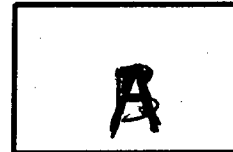


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- ☐ Grand Jury

Court of Appeal, Third Appellate District - No. C085652

S255544

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

BENJAMIN JUSTIN BROWNLEE, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

JUL 24 2019

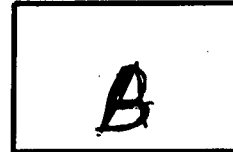
Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

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crime.*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN JUSTIN BROWNLEE,

Defendant and Appellant.

C085652

(Super. Ct. No. 16FE018278)

The body of Sharen Brandow, a 69-year-old homeless woman, was found on August 2, 2016. After confessing to her murder, defendant Benjamin Justin Brownlee was charged with murder and three special-circumstance allegations that the murder was committed during the commission of a robbery and forcible penetration of the anus and genitals with an unknown object. Defendant was further charged with two sex crimes and second degree robbery.

The jury found defendant guilty of first degree murder and found true the robbery special-circumstance allegation. The jury further found defendant guilty of second degree robbery. The jury, however, found defendant not guilty of the charged sex crimes and found the sex-crime-murder special-circumstance allegations not true.

Defendant raises four arguments on appeal: (1) there was insufficient evidence to support the robbery conviction and, consequently, “neither the robbery conviction, the robbery special circumstance, or robbery-felony murder can stand”; (2) the trial court committed prejudicial instructional error requiring reversal of the robbery special circumstance finding; (3) the trial court prejudicially erred in admitting evidence of a prior alleged sexual offense under Evidence Code¹ sections 1108 and 352; and (4) the prosecution misled the jury about the law during closing argument. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I

Prosecution Case

A

The Crimes

Around 5:00 p.m. on August 1, 2016, J. R., a Good Samaritan, bought Brandow food and a drink and gave her the last of the cash in his pocket, including “[s]ome fives, tens and some ones.” Brandow had set up “camp” close to the sidewalk near the freeway overpass at Broadway and Alhambra Boulevard in Sacramento. Brandow said she was going to sleep under the bridge where the street light hit her because she felt safe there. She had been there for a couple of weeks. When J. R. returned to Brandow’s location the next morning around 7:30 or 8:00, he saw her up on the hill, face down and half clothed with her pants around her ankles. He called a news station and 911.

¹ All further section references are to the Evidence Code unless otherwise specified.

The autopsy revealed she had suffered several injuries, including a fractured jaw and multiple rib fractures, abrasions to various parts of her body, and injuries to her vagina and rectum caused by force from an unknown blunt object. The injuries occurred at or near the same time and within less than 24 hours before her death. Brandow died of asphyxiation due to strangulation with a potential "component of smothering and/or chest compression."

A one-dollar bill was found among the personal items on Brandow's body. No useful DNA evidence was obtained from the vaginal, rectal, or oral swabs taken from Brandow or her clothing.

B

The Confession

L. M. met defendant at work and allowed him to stay at her house for approximately three weeks in August 2016. When she asked him to make new living arrangements, he was concerned about finding a place to stay. He mentioned "he did something bad" -- he killed someone. He explained it happened by the freeway off Broadway a month or two before and the victim was an older woman. While he had remorse, defendant said "when he gets to that point, that place, that dark place . . . he can't control himself." He said he was willing to speak with the police if L. M. supported him.

L. M. drove defendant to a police station, but pulled over on the way when she saw Sacramento Police Sergeant Dan Farnsworth on the side of the road. Defendant was arrested after he told Sergeant Farnsworth he had murdered a woman under the bridge on Alhambra Boulevard a couple of months prior. While defendant was seated in the patrol car, L. M. tried to comfort him. Defendant said it was best for him "to sit in jail" because

he could not “function . . . out [t]here on the streets.”² He believed it was “gonna get worse” for him because “when you go to jail, you never come out right. You come out worse.”

Sacramento Detective Edward Macauley interviewed defendant on September 18, 2016.³ During the interview, defendant said he believed he killed a person under the overpass on Broadway a couple of months prior. The attack occurred before the last light rail train departed from the Broadway station to 16th Street that evening. He “choked the lady out” by the sidewalk where there was a dirt path underneath the overpass. He “choked her out even when she was already not breathing [he] continued to choke her out.”

Defendant said that, due to posttraumatic stress disorder and having been “physically abused by people that’s supposed to be the one that take care of you,” he has “blackout moments” and loses control when he is overwhelmed; during those moments, he gets very violent and can hurt people who have nothing to do with his stress. Brandow’s attack was like “when [he] went to jail the first time” and the victim had to get facial reconstructive surgery. He said: “Now it’s [like] it came again but it took years for it to show up.”

Defendant explained he had previously been convicted of assault in the first degree in New York when he was 15 years old. During that “episode,” he punched and choked a lady and tried to rob her. Just prior to the attack, his grandmother had hit him on the back with a skillet and did not want him to go outside. Instead of “swinging off on [his] grandmother,” he went to an apartment building and tried to rob a lady. “And next thing you know, [he] just got violent” and punched and choked her.

² A video of the conversation was played for the jury.

³ A video of the interview was played for the jury.

The triggering events for Brandow's attack were his homelessness, medical problems, and an argument with his ex-girlfriend, T. W. He saw Brandow while he was walking down the street following the argument with T. W, and "just flipped," "just snapped." Defendant had seen Brandow before because she was always in that area.

He left Brandow on the blanket or sheet where she was lying and took the light rail train to 16th Street, where he slept in an elevator. He did not move her body, denied taking anything from her, and said he did not "know if she had been robbed." He also denied inflicting any other injuries on her and said he was willing to submit a DNA sample.

Defendant decided to confess because he felt an episode "coming on" and did not want another random person getting hurt.

C

Other Evidence

1

Defendant Had A Hand Injury

Defendant went to a hospital emergency room on August 3, 2016, the day after Brandow's body was found and complained of pain in his right hand. He had abrasions over his knuckles and generalized tenderness; the injury occurred within a couple of days prior to the examination.

2

Defendant's Backpack Contained Some Of Brandow's Documents

T. W. gave the police a black backpack she said belonged to defendant. She retrieved the backpack from the downstairs patio of her brother's house where defendant had stayed at some point. The backpack contained, among other things, a number of defendant's documents and his prescription bottle, and also contained Brandow's senior citizen identification, social security card, Medicare card, and documents discussing her

supplemental income from the Social Security Administration. None of these documents, however, had any latent fingerprints on them.

3

Evidence Regarding The 2005 New York Alleged Sexual Offense

The trial court allowed the prosecution to introduce testimony regarding a video of the sexual offense defendant allegedly committed in New York in 2005 when he was convicted of assault. The specifics of the trial court's admissibility ruling are discussed in greater detail in the pertinent Discussion section below.

E. B. testified she was attacked in 2005 while she was working in a building's laundry room. She recalled a man with a cast asked her where the lobby was and later, when she left the laundry room, she was hit in the face multiple times. She tried to fight and kick back but could not recall much else because she lost consciousness. When she came to, E. B. noticed her pants were slightly lowered and there was a woman in the basement. E. B. suffered injuries to her eye, nose, and teeth, and needed plastic surgery as a result.

Detective Josh Ulan investigated the assault. Defendant was 15 years old at the time of the attack and E. B. was 44 years old. Defendant admitted to assaulting E. B. by hitting her in the face several times. Defendant said he was interrupted by another woman coming to the laundry room and ran away.

A five-minute video showing defendant's movements in the apartment building, his initial discussion with E. B., and the attack was played for the jury. The video presented still frames rather than fluid playback. The frames of the attack depicted the following sequence: E. B. on the ground on her right side with defendant standing over her in a fighting stance with his right hand extended; E. B. face down with defendant's right hand on her back and his left hand in her lower abdomen, groin area; defendant rolling E. B. onto her right side; E. B. on her back and defendant crouching over her with his right hand by her face; E. B. still on her back with both of defendant's hands at her

groin; defendant squatting over E. B.'s legs appearing to pull backwards while his hands are at her groin; E. B.'s right leg in the air with defendant's hands at her shoe; defendant grabbing E. B.'s left leg by her ankle above the shoe, her other shoe a few feet behind her; defendant pulling E. B.'s left leg back over her head with his right hand and grabbing the waist of her pants with his left hand, trying to pull them over her buttocks; defendant flipping E. B. onto her stomach, her pants pulled down to her thighs with her buttocks exposed; E. B. sitting up, blood pouring from her face onto the ground, with defendant not in the frame.

II

Defense Case

Defendant was the sole witness for the defense. He testified he did not kill Brandow. He confessed to her murder only because winter was coming and he knew he would have a bed, food, companionship, and medical care in jail. Defendant intended to lie about the murder to get through the winter and believed the evidence would then have proven him innocent. He told L. M. he committed murder because he did not believe the police would take a lesser crime seriously.

When L. M. told defendant he needed to find somewhere else to live, he felt down, agitated, and stressed. Defendant did not have anywhere to go and did not have any money to find a place to stay. He never had money because he would spend it on medications and, if he had any extra, he would drink alcohol and buy drugs. He acknowledged he told T. W. during a jail visit that he "got to fuckin' rob and steal" to survive and had no choice but to "do credit card swipes, fuckin' stealing people's wallets just to fuckin' eat, just to get a place so [he] can fucking take a shower and sleep in a hotel for a couple hours."

The details in defendant's confession purportedly came from his discussions with a man named "CC," who was introduced to him by T. W.'s sister.⁴ CC told defendant he choked a woman and beat her in the head with a metal object. CC said the incident occurred on Broadway by the overpass. Defendant was able to give details about the area, Brandow, and her clothing and luggage because he had seen her there in the past.

Defendant tried to explain the other evidence introduced by the prosecution as well. He said the injury to his right hand occurred during a fistfight with individuals from a street gang. He further testified he did not recognize the black backpack T. W. gave to police and never touched any of Brandow's documents. He never left anything at T. W.'s brother's house either.

Regarding the New York offense, defendant testified his intent that day was "[j]ust to rob people." He went to the laundry because he knew the machines took quarters and there was a machine that turned dollars into quarters. He saw E. B. and decided to rob her because one of her pockets was "bulging out." He usually did not demand property from people; "[he] usually just tr[ie]d to knock the person out and then take their money and run off." He hit E. B. with his cast and was trying to get into her pockets when she started kicking. Her pants came off because his hands were trying to get into the little pockets on her pants to get the money out. Defendant was unable to get the money because he was interrupted and ran off.

Defendant took a bus to Sacramento the same day he was released from prison in New York and arrived in Sacramento on October 2, 2015.

⁴ T. W. testified her sister knew a man named "CC," but T. W. did not know him and he was not her brother's friend, nor had he been to her brother's house.

DISCUSSION

I

The Trial Court Did Not Abuse Its Discretion Under Sections 1108 And 352

Defendant argues his convictions should be reversed based on the improper admission of the New York alleged sexual offense evidence because (1) the offense was not a “sexual offense” within the meaning of section 1108; and (2) the admission of the evidence was an abuse of discretion under section 352. We conclude the trial court did not err.

A

Sections 1108 And 352

Section 1101, subdivision (a), generally renders inadmissible “evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion.” Enacted in 1995, section 1108 “was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant’s other sex offenses in evaluating the victim’s and the defendant’s credibility.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) The purpose of section 1108 is to “facilitat[e] the adjudication of sex crimes -- which typically occur outside the presence of potential witnesses and often leave no corroborating evidence -- the case for admission of propensity evidence ‘is especially compelling’ where, as here, ‘the sexual assault victim was killed and cannot testify.’ ” (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 824.)

Section 1108, subdivision (a) provides: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” Thus, under section 1108, the trial

court “may no longer deem ‘propensity’ evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352.” (*People v. Falsetta, supra*, 21 Cal.4th at pp. 916-917.)

The trial court’s ruling under section 1108 is subject to review for abuse of discretion. (*People v. Loy* (2011) 52 Cal.4th 46, 61.)

B

The Admissibility Proceedings

Before trial, the prosecution moved to admit evidence of the 2005 alleged sexual offense in New York; the prosecutor said defendant had entered a plea of guilty to robbery in that case. Defendant asked the judge to review the video of the incident, arguing it was not a sexual offense and was not admissible under section 1108. “Even if there were some degree of sexual conduct suggested by the evidence,” however, defendant argued it was not relevant to his state of mind because the New York offense was committed when he was a juvenile. Defendant also added he believed the offense was remote in time because it occurred approximately 11 years prior.

After reviewing the video, the trial judge said: “But the way I’m -- the way I viewed the video is that she’s on her back and I can’t tell if she’s conscious or not at that point, there’s no way to tell because there’s no audio, but I can see him holding her foot and then her shoe’s off in the next frame and then he pulled down her pants. It doesn’t look like his hands are in any position looking for money. He’s holding her feet up so he can get her pants off is what it appears.” The judge added: “I would note that the pants were pulled down well beyond what would be possibly accidental to search them. They’re pulled down mid thigh, not just a few inches. And he did turn her over after he pulled down her pants as if to mount her.”

The judge found the evidence persuasive that defendant intended to commit a sexual assault. He dispensed with defendant’s remoteness and state of mind arguments as well. While the judge agreed the offense was remote in terms of defendant’s age, he

noted defendant had not been out of custody for very long when the attack on Brandow occurred. He also found the fact pattern in defendant's case suggested he was not a very different person as a juvenile than when he was charged as an adult.

Defendant later made another objection to the evidence under section 352, arguing the testimony and video would result in an undue consumption of time and would place unnecessary attention on the prior alleged sexual offense, confusing the jury. He further argued "[t]he nature of the evidence [wa]s so inherently inflammatory and it would take so long compared to the other evidence in the case" that "it would become extremely prejudicial." The trial judge asked the prosecution whether it had considered alternatives to playing the entire video. The prosecution responded the video could be edited to about two minutes and the victim's testimony was estimated to take approximately 10 minutes.

Addressing the prosecution, the trial judge said: "Let me make this clear. I would agree that it is highly probative. The prejudicial value is far outweighed by the probative value in this case; however, having said that, what I don't want to do is consume an undue amount of time when it could otherwise be condensed. So I am not asking you to redact anything that is probative. What I do want to do is redact anything that's not probative."

Turning to defendant, the trial judge said: "With that, your objection is noted . . . and overruled in large degree and granted in some degree in that the Court is admonishing the prosecutor to redact anything that is unnecessary so as to avoid undue time and focus on the prior when the evidentiary value of that is slight or nil."

During trial, the parties attempted to reach a stipulation as to Detective Ulan's proposed testimony but failed to do so. Defendant argued his testimony in addition to the victim's testimony and the video depicting the attack would tip "the scales of the 352 test out of balance" and likely result in an unfair trial. The prosecution disagreed -- arguing the total amount of time to be spent on the prior alleged offense was minimal and would not prejudice defendant. The trial judge agreed with the prosecution.

The trial judge said: “As I weigh the elements of 352 and I consider the appropriate value of this, I don’t believe that it paints the defendant in an unfair light or creates an inherent unfairness. The consumption of time is not beyond the pale. It is consistent with the level of weight that the jury is going to put on that evidence to show his intent and predisposition in this case, which is allowable for that purpose. [¶] So, I don’t find that it’s an undue consumption of time.”

C

The Trial Court Did Not Err

Section 1108, subdivision (d)(1)(B) defines “sexual offense” to include “[a]ny conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem.” Penal Code section 220, subdivision (a)(1), prohibits any person from assaulting another with the intent to commit rape or sodomy. The trial court’s summary of the video accurately depicted the scene of the New York incident, and we agree it was persuasive to show defendant intended to commit rape or sodomy. We, therefore, conclude the prior alleged conduct was appropriately labeled a sexual offense for purposes of admissibility under section 1108. We also conclude the trial court did not abuse its discretion under section 352.

Defendant challenges the trial court’s section 352 ruling on three grounds:

(1) lack of probative value; (2) remoteness; and (3) undue prejudice. First, defendant argues the alleged conduct “lacked probative value” because it was “entirely speculative whether the prior offense had a sexual motive.” As we explained *ante*, however, the trial court did not abuse its discretion in finding the alleged conduct qualified as a sexual offense. The “sexual motive” was apparent from the video and the prior did not introduce a sexual motive where one was not otherwise obvious to the jury.

Second, defendant argues the alleged conduct was too remote because it had occurred more than 10 years prior and when defendant was a juvenile. “ ‘No specific time limits have been established for determining when an uncharged offense is so

remote as to be inadmissible.’ ” (*People v. Robertson* (2012) 208 Cal.App.4th 965, 992.) “Numerous cases have upheld admission pursuant to Evidence Code section 1108 of prior sexual crimes that occurred decades before the current offenses.” (*Ibid.*; see *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [“20 years is not too remote” under sections 1108 and 352].)

The 11-year gap between the prior alleged sexual offense and Brandow’s murder did not significantly reduce the probative value of the prior conduct evidence. As the trial court explained, defendant had been incarcerated the majority of the 11 years and had been released from prison for less than a year when Brandow’s murder occurred. Further, while defendant’s remoteness argument relied on general concepts of differences between cognition in juveniles and adults, he presented no evidence to show that *he* was a different person. Indeed, in his confession, defendant analogized Brandow’s attack to the New York attack in which E. B. suffered significant injuries. He has pointed us to no evidence from which we can conclude the trial court abused its discretion in finding that the fact pattern in defendant’s case suggested he was not a very different person as a juvenile than when he was charged as an adult.

Third, the uncharged sexual offense evidence introduced at trial was not unduly prejudicial. When determining the prejudicial impact of other sexual offenses admitted under section 1108, the trial court may consider the “nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.)

The record shows the trial court appropriately limited the scope of the evidence the prosecution proposed to introduce. The testimony and video evidence concerning the incident consumed a relatively small portion of the trial. In fact, E. B.'s testimony took approximately eight minutes and Detective Ulan's testimony took approximately 18 minutes. The five-minute video was played during Detective Ulan's testimony. None of the testimony was duplicative and the court appropriately sustained defendant's objection to Detective Ulan's narration of the video and instructed the jury the "video speaks for itself." The evidence from the New York attack was also "less inflammatory than the evidence about the" Brandow murder (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1099), which "limits the evidence's prejudicial effect" (*People v. Daveggio and Michaud, supra*, 4 Cal.5th at p. 826).

Nothing in the record suggests the jury was inclined to punish defendant for committing the prior alleged sexual offense instead of, or in addition to, the charged offense, or that the jury was otherwise confused by that evidence. Indeed, the jury found defendant not guilty of the charged sex crimes and found the sex-crime-murder special-circumstance allegations not true.

Defendant argues the evidence was prejudicial because defendant "testified that his intent in the prior was to commit robbery in order to defend himself from the allegation of a sexual motive." But, as the People appropriately note, "[h]ow [defendant] chose to defend against the uncharged offense was not known to the judge at the time he made his ruling and, thus, does not establish an abuse of discretion."

Finding no merit in any of defendant's arguments, we conclude the trial court did not abuse its discretion in ruling the prior alleged sexual offense admissible under section 1108.

II

The Evidence Was Sufficient To Support The Robbery Conviction

Defendant argues there was insufficient evidence to support the robbery conviction because there was no evidence from which the jury could infer defendant had the intent to rob Brandow before or during the act of force. It follows, he argues, that because the predicate robbery conviction must be reversed, the robbery special-circumstance finding and the “robbery-felony murder” conviction⁵ must be reversed as well. We find the evidence sufficient to support the robbery conviction.

“In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we ‘examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] ‘[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

Defendant posits *Marshall* supports his argument. (*People v. Marshall* (1997) 15 Cal.4th 1.) In *Marshall*, the defendant was charged with, among other things, murder and robbery. (*Id.* at p. 11.) The only property the defendant took from the victim was a letter from a grocery store to the victim responding to her request for a check-cashing card.

⁵ The jury was instructed with two theories for first degree murder -- felony murder and premeditated and deliberate murder.

(*Id.* at p. 34.) Our Supreme Court found no evidence the defendant exerted force against the victim or killed her to obtain the letter. (*Ibid.*)

Our Supreme Court explained that robbery is “the taking of personal property of some value, however slight, from a person or the person’s immediate presence by means of force or fear, with the intent to permanently deprive the person of the property. [Citations.] To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. [Citation.] ‘[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft.’ [Citation.] The wrongful intent and the act of force or fear ‘must concur in the sense that the act must be motivated by the intent.’ ” (*People v. Marshall, supra*, 15 Cal.4th at p. 34.)

The defendant’s possession of the victim’s letter did not constitute evidence that “ ‘reasonably inspires confidence’ ” that the defendant killed her for the purpose of obtaining the letter because it was, “in the prosecutor’s words, an ‘insignificant piece of paper’ ” and the prosecution offered no evidence tending to show the information was “so valuable to defendant that he would be willing to commit murder to obtain it.” (*People v. Marshall, supra*, 15 Cal.4th at p. 35.) Therefore, the court concluded there was insufficient evidence to support the robbery conviction. (*Ibid.*)

Defendant argues Brandow’s documents found in the black backpack were items of “no inherent value” like the letter in *Marshall* and there was no evidence or argument from which the jury could infer an intent to exert force for the purpose of obtaining the documents. We disagree with defendant that Brandow’s documents had “no inherent value.” Personal identifying information, financial information, and medical information have value and are often stolen for criminal purposes; indeed, that is why society seeks to protect personal information from prying eyes and hands. We also read the record quite differently. Brandow’s documents were not the only evidence from which the jury could

infer defendant's intent to steal arose before or during the commission of the act of force that resulted in her death.

The record shows the jury could have inferred defendant's requisite intent from several other additional facts taken together, such as: (1) his own testimony that once he forms the intent to rob someone, he uses violence as a means to subdue the person to carry out the robbery -- and Brandow suffered many violent injuries, including a fractured jaw and multiple rib fractures; (2) defendant's analogy to Detective Macauley regarding the Brandow attack and the New York offense and defendant's subsequent testimony that the New York attack arose from his intent to rob E. B.; (3) defendant's statements to T. W. during a jail visit that he had to rob and steal to survive on the streets; (4) defendant's testimony that he did not have any money to find a place to stay; (5) the temporal proximity between defendant's stress about needing money to find a new place to stay and the attack on Brandow; and (6) there were only a few hours between Brandow receiving "some fives, tens and some ones" (after she set up "camp" after 5:00 p.m.) and when defendant confessed to choking her (before the last light rail train ran from Broadway to 16th Street that evening) but only a one-dollar bill was found on Brandow's person the next morning.

Viewing the evidence in the light most favorable to the verdict, we conclude a reasonable trier of fact could find -- and did -- that the essential elements of robbery had been met beyond a reasonable doubt. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1260-1261 ["The requisite intent for each crime, and supporting each of these special circumstances, readily may be inferred from the evidence"].)

III

There Was No Instructional Error

A person found guilty of first degree murder may be sentenced to death or to prison for life without the possibility of parole if, among other things, the jury finds true the special circumstance that the murder was committed while the defendant was engaged

in the commission of a robbery. (Pen. Code, § 190.2, subd. (a)(17)(A).) The trial court instructed the jury that the robbery-murder special circumstance was true if defendant committed the murder in the course of a robbery such that (1) defendant committed robbery, (2) defendant intended to commit robbery, and (3) while committing the robbery, defendant did an act that caused the death of another. The court also instructed the jury that defendant must have intended to commit the robbery before or at the time of the act causing the death.

Defendant argues the trial court failed to “instruct *sua sponte* that, in order to find the [robbery] special circumstance true, the jury [had to] find that the defendant intended to commit the felony independent of the killing, and that if the felony [was] incidental to an intended murder, then the special circumstance was not true.” He relies on our Supreme Court’s decision in *Green* and the bracketed optional language in CALCRIM No. 730.⁶ We disagree.

In *Green*, the defendant instructed the victim to remove her clothing before shooting her. (*People v. Green* (1980) 27 Cal.3d 1, 15-16.) After the shooting, the defendant took the victim’s rings and purse, and removed cash from her purse. (*Id.* at p. 16.) The victim’s belongings were later burned or disposed of to avoid identification. (*Id.* at pp. 17, 61-62.) Our Supreme Court concluded that whether the items were taken before or after the victim was killed was of little relevance when the defendant’s primary objective was to remove items from the victim to prevent her subsequent identification. (*Id.* at p. 62.) Under those circumstances, because “defendant’s intent [wa]s not to steal

⁶ The pertinent bracketed language would have read: “In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit [robbery] independent of the killing. If you find that the defendant only intended to commit murder and the commission of [robbery] was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.” (CALCRIM No. 730.)

but to kill and the robbery [wa]s merely incidental to the murder,” there was insufficient evidence as a matter of law to support the jury’s finding of the truth of the robbery special circumstance. (*Id.* at pp. 61-62.)

Our Supreme Court subsequently clarified the impact of *Green* with regard to the special-circumstance instruction. In *Monterroso*, the court said: “We subsequently held, however, that inasmuch as *Green* did not announce a new element of the special circumstance allegation but had merely clarified the scope of an existing element, a trial court had no sua sponte duty to provide a clarifying instruction in the absence of evidence to support a finding that the felony was in fact merely incidental to the murder. [Citation.] Thus, unless the evidence supports an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specified felony, there is no duty to include” the bracketed language. (*People v. Monterroso* (2004) 34 Cal.4th 743, 767.)

In summary, the special circumstance applies only if the robbery was the primary crime rather than incidental to the murder; a robbery is incidental when the “sole object” of the robbery “is to facilitate or conceal” the murder. (*People v. Green, supra*, 27 Cal.3d at p. 61.) “That is, if the murder furthers the robbery or attempted robbery, the special circumstance is satisfied. But, if the robbery or attempted robbery simply furthers or facilitates the murder, it is not, because the robbery’s ‘sole object is to facilitate or conceal the primary crime.’ ” (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 490-491.) A trial court is required to instruct the jury on the requirement that the robbery not be incidental, however, only “ ‘where the evidence suggests’ ” -- that is, when “the evidence supports an inference” -- that the robbery was “ ‘merely incidental to achieving the murder.’ ” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 296-297; see *People v. Monterroso, supra*, 34 Cal.4th at p. 767.)

It is true, as defendant contends, that the record contains evidence defendant “had engaged in violent behavior as a misplaced reaction to other stressors in his life.” As

discussed below, such evidence alone does not, however, suggest that the robbery was merely incidental to achieving the murder. In *Navarette*, the defendant argued the trial court erred in failing to instruct the jury with “incidental” language similar to that defendant asserts was missing in the CALCRIM No. 730 instruction. (*People v. Navarette* (2003) 30 Cal.4th 458, 505.) Our Supreme Court explained: “[T]he record includes no significant evidence of any motive for the murders other than burglary and/or robbery. Defendant asserts, based on ‘the multitude of stab wounds,’ that the killings might have been an explosive ‘unleashing of some type of unconscious hatred for women,’ having nothing to do with robbery or burglary. But the record does not include any evidence (other than the brutality of the crimes) that defendant had an unconscious hatred for women, and defendant did nothing to develop this theory of the case at trial, making only a passing speculative reference to this theory at closing argument. Defendant’s primary defense at trial was that he was too intoxicated to act with intent. Under the circumstances of the case as presented to the jury, [the incidental language] was not required.” (*Ibid.*)

The only evidence⁷ regarding defendant’s “misplaced reaction to other stressors in his life” was his confession and his statement to L. M. Defendant did not develop “this theory of the case at trial.” (*People v. Navarette, supra*, 30 Cal.4th at p. 505.) In fact, defendant vehemently refuted it. During his trial testimony, defendant said the statements made in his confession and to L. M. were untrue. He denied having attacked Brandow and said he attacked E. B. with the intent to rob her (not as a misplaced reaction to other stressors). As defendant’s counsel appropriately pointed out in closing argument: “The prosecution in arguing its opening statement talked about a

⁷ Defendant’s reliance on the prosecutor’s statements made during closing argument does not assist him; attorney arguments are not evidence. (§ 140; *People v. Kiney* (2007) 151 Cal.App.4th 807, 815 [“unsworn statements of counsel are not evidence”].)

psychological profile that was unsupported by the evidence. There was no psychiatrist, psychologist, licensed clinical social worker or any other mental health professional, no F.B.I. profiler, not vi-cap agent to claim that [defendant] suffers from this cyclical buildup of aggression, release, violence towards older women. There is no evidence to support that diagnosis.” “Under the circumstances of the case as presented to the jury, [the incidental language] was not required.” (*Navarette*, at p. 505.)

This is not a case in which there was evidence from which the jury could infer defendant took the property to forestall identification of the victim (*People v. Green*, *supra*, 27 Cal.3d at pp. 61-62), as a remembrance of the murder or sexual offense (*People v. Marshall*, *supra*, 15 Cal.4th at p. 41), or where the taking of the property was for the sole purpose of killing Brandow (*People v. Brooks* (2017) 3 Cal.5th 1, 118 [jury could have inferred kidnapping was for the sole purpose of killing the victim]). “For those who kill . . . we need not discern their various mental states in too fine a fashion; a ‘concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance.’ ” (*People v. Abeles* (2007) 41 Cal.4th 472, 511.) Here, there was substantial evidence, as discussed *ante*, that defendant had a concurrent intent to commit the robbery.

The trial court, therefore, was not required to include the bracketed language in the CALCRIM No. 730 instruction. Since it properly could have been omitted, defendant suffered no prejudice from any purported error in that portion of the instruction. (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 767.)

IV

There Was No Prejudicial Prosecutorial Misconduct

Defendant argues the prosecutor committed prosecutorial misconduct by misleading the jury about the law during closing argument when she misquoted a United States Supreme Court opinion as support for her argument. The People argue defendant forfeited the argument by failing to object to the prosecutor’s closing argument. The

People further argue no prosecutorial misconduct occurred because, while the prosecutor misinterpreted the United States Supreme Court opinion, “there is no indication that [the prosecutor] was intentionally trying to mislead the jurors.”

“The applicable federal and state standards regarding prosecutorial misconduct are well established. ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) “It is a fundamental principle that reversal for prosecutorial misconduct is not required unless the defendant can show that he has suffered prejudice.” (*People v. Uribe* (2011) 199 Cal.App.4th 836, 873.)

Defendant acknowledges “[i]t is admittedly unlikely that this error alone changes the outcome of the trial, but it may have a cumulative effect with the other [alleged] errors” addressed *ante*. In this vein, defendant makes no showing, nor does he attempt to show, he suffered prejudice from the alleged prosecutorial misconduct. We need not, therefore, consider whether prosecutorial misconduct occurred because, in the absence of a showing of prejudice, defendant’s request for reversal cannot be granted. There can be no “cumulative effect” with regard to the other alleged errors either because we have found no merit in defendant’s other arguments.

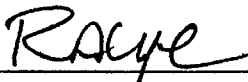
DISPOSITION

The judgment is affirmed.



Robie, J.

We concur:



Raye, P. J.



Renner, J.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

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