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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS PATRICK, Defendant and Appellant.	C056728 (Super. Ct. No. SF097472A)

Defendant Nicholas Patrick robbed James Fullard, Jr. and then shot and killed Fullard and Doretha Moore. Convicted of robbery and special circumstances murder, defendant appeals. He contends that: (1) he received ineffective assistance of counsel because his trial counsel did not make a hearsay objection; (2) a conversation that he had with his codefendant was improperly admitted; (3) the trial court allowed questions that invaded his attorney-client privilege; (4) he received ineffective assistance of counsel because his trial counsel had a conflict of interest; (5) the trial court improperly instructed the jury that his refusal to complete cross-

examination could be considered in assessing his credibility; (6) items from the pocket of his shorts were improperly admitted; (7) the trial court improperly denied his motion for new trial based on prosecutorial misconduct; (8) the consecutive sentencing violated Penal Code section 654; and (9) the errors were cumulatively prejudicial. Finding no error, we affirm.

PROCEDURE

Defendant and codefendant Jose Anthony Sterling were charged by information with murder of James Fullard, Jr. and Doretha Moore (Pen. Code, § 187; counts 1 & 2, respectively) and the robbery of Fullard (Pen. Code, § 211; count 3). The information also charged multiple-murder and robbery special circumstances (Pen. Code, § 190.2, subds. (a)(3) & (a)(17)(A)) and alleged that during the commission of each offense each defendant personally used a firearm and discharged a firearm resulting in death (Pen. Code, §§ 12022.5, subd. (a); 12022.53, subd. (d)).

Defendant and Sterling were tried in the same proceeding but by separate juries. Sterling's jury acquitted him of all charges. Defendant's jury found him guilty on all counts and found all allegations true.

The trial court sentenced defendant to a determinate term of three years for the robbery, with an additional indeterminate term of 25 years to life for discharge of a firearm resulting in death. For each murder, the court sentenced defendant to an indeterminate term of life without possibility of parole, plus

25 years to life for discharge of a firearm resulting in death. All of the terms were imposed consecutively.

FACTS

In the afternoon on September 11, 2005, defendant and Sterling met near Sterling's residence. They decided to obtain some marijuana. Defendant was a seller of marijuana, and Fullard was his supplier. Defendant used a cell phone to call Fullard from Sterling's residence, and Fullard agreed to come to Sterling's residence. About 20 or 30 minutes later, defendant and Sterling received a call that Fullard and Moore were outside in a car. Defendant and Sterling went outside and got into the backseat of the car. Moore was driving, and Fullard was in the front passenger seat. Defendant was seated behind Fullard, and Sterling was seated behind Moore.

Moore drove the car down the street, while Fullard and defendant talked about the marijuana. Moore made a U-turn, as Fullard gave defendant two or three ounces of marijuana. It was much more marijuana than Sterling thought they were buying. Fullard asked for the money, and defendant acted as if he was reaching into his pocket for money. Instead, he pulled out a gun and shot Fullard twice in the head. Moore began screaming, and defendant shot her three times. Both Fullard and Moore were killed by the gunshots.

The car crashed into six other cars. When it came to a stop, defendant and Sterling ran from the scene. A witness recounted that one of them yelled, "Cover your face, cover your

face." Both covered their faces with their shirts, and Sterling held the waistband of his baggy shorts.

Defendant and Sterling went to Sterling's residence. Sterling washed his face and hands. Defendant and Sterling changed out of their clothes, which were stained with blood. Defendant borrowed some of Sterling's clothing and left. Before he left, defendant tried to get Sterling to leave the residence with him, but Sterling stayed.

On the same day as the shootings, Stockton Police Department detectives went to Sterling's residence and questioned him. While there, they saw the bloody clothing. They collected the clothing, and later analysis showed Fullard's blood on defendant's shorts and shirt, as well as on Sterling's shirt. Moore's blood was on Sterling's shorts and shoes.

Sterling was arrested and taken to the police station. The next morning, defendant was arrested and also taken to the police station.

A search was conducted at defendant's residence. No guns were found. However, in the backyard was a shoebox containing about two ounces of marijuana -- the marijuana that defendant took from Fullard.

After defendant and Sterling were interviewed separately, they were put together in a room where their conversation could be recorded. Sterling started the conversation by stating that the detectives thought that he and defendant were involved in a shooting other than of Fullard and Moore. Defendant then told Sterling that the detectives had let him listen to the tape of

Sterling's interview, and defendant accused Sterling of lying that defendant was present when Fullard and Moore were shot.

Defendant told Sterling that all he had to say to the detectives was that defendant was not there and that he was not the shooter. Defendant rehearsed with Sterling what Sterling would tell the detectives: that Sterling called defendant for some marijuana, they got into the car along with a person named "CJ" (a made-up name), and "CJ" shot Fullard and Moore.

Broderick Huggins was in jail at the same time as defendant and Sterling. At separate times, he was housed with each of them. Sterling told Huggins that he and defendant planned to rob Fullard, but Sterling did not know that defendant intended to shoot Fullard and Moore. Defendant offered to pay Huggins to discredit Sterling. Defendant wrote scripts for Huggins to use in talking to authorities. Defendant admitted to Huggins that he and Sterling set up Fullard to rob him of the marijuana and that he shot Fullard and Moore because he was afraid Fullard would retaliate for the robbery and that Moore would be a witness against him. Defendant tried to get Sterling to go with him after they returned to Sterling's residence after the shootings so that defendant could kill Sterling. Defendant also asked another inmate, Ashton Bennett, to lie to authorities on his behalf.

Expert testimony established that Fullard and Moore were shot from inside the car. The shots came from between the victims, the gun being somewhere in the middle of the backseat. All of the shots came from the same gun.

In the defense case, there was testimony that Fullard had been arrested 10 years earlier in connection with a shooting for which other people went to prison. (The name "Rocquemore" was associated with that crime.) Fullard did not go to prison, and there was speculation that he had avoided prison by cooperating with the authorities.

Defendant testified that Fullard was a family friend. On the day of the shooting, defendant called Fullard on behalf of Sterling, who wanted to buy marijuana. When Fullard and Moore arrived, defendant and Sterling got into the backseat. Sterling pulled a gun from his waistband and said, "This is for snitching on Rocquemore." He then shot Fullard and Moore.

DISCUSSION

I

Effective Assistance of Counsel

Defendant contends that his trial counsel was ineffective for not objecting to the admission of a statement Sterling made to fellow inmate Broderick Huggins concerning defendant's robbery of Fullard. Defendant asserts that the evidence would have been excluded because it was not a declaration against penal interest. He further asserts that, if the evidence had been excluded, the trial court would have been required to sustain defendant's motion for acquittal at the end of the prosecution's case-in-chief. We conclude that counsel was not ineffective and, in any event, there was no prejudice even if the counsel should have objected.

A. *Standard of Review*

"'In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674].) Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]' [Citation.]

"Where 'there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance.' [Citation.] And, even when there was a basis for objection, '"[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." [Citation.] "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." [Citation.]' [Citation.]" (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

B. *Facts*

Huggins testified that he was incarcerated in the San Joaquin County jail where he met Sterling. Sterling told Huggins that he did not know that defendant would shoot Fullard and Moore. Instead, he thought they would only rob Fullard of the marijuana.

Later, Huggins was housed with defendant, also in the county jail. Defendant told Huggins that he knew that Sterling was snitching on him. Defendant told Huggins that, when defendant and Sterling got into the car and Moore made a U-turn, defendant shot Fullard in the head twice and Moore in the facial area three times. He shot Fullard so that Fullard would not retaliate for the robbery, and he shot Moore because she was a witness. After defendant and Sterling fled the scene and went to Sterling's house, defendant tried to get Sterling to come with him so he could "smoke" him. Defendant also told Huggins that he gave the gun to someone and that he obtained marijuana from Fullard when he shot him.

Defendant offered to pay Huggins money if Huggins would testify as defendant directed. Defendant wrote several notes containing versions of the story Huggins was supposed to give.

After the prosecution closed its case-in-chief, defendant moved for acquittal pursuant to Penal Code section 1118.1. He argued that there was insufficient evidence that a robbery had taken place because defendant's own statement could not be used to establish the corpus and Sterling's statement was unreliable. The trial court denied the motion.

C. *Declaration Against Penal Interest*

Defendant contends that trial counsel was ineffective because he did not object to admission of Sterling's statement to Huggins that Sterling and defendant intended to rob Fullard. This contention is without merit because the statement was admissible as a statement against penal interest.

The hearsay exception for a declaration against penal interest is found in Evidence Code section 1230.[1] "With respect to the penal interest exception, the proponent of the evidence 'must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 153.) When a trial court has been given the opportunity to rule on an objection based on this hearsay exception, "[w]e review a trial court's decision as to whether a statement is against a defendant's penal interest for abuse of discretion. [Citation.]" (*Id.* at pp. 153-154.)

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[1] Evidence Code section 1230 states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Defendant argues that Sterling's statement to Huggins was not admissible as a declaration against penal interest because (1) there was no showing that Sterling was unavailable and (2) Sterling's statement was inherently unreliable. We disagree.

As a codefendant in the case, Sterling was unavailable to the prosecution as a witness during the prosecution's case-in-chief, even though Sterling later testified during the defense portion of the case. A criminal defendant has a privilege not to testify. (Evid. Code, § 930.) "'[U]unavailable as a witness' means that the declarant is . . . [e]xempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant." (Evid. Code, § 240, subd. (a)(1).) Until a defendant waives this privilege, he is unavailable.

Defendant's claim that the evidence was too unreliable to be admissible is also without merit. Because the trial court did not have the opportunity to exercise its discretion to determine whether to admit Sterling's statement to Huggins, we must determine only whether admitting the evidence was within the realm of the trial court's appropriate discretion. We conclude that it was.

Defendant relies, primarily, on *People v. Duarte* (2000) 24 Cal.4th 603 (*Duarte*). In that case, the court "declared [Evidence Code] section 1230's exception to the hearsay rule 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of

the declarant.' [Citations.]" (*Id.* at p. 612.) Thus, "only those portions of [a declarant's] statements that were 'specifically disserving' [citation] to his penal interests were admissible under [Evidence Code] section 1230." (*Ibid.*) "[E]ven when a hearsay statement runs generally against the declarant's penal interest . . . , the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission [under Evid. Code, § 1230]. [Citations.]" (*Id.* at p. 614.) "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.] [¶] Clearly the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. 'Once partners in crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.' [Citation.] However, the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334-335.)

Here, there are indications of both reliability and unreliability in Sterling's statement to Huggins. He may have

been attempting to deflect blame, and his statement was partially exculpatory (saying he did not know that defendant would shoot Fullard and Moore). However, the statements were not made to authorities. Instead, they were made to a fellow inmate in a noncoercive situation.

Because defendant claims that Sterling's statement should not have been available to establish the corpus of the robbery, the only part of the statement relevant to our inquiry is Sterling's statement that he thought that he and defendant were going to rob Fullard. This statement directly incriminated Sterling; therefore, it is more reliable than his associated statement that he did not know that defendant was going to shoot Fullard and Moore. While we recognize that the statement about the robbery was part of the broader statement, it was not so suspect as to be inadmissible as a declaration against penal interest.

The trial court would have been well within the scope of its discretion in admitting the statement if it had been presented with the question by proper objection. Therefore, defendant has not established that counsel was deficient.

D. *Motion for Acquittal*

Defendant's motion for acquittal was based on his assertion that there was insufficient evidence of robbery to establish the corpus. Because we conclude that Sterling's statement was properly admitted, the trial court properly denied the motion because Sterling's statement established the corpus beyond the

statement of defendant to Huggins in which defendant admitted robbing Fullard.

Nonetheless, even assuming defendant is correct that Sterling's statement about the robbery should have been excluded, there was no prejudice in counsel's failure to object because the evidence was sufficient to establish the corpus of the robbery, even without Sterling's statement to Huggins.

"The corpus delicti consists of (1) the fact of injury, loss or harm, and (2) the existence of a criminal agency as its cause. [Citation.] The identity of the defendant as the perpetrator is not part of the corpus delicti; identity may be established by the defendant's words alone. [Citation.] Moreover, 'the modicum of necessary independent evidence of the corpus delicti, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be "a slight or prima facie showing" permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues.' [Citation.]" (*People v. Valencia* (2008) 43 Cal.4th 268, 297.)

Here, there was evidence that Fullard was a drug dealer and that there were no drugs at the scene of his murder. A significant amount of marijuana was found secreted in defendant's yard. These facts are sufficient, providing at least a modicum of independent evidence, to establish that a robbery took place.

Accordingly, even if Sterling's statement concerning the robbery had been excluded, the trial court's denial of the motion for acquittal would have been proper. In other words, the asserted deficiency in trial counsel's performance did not prejudice defendant.

II

Admission of Defendant's Statements

Defendant contends that the trial court erred by admitting evidence of his conversation with Sterling at the police station. He asserts that, when he conversed with Sterling, he was still subject to the coercion that produced his involuntary confession to the police. We conclude that the trial court did not err because the taint of the involuntary confession had been purged by intervening circumstances.

A. *Facts and Procedure*

On the morning after the shootings, defendant was arrested and questioned. Defendant waived his *Miranda* rights[2] and answered questions. Defendant admitted to having been in the car with Sterling, Fullard, and Moore when the shooting took place. However, he claimed that after the marijuana was exchanged, Sterling shot Fullard and Moore.

At the preliminary hearing, the trial court excluded evidence of defendant's statements. It found that the statements were involuntary because the detective made implied

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

promises of leniency and threatened prosecution of defendant's relatives. The prosecution did not challenge the exclusion of the evidence at trial.

After both defendant and Sterling gave statements to the police, they were placed in a room together. Their conversation in the room was monitored and recorded. During the conversation, defendant chastised Sterling for implicating him. He told Sterling that Sterling had to change his story. They agreed that they would blame the shooting on a person named CJ. They would say that, while they were in the car to purchase marijuana from Fullard, they picked up CJ, who sat between defendant and Sterling in the backseat. CJ shot the victims, and defendant and Sterling ran because they were scared.

Defendant moved to exclude the conversation between Sterling and him. He argued that the taint of the involuntary confession, which he gave the same morning, required exclusion of the conversation. The trial court denied the motion. It found that defendant's statements during the conversation with Sterling were not a result of coercion and were not affected by the factors that made defendant's earlier statement involuntary.

B. *Legal Background*

At trial, the prosecution bears the burden of proving by a preponderance of evidence that the defendant's confession, made while the defendant was in police custody, was voluntary. (*People v. Jones* (1998) 17 Cal.4th 279, 296.) When "'an accused makes one confession and then testifies or upon subsequent questioning again confesses, it is presumed that the testimony

or second confession is the product of the first.'" *(People v. Hogan* (1982) 31 Cal.3d 815, 843 *(Hogan),* disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) The burden is thus on the prosecution to show a break in the causal connection between the first and subsequent confessions. (*Hogan, supra*, 31 Cal.3d at p. 843.) If the prosecution cannot show a break in the connection, then the subsequent confession is inadmissible. *(Ibid.)* The trial court, in determining whether the subsequent confession was voluntary, should look at whether the subsequent confession was an exploitation of the initial illegality or whether it was instead produced by "'"means sufficiently distinguishable to be purged of the primary taint."'" *(Nix v. Williams* (1984) 467 U.S. 431, 442 [81 L.Ed.2d 377, 386].)

To determine whether a subsequent confession has been purged from the taint of an involuntary confession, the trial court looks at a variety of intervening factors such as "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators . . . ." *(Oregon v. Elstad* (1985) 470 U.S. 298, 310 [84 L.Ed.2d 222, 233].) The court may also look at evidence relevant to whether the coercion is still affecting the defendant or the conditions that precluded the admissibility of the initial confession have been removed. *(Lyons v. State of Oklahoma* (1944) 322 U.S. 596, 602 [88 L.Ed. 1481, 1485]; *United States v. Bayer* (1947) 331 U.S. 532, 540-541 [91 L.Ed. 1654, 1660].)

On appeal, the voluntariness of a confession is reviewed independently by the appellate court. *(People v. Jones, supra,* 17 Cal.4th at p. 296.) However, the details of the interrogation, the characteristics of the accused, and other findings regarding the circumstances surrounding the confession are subject to review for substantial evidence. *(People v. Memro* (1995) 11 Cal.4th 786, 826.)

Here, there appears to be no dispute concerning the material facts. We therefore independently apply the law to those facts.

C. *Analysis*

Defendant asserts that this case is comparable to *Hogan*, in which the statements were held to be inadmissible. We disagree.

The defendant in *Hogan* was questioned concerning the murder of a coworker's family members. He was interviewed three times by police and denied culpability during the first two interviews. (*Hogan, supra,* 31 Cal.3d at pp. 820-822, 827.) After the second interview, the defendant spoke to his wife, who had been given false information by the police, and the conversation was secretly recorded. (*Id.* at pp. 827, 837, 842.) During a third police interview, the defendant confessed to police. Ten minutes later he had another conversation with his wife. (*Id.* at pp. 827-829.) During that conversation, which police told defendant and his wife would be recorded, the defendant made additional incriminating statements to his wife. (*Id.* at pp. 828-829.) The defendant also made incriminating statements during a secretly recorded interview the next day.

(*Id.* at pp. 827, 829.) He was convicted of the murders in a trial in which the statements to his wife were admitted. (*Id.* at pp. 820, 827.)

On appeal, the defendant argued that his statements to his wife should have been excluded as extensions of his initial coerced confession to police. *(Hogan, supra,* 31 Cal.3d at p. 834.) The Supreme Court held the statements were inadmissible. It found that: (1) the police consciously used the defendant's wife to elicit incriminating information; (2) the visitation between the defendant and his wife occurred after two unsuccessful attempts by police to illicit a confession; (3) the defendant's wife was primed with false information that led her to believe that he was guilty, and she expressed this belief to the defendant; and (4) the defendant's conversation with his wife was simply a continuance of the coerced police interrogation because the defendant knew he was being recorded. *(Id.* at pp. 838-843.) The court concluded: "There was no apparent intervening circumstance between [the defendant's] involuntary statement to the police and his subsequent admissions to his wife. Therefore, they are inadmissible." (*Id.* at p. 843.)

Although the trial court considered *Hogan*, it relied on a more recent case, *People v. Terrell* (2006) 141 Cal.App.4th 1371 (*Terrell*), in denying the motion, finding *Terrell* more analogous to the facts here.

In *Terrell,* the defendant was suspected of being involved in a robbery, which ultimately led to a shooting. *(Terrell,*

supra, 141 Cal.App.4th at p. 1375.) When the defendant was interrogated, he initially invoked his right to remain silent, but the police continued to question him and he ultimately confessed. *(Id.* at pp. 1376, 1382.) At the end of the interview, the defendant requested that he be allowed to call his mother and other family members. *(Id.* at p. 1376.) Officers then left the room and decided to record the defendant's conversations, which included a second and more detailed confession of the crime. *(Ibid.)*

On appeal, the *Terrell* court concluded that the defendant's subsequent confessions to his mother and other family members were not made under "custodial interrogation or its functional equivalent." *(Terrell, supra,* 141 Cal.App.4th at p. 1386.) Relying on United States Supreme Court precedent (see *Arizona v. Mauro* (1987) 481 U.S. 520 [95 L.Ed.2d 458]; *Rhode Island v. Innis* (1980) 446 U.S. 291 [64 L.Ed.2d 297]), the court noted that custodial interrogation can extend to ploys by police officers or other functional equivalents of express questioning, but further reasoned that "merely acquiescing in defendant's unprompted request to call his family is not such an act. Moreover, there can be no coercion for *Miranda* purposes when the defendant is subjectively unaware of any police involvement in eliciting or recording his statements." *(Terrell, supra,* at p. 1386, citing *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1540.)

Concerning defendant's conversation with Sterling, the court ruled that it was "free of the influence of the police

statement made during earlier interrogation[;] it was not the result of a deterioration of the defendant's will to resist, and that the police involvement was not inextricably bound up in [defendant's statements during the conversation]." The court noted that, as in *Terrell*, where the police did not prompt the wife, the police here did not feed information to Sterling.

We agree with the trial court that, even though the police purposefully put defendant and Sterling together to see if defendant would make incriminating statements, the statements made by defendant under those circumstances were not tainted by defendant's earlier involuntary confession. Defendant and Sterling did not know that they were being monitored and recorded and therefore could not have been simply attempting to appease the police. During defendant's conversation with Sterling, the police conduct that rendered defendant's confession involuntary (promise of leniency and threat to prosecute relatives) appeared to have no bearing on defendant's statements. Defendant was interested, simply and foremost, in getting Sterling to lie to the police about defendant's involvement. Thus, the intervening circumstance of placing defendant in a room where he conversed with Sterling, free of any perceived police coercion, purged the taint of the police conduct which led to the involuntariness of the prior confession. Because the prosecutor successfully showed this break in the causal connection between defendant's involuntary confession and the subsequent conversation with Sterling, the

trial court properly denied the motion to exclude the statements that defendant made during the conversation.

III

Attorney-Client Privilege

In an attempt to bolster his assertion that he had not recently fabricated evidence about his claim that Sterling shot Fullard and Moore, defendant volunteered during cross-examination that he had told his attorney about the evidence. He was then questioned, both by the prosecutor and Sterling's defense attorney, concerning what he told his attorneys about his claim that Sterling shot Fullard and Moore. At times during this questioning, defendant's counsel objected that the questioning violated the attorney-client privilege. He attempted to make this a continuing objection. Counsel later moved for a mistrial, based on the questioning. The trial court denied the motion.

On appeal, defendant contends that the trial court violated his attorney-client privilege and denied him effective assistance of counsel when it allowed the questioning and denied the motion for mistrial. We conclude that defendant voluntarily waived his attorney-client privilege as to this specific subject of examination. Therefore, the trial court did not err.

A. *Trial Proceedings*

During cross-examination of defendant, the prosecutor explored whether defendant's claim that Sterling shot Fullard and Moore was a recent fabrication. The prosecutor suggested that defendant came up with the story after he heard the

testimony of Fullard's mother and wife to the effect that Fullard had avoided prison by giving evidence against his codefendants in an earlier case and that there was a rumor someone was after him for being a snitch. Responding to the prosecutor's suggestions, defendant said: "No. I been -- that's when I heard it from Jose [Sterling], that's when I gave the statement. To my attorney."

The prosecutor's questioning did not require any answer concerning what defendant had told his attorney. And no objection was made at this point to the waiver of the attorney-client privilege with regard to this subject. For awhile, the fact that defendant had mentioned his statement to his attorney went unexplored.

During the examination of defendant by Sterling's attorney, counsel asked defendant what he told his attorney, referring back to defendant's prior testimony. Defendant's attorney objected based on attorney-client privilege. Sterling's attorney responded that defendant was the holder of the privilege and that he brought it up. The trial court overruled the objection.

Defendant stated that he told his prior attorney, Marvin Marks, about a year before that Sterling shot Fullard and said that it was for snitching on Rocquemore. Marks, who passed away before trial, was his second attorney. Defendant testified that he did not tell his first attorney, Sam Behar, because they had not put together a defense yet. There was no objection to the question about what defendant told Behar.

After Sterling's attorney posed several questions to defendant about what defendant told Behar about Rocquemore and Sterling's involvement in the shooting, defendant's counsel stated: "Can I make this a continuing objection so the record is clear, because we're going far afield of the original question, I think we're impinging on the privilege." The court replied simply that it "[u]nderstood."

Sterling's attorney asked defendant when he told his third attorney, John Schick, who represented defendant at trial. Defendant responded that he told Schick when Schick began his representation of defendant, after Marks passed away. There was no objection to this question.

Defendant answered additional questions from the prosecutor and Sterling's attorney concerning his knowledge of who Rocquemore was and what he told Schick about Rocquemore and Sterling's statement at the time of the shooting. He said that Schick told him to "get on the stand and testify to it." Defendant also said that Schick told him that he had investigated and found that Rocquemore and Fullard had a prior case together.

Defendant's attorney moved for a mistrial. He asserted that the trial court should have advised defendant concerning his attorney-client privilege. He also asserted that, as a result of the trial court's error in not advising defendant, evidence had been introduced in violation of the privilege. Referring to the fact that defendant had told his attorney about Rocquemore, counsel stated that the testimony "should never have

been elicited. It should never have been allowed to respond to." (*Sic*.) Counsel was concerned that the line of questioning would result in his having to testify. The trial court denied the motion.

During the prosecution's rebuttal, Kenneth McGuire, who was Marvin Marks's investigator, testified that defendant did not mention Rocquemore in the initial interview with McGuire and Marks. In a later interview, however, defendant told McGuire about Rocquemore. McGuire testified that it is not unusual for a defendant to divulge further details as the defendant and the investigator develop a rapport.

B. *Analysis*

Evidence Code section 912, subdivision (a) provides: "[T]he right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (See *People v. Wilson* (2005) 36 Cal.4th 309, 336.)

Here, defendant volunteered the information that would have been protected by the attorney-client privilege. Trying to bolster his own credibility, he testified that he had told his

attorney, Marvin Marks, about Rocquemore. He therefore waived the privilege.

On appeal, however, defendant claims that he did not waive the attorney-client privilege because (1) the waiver was not unambiguous and (2) his statement did not disclose a significant part of the communication. He also claims that (3) the court abused its discretion in denying the motion for mistrial and (4) if we conclude the objections were insufficient to preserve the issue for appeal, he received ineffective assistance of counsel when his trial counsel failed to promptly object. None of these contentions has merit.

1. Unambiguous Waiver

Defendant contends that his statement about telling his attorney was not a waiver of the attorney-client privilege because he was required to answer the prosecutor's question and therefore it was not an unambiguous waiver. (See *People v. Kor* (1954) 129 Cal.App.2d 436 [defense attorney required to testify because third-party present when defendant spoke to attorney].) We disagree. The question posed by the prosecutor was whether defendant had recently fabricated his testimony. The prosecutor said nothing of defendant's conversation with counsel. Defendant volunteered that he had told his attorney about the evidence to bolster his own credibility. This is not a case in which defendant was required to divulge attorney-client communications.

2. Significant Part of Communication

Defendant also contends that the attorney-client privilege was not waived because defendant did not divulge a significant part of the communication before defense counsel interposed an objection. The contention is without merit.

In *Mitchell v. Superior Court* (1984) 37 Cal.3d 591 (*Mitchell*), the Supreme Court held that a disclosure that plaintiff had discussed dangers involved with a chemical did not waive the attorney-client privilege concerning the specifics of communications. The court stated: "[P]laintiff's answers, while revealing the existence of her attorney-client relationship, *at most* affirmed that she had discussed certain warnings with her attorneys, and in no way revealed a significant part of the substance of those discussions." (*Id.* at p. 602, original italics.)

Defendant asserts that this case is like *Mitchell* in that defendant did not disclose a significant part of the communication. He is mistaken. His statement, though brief, went to the very core of communication with his attorney, at least with respect to the matter of recent fabrication. The statement did not merely disclose that there had been a discussion but, instead, disclosed the substance of that discussion. Therefore, *Mitchell* is distinguishable.

3. Motion for Mistrial

"In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. [Citation.] 'A mistrial should be granted if the court is apprised of prejudice

that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)[3]

Defendant bases his contention that the trial court abused its discretion in denying the motion for mistrial on the premise that the trial court erred in finding that defendant had waived the attorney-client privilege. Because the premise is false, the contention fails.

4. Effective Assistance of Counsel

Defendant asserts that "if it was necessary for his attorney to object more promptly or on more specific grounds, he receive [*sic*] ineffective assistance of counsel when his trial attorney failed to do so." To the contrary, defendant's attorney was not ineffective.

As noted above, in order to establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington, supra,* 466 U.S.

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[3] Defendant contends that we must apply the standard discussed in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705], the harmless-beyond-a-reasonable-doubt standard. That standard, however, applies only when we find error of federal constitutional dimensions. Since we find no error here, we have no occasion to apply the standard.

at pp. 687-688.) The performance of defendant's counsel was not deficient because no amount of objecting after the fact would undo defendant's waiver of the attorney-client privilege when he disclosed that he told his attorney about Rocquemore. Defendant's statement was a voluntary waiver of the privilege. Furthermore, the disclosure was meant to bolster defendant's credibility. Therefore, his counsel was not deficient in failing to object.

IV

Asserted Conflict of Interest

Defendant contends that the judgment must be reversed because his trial attorney had a conflict of interest and the trial court erred by not relieving counsel. We conclude there was no error because there was no conflict of interest.

A. *Trial Proceedings*

As noted above, during the prosecutor's cross-examination of defendant, the prosecutor suggested that defendant's claim that Sterling had shot Fullard in retaliation over the Rocquemore events was a recent fabrication. Defendant testified that he told Schick, his third attorney and trial counsel, that when Sterling shot Fullard, Sterling said, "This is for snitching on Rocquemore." Defendant said that Schick investigated and found that Fullard and Rocquemore were "in a case together or something." The prosecutor asked defendant, "Did [Schick] at any point tell you that he represented Mr. Rocquemore?" Defendant replied that he had not. In response to another question from the prosecutor, defendant said that the

only two people he talked to concerning Rocquemore were Marks (his second attorney) and Schick.

Soon after this testimony, defendant moved for mistrial based on violation of the attorney-client privilege, as we have already discussed. After the court denied the motion, the court and the parties discussed how far the prosecutor and Sterling's attorney would be able to go in questioning defendant about Schick's prior representation of Rocquemore, which was implied in the prosecutor's question to defendant. Schick brought up the possibility that he would have to testify that he and defendant did not collude on defendant's story that Sterling shot Fullard in retaliation for snitching on Rocquemore.

The next day, Schick told the court that he thought it was necessary for the court to declare a conflict between Schick and defendant and relieve Schick. He asserted that this was necessary because the prosecutor and Sterling's attorney wanted to impeach defendant by arguing that the name Rocquemore came from Schick, not from defendant's observation at the scene of the crimes. Schick said that the argument would undermine his credibility as defendant's attorney.

The trial court, out of an abundance of caution, appointed counsel to advise defendant concerning the possible conflict and to see if defendant would waive any conflict. After meeting with the appointed attorney, defendant decided not to waive any conflict.

The court then dealt squarely with the issue of a possible conflict. It noted that defendant voluntarily waived his

attorney-client privilege with respect to the statement that he made to his attorney. It found no conflict between defendant and Schick, based on Schick's prior representation of Rocquemore. It therefore did not relieve Schick as counsel for defendant.

After the court denied the motion, defendant refused to continue with cross-examination.

B. *Analysis*

Defendant asserts that the trial court's failure to relieve Schick as counsel placed Schick in the untenable position of having to choose between (1) violating the rules of professional conduct and testifying or (2) leaving the jury with the impression that defendant was lying about Rocquemore. We disagree because the evidence that defendant and Schick colluded to have defendant lie about Rocquemore was insubstantial.

"Under the federal Constitution, when counsel suffers from an actual conflict of interest, prejudice is presumed. (*Cuyler v. Sullivan* (1980) 446 U.S. 335 [64 L.Ed.2d 333].) This presumption arises, however, 'only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."' (*Strickland v. Washington*[, *supra*,] 466 U.S. [at p.] 692 [], citing *Cuyler v. Sullivan, supra*, at p. 348.) An actual conflict of interest means 'a conflict that affected counsel's performance -- as opposed to a mere theoretical division of loyalties.' (*Mickens v. Taylor* (2002) 535 U.S. 162, 171 [152 L.Ed.2d 291], italics omitted.) 'Under

the Sixth Amendment of the federal Constitution, reversal is required if a defendant, over a timely objection, is forced to continue with conflicted counsel.' (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1685, overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.) To obtain a reversal for this type of error, 'the defendant need not demonstrate specific, outcome-determinative prejudice. [Citation.] But he must show that an actual conflict of interest existed and that that conflict adversely affected counsel's performance.' (*People v. Bonin* (1989) 47 Cal.3d 808, 837–838; see generally *Mickens v. Taylor, supra*, 535 U.S. 162.)" (*People v. Roldan* (2005) 35 Cal.4th 646, 673-674, disapproved to the extent it held that California has a different standard for conflict of interest; see *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

Under this standard, there is no cause for reversal. There was no actual conflict. While defendant's attorney asserted that the evidence had already planted in the juror's minds the possibility that defendant and Schick arranged for defendant to lie about Rocquemore, in fact, the evidence does not support that assertion. Defendant testified that he told Marks before he told Schick about Rocquemore. And McGuire, the investigator, testified that defendant had mentioned Rocquemore. The prosecutor's question to defendant about whether he knew that Schick had represented Rocquemore was just that -- a question. Defendant replied in the negative. The trial court instructed the jury not to consider questions as evidence. Accordingly,

there was no reason for Schick to testify and there was no conflict between defendant and Schick.

We therefore reject defendant's assertion that the trial court erred by denying Schick's motion to be relieved as counsel because of a conflict of interest.

V

Refusal to Continue Cross-Examination

After the trial court denied his motion for mistrial, defendant refused to continue with cross-examination. The trial court, therefore, instructed the jury that it could consider defendant's refusal to continue cross-examination when assessing his credibility. On appeal, defendant asserts that this instruction was an abuse of the trial court's discretion and violated his due process rights. We conclude that the instruction was not an abuse of discretion and did not violate defendant's due process rights.

A. *Trial Proceedings*

After the trial court denied the motion for mistrial, defense counsel informed the court that defendant felt he was being harassed and would not submit to continued cross-examination. The court informed defendant that, if he did not resume cross-examination, he would be subject to sanctions such as striking of his testimony or an instruction that the jury could consider the refusal to continue cross-examination in assessing his credibility. Defendant said he understood and still refused to testify.

The trial court elected to give the jury the credibility instruction. It told the jury: "On March 15, 2007, [defendant] refused to continue with his cross-examination. You may consider that fact when assessing his credibility."[4]

B. *Analysis*

"'Where a defendant takes the stand and makes a general denial of the crime the permissible scope of cross-examination is very wide.' [Citation.] When a defendant voluntarily testifies in his own defense the People may 'fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.' [Citation.]" (*People v. Harris* (1981) 28 Cal.3d 935, 953.)

When a defendant refuses to submit to cross-examination, the trial court may strike the testimony. It may also choose a less drastic sanction, such as striking part of the testimony or giving the jury an instruction that it may consider the defendant's refusal to submit to cross-examination in assessing his credibility. (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 525-526.) The decision to impose a sanction is subject to abuse of discretion review. (*People v. Reynolds* (1984) 152 Cal.App.3d 42, 47.)

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[4] The trial court instructed Sterling's jury that defendant's testimony was stricken. That instruction, however, was not given to defendant's jury and had no effect on defendant's trial.

In an attempt to show that the credibility instruction was an abuse of discretion, defendant details his testimony and the rounds of cross-examination by the prosecutor and Sterling's attorney. He claims that he was on the stand for an entire day, with direct examination taking only about an hour. Defendant asserts that, because he "submitted to extensive and argumentative cross-examination by the district attorney and Sterling, both of whom sought to blame him for the shooting and robbery," the credibility instruction "denied [him] a full opportunity to present evidence on his behalf and his right to a fair trial."

It is unremarkable that the prosecutor and Sterling's attorney were attempting to blame defendant for the crimes. This was a criminal trial in which the prosecution bore the burden of proof and Sterling was defending based on his assertion that defendant, not Sterling, killed Fullard and Moore. After defendant decided to take the stand and blame Sterling for the shootings, both the prosecution and Sterling were entitled to test defendant's testimony fully, not just to the extent defendant felt inclined to offer.

This is not a close case. The trial court selected the less drastic sanction of using the credibility instruction. In light of defendant's lack of credibility, noted by the court outside the presence of the jury several times during the trial, the credibility instruction was nearly no sanction at all. It was not an abuse of discretion and it certainly did not violate defendant's due process rights.

VI

Chain of Custody

Defendant contends that the trial court abused its discretion in admitting evidence found in the pocket of the shorts defendant wore during the crimes because the contents of the pocket were not discovered and documented by police when they were seized. He asserts there was an insufficient chain of custody shown. The contention is without merit.

A. *Facts Concerning Chain of Custody*

On September 12, 2005, the day after the shootings, the Stockton Police Department searched Sterling's residence. During the search, a pair of red and black shorts was found. As was everything else found in the search, the shorts were put into a separate plastic bag and taken to the police department, where the bag was sealed. Detective Jim Ridenour, who collected the items found during the search, signed the sealed bag containing the shorts.

Elizabeth Schreiber, a criminalist, obtained the red and black shorts in the bag sealed by Detective Ridenour. She tested the shorts for the presence of human blood. She found human blood on the shorts. At the same time, in a pocket of the shorts, Schreiber found a lighter, a blue washcloth, keys, and five one-dollar bills. The contents in the pocket were not itemized by the detectives who conducted the search of Sterling's residence, even though it is standard practice to book each item separately. Detective Eduardo Rodriguez, who was the lead investigator during the search of Sterling's residence,

testified that, except for the failure to book the items found in the pocket separately, the shorts were collected and retained according to proper procedure and the items were in the pocket when the shorts were found during the search.

B. *Trial Proceedings*

Defendant objected to the admission of the shorts and the items found in the pocket. Referring to both the shorts and the items from the pocket, defense counsel stated that "there's no proper chain of custody established as to show that that item has gone from one hand to another, and on the basis of that, that evidence should not be admitted before the Court." The trial court overruled the objection, finding that there had been a proper foundation laid for the chain of custody.

C. *Analysis*

"'*People v. Riser* (1956) 47 Cal.2d 566 sets forth the rules for establishing chain of custody: "The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the

evidence and let what doubt remains go to its weight." [Citations.]' [Citation.]" (*People v. Wallace, supra,* 44 Cal.4th at p. 1061.) We review the trial court's admission of evidence for abuse of discretion only. (*Ibid.*)

Defendant argues that the failure of the detectives to document and book separately the items in the pocket of the red and black shorts was a break in the chain of custody and, therefore, the trial court abused its discretion in admitting the evidence. We disagree.

Without more, the failure to discover, document, and book separately the items from the pocket did not result in a break of the chain of custody. Because the shorts were discovered and sealed into a bag by detectives and the criminalist found the items in the pocket when she examined the contents of the bag, the evidence was sufficient to establish an inference that the items were in the pocket when the shorts were discovered by the detectives. "[T]aking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration." (*People v. Wallace, supra,* 44 Cal.4th at p. 1061.) That there was a bare possibility that those items were not in the pocket when the shorts were discovered is not enough to prevent the trial court from exercising its discretion in admitting the items. A reasonable certainty that there was not alteration is sufficient.

VII

Asserted Prosecutorial Misconduct

Defendant contends that the trial court abused its discretion when it denied his motion for new trial based on his argument that the prosecutor committed prejudicial misconduct by arguing inconsistent theories about who shot Fullard and Moore. We conclude that the prosecutor did not argue inconsistent theories concerning who shot Fullard and Moore. Therefore, the trial court did not abuse its discretion in denying the motion for new trial.

A. *Trial Proceedings*

The prosecutor charged both defendant and Sterling with personal use of a firearm. The case was tried before separate juries. Defendant was convicted of all charges with true findings that he personally used a firearm, and Sterling was acquitted of all charges.

The evidence presented at the joint trial was sufficient to support a finding that either defendant or Sterling was the triggerman. For example, defendant testified that Sterling shot Fullard and Moore, while Sterling testified that defendant shot them. The expert evidence indicated that the shots were fired from approximately the middle of the backseat.

During the closing argument, the prosecutor first addressed both juries together. At that point, she stated that the gun was positioned around the middle of the car.

When the prosecutor argued to Sterling's jury, outside the presence of defendant's jury, the prosecutor presented

alternative theories to the jury. She stated that Sterling could be guilty under the felony-murder rule as an aider and abettor of the robbery, even if he did not shoot the victims. She then briefly analyzed evidence that supported a finding that Sterling was the shooter, including Sterling's lack of response when, in the videotaped conversation, defendant told him, "I didn't say nothing about you shooting the gun." After reviewing this evidence, however, the prosecutor reiterated to the jury that it was their responsibility to decide who the shooter was.

In her argument to defendant's jury, the prosecutor did not argue that defendant was the shooter. She also did not argue that Sterling was the shooter. Instead, she noted that the shots were fired from somewhere in the middle of the vehicle and reminded the jury that the evidence concerning who shot Fullard and Moore was conflicting.

B. *Analysis*

"On appeal, a trial court's ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard. [Citation.] Its ruling will not be disturbed unless defendant establishes 'a "manifest and unmistakable abuse of discretion."' [Citations.]" (*People v. Hoyos* (2007) 41 Cal.4th 872, 917.)

The basis for defendant's contention that the trial court abused its discretion is the prosecutor's argument with respect to who shot Fullard and Moore. Defendant claims that, by charging both defendant and Sterling with personal use of a firearm and arguing to each jury that the defendant being tried

by that jury was the one who shot Fullard and Moore, the prosecutor engaged in prejudicial misconduct. We first summarize the law concerning a prosecutor's argument of inconsistent theories. We then determine that the prosecutor's argument did not entail inconsistent theories and, on that basis, conclude that the trial court did not abuse its discretion in denying the motion for new trial.

1. Applicable Law

"[T]he People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for -- and, where prejudicial, actually achieves -- a false conviction or increased punishment on a false factual basis for one of the accused. 'The criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth.'" (*In re Sakarias* (2005) 35 Cal.4th 140, 159-160 (*Sakarias*).)

The two petitioners in *Sakarias* had been convicted in separate trials of first degree murder with special circumstances and sentenced to death. After consolidating their two petitions for writ of habeas corpus, the Supreme Court appointed a referee to hear evidence and make factual findings, and the referee found the prosecutor intentionally used divergent factual theories (*Sakarias, supra,* 35 Cal.4th at pp. 144, 151) and that he deliberately manipulated the evidence at the second trial (Sakarias's trial) to conform to his inconsistent theory. (*Id.* at pp. 153-154.) Based on these

findings, the Supreme Court concluded that the prosecutor engaged in prejudicial misconduct. (*Id.* at p. 156.)

2. Prosecutor's Conduct

Citing *Sakarias*, defendant asserts that "the prosecutor committed misconduct and denied [defendant] a fair trial by arguing to Sterling's jury that the physical evidence showed that Sterling was the shooter and then by omitting any argument to [defendant's] jury regarding the physical evidence and telling [defendant's] jury that they could find that he was the shooter."

Defendant's contention is without merit because (1) the theories presented to the juries by the prosecutor were not inconsistent, (2) the prosecutor's approach was justified, and (3) there was no injustice here in the form of a false conviction. (See *Sakarias, supra,* 35 Cal.4th at pp. 159-160.)

Although the prosecutor argued to the Sterling jury that Sterling was the shooter, she acknowledged that there was conflicting evidence and told the Sterling jury that it was up to them to decide who the shooter was. The prosecutor's argument to defendant's jury was not inconsistent because, as the prosecutor told the Sterling jury, the evidence potentially supported a decision either way on the identity of the shooter. Even though both defendants were charged with personal use of a firearm, the prosecutor was not attempting to get a true finding on that allegation for both defendants.

The approach taken by the prosecutor was justified by the facts. The shots came from around the middle of the backseat.

Therefore, either defendant or Sterling could have been the shooter. The evidence was conflicting. The prosecutor told each jury that it was up to them to decide who fired the shots, and that was appropriate given the evidence.

Unlike the conflicting verdicts in *Sakarias*, there was no conflict in the verdicts in this case, and, thus, no injustice based on a false conviction. Therefore, defendant cannot show that he was convicted unjustly or that the prosecutor committed misconduct by proposing inconsistent theories to the jury. The trial court did not abuse its discretion in denying the motion for new trial.

VIII

Consecutive Sentencing

Defendant contends that the trial court's imposition of unstayed, consecutive sentences for the murders and robbery violated the proscription on multiple punishment found in Penal Code section 654. We disagree. The evidence supports consecutive sentencing.

The trial court sentenced defendant, as relevant to this contention, to a prison term for robbery of Fullard and a consecutive prison term for first degree murder of Fullard with special circumstances. The two special circumstances found by the jury were robbery and multiple murder.

Penal Code section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in

no case shall the act or omission be punished under more than one provision." This protection applies if several offenses were committed during "'a course of conduct which . . . comprises an indivisible transaction punishable under more than one statute . . . .'" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Thus, "if all of the offenses were . . . the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Whether a defendant entertained a single or multiple criminal objectives is a question of fact for the trial court, and its determination will be sustained on appeal if it is supported by substantial evidence. (*People v. Coleman, supra*, 48 Cal.3d at p. 162.) If the court makes no express finding on the issue, a finding that the crimes were divisible "inheres in the judgment" and must be upheld if supported by substantial evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) Thus, "if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were

independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*)

The court's implicit finding of separate objectives for the robbery and murder was supported here. There was substantial evidence that the intent and objective in murdering Fullard was to avoid future retaliation. This intent and objective was separate from obtaining the marijuana. (See *People v. Coleman, supra,* 48 Cal.3d at pp. 162-163 [separate punishment for assault and robbery proper when victim stabbed after robbery to prevent sounding of alarm].)

Defendant claims that, because he was convicted of felony murder based on the robbery, he could not be sentenced, even concurrently on the robbery. Although the jury was instructed on first degree felony murder, it was also instructed on first degree premeditated murder. Therefore, the trial court was not bound to sentence defendant as if he had been convicted using the felony-murder theory. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

Defendant also contends that, because he was convicted of murder with a robbery special circumstance and sentenced to life without possibility of parole for that offense, it was necessary to stay the sentence for robbery. We disagree because the jury also found a multiple-murder special circumstance and could validly rely on that special circumstance to impose the sentence

of life without possibility of parole, even assuming that it would be impermissible to rely on the robbery to impose both the indeterminate term of life without possibility of parole and a consecutive sentence for the robbery. Therefore, it was unnecessary for the trial court to rely on the robbery special circumstance in imposing the indeterminate term for murder. Because the trial court could rely on the multiple-murder special circumstance to impose the indeterminate term, the court could impose an unstayed term for the robbery.

In any event, Penal Code section 654 does not apply to special circumstances because the special circumstance is used to enhance the punishment, not to define the crime. Penal Code "[s]ection 654, which precludes multiple punishment for a single offense or course of conduct, is inapplicable to enhancements, because they individually '"'do not define a crime or offense but relate to the penalty to be imposed under certain circumstances.'"' (*People v. Walker* (1976) 18 Cal.3d 232, 242, quoting from *People v. Strickland* (1974) 11 Cal.3d 946, 961; *People v. Superior Court* (*Grilli*) (1978) 84 Cal.App.3d 506, 512.)"[5] (*People v. Boerner* (1981) 120 Cal.App.3d 506, 511.)

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[5] The applicability of Penal Code section 654 to enhancements is under review in the California Supreme Court in *People v. Rodriguez*, S159497. Even if the Supreme Court disapproves this line of authority, the unstayed, consecutive sentencing was still valid because the trial court could rely on the multiple-murder special circumstance to impose the indeterminate murder term.

IX

Asserted Cumulative Error

Having found no error in the trial proceedings, we also reject defendant's assertion that error, viewed cumulatively, was prejudicial even if individual errors were not.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

RAYE, J.

ROBIE, J.