the issue of after-formed intent.

Finally, appellant cannot demonstrate any prejudice from the failure to give a theft instruction. It is settled that "'[a]n error in failing to instruct on lesser included offenses requires reversal unless it can be determined that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' (Citation.)" (*People v. Kelly*, *supra*, 1 Cal.4th 495, 530; accord, *People v. Silva*, *supra*, 25 Cal.4th 345, 371.) In this case, the jury's special circumstance finding, that appellant murdered Nicole during the course of a burglary, conclusively demonstrates that appellant entered the Carnahan residence with a pre-existing intent to steal. Thus, because the factual question regarding the timing of appellant's intent to steal was "resolved adversely to the defendant under other, properly given instructions,"any conceivable instructional omission was necessarily harmless. (*People v. Silva* , *supra*, 25 Cal.4th at p. 371.)

Despite the foregoing authority, appellant argues that his burglary conviction—which required a showing of intent to steal when he entered the Carnahan residence—does not mean "that the jurors necessarily considered after-acquired intent as it related to robbery." (AOB 63.) In making this claim, appellant notes that the gravamen of burglary is an unlawful entry for a felonious purpose. (*People v. Valencia* (2002) 28 Cal.4th 1, 12 ["burglary now entails only unlawful entry"].) In contrast, robbery consists of the forcible taking of property. (*People v. Kelly*, *supra*, 1 Cal.4th 495, 528.) Appellant states:

> One can commit burglary by entering a house with intent to steal without necessarily taking any items, but robbery focuses on the taking itself. Appellant's jury was given no alternative to account for the victim's property items that were found in appellant's house and yard other than robbery. Once the jury found that any property was taken, they were given no other options except to conclude that appellant committed the homicide. The omission of the theft instructions practically guaranteed robbery and felony murder convictions.

(AOB 63.)

Appellant's argument is illogical. Although a burglary conviction does not require an actual theft of property, *People v. Horning* (2004) 34 Cal.4th 871, 903, the circumstances in this case give rise to only one reasonable interpretation of the evidence—that appellant, an impoverished heroin addict living without electricity in a dilapidated trailer—removed boards from the Carnahans' fence in order to facilitate a pre-existing plan to steal property from the Carnahans. Not only was appellant's pre-existing plan to steal the only reasonable interpretation of the evidence, it was the only theory advanced during closing argument. Consistent with a logical view of the evidence, the prosecutor informed the jury that, in order to find the special circumstances true," the evidence must show" that, when appellant "went into the Carnahan home, [he] intended to commit the burglary or that he intended to commit the burglary and the robbery and that the killing, the murder of Nicole was not his primary or sole intent" (39 RT 7690.) Given the nature of the evidence in this case, the jury's special circumstance finding that appellant committed a murder during the course of a burglary necessarily demonstrates that appellant entered the Carnahan residence with an intent to steal, and that his subsequent theft of numerous items of property was not an afterthought. (See *People v. Cash* (2002) 28 Cal.4th 703, 735-736 [true finding on robbery-murder special circumstance foreclosed defendant's claim that intent to steal arose only after force was used].)

Appellant's last salvo is that the failure to give a theft instruction requires reversal of the penalty because "to rob and kill a child for essentially worthless property is much more heinous than if the jury had found that a theft occurred after the homicide." (AOB 64.) Respondent disagrees. Appellant's act of repeatedly bludgeoning and stabbing a defenseless child was heinous in the extreme, regardless of its motivation. Indeed, the crime could be considered even more depraved if it was simply a "thrill killing," rather than a murder

committed during the course of a robbery. In any event, because there is no reasonable likelihood that appellant was prejudiced by the lack of a theft instruction, any conceivable error was harmless, and appellant's right to reliable guilt and penalty verdicts was not infringed. (See *People v. Williams*, *supra*, 43 Cal.4th 584, 640; *People v. Bradford*, *supra*, 15 Cal.4th 1229, 1382.)

V.

CALJIC NOS. 8.71 AND 8.72 DID NOT COERCE JURORS TO RELINQUISH THEIR VIEW AS TO THE DEFENDANT'S LEVEL OF CULPABILITY

Appellant next complains that CALJIC Nos. 8.71 and 8.72 were prejudicially erroneous because they coerced jurors to relinquish their opinions regarding a defendant's level of culpability. (AOB 66-73.) This claim is foreclosed by the invited error doctrine since appellant requested CALJIC No. 8.71, and the language of CALJIC No. 8.72 mirrored that of CALJIC No. 8.71. Furthermore, case law establishes the propriety of the instructions.

A. The Instructions

At trial, the jury was instructed with the 1996 version of CALJIC No. 8.71. As given, the instruction provided:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree.

(40 RT 7856; 3 CT 758.)

The trial court also gave the 1996 version of CALJIC No. 8.72 which stated:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you

must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

(40 RT 7856; 3 CT 759.)

In addition, the trial court instructed the jury that the "People and the defendant are entitled to the individual opinion of each juror, that each juror "must decide the case" for himself, and that each juror should "not hesitate to change an opinion" if "convinced it is wrong." (40 RT 7868.)

B. Applicable Law

"The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." (*People v. Prieto* (2003) 30 Cal.4th 226, 264-265.) In this case, the record reflects that counsel requested that the jury be instructed with CALJIC No. 8.71, the instruction he now claims is deficient. (2 CT 384.) Since the language of CALJIC No. 8.72 mirrors that of CALJIC 8.71, appellant's claim is barred under the invited error doctrine. Even if the claim were not barred, a review of applicable case law shows the instructions were not erroneous.

In *People v. Frye* (1998) 18 Cal.4th 894, the defendant asserted that the 1979 versions of CALJIC Nos. 8.71 and 8.72 (1979 rev.) violated his due process rights, "by suggesting to members of the jury that they should compromise their firmly held beliefs in order to arrive at a verdict." (*Id.* at p. 963.)[11/] This Court rejected the defendant's contention, stating:

---

11. The 1979 versions of CALJIC Nos. 8.71 and 8.72 at issue in *Frye* largely duplicated the 1996 versions at issue in this case, but did not contain any references to unanimity. As given in *Frye*, CALJIC No. 8.71 provided: "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree." (*People v. Frye, supra*, 18 Cal.4th 894, 963-964.) CALJIC No. 8.72 provided:

> Defendant's argument relies on a strained reading of the challenged instructions. The thrust of these instructions was to inform jurors they must give defendant the benefit of any reasonable doubts by returning a second degree murder verdict in the one circumstance, and a manslaughter verdict in the other. Nothing in this language can reasonably be understood as encouraging jurors to forego their personally held views so that a verdict could be rendered. Moreover, the jury was specifically instructed otherwise. The trial court explained, "Both the People and the defendant are entitled to the individual opinion of each juror. [¶] It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. [¶] You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision." In light of this instruction, jurors were adequately informed not to abandon their views for the sake of a verdict. The instructions compelling verdicts of second degree murder and manslaughter if jurors had reasonable doubts when deciding between first and second degree murder, and murder and manslaughter, respectively, did not undermine this command.

(*Id.* at pp. 963-964.)

In *People v. Pescador* (2004) 119 Cal.App.4th 252, the defendant argued that the 1996 versions of CALJIC Nos. 8.71 and 8.72—the instructions given in this case—"force[d] individual jurors who had a reasonable doubt as to the degree of murder" to conclude that they could not individually give the defendant the benefit of that doubt, unless "the jury collectively and unanimously agree[d] upon the existence of reasonable doubt." (*Id* .at p. 256.) The court of appeal rejected that assertion. In so holding, the court first

---

If you are convinced beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder. (*Ibid.*)

observed that, when assessing the correctness of jury instructions, the court reviews all of the instructions given, rather than considering only "parts of an instruction or . . . a particular instruction." (*Id.* at p. 257.)

The court then noted that the defendant's proposed interpretation of the challenged instructions flew "in the face of CALJIC Nos.17.11 and 17.40." (*People v. Pescador*, *supra*, 119 Cal.App.4th 252, 257.) CALJIC No. 17.11 specifically informed the jurors that if they had "a reasonable doubt" regarding the degree of murder, the jurors must give the defendant the benefit of that doubt and "find him guilty of that crime in the second degree." (*Ibid.*) CALJIC No. 17.40 further instructed the jurors that the prosecution and defense were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (*Ibid.*) Finally, the jurors were further directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" (*Ibid.*)

The *Pescador* court concluded that, in "light of the instructions as a whole," it was not reasonably likely that the jury interpreted CALJIC No. 8.71 "as requiring them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree." (*People v. Pescador*, *supra*, 119 Cal.App.4th 252, 257.) For the same reasons, *Pescador* also found that "CALJIC No. 8.72, when considered in context with CALJIC Nos. 8.50 [explaining difference between murder and manslaughter], 17.11, and 17.40, did not instruct the jury that it had to make a unanimous finding that they had a reasonable doubt as to whether the crime was murder or manslaughter in order for defendant to receive the benefit of the doubt." (*Ibid.*)[12/]

---

12. CALJIC No. 8.50 provided: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the

Following *Pescador*, the validity of CALJIC No. 8.71 was again considered in *People v. Gunder* (2007) 151 Cal.App.4th 412. There, as in *Pescador*, the defendant argued that the instruction violated his due process rights because it purportedly "condition[ed] any juror's decision in favor of second degree murder on the unanimous agreement of the jurors that a doubt exists as to degree." (*Id.* at pp. 424-425.) The *Gunder* defendant also asserted that *Pescador* was inapposite, because the *Pescador* jury, unlike his jury, was given CALJIC No. 17.11, the instruction stating that if there was a reasonable doubt as to the degree of murder, the defendant was to be given the benefit of that doubt. (*Id.* at p. 425.) The *Gunder* court concluded that the foregoing distinction was immaterial, stating:

> We disagree that this is a crucial distinction. If indeed it were reasonably likely that CALJIC No. 8.71 communicated the need for the procedural prerequisite of a unanimous finding of doubt as to degree, the parallel pattern instruction [CALJIC No. 17.11] does not refute this any more directly than the instruction on the duty to deliberate individually. It is mere icing on the cake. What is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decision making. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder. Thus, nothing in the instruction is likely to prevent a minority of jurors from voting against first degree murder and in favor of second degree murder.

(*Id.* at pp. 827-828.)

---

offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel."

C. Discussion

Here, as in *Frye, Pescador*, and *Gunder*, the totality of the instructions clearly informed the jurors not to forsake their individual opinions when considering appellant's guilt or innocence. Like the juries in *Pescador* and *Frye*, the jury in this case was instructed that both the People and the defendant were "entitled to the individual opinion of each juror," and that each juror must "decide the case" for himself, and that a juror should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (3 CT 781.) Likewise, the jurors here were further directed to "'[c]onsider the instructions as a whole and each in light of all the others.'" (3 CT 723.)

Appellant nevertheless seeks to distinguish *Pescador*, claiming that, unlike the circumstances in *Pescador*, his jury was not given CALJIC No. 8.50, the instruction explaining the difference between murder and manslaughter. Nor, according to appellant, was his jury given CALJIC No. 17.11, the instruction directing the jury to give the defendant the benefit of the doubt and find him guilty of second degree murder if it could not decide the degree of the murder. (AOB 70.)

Appellant's proposed distinctions are unavailing. Although the jury was not given a voluntary manslaughter instruction, it was given CALJIC No. 8.47, an *involuntary* manslaughter instruction. That instruction explained that if, "as a result of voluntary intoxication," the defendant "killed another human being without an intent to kill and without malice aforethought," then the crime was involuntary manslaughter. (3 CT 756.) That instruction, like CALJIC No. 8.50, made it clear that a manslaughter verdict was available only if the defendant had not acted with "malice aforethought." (3 CT 756.)

Furthermore, even though the jurors were not instructed with CALJIC No. 17.11, *Gunder* establishes that CALJIC No. 17.11 "is mere icing on the cake,"

and that the "crucial"instruction is CALJIC No. 17.40 which expressly reminds jurors that they are "not bound to follow the remainder [of other jurors] in decision making." (*People v. Gunder, supra*, 151 Cal.App.4th at pp. 827-828.) Thus, because the jury in this case was given CALJIC No. 17.40, *Pescador* and *Gunder* mandate rejection of appellant's claim.

Appellant's final claim is that the purported instructional deficiency constituted a structural error requiring reversal of his conviction. (AOB 72.) Appellant argues that, under the challenged instructions, " a rational juror could have concluded that there was a reasonable doubt about the mental state required for first degree murder, but abandoned that position for lack of unanimous support." (AOB 72.) Not so. When evaluating claims of instructional error during the guilt phase, this Court has consistently employed a harmless error analysis requiring a determination of whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*People v. Frye, supra*, 18 Cal.4th at p. 957; *People v. Snow* (2003) 30 Cal.4th 43, 98; *People v. Cash, supra*, 28 Cal.4th at p. 739.) Since there was overwhelming evidence that appellant committed the murder with the requisite criminal intent, and there is no reasonable likelihood that the jurors misinterpreted the instructions, appellant's claim of structural error fails.[13/] Accordingly, appellant's due process right to a reliable guilt and penalty determination was not infringed. (See *People v. Bradford, supra*, 15 Cal.4th 1229, 1382.)

---

13. Appellant further argues that, even if a harmless error analysis were applied, the challenged instructions undoubtedly affected how the jury viewed that evidence and contributed to the verdict of first degree murder." (AOB 72-73.) In making this argument, appellant disregards case law upholding the validity of the challenged instructions. (*People v. Frye, supra*, 18 Cal.4th at pp. 963-964; *People v. Gunder, supra*, 151 Cal.App.4th at pp. 827-828; *People v. Pescador, supra*, 119 Cal.App.4th at p. 257.)

VI.

THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY ON FELONY MURDER AND FAILING TO REQUIRE JUROR UNANIMITY ON THE UNDERLYING THEORY OF MURDER

Appellant claims the trial court erred by instructing the jury on the elements of felony murder because that offense was not charged in the information. Appellant further argues that the failure to require juror unanimity on the underlying theory of murder violated his due process rights. (AOB 74-80, 84.) Controlling case law mandates rejection of appellant's claims.

In *People v. Hughes, supra*, 27 Cal.4th at p. 287, the defendant argued that "the trial court lacked jurisdiction to try him for the uncharged crime of first degree felony murder," and that "charging both malice murder and felony murder in one count of the information violated his right to a unanimous verdict." (*Id.* at p. 369.) This Court rejected those claims, finding that "felony murder and murder with malice" are not separate offenses which need to be alleged separately in the information, and that "it is unnecessary for jurors to agree unanimously on a theory of first degree murder." (*Ibid.*) Based on the foregoing authority, appellant's claims fail.

VII.

CALJIC NO. 2.03 WAS PROPERLY GIVEN

Appellant further contends that CALJIC No. 2.03 was improperly given because it was "unnecessary, improperly argumentative, and permitted the jury to draw irrational inferences against appellant." (AOB 86.) Respondent disagrees.

At trial, the jury was instructed over appellant's objection (38 RT 7407) with CALJIC No. 2.03, an instruction concerning a defendant's false or misleading statements. As given, CALJIC No. 2.03 stated:

> If you find that before this trial a defendant made a willfully false and deliberately misleading statement concerning the crime for which [he] is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(40 RT 7844; 3 CT 730.)

Appellant's claims are foreclosed by *People v. Howard* (2007) 42 Cal.4th 1000, wherein this Court rejected the identical arguments, stating:

> "CALJIC No. 2.03 . . . does not merely pinpoint evidence the jury may consider. It tells the jury it may consider the evidence but it is not sufficient by itself to prove guilt. [Citation.]. . . . If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence."

(*Id.* at p. 1025, accord, *People v. Richardson, supra*, 43 Cal.4th at p. 1019; *People v. Medina* (1995) 11 Cal.4th 694, 762; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03 and 2.06 are not argumentative and do not lessen the prosecution's burden of proof].) Accordingly, the foregoing authorities mandate rejection of appellant's claim.

VIII.

THE GUILT PHASE INSTRUCTIONS DID NOT UNDERMINE THE REASONABLE DOUBT STANDARD

Appellant contends that a series of guilt phase instructions, including CALJIC Nos. 2.01 [circumstantial evidence], 2.21 [discrepancies in witness testimony], 2.21.1 [discrepancies in testimony], 2.21.2 [witness wilfully false], 2.22 [force of evidence], 2.27 [testimony of one witness], 2.51 [motive] and 8.83 [circumstantial evidence for special circumstances], improperly undermined the constitutional requirement that guilt must be proven beyond a reasonable doubt, and his due process right to a reliable verdict. (AOB 100.) Appellant asserts that the effect of these instructions was to inform the jury

"that if appellant reasonably appeared to be guilty, they could find him guilty—even if they entertained a reasonable doubt as to guilt." (AOB 102.)

This claim is barred under the invited error doctrine since appellant affirmatively requested the challenged instructions, and did not object to the giving of CALJIC No. 2.21. (2 CT 384.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.) Even if it were not barred, this contention is foreclosed by *People v. Rundle* (2008) 43 Cal.4th 76, 84, and *People v. Brasure* (2008) 42 Cal.4th 1037, 1059, wherein this Court rejected the same claims as those made by appellant. Accordingly, appellant was not deprived of his federal constitutional rights to a fair trial and to a reliable penalty determination. (*People v. Bradford, supra*, 15 Cal.4th 1229, 1382.)

IX.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant argues that California's death penalty statute is unconstitutional because it contains no safeguards to avoid arbitrary and capricious sentencing, and therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 114-137.) In support of his argument, he raises numerous different claims, each of which has been considered and rejected by this Court.

1. Penal Code Section 190.2 Is Not Over Broad

Appellant asserts that California's capital sentencing scheme is impermissibly broad because it does not provide a meaningful basis to distinguish the "few cases in which the death penalty is imposed from the many cases in which it is not." (AOB 114.) He also asserts that permitting the jury to consider the "circumstances of the crime" during the penalty phase "results in the arbitrary and capricious imposition of the death penalty." (AOB 115.)

The claim is barred under the invited error doctrine because he requested the challenged instruction. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.) In any event, this Court has rejected his claims. (*People v. Boyer* (2006) 38 Cal.4th 412, 483; *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401; *People v. Ayala* (2000) 23 Cal.4th 225, 303.)

2. Appellant's Death Sentence Need Not Be Based On Findings Made Beyond A Reasonable Doubt

Appellant argues the jury must be required to find beyond a reasonable doubt that one or more aggravating factors existed, and that aggravation outweighed mitigation. (AOB 116-119.) The claim is barred under the invited error doctrine because he requested the challenged instruction. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.) Furthermore, this claim was most recently rejected in *People v. Richardson, supra*, 43 Cal.4th at p. 1036; accord, *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Koontz* (2002) 27 Cal.4th 1041, 1095.) Furthermore, this Court has likewise concluded that *Apprendi v. New Jersey* (2000) 530 U.S. 466 ("*Apprendi*"), *Ring v. Arizona* (2002) 536 U.S. 584 ("*Ring*"), and *Cunningham* v. *California* (2007) __ U.S. __ [127 S.Ct. 856] ("*Cunningham*"), do not compel a different result. (*People v. Stevens* (2007) 41 Cal.4th 182, 221.)

3. The Jury Need Not Be Instructed That The Prosecution Has The Burden Of Persuasion, and There Is No Presumption In Favor Of A Life Sentence

Appellant contends that his jury should have been instructed that: (1) "the State had the burden of persuasion regarding the existence of any factor in aggravation;" and (2) "it was presumed that life without parole was an appropriate sentence." (AOB 119-120, 127.) Appellant acknowledges, however, that this Court has held that capital sentencing is not susceptible to

burdens of proof because it is normative in nature, and that there is no presumption in favor of a life sentence. (*People v. Richardson*, *supra*, 43 Cal.4th 959, 1036; see also, *People v. Mendoza* (2000) 24 Cal.4th 130, 191 [trial court is not required to instruct the jury that neither party bears the burden of persuasion on whether death or life without possibility of parole is the appropriate sentence].)

4. There Is No Juror Unanimity Requirement With Respect To The Existence Of Aggravating Factors

Appellant further argues that jurors must unanimously agree on the existence of aggravating factors. (AOB 120-121.) This Court has considered and rejected his claim of jury unanimity. (*People v. Richardson*, *supra*, 43 Cal.4th 959, 1036-1037; see also *People v. Kipp* (1998) 18 Cal.4th 349, 381.)

5. The Jury Need Not Be Instructed That Prior Criminality Must Be Found True By A Unanimous Jury

Appellant claims that his due process rights were violated because the jury was not instructed that prior criminality "had to be found true by a unanimous jury." (AOB 122.) The claim is barred under the invited error doctrine because he requested the challenged instruction. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.) Moreover, this claim has been routinely rejected by this Court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1054; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061.) Nor does *Cunningham* v. *California, supra*,127 S.Ct. 856, alter this conclusion. (*People v. Ward, supra*, 36 Cal.4th at pp. 221-222.)

6. The Penalty Instructions Are Not Vague And Ambiguous

Appellant asserts that CALJIC No. 8.88's use of the term "so substantial" is "impermissibly broad" and does "not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious

sentencing," thereby violating the Eighth Amendment. (AOB 123.) The claim is barred under the invited error doctrine because he requested the challenged instruction. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.) Furthermore, *People v. Richardson, supra*, 43 Cal.4th 959, 1036-1037, refutes this contention. As stated by this Court in *People v. Millwee* (1998) 18 Cal.4th 96, that instruction adequately describes "when the balance of factors warrants the more serious penalty." (*Id.* at pp. 162-163.) The words "so substantial" clearly convey "the importance of the jury's decision and emphasize that a high degree of certainty is required for a death verdict." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1242-1244.) Given the moral and normative nature of sentencing in capital cases, nothing more is required.

7. CALJIC No. 8.88 Clearly States The Relevant Criteria In Determining Whether Death Is The Appropriate Penalty

Appellant asserts that, although the "ultimate question in the penalty phase" is "whether death is the appropriate penalty," CALJIC No. 8.88 "does not make this clear to jurors." (AOB 124.) The claim is barred under the invited error doctrine because he requested the challenged instruction. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.) As appellant recognizes, this claim is foreclosed by *People v. Mendoza* (2007) 42 Cal.4th 686, 707. (Accord, *People v. Arias* (1996) 13 Cal.4th 92, 171.)

8. CALJIC No. 8.88 Clearly Informs The Jury That The Death Penalty Should Be Imposed Only If The Aggravating Circumstances Outweigh The Mitigating Circumstances

Appellant claims that CALJIC No. 8.88 is constitutionally deficient because it states that the jury may impose a death verdict if the aggravating factors substantially outweigh the mitigating factors, but does not state when a life sentence is required. (AOB 125.) The claim is barred under the invited error doctrine because he requested the challenged instruction. (2 CT 444A.)

(*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.) In addition, this Court has concluded, however, that CALJIC No. 8.88 "is not deficient on grounds that it fails to say expressly a life sentence is required if mitigation outweighs aggravation." (*People v. Boyer, supra*, 38 Cal.4th 486.)

9. The Jury Instructions Are Not Required To Set Forth A Burden Of Proof, And The Lack Of Such Did Not Violate Appellant's Constitutional Rights

Appellant claims that the "failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment." (AOB 126.) Appellant further claims that there "is a substantial likelihood" that the jury erroneously believed they had to unanimously agree on the existence of mitigating factors. (AOB 126.) The Constitution, however, does not require the jury be instructed as to "any burden of proof in selecting the penalty to be imposed." *(People v. Jenkins, supra*, 22 Cal.4th at pp. 1053-1054.) Moreover, "'[t]he trial court need not instruct that the beyond-a-reasonable-doubt standard and the requirement of jury unanimity do not apply to mitigating factors'" (*People v. Lewis* (2008) 43 Cal.4th 415, 534.)

10. There Is No Requirement That The Jury Submit Written Findings

Appellant argues that written findings by the jury are constitutionally required. (AOB 128.) As recognized by appellant, this Court has considered and rejected his claim. (*People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Kraft* (2000) 23 Cal.4th 978, 1078.)

11. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Do Not Act As Barriers To The Jurors' Consideration Of Mitigation

Appellant claims that the use of restrictive adjectives such as "extreme" in factors (d) and (g), and "substantial" in factor (g), thwart proper consideration of mitigating evidence. (AOB 129.) First, the claim is barred under the invited error doctrine since appellant requested CALJIC No. 8.85. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.)

Second, it is established that the use of "restrictive adjectives "such as 'extreme' and 'substantial, in the sentencing statute and instructions do not render either unconstitutional." (*People v. Watson* (2008) 43 Cal.4th 652, 704; accord, *People v. Avila* (2006) 38 Cal.4th 491, 614.)

Nevertheless, appellant asserts that the foregoing rule is premised on the concept that "less-than-extreme mental or emotional disturbances" could be considered as a mitigating circumstance under factor (k), a catchall provision allowing jurors to consider any extenuating circumstances regarding the crime. (AOB 130; *People v. Wright* (1990) 52 Cal.3d 367, 443-444 [reference to"extreme" emotional disturbance in factor (d) does not improperly limit mitigating evidence because a lesser emotional disturbance can be considered mitigating evidence under factor (k)].) In making this assertion, appellant notes that, in the penalty phase, the prosecutor argued that appellant had not shown he was suffering from an "extreme" emotional disturbance within the meaning of factor (d), but never acknowledged that any lesser form of emotional impairment could be considered as mitigating evidence under factor (k). (AOB 130.) Appellant further observes that, during the hearing on his post-trial motion to reduce the verdict, "neither the prosecutor or the trial court acknowledged that appellant's mental impairments could be considered under factor (k)." (AOB 130.) Appellant thus believes that, since nobody, including defense counsel, mentioned that his mental impairment could be considered a

mitigating circumstance under factor (k), then the jury must not have been aware that it could be so considered. (AOB 130-131.) This claim is meritless and is based on a selective view of the record which fails to acknowledge that appellant's intoxication/mental defect defense was extensively considered under other, more directly applicable factors.

During the penalty phase, the prosecutor discussed factors (d) and (h) at length. She first argued that appellant did not suffer from an "extreme mental or emotional disturbance" within the meaning of factor (d). (50 RT 9815-9818.) She then argued that appellant also did not meet the criteria for factor (h), which allowed the jury to consider whether "intoxication" or mental disease or defect" caused the defendant either not to "appreciate the criminality of his conduct," or, alternatively, "conform his conduct" to the law. (50 RT 9818-9824.) After extensively discussing appellant's medical history under both of those factors, the prosecutor also briefly referred to factor (k), a general catchall provision allowing consideration of any extenuating circumstances relating to the crime. (50 RT 9824.) The prosecutor argued that there were no extenuating circumstances under that section because appellant had a normal childhood with a loving family, and his history of drug addiction did not excuse his crime. (50 RT 9824-9827.) Since factors (d) and (h) were directly applicable to appellant's intoxication/mental defect claim, there was absolutely no basis whatsoever for the parties to have argued that the foregoing evidence should also be viewed as a mitigating circumstance under factor (k). Furthermore, the prosecutor never told the jury that it could *not* view appellant's mental defect as a mitigating circumstance under factor (k). (*People v. Dennis* (1998) 17 Cal.4th 468, 547 [no basis to conclude that jury erroneously believed they were precluded from considering defendant's mental condition under factor (k)

because prosecutor made no such argument].)[14/]

Although the jury was never restricted from considering appellant's mental problems under factor (k), appellant believes his case "is similar to *Brewer v. Quartermain* (2007) __ U.S. __ [127 S.Ct. 1706], where the prosecutor's argument limited the jury's consideration of mitigating evidence." (AOB 133.) In *Brewer*, the trial court refused to give any of the defendant's proposed instructions, which were formulated to allow consideration of the evidence he presented regarding domestic violence in his home, as well as his drug addiction and treatment for depression. Instead, the jury was permitted to consider only whether the defendant's conduct was deliberate, and whether he was likely to commit future dangerous acts. Thus, during closing argument, the prosecutor emphasized that defendant's response to his physical abuse as a child supported a finding of future dangerousness, and de-emphasized the mitigating effect of evidence concerning Brewer's background, telling the jury that under Texas law, it could only answer whether the conduct was deliberate and whether he was a future danger to society. (*Id.* at p. 1711.) The United States Supreme Court reversed the defendant's conviction, stating:

> There is surely a reasonable likelihood that the jurors accepted the prosecutor's argument at the close of the sentencing hearing that all they needed to decide was whether Brewer had acted deliberately and would likely be dangerous in the future, necessarily disregarding any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence.

(*Brewer v. Quartermain*, *supra*, 127 S.Ct. at p. 1712.)

---

14. At the hearing on appellant's motion to modify the verdict, neither the prosecutor nor defense counsel presented oral argument. (53 RT 10407-10415.) However, the trial court expressly discussed that factor in ruling on appellant's motion to modify the verdict, noting that it considered appellant's drug addiction as a mitigating circumstance under that factor, but finding that it did not outweigh the aggravating circumstances. (53 RT 10406-10407.)

Brewer is wholly inapposite. California's death penalty statute, unlike that of Texas, expressly permits the jurors to consider a wide array of mitigating evidence, including whether the defendant had a mental defect, or extreme emotional disturbance, which affected his ability to fully consider the nature and consequences of his actions. (Pen. Code, § 190.3, subds. (d), (h) & (k).) Furthermore, unlike the circumstances in *Brewer*, the prosecutor in this case never sought to preclude the jury from considering the mitigating effect of evidence regarding defendant's mental health issues and his drug addiction. Instead, she merely stated that such evidence was not severe enough to constitute an extreme emotional disturbance under factor (d), and that those problems did not preclude him from appreciating the nature and consequences of his actions under factor (h). (50 RT 9818-9824.) Accordingly, because there is no reason to believe the jury was impermissibly restricted in its consideration of mitigating circumstances, appellant's claim should be rejected.

12. There Is No Duty To Delete Inapplicable Sentencing Factors

Appellant next asserts that the failure to delete inapplicable sentencing factors such as factors (e) [consent of the victim], (f) [reasonable moral justification], (g) [duress], and (j) [accomplice], "likely" confused the jurors, thereby preventing them from rendering a reliable verdict. (AOB 134.) As appellant acknowledges, the prosecutor explicitly told the jury that these factors were inapplicable (50 RT 9808), and this Court has also determined that the inclusion of inapplicable factors does not violate a defendant's state or federal constitutional rights. (*People v. Harris* (2008) 43 Cal.4th 1269, 1320-1321; *People v. Cook, supra*, 39 Cal.4th at p. 618.) In addition, the claim is barred under the invited error doctrine since appellant requested CALJIC No. 8.85. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.)

13. The Trial Court Is Not Required To Instruct The Jury As To Which Of The Listed Sentencing Factors Were Aggravating, Which Were Mitigating, Or Which Could Be Either Aggravating Or Mitigating

Appellant further argues that the failure to identify which sentencing factors were aggravating or mitigating "invited" the jury "to aggravate appellant's sentence based on non-existent or irrational aggravating factors, thus precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments." (AOB 135.) This claim has been consistently rejected by this Court. (*People v. Farnam* (2002) 28 Cal.4th 107, 191 ["the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating"]; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 979 ["A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"].) It is also barred under the invited error doctrine because he requested the challenged instruction. (2 CT 444A.) (*People v. Prieto, supra*, 30 Cal.4th 226, 264-265.)

14. There Is No Constitutional Right To Inter-case Proportionality Review

Appellant next claims the California death penalty sentencing scheme is unconstitutional because it does not provide for inter-case proportionality review. (AOB 136.) This Court has repeatedly rejected the argument that inter-case proportionality review is constitutionally required. (*People v. Boyette, supra*, 29 Cal.4th at p. 467; *People v. Lawley* (2002) 27 Cal.4th 102, 169.) The United States Supreme Court has also held that inter-case proportionality review is not constitutionally required under the Eighth Amendment as applicable to the states through the Fourteenth Amendment. (*Pulley v. Harris* (1984) 465 U.S. 37, 44, 50-51.)

X.

CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant contends California's use of the death penalty as a regular form of punishment violates international norms of humanity and decency, and violates the federal constitutional ban on cruel and unusual punishment under the Eighth and Fourteenth Amendments. (AOB 138-142.) This Court has previously held that international law does not compel the elimination of capital punishment in California. (*People v. Snow, supra*, 30 Cal.4th at p. 127; see *People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 370-376.) This Court also has rejected the contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.)

California's use of the death penalty does not violate international law, nor does it constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

XI.

THERE WERE NO PREJUDICIAL ERRORS REQUIRING REVERSAL OF APPELLANT'S CONVICTION

Appellant's final claim is that the cumulative effect of the alleged errors requires reversal of his convictions. Respondent disagrees.

Where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 321, 465.) "A defendant is entitled to a fair trial, not a

perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.)

Here, the trial court did not commit any errors. Therefore, the cumulative error doctrine does not apply, and appellant "was not denied his federal constitutional rights to a fair trial and to a reliable penalty verdict." (*People v. Kipp, supra*, 18 Cal.4th p. 383; see *People v. Beeler* (1995) 9 Cal.4th 953, 994 ["[i]f none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the . . . verdict"].) Accordingly, his claim fails.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: August 4, 2008

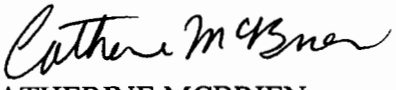
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

ALICE B. LUSTRE
Deputy Attorney General



CATHERINE MCBRIEN
Deputy Attorney General

Attorneys for Respondent

SF1999XS0004
20129081.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 31124 words.

Dated: August 4, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

CATHERINE MCBRIEN
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ronald Wayne Moore**

No.: **S081479**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 4, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Arnold Erickson
Deputy State Public Defender
State Public Defender's Office - San Francisco
221 Main Street, 10th Floor
San Francisco, CA 94105

California Appellate Project
CAP- SFO
101 Second Street, Suite 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 4, 2008, at San Francisco, California.

Pearl Lim
Declarant

Signature

20129252.wpd