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P. v. Pineda

CA4/1

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I.

INTRODUCTION

Defendants Joseph Peter Pineda, Solina Sandra Gonzales and Johnny Montano appeal their convictions and sentences after a jury convicted them of robbery, carjacking, kidnapping and murder. The defendants contend (1) that the trial court erred in instructing the jury with respect to CALCRIM No. 540B, the felony murder instruction, by using improper formatting that allowed the jury to convict the defendants of felony murder based solely on a finding that the defendants either committed, aided and abetted, intended to commit or intended to aid and abet a robbery, carjacking, or kidnapping; (2) that the trial court erred in including the crimes of torture and murder when instructing the jury with CALCRIM No. 376, which tells the jury how it may use evidence that a defendant possessed stolen property; (3) that the trial court erred in failing to instruct the jury on the crime of assault, as a lesser included offense of robbery; (4) that the trial court erred in instructing the jury that the prosecutor did not have to prove motive, because some of the charged offenses required showing that the defendants had a particular purpose in carrying out the crime; (5) that the court erred in not staying the imposition of sentence for the offense of torture pursuant to Penal Code¹ section 654, since the murder and torture were part of a single course of conduct; (6) that the court erred in denying the defendants' motions to sever their trials from that trial of a fourth co-defendant whom the jury eventually acquitted; (7) that the trial court erroneously instructed the jury with respect to the "one continuous transaction rule" as it applies to felony murder; (8) that there is insufficient evidence to support their convictions for murder based on felony murder because there is insufficient evidence that the torture and murder were part of one continuous transaction; (9) that there is insufficient evidence to support the convictions for carjacking as to two of the three victims; (10) that the prosecutor committed misconduct in at least two ways; and (11) that



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the cumulative effect of the identified errors requires reversal.

We conclude that the trial court erred in including murder and torture when instructing the jury with CALCRIM No. 376. However, we further conclude that the error was harmless. The defendants' other claims of error are without merit. We therefore affirm the judgments of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual background

On the night of June 7, 2006, Adrian Rojo, Jerry Palominos and Noe Medina drove to a San Bernardino night club in Rojo's Chrysler 300. The three were sitting in the car deciding whether to go inside the club when Gonzales approached the car and began talking with the men. Gonzales asked the men if they wanted to "hang out."

Gonzales waited for some of her friends to come out of the club, and then told the men to follow her blue Suburban. The other women who joined Gonzales were Linda Caballero and Desiree Cardenas.

The men followed the women to an apartment complex that was approximately a mile away from the club. The women escorted the three men to Jeannette Rios's apartment, where the men sat on one couch, and Caballero and Cardenas sat on a couch across from the men. Gonzales alternatively stood and sat while talking with the others. While Rojo, Palominos and Medina talked with Gonzales, Caballero and Cardenas, Rios was moving from room to room. At one point, Rios told everyone that they had to "keep it down" because her kids were asleep in the apartment.

After a few minutes, Gonzales got up and went into a bedroom with Rios. They were in the bedroom for about 10 to 15 minutes. Shortly after Gonzales and Rios emerged from the bedroom, they returned to the bedroom, taking a telephone with them.

At some point, Gonzales returned to the living room and asked the men if they wanted to buy some beer. Rios walked back and forth to a window and kept looking out through the blinds. Gonzales left the apartment. Rios then went into the bathroom. Caballero went to the bathroom door and saw Rios with a spoon and syringe. Caballero believed that Rios was "doing some kind of drugs."

Caballero asked Rios for a cigarette. Rios told Caballero to ask one of the men to take her to the store, and then told Caballero that she, Rios, was going to take the man's car. Caballeros "looked at her like [she was] crazy" and walked away.

About five to 10 minutes after Gonzales left to buy beer, Rios used the telephone. At some point



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during this time, Rios told Palominos, in an aggressive tone, that she did not like the black and red baseball cap that he was wearing.

Gonzales returned about 20 minutes after she had left the apartment. She was carrying a pocketknife and did not have any beer. Montano and Pineda followed Gonzales into the apartment. Montano and Pineda shook hands with the three men. Montano then pulled out a black nine-millimeter semiautomatic handgun, placed it next to Palominos's head, and asked Palominos whether "he liked it." Pineda pulled out a revolver.

Either Gonzales or Rios told Caballero and Cardenas to leave, and the two women left the apartment.

One of the remaining women told Rojo, Palominos and Medina to "[t]ake off all [their] shit and hand over the car keys." Rojo gave the car keys to Montano. Someone ordered Rojo to turn around and put his hands on the back of the couch. Montano grabbed Palominos by the shirt and forced him to the floor. Pineda ordered Medina to get on the floor, and Medina complied.

Gonzales began removing Rojo's clothing and belongings, and cut a gold bracelet off of his wrist using her pocketknife. Montano removed Palominos's clothing and belongings. Pineda did the same to Medina. Gonzales collected all three men's wallets and cell phones.

Pineda put his gun to Medina's back and escorted Medina out of the apartment to the curb where Rojo's car was parked and ordered him to sit. Gonzales, meanwhile, had a discussion with Montano about handcuffs. Pineda walked back to the apartment, leaving Medina outside. Pineda then placed a gun to the back of Rojo's head and escorted Rojo to the curb to join Medina.

Montano later emerged from the apartment with Palominos, whose hands were bound behind his back. Pineda followed soon after, with his gun in his hand. Gonzales and Rios then walked out of the apartment, carrying the men's shoes and clothing, and went to the blue Suburban.

Although Montano had originally indicated that he was going to take Rojo with him, at some point Gonzales said that she did not like Palominos, and suggested that they take him instead of Rojo. Someone then led Palominos to Rojo's car and placed him in the back seat.

After Palominos was placed in the car, Montano pointed his gun at Rojo and Medina and told them to stand up and look down the street. Montano then told the two men to "start running before he killed" them. The men ran away. Rojo looked back and saw Gonzales and Rios get into the Suburban. Medina saw Montano get into the Chrysler, where Palominos was sitting. As Rojo turned a corner, he saw the Suburban drive away, with his Chrysler following close behind.

Police later found Rojo's Chrysler abandoned in an alley in San Bernardino. Police found bloodstains that contained Palominos's DNA on the front passenger seat, the rear seat, and the interior door



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frame of the passenger side rear door of the vehicle. A bloodstain on the rear seat of the Chrysler was found to contain the DNA of both Palominos and another individual, possibly Pineda.

Police also found Palominos's DNA in bloodstains in the Suburban, including in stains on the door frame of the driver's side rear door, the backrest of the passenger side front seat, and the shoulder belt on the passenger side middle seat. In addition, Palominos's DNA was found in bloodstains on Montano's jeans, on Pineda's shorts, on the barrel and grip of a handgun, and on a folding knife.

Police recovered Palominos's body in another alley in San Bernardino. Palominos's head was wrapped in a blood-soaked t-shirt. He had been shot three times in the face. At least one of the shots appeared to have been fired at close range. A strip of dark colored fabric was wrapped around Palominos's neck. A ligature mark on his neck and petechial hemorrhages in the conjunctiva of both of Palominos's eyes indicated that he had been strangled. Palominos had suffered 10 stab wounds to the head and back. Handcuffs were secured on Palominos's right wrist, and a piece of green cloth was tied around his left arm. A hemorrhage on the left arm was consistent with a needle puncture, which could be consistent with an injection of methamphetamine.

Palominos's body also revealed multiple contusions on the torso and soles of his feet that were consistent with his having been struck with a long cylindrical object. Abrasions on Palominos's body were consistent with his body having been dragged, and black marks on the body were consistent with him having been run over by a vehicle.

Toxicology tests on Palominos's body indicated that he had methamphetamine in his system, but no alcohol. The autopsy determined that Palominos died as a result of "gunshot wounds of [sic] head with strangulation, with stab wounds of chest."

Police officers served a search warrant at an apartment in San Bernardino in connection with this case on June 8, 2006. Police found a purse in a dresser in the master bedroom that contained a loaded pistol magazine and an identification card with Gonzales's name and photograph. There was a handcuff key sitting next to the purse. Police also found a revolver hidden under a bag, which was under a nightstand in the room. The revolver contained two live rounds of ammunition and three spent shell casings. The bullets recovered from Palominos's body had fragmented, but they nevertheless appeared consistent with the live rounds that were recovered from the revolver. Police also found Gonzales's folding knife, which she apparently routinely carried concealed in her bra, and Medina's cell phone, in a closet in the master bedroom.

Police made contact with Montano, Pineda and Gonzales that day at the apartment. An officer conducted a custodial search of Pineda and found a wallet and cell phone in his right front pocket. At trial, Palominos's mother identified the cell phone found on Pineda as belonging to Palominos.

The following day, police found Gonzales's blue Suburban at another residence. Gonzales's



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stepfather and his friend were inside the vehicle when police arrived. The carpet in the vehicle was completely soaked, and a garden hose was running at high pressure on the ground nearby. Gonzales's stepfather was arrested. During an interview with police, he admitted that Gonzales had asked him to take the Suburban because "it was hot."

Police also executed a search warrant at Rios's apartment. During the search of her apartment, police found a substance that they believed to be methamphetamine, as well as paperwork addressed to Rios. In the bathroom, police found a scale of the size that is often used to measure small quantities of drugs. The scale had white powdery residue on it.

B. Procedural background

On August 12, 2009, a jury found the defendants guilty of one count of murder (§ 187, subd. (a); count 1); three counts of robbery (§ 211; counts 2, 3 & 4); three counts of carjacking (§ 215, subd. (a); counts 5, 6 & 7); one count of kidnapping to commit robbery (§ 209, subd. (b)(1); count 8); and one count of torture (§ 206; count 9).² The jury found true the special circumstance allegation that the defendants committed the murder during the commission of a robbery and a kidnapping (§ 190.2, subd. (a)(17)). The jury also found true the enhancement allegations that Pineda and Montano personally used a firearm during the commission of the offenses (§ 12022.53, subd. (b)); that Gonzales personally used a knife during the commission of the offenses (§ 12022, subd. (b)(1)); and that the defendants entered a structure while voluntarily acting in concert with two or more accomplices (§ 213, subd. (a)(1)(A)).

The trial court found that Pineda had served three prior prison terms, and that Montano and Gonzales had each served two prior prison terms (§ 667.5, subd. (b)).

The trial court sentenced Pineda to life in prison without the possibility of parole, plus life with an additional 22 years. The court sentenced Montano to life in prison without the possibility of parole, plus life with an additional 21 years. The court sentenced Gonzales to life in prison without the possibility of parole, plus life with an additional 12 years.

The defendants filed timely notices of appeal.

III.

DISCUSSION

A. The trial court did not err in instructing the jury on felony murder

Pineda, joined by Gonzales and Montano, contends that the trial court erred in instructing the jury with CALCRIM No. 540B, regarding the elements of felony murder, on the theory that the instruction, as given by the court, created two alternative theories of liability for felony murder.



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Specifically, Pineda asserts that, "[h]ad CALCRIM [No.] 540B been read as it was written, there would be no error here" but contends that as a result of the placement of the word "Or" and the use of a period after the second numbered paragraph, the court prejudicially altered the instruction.

The written instruction that the court gave to the jury to take with them into the jury room read, in relevant part, as follows:

"Each defendant is charged in Count 1 with murder, under a theory of felony murder.

"A defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator.

"To prove that a defendant is guilty of first degree murder under this theory, the People must prove that:

"1. The defendant committed or aided and abetted the crime of robbery, carjacking, or kidnapping,
Or

"2. The defendant intended to commit or intended to aid and abet the perpetrator in committing the crime of robbery, carjacking, or kidnapping.

"3. If the defendant did not personally commit the crimes of robbery, carjacking, kidnapping, then a perpetrator, whom the defendant was aiding and abetting personally committed the crime of robbery, carjacking, or kidnapping,

"[AND]

"4. While committing robbery, carjacking, or kidnapping, the perpetrator did an act that caused the death of another person.

"AND

"5. There was a logical connection between the act causing the death and the robbery, carjacking, or kidnapping."

Pineda contends that the word "Or" at the end of the first numbered paragraph, combined with the "." at the end of the second numbered paragraph, told the jury that in order to convict the defendants of felony murder, they would have to determine only that the defendants either "committed or aided and abetted the crime of robbery, carjacking, or kidnapping," or that the defendants "intended to commit or intended to aid and abet the perpetrator in committing the crime of robbery, carjacking, or kidnapping," but that the jury did not have to also find that the "perpetrator did an act that caused



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the death of another person," nor that a "logical connection" existed between the act causing the death and one of the underlying felonies. Pineda notes that the standard instruction for CALCRIM No. 540B connects all of the paragraphs with semicolons and the word "AND." He argues that in failing to use semicolons between paragraphs and the word "AND" after the first numbered paragraph, the trial court's instruction failed to inform the jury that it had to consider whether the actual perpetrator did an act that caused the victim's death and whether there was a logical connection between that act and the underlying felonies.

We disagree with the suggestion that the trial court's instruction failed to tell the jury that it had to consider whether the actual killer committed the fatal act while committing the robbery, carjacking or kidnapping and whether there was a logical connection between the fatal act and the robbery, carjacking or kidnapping. The instruction, taken as a whole, instructed the jury that it had to consider these two elements, which were identified in numbered paragraphs 4 and 5, regardless of whether the jury determined that the particular defendant had personally committed the crimes of robbery, carjacking or kidnapping, or that someone else had committed those crimes and the defendant merely aided and abetted in committing those crimes.

Pineda's argument requires a strained reading of the instruction. It is simply not reasonable to suggest that a jury considering whether a defendant is guilty of felony murder would believe that it could find a defendant guilty of such an offense by determining only whether that person committed or aided and abetted in one of the other identified crimes, without considering whether a victim was killed. Yet this is precisely what Pineda suggests. A reasonable juror would not ignore paragraphs 4 and 5 in deciding whether to convict these defendants of felony murder on the basis of the trial court's alternative formatting of this instruction. We conclude that it is not possible that, based on the trial court's use of a period instead of a semicolon and the word "Or" between paragraphs 1 and 2 instead of the word "and," the jury believed that it could convict any of these defendants of murder under a felony murder theory if it concluded merely that the defendant committed or aided and abetted in the robbery, carjacking or kidnapping, without also considering whether a victim was killed by an accomplice, and whether there was a logical connection between the robbery, carjacking or kidnapping and the death. We therefore reject Pineda's argument that the trial court erred in instructing the jury with the felony murder instruction.

B. The trial court's error in instructing the jury with CALCRIM No. 376 was harmless

Pineda, joined by Gonzales and Montano, contends that the trial court improperly instructed the jury that CALCRIM No. 376, the standard instruction regarding a jury's consideration of evidence of a defendant's possession of recently stolen property, applied to the offenses of murder, torture, robbery and carjacking.

The written instruction that the court provided to the jury was as follows:



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"If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of robbery, carjacking, murder, [or] torture based on those facts alone. However, if you also find that supporting evidence tends to prove a defendant's guilt, then you may conclude that the evidence is sufficient to prove he/she committed robbery, carjacking, murder, torture. The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his/her guilt of the crimes charged.

"Remember that you may not convict a defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

The defendants contend that by including the offenses of murder, torture, robbery and carjacking in the instruction, the court created an unconstitutional presumption, and reduced the state's burden of proof.

We first address this contention with respect to the offenses of robbery and carjacking. As the defendants concede, the Supreme Court has already held the giving of a virtually identical instruction proper when it is given in association with theft-related offenses.³ (See *People v. Smithey* (1999) 20 Cal.4th 936, 975-976.) Because robbery and carjacking are theft-related offenses, we must reject the defendants' claim in this regard.

With respect to the court's inclusion of the offenses of murder and torture in CALCRIM No. 376, we conclude that this was error, but that the error was harmless. The Supreme Court has determined that the giving of CALJIC No. 2.15, the predecessor instruction to CALCRIM No. 376, should be limited to theft-related offenses. (See *People v. Prieto* (2003) 30 Cal.4th 226, 248 (Prieto) [finding inclusion of rape and murder improper, but concluding that instructional error was harmless].) Thus, it was clearly error for the court to include these non-theft-related offenses in this instruction.

However, given the state of the evidence against these defendants, we conclude that the fact that the court gave this erroneous instruction did not prejudice them. Although the defendants argue that we should apply the more stringent test for prejudice announced in *Chapman v. California* (1967) 386 U.S. 18, 24, the Supreme Court applied the test announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 (Watson) when it considered the prejudice arising from a similar instructional error in *Prieto*, supra, 30 Cal.4th at page 249. We therefore consider whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (Watson, supra, at p. 836.)

There is no reasonable likelihood that the jury would have reached a different result if the court had limited the permissive inference described in CALCRIM No. 376 to the theft-related offenses. The



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surviving victims and other witnesses identified the defendants as the persons who perpetrated the robbery, carjacking, and kidnapping of Palominos, and there was significant forensic evidence linking them to his torture and murder. Given the overwhelming evidence of the defendants' guilt on the murder and torture offenses, the error in the instruction could not have caused prejudicial error. (See Prieto, *supra*, 30 Cal.4th at p. 249.)

C. The trial court did not err in not instructing on assault as a lesser included offense of robbery in concert, kidnapping for robbery, murder or the robbery special circumstance

Pineda, joined by Gonzalez and Montano, contends that the trial court erroneously failed to instruct *sua sponte* on assault because there was substantial evidence showing that the offense he committed was less than the charged offense of robbery or the robbery-related offenses and special circumstance. The failure to instruct on assault, Pineda asserts, requires reversal of the convictions for robbery and kidnapping for robbery, as well as the first degree murder conviction and special circumstances premised on robbery.

"A trial court has a *sua sponte* obligation to instruct the jury on any uncharged offense that is lesser than, and included in, a greater charged offense, but only if there is substantial evidence supporting a jury determination that the defendant was in fact guilty only of the lesser offense. [Citations.]" (People v. Parson (2008) 44 Cal.4th 332, 348-349.) "An uncharged offense is included in a greater charged offense if either (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), or (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). [Citations.]" (Id. at p. 349.)

"Under the elements test, a court determines whether, as a matter of law, the statutory definition of the greater offense necessarily includes the lesser offense. A robbery is 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' [Citation.] An assault, however, is 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' [Citation.] Because a robbery can be committed strictly by means of fear, assault is not a lesser included offense of robbery under the elements test. [Citation.]" (Parson, *supra*, 44 Cal.4th at p. 349.)

"Under the accusatory pleading test, a court reviews the accusatory pleading to determine whether the facts actually alleged include all of the elements of the uncharged lesser offense; if it does, then the latter is necessarily included in the former. [Citation.]" (Parson, *supra*, 44 Cal.4th at p. 349.)

In this case, as was true in Parson, the information accused the defendants of a taking by force and fear. (See Parson, *supra*, 44 Cal.4th at p. 349.) According to the defendants, assault was necessarily a lesser included offense of that robbery under the accusatory pleading test because the information alleged that they committed the robbery by means of force and fear.



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The People point out that this argument has been rejected in *People v. Wright* (1996) 52 Cal.App.4th 203 (Wright). The Wright court specifically held that an assault is not necessarily a lesser included offense when a pleading alleges a robbery by force and fear, reasoning that commission of a robbery by force is possible without necessarily committing an assault, because the use of force for purposes of the offense of robbery may be actual or constructive, and may include the use of a threat to induce fear, even without an attempt to apply force or the present ability to commit an assault. (Id. at pp. 210-211.)⁴ The Wright court reasoned that " 'force' is not an element of robbery independent of 'fear'; there is an equivalency between the two. " "[T]he coercive effect of fear induced by threats . . . is in itself a form of force, so that either factor may normally be considered as attended by the other." " [Citation.] "[¶] . . . [¶] . . . Since the element of force can be satisfied by evidence of fear, it is possible to commit a robbery by force without necessarily committing an assault. Consequently, under the 'accusatory pleading' test, assault is not necessarily included when the pleading alleges a robbery by force." (Id. at p. 211.)

Pineda acknowledges Wright and its potential applicability to this case. However, he urges us to reject the decision as poorly reasoned and inconsistent with other authority. We find the Wright court's analysis persuasive and will apply it here. We therefore conclude that the trial court did not err in refusing to instruct on assault as a lesser included offense of robbery.

D. The trial court did not err in instructing the jury that the prosecution did not have to prove motive

Pineda, joined by Gonzales and Montano, contends that the trial court erred in instructing the jury that the prosecution was not required to prove motive. According to the defendants, the intent element for the crime of kidnapping for robbery required the jury to determine whether the defendants committed the kidnapping to further the robbery, and the intent element for torture required the jury to determine whether defendants inflicted pain on the victim for the purpose of revenge, extortion, persuasion or sadism. Thus, the defendants maintain, the offenses "plainly required [the jury] to determine why [the defendants] committed these crimes." The defendants assert that by instructing the jury with CALCRIM No. 370,⁵ which told the jury that the prosecution did not have to prove the motive for the crimes, the court reduced the state's burden of proof with respect to the offenses of torture and kidnapping for robbery.

This argument rests on the fallacious presumption that motive and the specific intent elements of the crimes of torture and kidnapping for robbery are synonymous. Courts have previously rejected this argument as to both offenses. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 503-504 (Hillhouse) [instructing jury that motive need not be shown did not conflict with instruction regarding specific intent required for kidnapping for robbery]; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1452 [motive is not an element of the crime of torture, therefore it was not error to instruct the jury that motive need not be shown].)

We agree with these authorities. " 'Motive, intent, and malice--contrary to appellant's



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assumption--are separate and disparate mental states. The words are not synonyms. . . . ' [Citation.] Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (Hillhouse, supra, 27 Cal.4th at p. 504.) Because the concepts of motive and intent are distinct, an instruction informing the jury that the prosecution does not have to prove motive does not alter the prosecution's burden of proof with respect to the requisite intent element of a charged crime.

E. The trial court did not err in punishing the defendants for both torture and murder, since there is sufficient evidence to support the conclusion that the torture and murder were not part of a single course of conduct

Pineda, joined by Gonzales and Montano, claims that the trial court erred in imposing consecutive sentences for the murder and the torture of Palominos, pursuant to section 654. The defendants maintain that the trial court was required to stay execution of one of the sentences because the torture and murder were committed pursuant to one criminal objective and as part of the single course of conduct of torturing the victim. Specifically, the defendants contend that under the prosecution's theory of the case, Palominos was tortured to death.

Section 654 provides in relevant part: "(a) 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Section 654 prohibits multiple punishments where a single criminal act or omission violates more than one penal statute. This statutory prohibition has been extended to cases in which the defendant engages in an indivisible course of conduct with a single objective, but violates several different penal statutes in the process. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

In reviewing a defendant's claim that the court erred in failing to stay a sentence pursuant to section 654, the "defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence." (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

Based on its determination that "the torture was separate and apart from the actual homicide," the trial court imposed separate consecutive sentences for the murder and torture convictions as to each defendant. The evidence is clearly sufficient to support the trial court's determination in this regard.



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The medical examiner estimated that Palominos died at approximately 2:40 p.m. on the afternoon of June 8, 2006. The last time that Palominos's friends saw him was very early that morning, many hours before his death, while he was being forcibly taken by the defendants. When Palominos's body was finally discovered, it was clear that he had suffered a great deal in those intervening hours. He had been stabbed at least 10 times during that time. Palominos's blood was found in two different vehicles, suggesting that the stabbings occurred sometime prior to his being shot in the face three times in the alley where he was found. There was also evidence that Palominos had been strangled while he was alive. In addition, the multiple contusions on his body and his feet were consistent with his having been hit a number of times with a cylindrical object while he was still alive. The nature and extent of Palominos's injuries constitutes substantial evidence to support the trial court's conclusion that the defendants harbored a separate objective of inflicting a prolonged period of extreme pain and suffering on Palominos before they ultimately killed him.

F. The trial court did not abuse its discretion in denying Gonzales's and Montano's motions to sever their trials from the trial of co-defendant Rios

Defendants Gonzales and Montano contend that the trial court improperly denied their motions to sever their trials from the trial of co-defendant Rios. Gonzales and Montano assert that they were prejudiced by gang evidence that Rios presented as part of her defense.

"Section 1098 provides in pertinent part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.' [Citation.]" (People v. Tafoya (2007) 42 Cal.4th 147, 162 (Tafoya).) "Defendants 'charged with common crimes involving common events and victims' present a ' "classic case" ' for a joint trial. [Citation.]" (Ibid.)

"Nonetheless, a trial court, in its discretion, may order separate trials ' "in the face of an incriminating confession, prejudicial association with co-defendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a co-defendant would give exonerating testimony." [Citations.] [Citation.]" (Tafoya, supra, 42 Cal.4th at p. 162, italics omitted.) "A trial court's denial of a severance motion is reviewed 'for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion.' [Citations.] A trial court's erroneous refusal to sever a defendant's trial from a co-defendant's requires reversal if the defendant shows, to a reasonable probability, that separate trials would have produced a more favorable result [citations], or if joinder was so grossly unfair that it deprived the defendant of a fair trial [citations]." (Ibid.)

Prior to trial, Pineda and Gonzales moved to sever their trials from the other defendants' trials out of a concern that Rios's defense would seek to place blame for the crimes on them. Pineda and Gonzales both noted that Rios had given police a statement in which she implicated herself in the robbery, carjacking, and kidnapping, but not the murder, and in which she identified her co-defendants as



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having participated in the crimes.⁶ The prosecutor indicated in response that the prosecution did not intend to introduce Rios's post-arrest statements at trial.

The trial court heard from the attorneys on the issue of severance, and ultimately denied the motions to sever. The court said that if the prosecutor had indicated an intention to use Rios's statements, the court might lean toward severing Rios's case from the others, or ordering separate juries. However, because the prosecutor had said that the prosecution did not intend to use Rios's statements in its case-in-chief, Rios's statements did not provide a basis for severing the trials or ordering separate juries. The court rejected the defendants' other arguments for severance, noting that they were "the kind of usual arguments that apply in most multiple defendant cases," including the possibility of "contradictory defenses." The court stated that it was satisfied that "a severance is not required to assure a fair trial [for] all of the defendants."

During opening statements, Rios's counsel made a statement to the effect that Rios was "[a]fraid of calling the police, because these people will kill her." At that point, Montano's attorney renewed his motion to sever, and also moved for a mistrial, based on this statement. The trial court denied both motions, stating that the fact that one defendant would argue that she was not involved, but that the other defendants were involved, and even going so far as to suggest that she was fearful that if she told anyone what had happened the others would kill her, was not a ground for severance or for a mistrial.

During Rios's defense case, Rios's attorney elicited evidence that Rios was not a gang member, in an attempt to demonstrate that Rios was not a violent person. Outside the presence of the jury, the trial court indicated that the court would allow Rios to introduce evidence that disassociated her from gang activity and other violence, but that the court would not permit her to present evidence that the other defendants were involved in gang activities or that suggested that the crimes were gang related.

In an effort to rebut Rios's evidence of her character and reputation for nonviolence, the prosecution offered the testimony of a Colton police detective who testified about gangs that operated in the area, and called into question the testimony of defense witnesses who suggested that Rios did not associate with known gang members.

During closing arguments, Rios's attorney argued that Rios's co-defendants were gang members, and suggested that this was a gang case. None of the other defendants objected to this portion of counsel's argument.

Gonzales and Montano now argue that if their cases had been severed from Rios's, the jury would not have heard the gang evidence or Rios's attorney's suggestion that this was a gang case. However, in each count the defendants were charged with committing " 'common crimes involving common events and victims' " [citation], making this a " 'classic case' for a joint trial." (People v. Burney (2009) 47 Cal.4th 203, 237 (Burney).) Further, at the time the court considered the defendants' motions



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to sever their trials, there was no indication that Rios intended to raise the issue of gang activity. The defendants' motions for severance were based on the more general ground that Rios would attempt to place the blame for the crimes on them in defending herself. However, the trial court was correct in noting that the mere existence of possibly antagonistic defense does not necessarily require severance. " '[A]ntagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other.' [Citation.] 'Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.]' [Citations.]" (Tafoya, supra, 42 Cal.4th at p. 162.) Neither Gonzales nor Montano made any such showing at any point in this trial.

Even though the trial court's ruling on the motion to sever was clearly not an abuse of discretion at the time it was made, we must nevertheless determine whether the joinder of the defendants ultimately resulted in gross unfairness that deprived any of the defendants of due process of law. (Burney, supra, 47 Cal.4th at p. 237.) It is clear that " '[t]he prosecution presented independent evidence supporting each defendant's participation in the group's mutual criminal endeavors.' " (Id. at p. 239, citations omitted.) There was abundant evidence of each defendant's role in the offenses, including the testimony of a number of eyewitnesses, as well as DNA and other forensic evidence. Thus, " '[n]o gross unfairness resulted from the joint trial' [citations]" (ibid.), and there was no deprivation of due process as to any of the defendants due to the joinder.

G. The trial court did not err in instructing the jury regarding the "one continuous transaction" concept for purposes of the felony murder charge

Montano, joined by Gonzales, contends that the trial court erred in a number of respects in instructing the jury concerning the "one continuous transaction" element of the felony murder rule. First, Montano and Gonzales argue that the modified version of CALCRIM No. 540B that the trial court gave failed to properly inform the jury that in order to find the defendants guilty of felony murder, the murder and the underlying felony must have been part of one continuous transaction. They further contend that the trial court failed to sua sponte instruct the jury with CALCRIM No. 549, which provides a clarifying instruction concerning how the jury is to determine whether a killing and underlying felony were part of one continuous transaction. Finally, Montano and Gonzales contend that the court erred in failing to instruct the jury on the issue of when the crimes of kidnapping, carjacking, and robbery could be considered to have concluded prior to the time Palominos was killed.

The first argument that Montano and Gonzales make is that there was a defect in the modified CALCRIM No. 540B instruction that the trial court gave the jury. The court instructed the jury as follows:

"Each defendant is charged in Count 1 with murder, under a theory of felony murder.



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"A defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator.

"To prove that a defendant is guilty of first degree murder under this theory, the People must prove that:

"1. The defendant committed or aided and abetted the crime of robbery, carjacking, or kidnapping,
Or

"2. The defendant intended to commit or intended to aid and abet the perpetrator in committing the crime of robbery, carjacking, or kidnapping.

"3. If the defendant did not personally commit the crimes of robbery, carjacking, kidnapping, then a perpetrator, whom the defendant was aiding and abetting personally committed the crime of robbery, carjacking, or kidnapping,

"[AND]

"4. While committing robbery, carjacking, or kidnapping, the perpetrator did an act that caused the death of another person.

"AND

"5. There was a logical connection between the act causing the death and the robbery, carjacking, or kidnapping.

"The connection between the fatal act and the robbery, carjacking, or kidnapping must involve more than just their occurrence at the same time and place.

"A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

"To decide whether any defendant committed robbery, carjacking, or kidnapping, please refer to the separate instructions that I will give/have given you on those crimes. To decide whether any defendant aided and abetted a crime, please refer to the separate instructions that I will give/have given you on aiding and abetting. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

"The defendant must have intended to commit or to aid and abet the felonies of robbery, carjacking, or kidnapping before or at the time of the act causing death.



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"It is not required that the person die immediately, as long as the act causing the death and the felonies are part of one continuous transaction.

"It is not required that the defendant be present when the act causing the death occurs." (Italics added.)

According to Montano and Gonzales, this "instruction is formulated in terms of five mandatory elements, followed by some explanatory statements that are not presented as co-equal with the five elements that the prosecution 'must prove.' " These defendants argue that the "explanatory statements" "include a passing reference to 'one continuous transaction,' but only in the context of an ambiguous remark pertaining to the time of the victim's death." According to Montano and Gonzales, because the "one continuous transaction" language was not set forth in an enumerated paragraph in the instruction, the jury would not interpret the instruction as requiring that the People prove that the act causing the death and the felonies were part of one continuous transaction. They contend that the instruction was thus defective.

None of the defendants requested that the trial court modify or clarify the instruction with respect to the "one continuous transaction" language. As a result, they have forfeited this challenge to CALCRIM No. 540B. (People v. Rodrigues (1994) 8 Cal.4th 1060, 1140 [it is incumbent on a defendant to request clarification or modification of instructions].) Nevertheless, even on the merits, this argument fails.

"When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. [Citations.]" (People v. Wilson (2008) 44 Cal.4th 758, 803-804.)

The jury was clearly instructed that it had to determine that the act that led to Palominos's death and the underlying felonies were part of one continuous transaction. The instruction was not defective simply because the "one continuous transaction" rule was not identified as an "element" of the offense and/or set forth in a numbered paragraph. We discern no basis for concluding that the jurors would view language in an instruction that is set forth in a numbered paragraph differently from language that is not in a numbered paragraph, or that the jurors would have misunderstood or ignored the portion of this instruction that informed them that the cause of death and the underlying felony must be part of one continuous transaction. Nor do we think that the fact that the "one continuous transaction" language appeared in a sentence that contained the additional language that "[i]t is not required that the person die immediately" would indicate to the jury that it had to consider whether there was one continuous transaction only if it concluded that the victim did not die immediately. Rather, a natural reading of the sentence would require application of the "one continuous transaction" rule, regardless of whether the victim died immediately or after some time had passed.



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Montano and Gonzales also contend that the trial court should have instructed the jury with CALCRIM No. 549, which provides additional instruction on the one continuous transaction rule. That instruction provides:

"In order for the People to prove that the defendant is guilty of murder under a theory of felony murder [and that the special circumstance of murder committed while engaged in the commission of _____ is true], the People must prove that the _____ [or attempted _____] and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time and in more than one location.

"In deciding whether the act causing the death and the felony were part of one continuous transaction, you may consider the following factors:

"1. Whether the felony and the fatal act occurred at the same place;

"2. The time period, if any, between the felony and the fatal act;

"3. Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony;

"4. Whether the fatal act occurred after the felony but while [one or more of] the perpetrator[s] continued to exercise control over the person who was the target of the felony;

"5. Whether the fatal act occurred while the perpetrator[s] (was/were) fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime;

"6. Whether the felony was the direct cause of the death;

"AND

"7. Whether the death was a natural and probable consequence of the felony.

"It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction." (CALCRIM No. 549, italics omitted.)

The defendants did not request that the court give this instruction, and the trial court did not provide it.

In *People v. Cavitt* (2004) 33 Cal.4th 187, 204 (Cavitt), the Supreme Court stated that "if the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise



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adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, 'it is the defendant's obligation to request any clarifying or amplifying instructions on the subject.' [Citation.]" (Ibid.) "[T]here is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide without regard to whether the evidence supports such an instruction. [Citation.]" (Ibid.)

Because the evidence in Cavitt "did not raise an issue as to the existence of a logical nexus between the burglary-robbery and the homicide," the Supreme Court concluded that the trial court had no sua sponte duty to clarify the requirement of a logical nexus between the felony and the killing. (Cavitt, supra, 33 Cal.4th at p. 204.) The Cavitt court noted that "cases that raise a genuine issue as to the existence of a logical nexus between the felony and the homicide 'are few indeed,' " and that "[i]t is difficult to imagine how such an issue could ever arise when the target of the felony was intentionally murdered by one of the perpetrators of the felony." (Id. at p. 204, fn. 5.)

Montano and Gonzales argue that whether such a "nexus" existed in this case was in issue. According to these defendants, a number of the factors identified in CALCRIM No. 549 would weigh against a finding that the felonies here and the killing were part of one continuous transaction. In arguing that whether the killing was part of one continuous transaction with the other felonies was in question, Montano and Gonzales appear to presume that the felonies somehow had concluded long before Palominos was killed. This is simply an incorrect presumption, given that Palominos was clearly under the defendants' control until the time he was killed. Thus, at a minimum, the kidnapping was clearly ongoing at the time of his murder. (See Burney, supra, 47 Cal.4th at p. 233 ["'the crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim and [the defendant] has reached a place of temporary safety' [citation]"].) Given that the evidence demonstrated that Palominos was still under the defendants' control at the time he was killed, it is indisputable that a logical nexus between felony kidnapping and the homicide existed. Further, it is clear that Palominos was a target of the robbery and the carjacking, and that he was the sole target of the kidnapping. It is further clear that he was intentionally murdered by one of the perpetrators of those felonies. This is the very situation that the Cavitt court noted would not raise a "genuine issue as to the existence of a logical nexus between the felony and the homicide." (Cavitt, supra, 33 Cal.4th at p. 204, fn. 5.) The trial court therefore had no sua sponte duty to give CALCRIM No. 549.

Gonzales also argues that the trial court should have instructed the jury with respect to the duration of the crimes of kidnapping, carjacking and robbery by informing the jury as to when those crimes could be deemed to be completed. She cites *People v. Bigelow* (1984) 37 Cal.3d 731, 753 for the proposition that a defendant's reaching a place of temporary safety after committing other felonies but prior to committing a murder severs the connection between the prior felonies and the killing for purposes of the felony murder rule. However, in Cavitt, supra, 33 Cal.4th at pages 208-209, the Supreme Court clarified that the duration of an offense under the "escape rule," which provides that a felony continues until the felon has reach a place of temporary safety, is not equivalent to a



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defendant's liability under the "one continuous transaction" element of the felony murder rule. In other words, a defendant's liability for felony-murder may extend beyond the completion of the felony as long as the felony and the act resulting in death are part of one continuous transaction. Therefore, the relevant question for the jury was not when or whether any of the underlying felonies had been completed at the time of the act or acts that caused Palominos's death, but rather, whether the underlying felonies and the act or acts that caused Palominos's death were part of one continuous transaction. In any event, we doubt that any of the charged felonies could be considered to have been completed at the time of Palominos's death, given the circumstances of this case.

H. There is substantial evidence that the killing was part of "one continuous transaction" with the underlying charged felonies

Montano, joined by Gonzales, argues that there is insufficient evidence that Palominos's murder was part of one continuous transaction with the robbery, carjacking and/or kidnapping.

"In determining whether the evidence is sufficient to support a conviction . . . , 'the relevant question is whether, after viewing the evidence in the light most favorable 'to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] Under this standard, 'an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.]" (People v. Vy (2004) 122 Cal.App.4th 1209, 1224.) "Rather, the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (Ibid.)

Montano notes that "the prosecution's evidence demonstrates that these felonies [robbery, carjacking and kidnapping] were committed at approximately 2:30 a.m. on June 8, while the homicide occurred approximately 12 hours later in mid-afternoon." According to Montano, the evidence was such that the "robbery and carjacking were long since completed under the standards of California law," and as a result, there is a "complete absence of evidence as to the relationship between the felonies committed during the early morning hours of June 8 and the homicide committed during the mid-afternoon hours." In making this argument, Montano apparently chooses to ignore the overwhelming evidence that Palominos continued to be under the defendants' control throughout that entire time period, and that, as noted above, at a minimum, the kidnapping was continuing at the time of the murder. There is thus clearly substantial evidence from which the jury could have found the defendants guilty of felony murder beyond a reasonable doubt.

I. The evidence is sufficient to support the defendants' convictions for carjacking with respect to victims Medina and Palominos

Montano, joined by Gonzales, contends that there is insufficient evidence to support the defendants'



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convictions for carjacking with respect to two of the three victims. Specifically, Montano argues that there was no evidence that Rojo's Chrysler was taken from the immediate presence of Medina or Palominos. In order to be convicted of carjacking under section 215, a defendant must have taken a vehicle "from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle." (People v. Magallanes (2009) 173 Cal.App.4th 529, 534.) The concept of "immediate presence" is explained in CALCRIM No. 1650, which states that "[a] vehicle is within a person's immediate presence if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear." The carjacking statute does not require "that the victim be inside or touching the vehicle at the time of the taking." (People v. Medina (1995) 39 Cal.App.4th 643, 650 (Medina).)

In Medina, the defendant challenged the sufficiency of the evidence to support a carjacking conviction under circumstances similar to those in this case. There, the victim was lured away from his car to a motel room by someone posing as a prostitute. (Medina, supra, 39 Cal.App.4th at p. 651.) Once the victim was in the motel room, the defendant and the defendant's brother robbed the victim, took his car keys, and took his car. (Ibid.) The Medina court noted that in the context of a robbery, " 'The trick or device by which the physical presence of the [victim] was detached from the property under his [possession] and control should not avail defendant in his claim that the property was not taken from the "immediate presence" of the victim.' " [Citation]" (Ibid., italics omitted.) Finding that the nature of the theft in Medina was one committed by "trick or devise," the Medina court concluded that the evidence was sufficient to establish that the immediate presence requirement of the carjacking statute was satisfied.

We find Medina instructive, and apply its reasoning to the carjacking in this case. The defendants clearly lured all three victims from the car into the apartment, where all three victims were robbed and the car keys taken. The car was ultimately stolen by the defendants. Under the reasoning of Medina, the evidence is sufficient to support the defendants' convictions on all three counts of carjacking.

J. There was no prosecutorial misconduct

Montano and Gonzalez present two theories as to how the prosecutor committed misconduct during closing arguments. First, Montano and Gonzalez argue that the prosecutor misstated the law with respect to the one continuous transaction rule, for purposes of felony murder. Second, the defendants argue that the prosecutor committed misconduct in making references to certain circumstantial evidence as being part of victim Palominos's "testimony," as though he were a living witness.⁷

1. Legal standards

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury,



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and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights--such as a comment upon the defendant's invocation of the right to remain silent--but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citation.]" (People v. Riggs (2008) 44 Cal.4th 248, 298.)

"When a claim of misconduct is based on the prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' [Citation.]" (People v. Friend (2009) 47 Cal.4th 1, 29.)

2. The prosecutor's statement regarding the "one continuous transaction" requirement

Montano and Gonzalez contend that the prosecutor misstated the law regarding the "one continuous transaction" element of the felony murder rule. During closing argument, the prosecutor stated, "The law is that you don't have to commit any act during a robbery. None is required. If you're aiding and abetting, you don't have to do that. Also, a finding that a victim remained under their control at the time of a homicide is equivalent [to] finding that the homicide was part of a continuous transaction with robbery or kidnapping. No defense to a murder that a non-killer did not intend to kill, forbade his associates to kill or was herself unarmed. No defense."

At that point, defense counsel objected, saying, "Your Honor, I'm going to have to object. She's quoting the law from a case that--and Your Honor has given instruction on all this." At this point, the court gave the jury the following admonition: "You are reminded that the instructions of law that apply to the case are the instruction[s] that I've given you. The attorneys are free to suggest to you what those instruction mean, but you are to be guided by the instructions that I have given you." The prosecutor then continued, "So I stand by the initial argument that was made to you a day ago on felony murder, if they bought into the robbery, the kidnapping, the carjacking then they bought into the murder."

Montano and Gonzalez argue that while the question whether the victim remained under the control of the perpetrators at the time of the homicide is one factor for a jury to consider when determining whether the killing was part of a continuous transaction with the other felonies, they contend that the prosecutor misinformed the jury that this was the only factor that it had to consider, and that the jury's verdict as to felony murder would be determined based on this factor alone.

While CALCRIM No. 549, the pattern jury instruction that explains the "one continuous transaction" rule for purposes of felony murder, does identify a number of factors that the jury may consider in determining whether a homicide and underlying felonies were part of a single continuous



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transaction, a jury may rely on any of these factors, including the factor that the prosecutor cited, in deciding whether the homicide and the underlying felonies were part of one continuous transaction. In this sense, the prosecutor's comment may have been under-inclusive, but it was not an incorrect statement of the law.

In any event, we cannot conclude that the prosecutor's statement with respect to the "one continuous transaction" rule had any effect on the jury's assessment of this element. After the prosecutor made the statement in question, the trial court immediately indicated to the jury that it was not to take the attorneys' statements as an indication of what the law required of them, and instead, they were to focus on the instructions that the court gave as to what the law requires. We presume that the jury followed this instruction. (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 574.) Therefore, to the extent that the prosecutor's statement may have been erroneous, the trial court's admonition cured any potential harm that the comment might have caused.

3. The prosecutor's statements that Palominos was "talking to" the jury and telling the jury "[d]on't let them get away"

Gonzales and Montano contend that the prosecutor's references to Palominos's "testimony" during opening statement and closing argument constituted prejudicial prosecutorial misconduct. For example, during the prosecutor's opening statement, she told the jury, "Jerry is going to tell you through the coroner what was done to him." The prosecutor also said, "Jerry will speak to you and let you know that from the moment they took him in that car he was tortured, obviously kidnapped, and that he was ultimately killed by the people involved in this case." In concluding her opening statement, the prosecutor said, "I hope you will listen to Jerry as the rest of us have."

During closing arguments, the prosecutor also referred to Palominos's "testimony." She said that his testimony "beg[an]" where the testimony of the surviving witnesses ended, and summarized how the injuries found on Palominos's body and the DNA on the defendants' clothing and in the vehicles demonstrated what had happened to Palominos in the hours after he was taken from the apartment, before he was killed. In discussing this evidence, the prosecutor said, "[T]his is Jerry talking to you, trying to tell you: Don't let them get away. Let me tell you who was there. Let me tell you what they did to me." And in her rebuttal, the prosecutor said, "[At] the beginning of this trial, I told you I didn't have a victim to sit next to me. But he spoke to you. And I'd ask that you listen to him."

None of the defense attorneys objected at any point to the prosecutor's remarks. "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury. [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553.) In any event, however, we conclude that the prosecutor's statements here did not amount to misconduct.

The prosecution had essentially no direct evidence as to what happened to Palominos between the



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time the defendants took him from the apartment and the time his body was discovered in an alley. However, the circumstantial evidence of what had occurred was significant. The prosecutor utilized a rhetorical device in telling the jury that despite the lack of any eyewitnesses who could testify as to what happened to Palominos during the relevant time period, there was evidence that would tell them what had taken place. The prosecutor framed this evidence as being Palominos's "testimony," but did not overly personalize the evidence, nor improperly appeal to the passions and prejudices of the jury.

Montano and Gonzales rely principally on *Drayden v. White* (9th Cir. 2000) 232 F.3d 704 (*Drayden*), in support of their argument that the prosecutor committed misconduct in suggesting that the dead victim was giving "testimony" in the case. In *Drayden*, a Ninth Circuit case that is not binding on this court, the defendant argued that the prosecutor committed misconduct during closing arguments by asking the jury to imagine what the deceased victim would have told the jury if he could have testified at trial. (*Id.* at pp. 711-712.) The prosecutor then sat in the witness chair and delivered a soliloquy in which the prosecutor "testified" in the victim's voice, telling a story about what had occurred that night as if it were being told by the victim. (*Ibid.*) The *Drayden* court concluded that the prosecutor's actions constituted misconduct. Specifically, the court concluded that the prosecutor "obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim," "seriously risked manipulating and misstating the evidence by creating a fictitious character based on the dead victim," and "risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim who, in the words of the prosecutor, was a gentle man who did nothing to deserve his dismal fate." (*Id.* at p. 713.) Despite concluding that the prosecutor had committed misconduct, the *Drayden* court determined that the misconduct had not violated the defendant's due process rights, and did not require reversal. (*Ibid.*)

The prosecutor's suggestion in the present case that the victim was "talking to" the jury was not equivalent to the prosecutor's fictionalized "testimony" by the victim in *Drayden*. In this case, although the prosecutor used the rhetorical device of suggesting that the deceased victim could tell the jury what had happened to him, the prosecutor did not attempt to provide "testimony" as if she were the victim, in the victim's fictional voice. Rather, she suggested that the circumstantial evidence gleaned from the condition of the victim's body and from the vehicles could inform the jury as to what happened during the time that Palominos was under the defendants' control. The prosecutor's statements suggesting that Palominos had given "testimony" by way of the circumstantial and forensic evidence is distinguishable from what occurred in *Drayden*, and constituted permissible argument.

Gonzales and Montano further contend that the prosecutor's statement, "Don't let them get away," was "nothing short of an appeal to the passion and prejudice of the jury." We disagree that this portion of the prosecutor's statement amounted to misconduct. This brief comment was neither deceptive nor reprehensible, and did not, even in combination with the prosecutor's comments



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referring to the victim "talking to" the jury, so infect the trial with unfairness that it amounted to a denial of due process. Gonzales and Montano thus cannot demonstrate that the prosecutor's conduct rose to the level of misconduct.

K. There was no prejudicial cumulative effect from the claimed errors

Gonzales, joined by Montano, contends that the cumulative effect of the alleged errors requires reversal. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (In re Avena (1996) 12 Cal.4th 694, 772, fn. 32.) We have concluded that only one of the defendants' asserted claims of error has merit, i.e., the court's error in including the offenses of torture and murder in the CALCRIM No. 376 instruction, but we have further concluded that the error was harmless. Consequently, there are no errors for which the cumulative effect would require reversal of the judgment against Gonzales or Montano.

IV.

DISPOSITION

The judgments of the trial court are affirmed.

WE CONCUR: HUFFMAN, Acting P. J. IRION, J.

1. Further statutory references are to the Penal Code unless otherwise specified.
2. Although Rios was also charged in connection with this case, the jury found Rios not guilty of all the charges against her, and thus she is not involved in the current appeal.
3. The defendants raised this issue in order to preserve the claim.
4. The issue raised in Wright was noted by the Supreme Court in Parson, supra, 44 Cal.4th at page 350, but the Supreme Court did not address the issue on the merits. Rather, the Parson court stated that even if it assumed that assault is a lesser included offense of robbery, "the trial court was under no sua sponte obligation to instruct on assault if . . . there was no substantial evidence supporting a jury determination that the defendant was in fact guilty only of that offense." (Ibid.)
5. The court's instruction to the jury with respect to CALCRIM No. 370 provided: "The People are not required to prove that a defendant had a motive to commit (any of the crimes) charged. In reaching your verdict you may, however, consider whether a defendant had a motive. [¶] Having a motive may be a factor tending to show that a defendant is guilty. Not having a motive may be a factor tending to show a defendant is not guilty."
6. Montano's attorney orally joined in the motions to sever.



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7. In addition to joining in Montano's argument, Gonzales also separately maintains that in purporting to state Palominos's "testimony," the prosecutor improperly appealed to the passions and prejudices of the jury.

