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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE NICOLAS BERRY, JAMES NICKOLAS DURBIN AND SHAWN EARL BERRY,

Defendants and Appellants.

2d Crim. No. B183555
(Super. Ct. No. KA064692)
(Los Angeles County)

George Nicolas Berry, James Nickolas Durbin and Shawn Earl Berry appeal from judgments entered after a jury convicted them of conspiracy to commit robbery (Pen. Code, § 182, subd. (a)(1))[1], two counts of second degree robbery (§ 211), and special circumstances (robbery-murder) first-degree murder (§§ 187, subd. (a); 189, 190.2, subd. (a)(17)). Shawn Berry was also convicted of two counts of assault on a peace officer (§ 245, subd. (c)) and evading an officer (Veh. Code, § 2800.2, subd. (a)). The jury found that George Berry personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) during the commission of the murder and robberies, and convicted him on a separate count of possession of a firearm by a felon. (§ 12021, subd. (a)(1).)

[1] Unless otherwise stated, all statutory references are to the Penal Code.

In the second phase of trial, the trial court found that James Durbin had suffered a prior strike and a prior serious felony conviction, and that George Berry had suffered three prior strikes and three prior serious felony convictions. (§ 667, subd. (a)(1); § 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

The trial court sentenced James Durbin to 15 years plus life without possibility of parole. George Berry was sentenced to 80 years to life, plus life without possibility of parole. Shawn Berry was sentenced to seven years eight months, plus life without possibility of parole.

Appellants raise numerous contentions which we reject with one exception: the trial court erred in ordering them to pay parole revocation fines (§ 1202.45). We strike the parole revocation fines and affirm the judgments as modified. (See *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183 [defendant sentenced to life without possibility of parole not subject to parole revocation fine].)

Facts and Procedural History

James Durbin is the cousin of brothers Shawn Berry and George Berry. On December 13, 2003, Durbin, Shawn, and George left their residence at 1235 South Wilson Drive, West Covina and visited Gerardo Ortiz in El Monte. Durbin drove his mother's white Pontiac, was dressed in black with a black beanie, and took a Dodger duffel bag.

George Berry asked Ortiz asked if they could borrow a handgun. Ortiz said that his .38 revolver was on loan and they could get it from "Lucky." Durbin backed the white Pontiac into a parking space at a Sav-On drug store. A Grand Discount store was next to the Save-On.

Shawn Berry and Durbin entered the Grand Discount store and looked around. Shawn purchased a pair of black gloves and a beanie cap. Durbin selected a pair of white gloves which he left at the counter, and bought a pair of black gloves. The two men went outside.

About 10 minutes later, George Berry and Durbin re-entered the store wearing masks and black hats. Shawn Berry stood outside the store as a lookout.

Brandishing a large bowie knife, Durbin kicked and handcuffed the store owner, Shu-Ying Chen. George Berry pointed a revolver at Chen's husband, Chang Lin, ordered him to the front of the store and pushed him down. Chang Lin tried to remove his fanny pack and pled, "I'll give you money, I'll give you money." George Berry shot him with the revolver.[2]

Durbin and George Berry fled with the fanny pack and cash register money. Shawn Berry, who was stationed outside the store, returned to Ortiz's house on foot.

Witnesses to the robbery included Ivette Payan, who grew up with Shawn Berry. Payne bumped into him outside the Grand Discount store and heard a woman scream minutes later.

Louis Polanco was parked nearby and saw two men enter the store. One of the men, wearing a gray and black plaid jacket and matching hat, pulled a ski mask down over his face. Polanco called 911 and reported a robbery in progress. Through the doorway, he saw a man with dark clothing and a mask kicking something behind the store counter. The men removed their masks and left in the white Pontiac. Polanco identified one of the men as George Berry.

Polanco saw a third man pace back and forth in front of the store doorway during the robbery. The man peered into the doorway twice, wore a white T-shirt, and fit Shawn's description: male Hispanic, mid 20's, with dark complexion and a tattoo on the left arm. Polanco's wife, Elsa Polanco, saw the same man pace up and down in front of the store.

The robbery victim, Shu-Ying Chen, identified Shawn Berry as one of the men who came into the store and bought gloves and a beanie cap a few minutes before the robbery. Shawn's fingerprints were on a cardboard tag attached to the white pair gloves behind the cash register counter.

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[2] Chang Lin died from a .38 special or .357 caliber gunshot to the chest. Ortiz told the police that he had a .38 Smith and Wesson revolver, but the handgun was never found.

Maria Escobedo was in a store aisle during the robbery. She heard a woman scream and saw George Berry next to the cash register with a handgun. Escobedo testified that George Berry was wearing black pants, a gray shirt with long black sleeves, and had a woman's nylon stocking pulled down over his face.

The robbers left a black and gray camouflage baseball cap in the store. "James" was written in graffiti block-style letters under the cap bill. The cap belonged to James Durbin's son, James Santino Durbin.

Behind the cash register, the police found a Verizon cell phone with a "Charisma" nameplate. Durbin's nickname was "Charisma" and was tattooed on his body. Phone records indicated that the cell phone number was issued to Durbin's mother, Santina Spadaro. About 45 minutes before the robbery, someone used the cell phone to call the house where Gerardo Ortiz's parents lived.

On December 16, 2003, three days after the robbery, Durbin was stopped in the white Pontiac driving with a suspended driver's license. Durbin's mother, Santina Sparado, told the officer that Durbin had had just lost his cell phone.

Earlier that day, a police surveillance team followed Durbin to a tobacco store in La Puente. Durbin looked at a pair of handcuffs on display and purchased cigarette rolling papers with a credit card. The store clerk told the police that Durbin went by the name Jaime Spadaro and had the letters "Jaime" tattooed on one of his hands. Durbin told the store clerk that he needed to get another pair of handcuffs because he had "used" his last pair.

On December 17, 2003, a police surveillance team observed George Berry, Shawn Berry, and Angel Garcia (Shawn's stepdaughter) leave the West Covina residence in a Toyota Camry. Shawn saw a patrol car and stopped. When the officers activated their red light, Shawn backed up, accelerated out of a driveway, and hit the patrol car, tearing the bumper off the Toyota.

Shawn sped off, almost hitting another officer. Detective Bobby Lyons shot at the Toyota, hitting the driver's door and Shawn's leg.

Shawn led the officers on a chase at speeds in excess of 70 miles per hour, running traffic lights and stop signs, weaving in and out of traffic, and driving up the center median. At the intersection of Herring and Holly, George Berry opened the passenger door, pulled Angel Garcia out of the Toyota, knelt down behind Garcia, and used her as a shield.

Shawn Berry escaped but was stopped that evening by the Baldwin Park Police. He said that his name was Ervin Mantilla and was arrested for driving without a license. The officer took him to a hospital where he was treated for a bullet wound to the left leg. Shawn claimed that he was riding a bicycle earlier that day and that someone shot him for no reason.

On December 17, 2003, the police searched appellants' house. In Durbin's bedroom, the police found a duffle bag with knives and handcuffs, a large bowie knife under the mattress, and 50 rounds of nine millimeter ammunition in a hallway closet. The robbery victim, Shu-Ying Chen, testified that the bowie knife was similar to the one used in the robbery.

On January 9, 2004, the police found the Toyota parked in front of appellants' West Covina residence. A bullet hole in the driver's door had been recently repaired and the door interior tested positive for human blood.

Durbin's Courtroom Outburst

At the preliminary hearing, Durbin blurted out "I did this crime" and declared that Shawn Berry and George Berry had nothing to do with the robbery.[3] Counsel asked the magistrate "to consider striking the statement. It was over my objection. I did ask him not to be heard without consulting me. . . . [H]e blurted out before the court could stop him . . . ."

[3] Durbin said that he wanted to "clear my conscience" and "I did this crime." "These gentlemen [Shawn Berry and George Berry] are my family. . . I'm the one who committed this crime. I'm the [one] who shot the victim. I'm the one that left all the evidence behind and, you know what, these gentlemen had nothing to do with it and you know what, I can't stand seeing what they're going through."

The magistrate indicated that this statement was not a change of plea and there was no "Marsden problem here." The magistrate also said, "I don't know if I can strike it. I know it's over your objection, but it seemed to be voluntary. . . . [H]e himself said it was freely and voluntarily made, that his conscience was hurting him. So I don't think I can strike it."

Durbin argues that the statement should have been stricken because there was no factual basis for the statement, because he made it without consulting his attorney, and because the magistrate failed to determine whether he was attempting to discharge his attorney. Durbin waived these issues by not filing a section 995 motion. He is precluded from arguing, for the first time on appeal, that the statement should have been stricken from the preliminary hearing transcript. (§ 996; *In re Hannie* (1970) 3 Cal.3d 520, 528; *People v. Harris* (1967) 67 Cal.2d 866, 868.)

At trial, Shawn Berry and George Berry introduced the statement over Durbin's objection. The trial court did not err in admitting the preliminary hearing statement as a declaration against penal interest. (Evid. Code, § 1230; *People v. Cudjo* (1993) 6 Cal.4th 585, 608-609.) Discrepancies between Durbin's statement and the prosecution's theory of the case did not render the statement inadmissible. (*Id.*, at p. 609.) "Applying the abuse-of-discretion standard, we find no error in the determination that the against-interest requirement was met. The [trial] court could have reasonably concluded that at the time it was made, [Durbin's] statement so far subjected him to the risk of criminal liability that a reasonable person in his position would not have made it unless he believed it to be true." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1252.)

Durbin argues that the statement violated his right of cross-examination, his due process rights, and required a limiting instruction.[4] These arguments may not be raised

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[4] Durbin did not request a limiting instruction. The jury did, however, receive CALJIC 2.72 stating that the corpus delicti must be proved independent of a defendant's admission or confession. The jury was instructed: "You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part." (CALJIC 2.71.)

for the first time on appeal and are not supported by case authority. (Evid. Code, § 353; *In re Seaton* (2004) 34 Cal.4th 193, 198; see e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 996 [confrontation claim forfeited].)

Assuming that the trial court erred in receiving the statement, the alleged error was harmless beyond a reasonable doubt. (See *Yates v. Evatt* (1991) 500 U.S. 391, 403 [114 L.Ed.2d 432, 448]; *People v. Song* (2004) 124 Cal.App.4th 973, 984-985.) Durbin's guilt was clearly established. The robbery victim, Shu-Ying Chen identified Durbin as the robber with the knife. Durbin also left his cell phone and his son's baseball cap at the store. Three days after the robbery, Durbin shopped for new handcuffs and told a store clerk that he had "used" his last pair. A bowie knife, similar to one used in the robbery, was found in his bedroom along with the duffle bag and another pair of handcuffs.

The admission of Durbin's statement did not deny him a fair trial. The jury found that George Berry, not Durbin, was the shooter. Had the trial court excluded the statement, it is not reasonably likely that Durbin would have received a more favorable verdict. We therefore conclude that the admission of the preliminary hearing statement was harmless beyond a reasonable doubt. (See e.g, *People v. Cahill* (1994) 22 Cal.App.4th 296, 318-319 [error in admitting involuntary confession harmless].)

Knives and Ammunition

Durbin argues that the trial court erred in receiving evidence that a duffle bag, knives, a pair of handcuffs, and 50 rounds of nine millimeter ammunition were found in his house. He claims that the evidence is irrelevant (Evid. Code § 210) and bad character evidence (Evid, Code, § 1101). Durbin did not object on those grounds and is precluded from arguing these issues for the first time on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 435; *People v. Ochoa* (1998) 19 Cal.4th 353, 453.)

Durbin's attorney acknowledged that the knives were relevant but argued that some of the knives were "very nasty looking, medieval type" and may prejudice the jury. The prosecutor argued that the duffle bag, knives, and handcuffs were relevant to prove the conspiracy.

The trial court did not abuse its discretion in finding that the probative value of the evidence outweighed the potential for prejudice. (Evid. Code, § 352; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) The robbery victim, Shu-Ying Chen testified that the bowie knife under Durbin's mattress looked like the knife used in the robbery. Gerardo Ortiz told the police that Durbin collected knives and carried them in a dark gray or dark blue/gray Dodger bag similar to the duffle bag found by the police. Durbin's son, James Santino Durbin, also told the police that his father had a knife collection and left the house carrying a black Dodger duffle bag.

Appellants argue that the nine millimeter ammunition was irrelevant because the robbery victim was shot with a .38 caliber revolver. The ammunition was properly received to impeach Durbin's son who testified that Durbin hated handguns and would not have allowed ammunition to be kept in the house. (Evid. Code, § 780, subd. (i); *People v. Lang* (1989) 49 Cal.3d 991, 1017 [evidence that tends to contradict a witness's testimony is relevant for impeachment purposes].) "The admission of relevant evidence does not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Appellants received a fair trial.

Judicial Misconduct: Examination of Angel Garcia

During the police chase, George Berry and Angel Garcia jumped out of the Toyota. Garcia was taken to the City of Industry and interviewed. Garcia testified that the officer who transported her was mad and "started spitting in my face."

The trial court asked, "You made it sound like he [the officer] walked up and spit in you're [sic] face which would be pretty weird. Is that what happened?" Garcia answered: "No, he didn't walk up and intentionally spit in my face. He didn't really do that." Garcia said that the spitting may have been accidental.

George Berry argued, out of the presence of the jury, that the questions were argumentative and undermined the defense theory that the officer was mad. Overruling the objection, the trial court stated that it was "incomprehensible" that an officer would spit in a 10-year-old girl's face. "You know, we've heard some fairly ridiculous testimony in this

trial and some people that have really stretched the truth a bit." The trial court stated: "I think the jury is entitled to hear whether or not an officer involved in this case would do that. Because any officer that would do that, A, shouldn't be believed and, B, ought to be fired and, C, maybe ought to be prosecuted. [¶] But the young lady apparently had embellished a bit. Well, spitting mad, that's maybe what she's trying to refer to. "

Counsel was permitted to recall Garcia but declined to do so.

The trial court gave a CALJIC 17.30 instruction which stated: "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." Appellants argue that the trial court's questions violated their due process rights and right to fair trial. Appellants, however, did not object on those grounds and waived the issue for purposes of appeal. (Evid. Code, § 353; *People v. Corrigan* (1957) 48 Cal.2d 551, 556.) It is well settled that the trial court may ask a witness to clarify his her or testimony. (Evid. Code, § 775; *People v. Hawkins* (1995) 10 Cal.4th 920, 948.)

Appellants claim that the questions were argumentative and that Garcia's testimony needed no clarification. We disagree. Gloria agreed that her testimony might be misleading and stated that the officer "didn't really do that." "A trial judge may examine witnesses to elicit or clarify testimony. [Citations.] Indeed, 'it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence.' [Citation.]" (*People v. Rigney* (1961) 55 Cal.2d 236, 241; see also *People v. Carlucci* (1979) 23 Cal.3d 249, 255; *Duckett v. Godinez* (9th Cr. 1995) 67 F.3d 734, 739.).)

The alleged error, if any, was harmless beyond a reasonable doubt and corrected by the CALJIC 17.30 admonition. It is presumed that the jury understood and followed the instruction. (*People v. Harris* (2005) 37 Cal.4th 310, 350.) The spitting incident occurred four days after the robbery. Garcia's account of the police chase was

irrelevant to the question of whether appellants conspired to rob the store, robbed the store owners, and murdered the store keeper.

Shawn Berry's Exculpatory Statement

Shawn Berry argues that the trial court erred in excluding evidence that he told Virginia Conarroe that he was not involved in the robbery.[5] Conarroe, Gerardo Ortiz's girlfriend, testified that Shawn showed up after the robbery and was "a little" upset. Shawn argued that this would cause the jury to infer that he was involved in the robbery. (Evid. Code, § 352.)

The trial court rejected the argument that Shawn's demeanor was a "verbal communication" and that the exculpatory statement was admissible pursuant to Evidence Code section 356.[6] It did not err. (*People v. Pride* (1992) 3 Cal.4th 195, 235.) "The purpose of [section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.)

The trial court reasonably concluded that Shawn's demeanor was not a declarative act or oral admission. (*See e.g., People v. Pride, supra,* 3 Cal.4th at p. 235 [out-of-court statement not admissible to illustrate defendant's "state of mind"].) Shawn cites no

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[5] Conarroe told the police that Shawn "told me . . . that he went with Jamie [Durbin] and he went with his brother, George. They go to the store. He doesn't know what happened inside. They tell him to go back in there about a cell phone. Then Shawn told me the thing about the cell phone. I'm putting together that his brother and cousin sent him back in . . . because they don't want to risk going back in and then Shawn walked to my house."

[6] Counsel argued that Shawn's demeanor was a "verbal communication" and the exculpatory statement explained why he was upset. Rejecting the argument, the trial court stated that Shawn can "testify if he wants. . . [¶] . . . He's entitled to explain in any way he wishes . . . his demeanor, his actions but that does not mean he's entitled to have a statement come into evidence that he made at that time."

authority that a defendant can introduce self-serving hearsay to explain his demeanor or mood. Such a rule would deny the prosecution or a codefendant the right to cross-examine the declarant. (See e.g., *People v. Blackington* (1985) 167 Cal.App.3d 1216, 1223-1224.)

Shawn argues, for the first time on appeal, that the statement was an excited utterance. (Evid. Code, § 1240.) The trial court did not err in sustaining a hearsay objection. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778 [proponent of hearsay must alert court to hearsay exception and lay proper foundation].) The excited utterance hearsay exception requires that the out-of-court statement be made under the stress of excitement and without deliberation or reflection. (Evid. Code, § 1240, subd. (b); *People v. Poggi* (1988) 45 Cal.3d 306, 318.) Those foundational facts were missing here. Conarroe testified that Shawn was "a little" upset but his behavior was not unusual. Ortiz told the police that Shawn did not seem worried and that he joked around, played with the kids, and smoked some methamphetamine.

Assuming, arguendo, that the trial court erred in admitting the demeanor evidence, the error was harmless. (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1121-1122; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Shawn Berry's guilt was clearly established. He went with George Berry and Durbin to Ortiz's house to borrow a handgun, drove to the Grand Discount store with them, entered the store with Durbin and bought a pair of gloves, and acted as a lookout. Shawn fled from the police four days after the robbery, attempted to run down two officers, and falsely identified himself after he was shot. Witnesses testified that Shawn was at the robbery scene and returned on foot to Ortiz's house. Had the trial court excluded Conarroe's testimony that Shawn was "a little" upset, it is not reasonably likely that he would have received a more favorable verdict. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

CALJIC 8.80.1

Shawn Berry claims that the CALJIC 8.80.1 special circumstances instruction violated his right to jury trial and due process. The instruction defines the requisite mental state for a felony-murder special circumstances finding where the defendant is not the actual killer or the jury is unable to find the defendant is an aider-abettor or co-conspirator.

CALJIC 8.80.1 describes two categories of defendants: (1) defendants found not to be the actual killer, or in the alternative, (2) a defendant whom the jury is "unable to decide" was an actual killer or an aider-abettor or conspirator.[7]

Shawn Berry argues that the CALJIC 8.80.1 instruction failed to instruct on the requisite mental state where the jury is unable to decide that he is a co-conspirator. The jury was provided a copy of the instruction but the copy had a scratch mark across the words "or co-conspirator." Other portions of the instruction were clearly blacked out to reflect modifications. The trial court, in reading the CALJIC 8.80.1 instruction, did not omit the words "or conspirator." On review, the written version of the jury instruction governs any conflict with the oral instruction. (See *People v. Osband* (1996) 13 Cal.4th 622, 687; *People v. Crittenden* (1994) 9 Cal.4th 83, 138.)

Assuming the words "or co-conspirator" were deleted from the instruction, the alleged error was harmless beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 256-257; *People v. Purcell* (1993) 18 Cal.App.4th 65, 76.) The jury determined that George Berry was the actual killer when it found that he "personally and intentionally discharged a firearm, a handgun, which caused the death of Chang Lin within the meaning

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[7] The CALJIC 8.80.1 instruction stated in pertinent part: "If you find a defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance[] is true or not true: robbery-murder.

"The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

"If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.

"If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor ~~**or co-conspirator**~~, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of robbery under Penal Code section 190.2(a)(17).)" (Emphasis added.)

of Penal Code section 12022.53(d)." (See e.g., *People v. Jones* (2002) 30 Cal.4th 1084, 1120 [express finding that defendant personally used firearm supports implied finding defendant was actual killer].) Because only one firearm was used in the robbery, the jury impliedly found that Shawn Berry was not the actual killer. Since he was not the actual killer, the only issue for the jury to resolve, in the context of the special circumstances allegation, was Shawn Berry's intent. It did so.

Citing *People v. Roy* (1989) 207 Cal.App.3d 642, 652, Shawn argues that the jury may have returned a true finding on the special circumstance allegation based on the theory co-conspirators are liable for the natural and probable consequence of any crime in furtherance of the conspiracy. In *People v. Roy*, *supra,* the jury was instructed that it could find the special circumstance to be true if "the killing was the natural and probable product of the robbery, whether he intended that result or not." (*Id*., at p. 652.) The trial court in *People v. Roy, supra,* failed to instruct "that the accomplice must have 'intended to aid in the *killing* of a human being. . . .' (Italics added.) Rather, the jury was instructed in terms which invited the fusion of the distinct standards of guilt and special circumstance." (*Id*., at p. 649.)

People v. Roy, *supra,* is inapposite. Assuming that CALJIC 8.80.1 was inadvertently modified to delete the words "or co-conspirator," the jury was instructed that it could not find the special circumstance to be true as to a non-shooter defendant (i.e., Shawn) "unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted . . . or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, . . . or assisted in the commission of the crime of robbery . . ." The jury also received CALJIC 8.83.1 which instructed that it could not find a special circumstance to be true unless "the proved surrounding circumstances are not only, (1) consistent with the theory that the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion."

The argument that the evidence does not support the special circumstances finding is equally without merit. The prosecution was required to show that Shawn, as a

nonshooter, had the intent to kill or acted with reckless indifference to human life while acting as a major participant in the robbery. (§ 190.2, subds. (c) & (d): *People v. Proby* (1998) 60 Cal.App.4th 922, 927.)

The evidence showed that Shawn went with Durbin and George Berry to borrow the revolver from Ortiz, that he accompanied them to the store, that he helped them "case" the store and purchased gloves, and that he acted as a lookout. Shawn stood at the doorway while the victims were thrown to the floor, kicked, handcuffed, threatened with a knife and revolver, and screamed. George Berry fired three shots, killing Chang Lin. Shawn fled with his accomplices, leaving the victim to die. "This evidence was sufficient to support the jury's special circumstance finding that the murder was committed in furtherance of the robbery, that defendant was a major participant, and that he acted with a reckless indifference to human life." (*People v. Proby*, *supra*, 60 Cal.App.4th at p. 929; see also, *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754; *People v. Smith* (2005) 135 Cal.App.4th 914, 927-928.)

Sentence – George Berry

On count 4, first-degree murder with special circumstances, George Berry was sentenced to life without possibility of parole, plus 25 years to life for personal use of a firearm causing death (§ 12022.53, subd. (d)). Section 12022.53, subdivision (j) states that the 25-year-to-life term shall be imposed "rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment." Appellant argues that the 25-year-to-life term should not have been imposed because the special circumstances, first-degree murder sentence (i.e., life without possibility of parole) is the "greater" sentence.

There was no sentencing error. Our Supreme Court, in *People v. Shabazz* (2006) 38 Cal.4th 55, 70, recently held that a section 12022.53 sentence enhancement may be imposed consecutive to a sentence of life without possibility of parole for first-degree, special circumstances murder.

Blakely v. Washington

The trial court, in sentencing Durbin and Shawn Berry, imposed a consecutive upper term on count 2 for robbery based on the finding that the robbery was premeditated. Citing *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*), appellants argue that the sentence violates their constitutional right to jury trial and due process because the jury was not asked to determine whether their conduct was premeditated. Appellants waived the issue by not objecting at the sentencing hearing. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.)

Waiver aside, there was no sentencing error. In *People v. Black* (2005) 35 Cal.4th 1238, 1244, our Supreme Court held that judicial factfinding to impose the upper term does not violate *Blakely*. "[T]he provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. . . . [T]he upper term is the 'statutory maximum' and a trial court's imposition to an upper term sentence does not violate a defendant's right to a jury trial . . . ." (*Id*., at p. 1254.) *People v. Black* controls. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Imposition of the upper term did not violate appellants' constitutional right to jury trial or due process.[8]

Parole Revocation Fines

Appellants argues, and the Attorney General agrees, that the trial court erred in imposing parole revocation fines pursuant section 1202.45. The trial court ordered Shawn Berry to pay a $5,000 parole revocation fine and ordered George Berry and James Durbin to pay $10,000 parole revocation fines. A parole revocation fine may not be

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[8] The United States Supreme Court has granted certiorari in *Cunningham v. California* (Feb. 21, 2006, No. 05-6551), ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47] on the effect of *Blakely* and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621] on California's determinate sentencing law.

imposed where the defendant is sentenced to life without parole. (*People v. Oganesyan, supra,* 70 Cal.App.4th at p. 1183.)

We strike the $10,000 parole revocation fines (§ 1202.45) as to James Durbin and George Berry, and the $5,000 parole revocation fine as to Shawn Berry. (*Ibid.*) The clerk of the superior court is ordered to prepare and forward amended abstracts of judgment to the Department of Corrections.

As modified, the judgments are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Charles Horan, Judge

Superior Court County of Los Angeles

Kathy M. Chavez, under appointment by the Court of Appeal, for George Nicolas Berry, Defendant and Appellant.

Landrea E. Rosenthal, under appointment by the Court of Appeal, for James N. Durbin, Defendant and Appellant.

Corinne S. Shulman, under appointment by the Court of Appeal, for Shawn Earl Berry, Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, Kenneth N. Sokoler, Susan Lee Frierson, Deputy Attorneys General, for Plaintiff and Respondent.