THE PEOPLE, Plaintiff and Respondent, v. HAMISI XAVIER SPEARS, Defendant and Appellant.

A107984

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

2006 Cal. App. Unpub. LEXIS 1264

February 10, 2006, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: Alameda County Super. Ct. No. C126894.

CORE TERMS: robbery, confession, murder, shooting, shot, tape, heroin, restitution, caution, fine, pocket, restitution fines, arrest, robber, interview, minute, gang, wallet, gun, abstract of judgment, conversation, probability, bottle, times, special circumstance, defense counsel, felony murder, involuntary, suppress, killing

JUDGES: Marchiano, P.J.; Stein, J., Swager, J. concurred.

OPINION BY: Marchiano

OPINION

Hamisi Xavier Spears appeals from his conviction of the first degree murder of Simeon Andrades. He contends that his confession to the police was involuntary, that the court made several erroneous rulings on evidence, that there were serious instructional errors at his trial, and that the court violated the rule of Blakely v. Washington (2004) 542 U.S. 296, 159 L. Ed. 2d 403 (Blakely) when sentencing him. He also requests correction of the abstract of judgment to strike portions of the restitution order and to award presentence credits.

We reject his substantive arguments, but will order the requested corrections to the abstract of judgment.

BACKGROUND

On the night of the murder, Orient Stimpson, Terrence Hill, Kennetha[*2] Newell, and others were at Andrea Minor's house socializing and taking drugs. When Andrades arrived at the house, he was happy that he had received his first paycheck and was wiggling the check in his hand.

Hill had heroin and cocaine, which he was sharing with others, including Andrades. Hill became agitated because Andrades would not share his cocaine. Andrades seemed unaware that he was irritating Hill.

Later that evening, Stimpson saw Hill on the telephone. Hill called Lawrence "Pooh-Man" Thomas' house. When defendant answered the phone, Hill asked for Pooh-Man. Defendant said he was asleep, and Hill said, "Well, look, I got a lick set up for fifty-two hundred dollars." A "lick" meant a robbery. Hill said, "Man, just get some masks or something and me and you can do it." Hill told defendant he would not need a gun explaining: "the dude is just a mark. He ain't going to trip." Defendant agreed, hung up the phone and began looking around the house for a beanie hat to make a mask. Pooh-Man saw him and asked, "What's up?" Defendant told him Hill had called with a "lick" for "fifty-two hundred" dollars. Defendant found some hats and cut out holes for the eyes, grabbed his gun and[*3] put it in his pocket. Pooh-Man decided to come along, and they went outside to wait for Hill to pick them up.

Hill pulled up with Stimpson in the car. As they were driving off, defendant asked Hill, "So what's up, man?" Hill responded that the robbery was for only "50 to a hundred dollars . . . ." As they reached their destination, Stimpson said, "You all ain't going to hurt him, is you?" Defendant replied, "For what? We ain't supposed to hurt him." Pooh-Man and defendant had not really discussed their plan, but defendant's idea was to go towards the victim and get him off balance so they could grab him and check his pockets.

Defendant and Pooh-Man got out of the car and Hill said, "Here he comes." Defendant walked towards the victim and Pooh-Man went across the street. Pooh-Man heard defendant say, "Break yourself" to the victim, which means to give up anything in your pockets. At his subsequent trial, defendant denied that he said, "Break yourself." According to defendant, he approached Andrades and, using a Hispanic accent, said: "What's up, homie? 38 Locos," referring to a Hispanic gang. Andrades kept walking, so defendant came around the corner and met him again. Defendant claimed[*4] that Pooh-Man stayed with him and was next to him as he approached Andrades. Pooh-Man claimed that he was on the opposite side of the street watching. Defendant saw that Andrades had a 40-ounce bottle in his hand and seemed ready to fight. The next thing defendant knew, Andrades threw the bottle at him.

The bottle hit defendant in the hand and made him angry. Defendant later explained that after the bottle hit him in the hand, "I'm just mad and I'm just in a rage." Andrades turned and ran and defendant chased him, and "it just went all bad from there." Defendant stopped, grabbed the gun from his pocket and shot one time. Andrades fell. Defendant ran up to him and shot him three more times as he lay on the ground. Defendant started to run away, but went back and stuck his hand in the victim's pocket. At his trial, defendant denied taking the victim's wallet, even though he told the police he had taken a green wallet from Andrades.

Cecilia Jackson lived in the neighborhood of the shooting. She heard a dog

barking and looked out the window where she saw "some guys chasing a guy." She heard approximately three gunshots, saw the victim on the ground and saw that the man who shot the victim[*5] was going through his pockets. She assumed they were robbing him and called 911.

Stimpson, who had been circling the block in the car with Hill, saw defendant running towards the car. He jumped in the car and told Hill something like: "Dude tried to throw a 40-ouncer . . . at me and I popped dude . . . hurry up and get . . . me to the house, I got this shit on me." Stimpson understood defendant's comment about "this shit" as referring to the gun. Defendant was very calm, but Hill became angry and almost hysterical. They took defendant back to Pooh-Man's house and dropped him off. n1

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n1 Stimpson and Andrea Minor both received telephone calls after the murder telling them not to testify.

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When Pooh-Man arrived home, defendant was there, repeating: "Man, I fucked up for nothing," meaning he did not get anything out of the incident. Defendant told Pooh-Man that he shot Andrade because he hit defendant in the face with a bottle. Later that morning, Pooh-Man saw defendant burning something behind the building. Defendant[*6] said he was burning the wallet. A police evidence technician subsequently recovered burned green material from behind Pooh-Man's building. It could not be identified as a wallet.

Right after the shooting, the police received 911 calls from people in the area and were on the scene by approximately 3:39 a.m. Officer Keith Samuel was first on the scene. He saw the victim lying on his back on the street, breathing, but unresponsive. It appeared that he had been shot several times. The officer did not notice any money on the victim or that his pockets were turned out. He would have noted in his report if the pockets had been turned out.

Paramedics arrived on the scene at approximately 3:40 a.m. They cut away the victim's clothing, but did not notice if there was any money or identification in the clothing. Andrades stopped breathing and the paramedics unsuccessfully attempted to resuscitate him. Andrades had been shot once in the back, the right arm, chest, upper abdomen and the right side of his chin. n2 The angle of the bullet in the victim's back was consistent with having been inflicted as Andrades ran away. A police evidence technician found a total of $ 108.83, including a folded[*7] $ 100 bill in the victim's clothing.

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n2 The bullet that entered the victim's chin exited and reentered his body three times, finally lodging in the back of his neck. The pathologist testified that the victim could have been shot four or five times. He recovered four bullets

that could have caused the five entrance wounds.

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Sergeant David Politzer interviewed the victim's mother and learned that Andrades owned a blue Velcro wallet. Approximately one week after the murder, police arrested defendant, Thomas and defendant's cousin, Kenyatta Holmes, for two unrelated purse snatch-type robberies. Kenyatta admitted that he was the getaway driver in the two robberies with defendant. Defendant confessed to the two robberies.

Sergeant Politzer, who had been interviewing BB (Andrea Minor), Neice (Stimpson), and Kennetha Newell regarding the shooting, had learned of the involvement of Hill and Thomas. Politzer then learned that the robbery officers had just arrested them. Politzer interviewed Thomas, then composed a photo [*8]lineup that included defendant. Newell identified defendant as the man who was standing over Andrades going through his pockets. Politzer then interviewed defendant, who eventually confessed to the shooting and to taking the victim's green Velcro wallet and subsequently burning it.

Defendant and Hill were charged with the first degree murder of Simeon Andrades on June 6, 1995, with the special circumstance allegation as to defendant of murder during the commission of a robbery. (Pen. Code, @@ 187, 190.2, former subd. (a)(17)(i).) n3 The information also alleged personal use of a handgun. (@@ 1203.06, 12022.5.) In addition to the robbery and murder of Andrades, defendant and Kenyatta Holmes were charged with the separate robberies of Anna Sanchez and Johanna Maher on June 11, 1995.

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n3 All statutory references are to the Penal Code.

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Defendant pleaded guilty to the Sanchez and Maher robberies. Hill pleaded guilty to voluntary manslaughter and agreed to testify at[*9] defendant's trial, but it was Thomas who actually testified.

Defendant testified at length at his trial. He admitted that he went to the scene of the shooting intending to rob Andrades and admitted that he shot him four times. Defendant tried to hit him in the back, butt, or leg with the first shot, just to slow him down. He didn't mean to kill Andrades, he was reacting from anger and didn't know why he fired the additional shots. In his closing argument, defense counsel contended that there was no malice, no robbery and that the felony murder doctrine did not apply because defendant "forgot about the robbery when he did this killing, so he didn't have specific intent to commit the crime of robbery at the time he did the killing." Counsel urged the jury to find that the crime was second degree murder.

On March 16, 2004, the jury returned its verdict finding defendant guilty of first degree murder with use of a handgun, but found the special circumstance not true. On September 1, 2004, the court sentenced defendant to 25 years to life for the murder, plus 10 years for using a firearm, and consecutive 3-year and 1-year sentences for the 2 robbery counts, for a total sentence of 39 [*10]years to life. The court also imposed restitution and parole fines and restitution payable to the State Board of Control. Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant attacks his confession as involuntary, questions some of the trial court's evidentiary rulings, and argues that several improper jury instructions require reversal of his conviction. We have reviewed those contentions and find they have no merit, as we explain below. Defendant also notes that the court erroneously imposed two restitution fines based on statutes enacted after he committed his crimes and that the abstract of judgment fails to reflect his substantial time in presentence custody. The Attorney General properly concedes these two issues and we will order appropriate correction of the record.

Error in Ruling on Defendant's Motion to Suppress

Defendant argues that the trial court erred by denying his motion to suppress evidence obtained as a result of an illegal arrest. We have reviewed the record and are convinced that the arrest was legal.

Motion to Suppress: Factual Background

On June 13, 1995, Oakland Police Sergeant Darrell Kelley received a request [*11]to review robbery reports from Lieutenant Williams of the robbery unit. Kelley was a 15-year veteran of the Oakland Police Department assigned to the police gang unit. He reviewed the reports of the June 11th robbery of Johanna Maher on the corner of Piedmont Avenue and 41st Street, including the statements of Maher and witnesses Bernadette Toal and Peter Matsukawa. Kelley believed that one suspect committed the robbery and the other drove the vehicle in which they fled from the scene. According to Maher's description, the robber was male, Black, about 25 years old, six feet tall, about 160 pounds, dark complexion and wearing a blue denim cap with "a lot of hair sticking out from the sides." Witness Toal's description was similar: "male Black, 30 to 35 years, five-ten, 160, thin build, shiny, wavy hair and a four to five inch ponytail, medium complexion." According to Toal, the robber took the victim's purse, ran across the street and got into an '80's Volkswagen Rabbit, possibly two-door, dark gray with the license 2YXX970 or 2YKX970. n4 Matsukawa described the robber as being 25 to 29 years old, five feet eleven inches to six feet two inches and 165 to 180 pounds, with pronounced[*12] ears and a short ponytail. Matsukawa also described the car in which the robber fled as a '75 to '78 Volkswagen Rabbit, oxidized blue or gray in color with a reflectorized license plate. Kelley confirmed that the vehicle bearing the license plate number reported by the witnesses belonged to Monique Nicole Holmes on 61st Avenue.

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n4 The handwriting on the report stated the license number as YXX in one place and YKX in another place. Kelley found the owner of the YKX plate.

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Based on his experience as a patrol officer and gang unit member, Kelley opined that the hairstyle described by the victim and witnesses was not common. According to Kelley, most of the younger people he knew from working in the gang unit were not wearing their hair long, but had "high-top fades" or "Louisville" haircuts. Only a handful of men still had long hair, and they were much older than defendant. Kelley and Sergeant Sherman went to the address of the registered owner of the vehicle and saw the car, a gray Volkswagen Rabbit, license number[*13] 2YKX970, parked next to the house. In about 15 minutes, a Black male, about five feet nine inches tall, around 25 years of age, with very short hair got into the car. He did not match the description of the robber, so the police continued watching. They later learned this person was Kenyatta Holmes. Holmes drove away and the police followed him to an address on Bancroft.

At that location three more men entered the car. Kelley noted that one of the men matched the description of the robbery suspect. He was approximately six feet tall, 165 or 170 pounds, a medium to dark complexion with his hair pulled back into a four or five-inch ponytail. Kelley later learned that this individual was defendant. Defendant had a conversation with the driver and they appeared to know each other. Based on the descriptions he had reviewed and his knowledge of the hairstyle, Kelley believed defendant was the robbery suspect.

Kelley called for a patrol unit to stop the car. The individuals in the car were placed under arrest and transported to the criminal investigations division.

Sergeants Politzer and McKenna interviewed defendant at the police station. After defendant confessed to the two robberies,[*14] he discussed the June 6 shooting incident. Initially, defendant denied any knowledge of the shooting, but later confessed that he shot Andrades.

On May 14, 2003, defendant filed a motion to suppress all evidence obtained as a result of the arrest, including his inculpatory statements. Following a hearing, the trial court denied the motion, finding that the police had probable cause to arrest defendant, based on Kelley's review of the witness and victim statements, the description of the vehicle, Kelley's familiarity with "certain elements in the City of Oakland" and the totality of the circumstances.

On appeal, defendant argues that the arrest was made without probable cause, relying primarily on In re Dung T.(1984) 160 Cal. App. 3d 697, 206 Cal. Rptr. 772 (Dung T.), and People v. Gonzalez (1998) 64 Cal.App.4th 432 (Gonzalez).

Motion to Suppress: Discussion

" 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining

whether, on the facts so found, the search or[*15] seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' " (People v. Weaver (2001) 26 Cal.4th 876, 924.) We resolve all factual conflicts in favor of the trial court's ruling on the motion. (People v. Martin (1973) 9 Cal.3d 687, 692, 108 Cal. Rptr. 809 (Martin).)

"The term 'probable cause' . . . refers to 'a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.' " (People v. Hurtado (2002) 28 Cal.4th 1179, 1188-1189.) Although a police officer's hunch or good faith belief cannot supply probable cause, when the officer can "point to specific and articulable facts" to support the suspicion of guilt, probable cause is established. (Martin, supra, 9 Cal.3d at p. 692.)

The cases cited by defendant concern arrests with far less information than the police had in this case. The facts in Dung T., supra, 160 Cal. App. 3d 697, were that the robbery suspects were described only as six Vietnamese males in their early twenties in a Dodge automobile. Two nights[*16] after the robbery, police stopped a Dodge occupied by eight young Vietnamese males and promptly arrested them. (Id. at p. 705.) No attempt was made to identify the owner of the car and the officer had no particularized descriptions. Absent any other information, the court stated that the arrests were illegal. (Id. at pp. 705, 715-716.)

InGonzalez, supra,64 Cal.App.4th 432, the defendant was arrested nine days after a robbery because he was a passenger in a car that police suspected was the getaway car. The police had no description of the suspects other than a Black male and a Hispanic male. They arrested defendant solely because he was in the car at a later time. (Id. at p. 438.)

The information known to the officers in this case was far greater than the generalized descriptions in Dung T. and Gonzalez. (See, e.g., People v. Price (1991) 1 Cal.4th 324, 410 [probable cause to arrest found where detective reviewed composites, defendant's arrest and conviction record, and knew several robbery witnesses thought defendant resembled robber, although none could identify defendant].)

Defendant[*17] in this case fit the particularized description of the robber. The car was not only similar to the described getaway car, but it was the same car, as verified by the license number. The descriptions given of the robbery suspect included approximate height, weight, age and complexion. In addition, defendant's hairstyle was quite distinctive, as testified by the veteran police officer assigned to the gang unit.

The descriptions, the unusual hairstyle and the identification of the VolkswagenRabbit provided ample particularized facts to support a finding that a man of ordinary caution and prudence would "believe and conscientiously entertain a strong suspicion of the guilt of the accused." (Hurtado, supra, 28 Cal.4th at pp. 1188-1189.) The suppression motion was properly denied. n5

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n5 Defendant argues that the trial court denied him due process by refusing to allow defense counsel to review two cases cited by the prosecutor during

argument of the suppression motion. In fact, counsel only asked for time to review the cases if the court was going to rely on them. The record does not indicate that the court relied on those cases. There was no denial of due process.

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[*18]Error In Refusing to Suppress Defendant's Final Statement

Defendant moved to exclude evidence of his statement to the police on the ground that it was involuntary. On appeal, he argues that the court's determination that his confession was voluntary was error. After reviewing the record, we also determine that the statement was voluntary.

Defendant's Statement: Background Facts

Officer Jack Hoth testified that he was the lead investigator in the Sanchez and Maher robberies. He first saw defendant in an interview room at approximately 2:00 p.m. on June 13, 1995. At approximately 8:20 p.m. Hoth spoke with defendant after advising him of his rights under Miranda v. Arizona (1966) 384 U.S. 436, 16 L. Ed. 2d 694 (Miranda). Defendant replied that he understood his rights and wished to speak with the police. Defendant initialed the printed Miranda waiver form. After talking to defendant without the tape recorder for about 45 minutes, Hoth turned on the tape recorder. In the taped statement, which lasted for about nine minutes, defendant admitted committing the two robberies with his cousin Holmes, because he needed money for drugs.

At the end[*19] of the interview, Hoth asked defendant if the police had threatened him or made promises to obtain a confession. Defendant laughed, then said he was "just playing" and "They told me I'd get off here with probation. Naw." Hoth said, "No, we didn't say that. Right?" Defendant said, "I'm just playing, yeah. . . . You didn't give me no type of promises. I confessed. They found me. They caught me. Now, can I go to sleep?" Hoth asked if defendant was alert and knew what he was doing, and defendant said, "Yes. I, I, I, I'm feel alert. I know what I'm doing."

Sergeant Politzer was investigating the shooting of Simeon Andrades. He learned that defendant was in custody in the robbery division, and read him his Miranda rights in an interview room in the homicide division at approximately 10:13 p.m. Defendant again indicated he would talk to the police and initialed the Miranda waiver form. Politzer then spoke with defendant without a tape recorder about the shooting for about 20 minutes. The first taped interview lasted about 10 minutes and defendant claimed that he and Thomas were together on the night of the shooting. Defendant said that he and Thomas went out to eat, and later went[*20] out looking for heroin. Defendant said he used about $ 30 worth of heroin a day and got his money from doing rap concerts. After finding some heroin, he said he slept all night.

After a break, Politzer and his partner, Sergeant McKenna, returned to speak with defendant again. McKenna told defendant that they did not believe his previous statement and falsely told him that the police had evidence implicating him in the shooting of Andrades. Politzer showed defendant a picture of

Terrence Hill, and defendant began to confess to the murder.

Politzer spoke to defendant for about an hour, then turned on the tape recorder and recorded defendant's confession. The second tape was approximately 27 minutes long, ending at 12:21 a.m. Defendant told the police about Terrence Hill's call saying he had a "lick" for defendant. He recounted the facts of his encounter with Andrades and admitted shooting him four times. Defendant admitted that he went to the scene for the purpose of robbing Andrades and that after shooting him, he took the victim's wallet, intending to split the money with Hill.

Defendant calmly described to the police how he had chased the victim, shot him, then ran up on him and[*21] shot him three more times as he lay on the ground. In his taped confession, defendant said that after he shot the victim, he started to run away, but went back to the victim, searched his pockets and took a green Velcro wallet. Although he had ingested "about four sacks of heroin" that day, he knew he was robbing Andrades and shooting him, but said he "didn't know that [he] was killing him." Defendant said he did not know why he fired the gun three more times, but he was probably angry because the victim had thrown a bottle at him.

Defendant admitted he was a regular heroin user, but said he did not have any heroin in his system at the interview. According to Politzer, defendant did not appear to be under the influence of any kind of drugs. Politzer described his own demeanor during the interviews as friendly, but professional. He denied ever having a heated exchange with defendant.

At the conclusion of the hearing on the motion to exclude the confession, the trial court found that the confession was voluntary, noting that defendant had been properly advised of his rights before each statement, that he understood his rights and made a knowing and voluntary waiver, free of any influence [*22]of drugs, compulsion or promise of reward.

Defendant's Statement: Discussion

On appeal, defendant claims that he was exhausted, sleepy, "likely hungry" and in some discomfort due to heroin withdrawal during the second interview. He claims that when he was confronted with the lies that the police had information implicating him in the murder, he broke down, out of physical and emotional stress and exhaustion.

" 'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." ' " (People v. Thompson (1990) 50 Cal.3d 134, 166, 266 Cal. Rptr. 309 (Thompson).)

" . . .'Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are " 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; [*23] physical condition [citation]; and mental health.' " [Citation.] On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by

substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.] In determining whether a confession was voluntary, "the question is whether defendant's choice to confess was not 'essentially free' because his will was overborne." [Citation.]' " (People v. Boyette (2002) 29 Cal.4th 381, 411.)

Although defendant argues that psychological coercion was present, we see no evidence of any coercion. Defendant speculates that sleep deprivation and drug withdrawal symptoms are relevant to the court's inquiry. But there is no indication the court did not properly consider that evidence and find it was outweighed by the clear and lucid nature of defendant's confession.

The fact that the police lied when they told defendant they had incriminating evidence does not make the confession involuntary. The police are not required to provide full disclosure of their case prior to questioning a suspect. "Lies told by the[*24] police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary." (People v. Musselwhite (1998) 17 Cal.4th 1216, 1240 (Musselwhite) [police falsely told defendant his fingerprints had been taken from homicide victim].)

When a police lie is not the cause of a defendant's confession, the lie itself does not make the confession involuntary. (Musselwhite, supra,17 Cal.4th at p. 1241.) In Thompsonthe police repeatedly lied to defendant regarding evidence connecting him to the crime. The court explained that in general a mere misrepresentation about evidence ". . . 'was not of a type reasonably likely to procure an untrue statement.' " (Thompson, supra, at pp. 166-167.) The court noted a number of decisions upholding confessions despite false police statements about evidence linking the defendant to the crime and stated that deception alone did not render the confessions involuntary. (Thompson, supra, at pp. 167, 170.)

In this case, the trial court's factual findings regarding the circumstances of the confession are supported[*25] by substantial evidence. Defendant was properly advised of his rights before each statement. He acknowledged that he understood his rights and stated that he wished to speak to the police. The interview was not unduly prolonged, there were several breaks, and there is no hint that defendant's mental status was affected by the presence or absence of drugs. n6 Defendant was calm, logical and rational throughout his taped interviews. The circumstances surrounding defendant's confession reveal no hint of coercion, mental weakness or breaking down by defendant. We find the confession was voluntary and reject his attack on its admission.

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n6 Defendant expressly stated that there had been no compulsion or promise of reward at the end of his first statement to Officer Hoth, when he was laughing and "playing" with the investigating officer.

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Redaction of Tape Recorded Jailhouse Conversations

The court allowed the prosecutor to play an edited tape of defendant's March 15, 2003 recorded jailhouse conversations during[*26] opening argument. The trial court ordered redaction of gang references in response to a pretrial defense motion regarding gang references and improper references to a prior murder. Defense counsel objected to the entire tape and moved for a mistrial after the tape was played. The court denied the motion and stated it would reconsider the issue when specific portions were offered in evidence.

During the trial, over continuing defense objections, the prosecutor played the three tapes of defendant's jailhouse conversations with Hill. The transcript was admitted into evidence. During the conversation, Hill offered to withdraw his plea. Defendant did not accept the offer, but told Hill not to worry because he had been studying the case and his "game plan" was to show the jury reasonable doubt. Defendant said he knew who all the witnesses were, and "I know who could point somebody out that's nobody. So, if two people is out there, either one of them could of did it. There's only one person that could point me out."

Before closing argument, defense counsel again moved to exclude Exhibit 27A in its entirety because it still contained unnecessary gangster, prison and criminal innuendo. The[*27] court denied the motion, explaining that the tape was admitted because it was relevant to defendant's credibility, prior inconsistent and consistent statements, admissions, and plan and motive for falsifying testimony.

On appeal defendant again contends that the tape unnecessarily portrayed him as a hardened criminal. He objects to references to his use of the words "crimey" and "cellie," and his questions to Hill about "back time" on his case, as well as discussions about obtaining a lawyer. n7 Without referring to any supporting facts in the record, defendant, an admitted heroin user and robber, argues that he only acquired his gangster jargon during the years he was incarcerated on the charges in this case. This assertion is questionable in light of defendant's admitted gang reference when he first accosted Andrades and said, "What's up homie? 38 Locos."

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n7 The references that defendant finds objectionable are innocuous. Referring to his cousin's involvement in the purse snatchings, defendant said, "He was my crimey." Defendant asked Hill, "Did you get what you wanted out of the deal? Did you get any back time?" When speaking of a third party, defendant said, "He's my cellie now."

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[*28] We have reviewed the record regarding the taped conversation. We find it unexceptional. A trial court's decision to admit evidence under a relevance or prejudice objection is reviewed for abuse of discretion. (People v. Lewis (2001) 26 Cal.4th 334, 372-373.) Defendant has not shown that the

court's ruling was an abuse of discretion. Defendant's discussions with Hill were relevant to show his plan to manipulate the testimony and influence the trial. His language was not unduly laden with profanity or gang references in light of all the circumstances.

Even if some prejudicial material was revealed in the taped conversation, the jury had a clear picture of who defendant was from his own testimony. He testified that he and his friend Pooh-Man were rappers who snatched purses, had sold drugs and used heroin. Defendant candidly told the jury of his lifestyle and his associates. He testified that he had lived in the ghetto all his life and had been familiar with guns since the ninth grade, stating, "where I live at, guns is normal for people to have." He admitted to the jury that he stole from his Auntie Brenda who helped raise him. He told the jury he was dealing dope[*29] when he was 17 years old, but did not carry a gun then, unless "if you grinding in the late hours like 2:00 in the morning." When he started doing robberies, he carried a concealable gun. He explained that different types of robberies involved different techniques. He told the jury, "That was my life then, . . . I am not proud of what I've done. I was on heroin at the time. I stole from my own . . . my mother's house. I done stole tool sets from my stepfather. . . . That is what heroin addicts do." When the prosecutor noted that defendant stole from his family before he ever touched heroin, defendant blamed his actions on "being around the wrong crowd."

Defendant told the jury that he was not as bad as other career criminals, that he had not been to juvenile hall and the youth authority, and that he was sorry, and "spiritually inclined" and he wanted the jury to know that. He stated he was a high school dropout who went into the rap business and "lived the life" taking drugs and hoping for big money.

In light of all the evidence, defendant's use of obscenities and jail or street jargon when talking to Hill was not so prejudicial as to provide a reasonable probability of a more favorable[*30] result if the tape had not been played. There is no possibility that introduction of the profanities and slang from the taped conversations could have changed the outcome of the trial.

Jury Instructions: Definition of Robbery

The jury was instructed on the elements of robbery in the language of CALJIC No. 9.40, stating that the prosecutor had to prove the taking of property against the will of the victim was "accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, . . ." The court also instructed on first degree felony murder pursuant to CALJIC No. 8.21, that "the unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime." The jury was further instructed with CALJIC No. 3.31, regarding the concurrence of act and specific intent.

Defendant argues that the standard jury instructions did not properly explain to the jury that it had to find that[*31] defendant had the intent to commit robbery immediately prior to or during the infliction of the fatal wounds. Precise timing was important to the defense. Defense counsel argued that although defendant admitted that he armed himself and went to the scene of the shooting for the express purpose of robbing the victim, he acted solely out of

rage when he shot Andrades because the victim threw a bottle at him. In other words, even though defendant may have had the intent to rob before and after the shooting, the shooting itself was motivated only by rage at being assaulted with the bottle. n8

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n8 Counsel argued that the burned wallet came from some other robbery and that Andrades was never actually robbed.

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According to defendant, the jury should have been instructed that the application of force component of robbery, and not just the taking component, had to be motivated by an intent to steal. He contends that the vagueness of the robbery and felony murder instructions was further confused by the court's instruction[*32] on after-acquired intent. We reject defendant's argument. The controlling case law has validated the use of the standard instructions given in this case. Moreover, the type of pinpoint instruction now suggested on appeal need not be given sua sponte in a robbery/murder case. (See People v. Valdez (2004) 32 Cal.4th 73, 111 (Valdez).)

In People v. Hughes (2002) 27 Cal.4th 287 (Hughes), the defendant was convicted of first degree murder, robbery, burglary and sodomy. (Id. at p. 315.) The defendant argued that the robbery instruction failed to advise that the intent to steal must arise before or during the commission of the act of force. (Id. at p. 358.) The court rejected the argument, stating that the felony murder instruction adequately covered the issue of the time of formation of intent to steal. (Id. at pp. 358-359.) The defendant in Hughes also argued that the jury could have found that the killing was committed during the commission of a robbery even if it believed that the intent to steal did not arise until after the killing. The Supreme Court responded: "We are not persuaded by[*33] defendant's speculation. [P] As both parties acknowledge, the jury also was instructed pursuant to CALJIC No. 3.31, regarding the concurrence of act and specific intent. That instruction required the jury to find 'a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator.' Reading CALJIC Nos. 8.21 and 9.40 together with No. 3.31, we believe that a reasonable juror would understand that defendant had to possess the specific intent to steal prior to or during his application of the force required for the commission of the offense of robbery." (Hughes, supra, 27 Cal.4th at pp. 359-360, fn. omitted; see also Valdez, supra, 32 Cal.4th at pp. 111-112.)

These proper instructions, as given in defendant's case, were reinforced by defense counsel's repeated argument that defendant could not be found guilty of felony murder because he did not form an intent to steal until after the murder. Counsel argued that defendant did not shoot Andrades for the purpose of robbing him as evidenced by the fact that the victim's pockets were not turned out [*34]and his cash was not taken. He argued repeatedly that the jury must find that defendant killed Andrades not for the purpose of robbing him. n9

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n9 The jury was also instructed on premeditated first degree murder.

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The after-acquired intent instruction, which defendant argues further confused the jury, pertained to the taking element of robbery and explained that if intent did not exist until after the property was taken, there was no robbery. n10 (CALJIC No. 9.40.2.) This instruction had no impact on the force element of robbery, which was correctly defined by the combination of CALJIC Nos. 8.21 and 3.31 defining felony murder as occurring during the commission of a robbery when the perpetrator had the specific intent to commit robbery and explaining the need for a joint operation of act and intent.

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n10 CALJIC No. 9.40.2 stated: "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person . . . the crime of robbery has not been committed."

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[*35] Defendant also argues that the jury's rejection of the special circumstance of murder committed to carry out or facilitate the commission of a robbery shows that the jury harbored doubt as to whether the shooting was committed during the commission of the robbery. We note that defense counsel carefully explained to the jury that even if it believed that the killing occurred during the commission of a robbery, it could still reject the special circumstance because the robbery was an afterthought. Counsel explained to the jury that the special circumstance required a finding that murder was committed in order to advance the commission of the robbery, while felony murder just needs only a finding of a death during the commission or attempted commission of a robbery. Counsel repeated, "there is no evidence . . . to find the special circumstances . . . whatever you find as to the homicide." The jury's rejection of the special circumstance does not shed light on its understanding of the felony murder theory.

The trial court did not err by giving these instructions. The jury was properly instructed with the regular CALJIC instructions, which have been approved by our Supreme Court.

[*36] Instruction with CALJIC No. 2.11.5

CALJIC No. 2.11.5 tells the jury that there was evidence that others were

involved in the crime, but "do not speculate or guess as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial." n11 (CALJIC No. 2.11.5 (Jan. 2004).) Defendant argues that giving the 2004 revised version of CALJIC No. 2.11.5 regarding unjoined perpetrators improperly chilled the jury's consideration of witness bias. He claims that the instruction prevented the jurors from assessing the credibility of Thomas, who obviously faced potential prosecution as an aider and abettor. He contends that this is the same harm discussed in People v. Hernandez (2003) 30 Cal.4th 835, 875 (Hernandez).

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n11 The use note correctly states that this instruction should not be used if the other person is a witness. (Use note to CALJIC No. 2.11.5.)

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[*37] When Hernandez was decided, CALJIC No. 2.11.5 stated: " 'There has been evidence in this case indicating that a person other than defendant was or may have also been involved in the criminal activity [in] which the defendant is alleged to have been involved. [P] There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration to why the other person is not being prosecuted in this trial, whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved that the defendant was involved in such criminal activity.' " (Hernandez, supra, 30 Cal.4th at p. 875.)

As currently promulgated, the instruction no longer tells the jury not to discuss or consider why the other person is not on trial, but only not to guess or speculate on that issue. It does not tell the jury to ignore other instructions on witness credibility. Defense counsel reminded the jury to view the accomplice testimony with caution, going so far as to argue: "They lie a lot" and "look at what their motivations are for saying what they say. . . . Lawrence Thomas is a robber . . . robber and[*38] rapper."

Defendant's jury was also instructed to consider whether Thomas, Hill, and others were accomplices and to view incriminating accomplice testimony with caution. As the Supreme Court observed in People v. Lawley (2002) 27 Cal.4th 102, 162: " '. . . "When [CALJIC No. 2.11.5] is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses. [Citation.]" ' " (See also People v. Brown (2003) 31 Cal.4th 518, 561 [no reasonable likelihood the jury understood CALJIC No. 2.11.5 to preclude consideration of grant of immunity to accomplice witness].) The Lawley/Brown analysis applies here. Giving the 2004 revised version of CALJIC No. 2.11.5 did not prejudice defendant.

Sua Sponte Obligation to Instruct

Defendant[*39] contends that the trial court had a duty to instruct that evidence of defendant's preoffense statement should be viewed with caution. (See CALJIC No. 2.71.7.) n12 He concedes that the court did instruct with CALJIC No. 2.70, regarding the definition of a confession or admission, ending with the admonition: "Evidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution."

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n12 CALJIC No. 2.71.7 provides: "Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed. [P] It is for you to decide whether the statement was made by [a] [the] defendant. [P] Evidence of an oral statement ought to be viewed with caution."

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Defendant argues that failure to give CALJIC No. 2.71.7 as it pertained to what he characterizes[*40] as Thomas' critical testimony that defendant said, "Break yourself" as he approached the victim was prejudicial error because defendant, after admitting the statement in his confession, denied it at trial. n13 But the jury was also instructed to view Thomas' testimony with caution if it determined he was an accomplice and to view defendant's admissions with caution.

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n13 Sergeant Politzer testified that "break yourself" means "give up your money." Defendant testified that he volunteered that phrase to the police, but he never said it, and was only trying to take the blame for Thomas.

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Our Supreme Court has clearly stated that CALJIC No. 2.70 is a broad instruction that "encompassed evidence of preoffense statements and was adequate in this case." (People v. Lang (1989) 49 Cal.3d 991, 1021, 264 Cal. Rptr. 386.) n14 The same is true in defendant's case. The instructions given, especially CALJIC No. 2.70, adequately advised the jury to view all of defendant's[*41] admissions with caution. Defendant was not prejudiced by the absence of CALJIC No. 2.71.7.

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n14 At the time Lang was decided, CALJIC No. 2.70 was numbered 2.71.

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Instruction with CALJIC No. 2.21.2

Defendant objects to the court's instruction that: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." n15 Defendant argues giving the instruction constitutes federal constitutional error because it lowers the prosecutor's burden of proof by allowing the jury to apply a probability standard to dispositive prosecution and defense testimony.

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n15 We note that defense counsel made a blanket objection to all instructions that he had not requested. Blanket objections often fail to preserve specific issues. (People v Valdez (1997) 58 Cal.App.4th 494, 505.) Even if defense counsel properly preserved objections to the jury instructions, we find no prejudicial error.

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[*42] The same argument as applied to a defendant's testimony has been rejected by our Supreme Court. "Because the instruction could be applied to the testimony of defendant, he contends it erroneously shifted the burden of proof by allowing the jury to reject his entire testimony unless they believed from all the evidence that his testimony was favored by 'the probability of truth.' He claims the instruction thereby increased his burden from that of raising a reasonable doubt of the sufficiency of the prosecution's evidence to one of affirmatively proving his defenses." (People v. Beardslee (1991) 53 Cal.3d 68, 94, 279 Cal. Rptr. 276.) "The qualification attacked by defendant as shifting the burden of proof ('unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars') is merely a statement of the obvious-that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it." (Id. at p. 95.) n16

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n16 We note that federal courts have also rejected challenges to CALJIC No. 2.21.2. (Turner v. Calderon (9th Cir. 2002) 281 F.3d 851, 865-866 [declining certificate of appealability on this issue stating that no reasonable jurist could conclude the instruction violated due process].)

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[*43] Discussing the argument as applied to prosecution witnesses, the court in People v. Maury (2003) 30 Cal.4th 342 commented as follows. "Regarding CALJIC No. 2.21.2, defendant argues that it lowers the standard of proof for conviction by permitting the jury to assess the testimony of prosecution witnesses under a 'probability of truth' standard. We have rejected a similar claim that the instruction, as applied to the defendant's testimony, increases the burden of proof from raising a reasonable doubt to meeting a 'probability of truth.' [Citation.] '. . . [P] "Thus CALJIC No. 2.21 does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute." ' [Citation.] Although defendant here attacks the instruction as applied to prosecution witnesses, the same rationale applies. . . ." (Id. at pp. 428-429, fn. omitted.)

The instruction given did not improperly shift the burden of proof.

Reasonable Doubt Instruction

Defendant argues that the trial court should have modified CALJIC No. 2.90 to define specifically the term "abiding conviction" as requested[*44] by the defense. n17 Defendant concedes that this argument has been rejected by our Supreme Court in People v. Freeman (1994) 8 Cal.4th 450, 504 (Freeman), but states he is exhausting his state remedies by raising it. Our Supreme Court approved of the deletion of the old "moral certainty" language from the instruction, but strongly warned: "We also continue to caution against trial court experimentation; individual courts should not otherwise modify the standard instruction." (Freeman, supra, at p. 504.) (See also People v. Aguilar(1997) 58 Cal.App.4th 1196, 1208 [rejecting similar challenge to reasonable doubt instruction].)

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n17 The relevant portion of the instruction states that reasonable doubt is not: "a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (CALJIC No. 2.90.) Trial courts have been warned against trying to modify this instruction. (See, e.g., Freeman, supra, 8 Cal.4th at pp. 503-504.)

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[*45] The instruction has been approved by our Supreme Court and the trial court's refusal to modify it further was not error.

Cumulative Effect of Errors

Defendant argues that the cumulative effect of errors deprived him of due process. The only arguable errors in this case were minor instructional errors that did not result in prejudice. The test is whether a defendant received a fair trial, not a perfect one, and the trial in this case was fair. (People v. Mincey (1992) 2 Cal.4th 408, 454.)

BlakelyError Imposing Upper and Consecutive Terms

Defendant filed his opening brief before our Supreme Court decided People v. Black (2005) 35 Cal.4th 1238 (Black). He argued that the trial court violated the rule of Blakely, supra, 542 U.S. 296 by imposing the upper term for use of a firearm and imposing a consecutive sentence for the other two robberies based on facts not admitted by defendant or found true by the jury.

The court in Black concluded: "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate[*46] a defendant's Sixth Amendment right to a jury trial." (Black, supra, 35 Cal.4th at p. 1244.) Defendant's argument is foreclosed by Black.

Erroneous Restitution Fines

The trial court imposed a $ 5,000 statutory restitution fine, a $ 5,000 parole revocation fine and a $ 14,772.97 victim restitution fine. Defendant argues that at the time of his offenses, victim restitution could only be ordered in lieu of the general restitution fine. Courts were required to offset the victim restitution against the maximum $ 10,000 restitution fine. The Attorney General concedes that imposition of these fines was error.

The murder and two robberies occurred in June of 1995. Up until August of 1995, section 1202.4, subdivision (f) provided for victim restitution in lieu of part or all of the restitution fine. The August 1995 amendment removed the "in lieu" language and allowed full restitution in addition to the fine. Section 1202.45 added the provision regarding the parole revocation fine. (Former Pen. Code, @@ 1202.4, 1202.45; Stats. 1995, ch. 313, @@ 5, 6, pp. 1755-1758.)

he ex post facto clause of the California Constitution prohibits legislation that makes the[*47] punishment for a crime more burdensome. (People v. Saelee (1995) 35 Cal.App.4th 27, 30.) A restitution fine is punishment, and is subject to the ex post facto prohibition. (Ibid.) Similarly, a parole revocation fine is punishment. (People v. Callejas (2000) 85 Cal.App.4th 667, 678.) Victim restitution also has been characterized as punishment in some cases, and therefore subject to ex post facto restrictions. (People v. Zito (1992) 8 Cal.App.4th 736, 741 [decided prior to amendments]; People v. Young (1995) 38 Cal.App.4th 560, 568-569.) By deleting the "in lieu" language, the August 1995 amendment to section 1202.4 increased the potential amount that may be imposed and made the restitution provision more burdensome.

he court was required to offset the amount of the victim restitution order against the restitution fine. Because the amount of victim restitution exceeded the $ 10,000 maximum statutory fine, no restitution fine may be imposed.

efendant's crime predated the amendment allowing imposition of a parole revocation fine. He cannot be subjected to the provisions of the later enacted

statute. (People v. Blackburn (1999) 72 Cal.App.4th 1520, 1534-1535.)[*48]

e will order correction of the abstract of judgment to strike both fines.

Omission of Presentence Credits

he informal minute order entered at the follow up sentencing hearing on September 13, 2004 reflected custody credit as 3,888 days of pretrial custody credit. The formal minute order reflects only 3,388 days, which appears to be a mathematical error, as both orders show a calculation of 3,381 actual credits plus 507 conduct credits, which is 3,888 days.

he Attorney General concedes the need to correct the abstract of judgment. Defendant is entitled to an abstract of judgment that correctly reflects his custody credits. (Cal. Rules of Court, rule 4.472.) As defendant notes, the discrepancy between the informal and formal minute orders reflecting the judgment appears to be the result of a mathematical error, which we shall order corrected. (People v. Mitchell(2001) 26 Cal.4th 181, 188.)

DISPOSITION

he matter is remanded to the trial court with directions to prepare a corrected abstract of judgment deleting the $ 5,000 restitution fine and the $ 5,000 parole revocation fine, and to enter the correct amount of presentence [*49]credit and transmit the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

archiano, P.J.

We concur:

Stein, J.

Swager, J.