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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CRISTO LOPEZ et al., Defendants and Appellants.	C065058 (Super. Ct. No. 09F02695)

APPEAL from a judgment of the Superior Court of Sacramento County, Russell L. Hom, Judge. Affirmed as modified.

Susan D. Shors, for Defendant and Appellant Cristo Lopez.

Charles M. Bonneau for Defendant and Appellant Rebecca Brousseau.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Cristo Lopez and Rebecca Brousseau of first degree murder and attempted robbery, and sustained firearm and robbery-murder allegations as to each. (Pen. Code,[1]

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* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III, IV, V, VI, VII, VIII and IX.

[1] Further statutory references are to the Penal Code unless otherwise specified.

§§ 187, subd. (a), 190.2, subd. (a)(17), 664/211, 12022, subd. (a)(1) [Brousseau], 12022.53, subds. (b), (c), & (d) [Lopez].) The trial court sentenced them to prison for life without the possibility of parole, and imposed unstayed terms of 25 years to life as to Lopez and one year as to Brousseau. Defendants timely appealed.[2]

Brousseau contends that 1) no substantial evidence supports the special circumstance finding; 2) the trial court erroneously instructed the jury; 3) alleged adoptive admissions she made in jail were improperly admitted; 4) she was entitled to instruction on included offenses; 5) the trial court used the wrong standard in evaluating her new trial motion; 6) and her sentence is unconstitutional. Brousseau also contends the trial court should have instructed the jury to consider whether Lynch was an accomplice. Lopez joins in this contention, and adds that Brousseau was an accomplice and the jury should have been so instructed. Both defendants also contend the trial court improperly imposed a parole revocation restitution fine, a point conceded by the People.

We shall strike the unauthorized fine, order a modification to clarify the abstracts of judgment, and otherwise affirm.

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[2] Two former codefendants did not appeal. Andrew Lynch pled guilty to obstructing a peace officer (§ 148, subd. (a)(1)), and Lopez's brother, Bictoriano Lopez (we shall refer to him as "Bictoriano" within the opinion, as he and defendant share the same last name), pled guilty to being an accessory after the fact (§ 32).

FACTUAL AND PROCEDURAL BACKGROUND

Brousseau lured the victim, Khet Saelee, into a secluded alley by promising an act of prostitution, to enable Lopez to rob the victim. Lopez then shot the victim. The authorities eventually persuaded four other individuals associated with the robbery or its aftermath to provide information regarding the facts and circumstances of the murder. These four individuals testified as witnesses for the prosecution at trial. Defendants also testified. What follows is a summary of the pertinent testimony heard by the jury regarding the facts and circumstances surrounding the planned robbery as well as the victim's shooting and later events.

The alley runs between Roosevelt Avenue and Baker Avenue to the north and south, "dead-ends" to the west, and is accessed from Stockton Boulevard to the east.

On the night of November 22-23, 2008, the victim left home to go to a bachelor party with his cousin, who had asked him to bring beer. His cousin called him after midnight and told him to hurry up, but the victim never arrived.

The next morning, a man who lived in a unit at 4929 Baker Avenue, near the end of the alley, found the victim in his car by the end of the alley, and called 911. The victim was in the front seat, which was slightly reclined, and his pants were unbuckled. The keys were in the "on" position and the car was in reverse, and had been backed into a fence, where it ran out of gas. The victim had $5 in his right front pants pocket, $200 in his right rear pants pocket, and his wallet was found in the

driver's door panel. An unrolled condom was on the ground near the car, but it was not tested for DNA.

The victim had been shot through the left arm, and the bullet, consistent with a .38-caliber bullet, had reentered the body and pierced his heart. He could have lived long enough after being shot to start his car, put it in reverse, and try to drive off.

A. Crawford's Testimony

On April 8, 2009, Amy Lee Crawford was arrested for failing to complete work project duties arising from a felony car theft conviction; when questioned, she gave information about this case. By the time of trial, she was on felony probation arising from an unrelated burglary case.

Crawford testified she lived at 4929 Baker Avenue. She had known Lopez since he was 13, and had met Brousseau in 2008. She had sex with Lopez in the past, but had never dated him. On the night of the killing, she met defendants on her way to a liquor store. Lopez was intoxicated, "hypie" and "wild." The trio walked toward Lopez's mother's house, but changed their minds and walked to Lynch's house, on Roosevelt Avenue "just beyond" the end of the alley. Defendants planned "a quick come-up, and they were talking about robbing some tricks." Lopez said, "Hey, let's rob some tricks, and [Brousseau] agreed to it, and she's, like, I'll go pull a trick." Brousseau said she would go to Stockton Boulevard, and "bring them to the alley." When Crawford objected that this was too close to her house,

Lopez reassured her that "it wasn't going to be that serious." Nothing was said about a gun.

According to Crawford, when the trio reached Lynch's house, Lopez alone went in and then came out. They walked back, and Crawford and Lopez went to Crawford's yard and smoked cigarettes, while Brousseau went to Stockton Boulevard. Lopez then stood "in the dark," waiting. Crawford heard a car drive to the end of the alley, and after about five minutes, Lopez "went into the alley, and I heard arguing, and I heard Ms. Brousseau scream and get out of the car and start running down the alley." Crawford went to the alley and saw Lopez "arguing with a guy through the window" saying, "Give me your money[.]" She followed Brousseau "and we got almost to the end of the alley, and we heard a gunshot." Crawford walked to Roosevelt Avenue, and saw Lopez "running ahead of us." All three met at Lynch's house, although Crawford denied the meeting had been planned. Lopez alone went in, and came out after five or 10 minutes.

While they were waiting for Lopez, Crawford asked Brousseau what happened, and she replied, "I freaked out. He knocked on the window with a gun." Brousseau also said she dropped a condom in the car. When Lopez came out with Lynch, the two men smoked cigarettes, Lynch returned to his house, and the trio went to a back room that had been added on to Lynch's house, used methamphetamine, then fell asleep. Crawford had sex with Lopez that night. Later, Lopez said he left the gun at Lynch's house.

B. Lynch's Testimony

Lynch was arrested on an unrelated matter at his house on April 8, 2009, with Bictoriano. On March 2, 2010, Lynch agreed to testify truthfully for a reduction of a felony accessory to murder charge to a misdemeanor charge of interfering with a peace officer's investigation, with a time-served sentence.

Lynch testified he had lived at 4900 Roosevelt Avenue, about five or six houses down from where the victim's car was found. He had known Lopez for 10 to 12 years, and had seen Brousseau about five times. When Lopez came by the house that night, Lynch went outside to smoke a cigarette, and he did not let Crawford or Brousseau inside. Lynch agreed that Lopez could use his back room, accessible through the backyard, later. Lopez left for about 30 minutes, and when he returned, he asked if Lynch could store a gun. Lynch told Lopez that Lopez knew where to put it, in a "tuck spot" on a hook under the stairs in Lynch's room. Lynch did not think Lopez had retrieved the gun from his house earlier and did not see him go to where guns were kept. The next morning, Lopez's brother Bictoriano came to retrieve his gun, and Lynch told him where to get it, but did not see the gun. He admitted he had seen Lopez with a gun when Lopez came in that night, describing it as a .38-caliber Smith and Wesson revolver. When asked if Lopez had picked up the gun from Lynch earlier that night, Lynch replied, "I don't think so." Lynch had seen Bictoriano with that gun before, which he would leave at Lynch's house. According to Lynch, Bictoriano came to the house the morning after the murder, which was also

the morning after Bictoriano's daughter's birth, and Lopez showed up after he left. The three men were not together on or near November 23rd, and Lynch did not show the other two men a gun.[3]

C. Bictoriano's Testimony

After Bictoriano was arrested and refused to give information, he was charged with accessory to murder. On the day the preliminary hearing had been set, August 20, 2009, Bictoriano gave a statement to law enforcement. He agreed to plead guilty and testify truthfully, in exchange for a time-served sentence.

Bictoriano testified his daughter was born November 22, 2008. A few days later he visited Lynch to share this news.[4] Later that day, at Lynch's, he saw Lopez. Lopez "told me something had went wrong, he had hurt somebody." Lopez told him about a gun; Lynch pointed towards a tree in the yard, where Bictoriano found the gun, and took it to "get rid of it" and help his brother. It was a .38-caliber revolver. He denied going to Lynch's house the morning of the shooting, and denied the gun was his.

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[3] Lynch testified that Bictoriano lied at the preliminary hearing, by saying he had come to Lynch's house three or four days after the shooting, by testifying the gun was not his, and by testifying Lynch showed him where the gun was, in the backyard.

[4] Bictoriano testified his daughter was in intensive care and he stayed at the hospital after her birth, hence, he did not visit Lynch the morning after the killing.

D. Peralez's Testimony and Jail Visits

On March 10, 2010, Monica Peralez was arrested while working as a prostitute, in a sting set up by Detective Cvitanov. She was given use immunity to protect her from charges of prostitution, witness intimidation, and being an accessory to murder.

Peralez married Lopez after he had been charged with the instant offenses. She had known Lopez for about eight years. Lopez told her before he was arrested that he shot a man in the arm, in an alley, and also told her he shot the man by accident. She visited Lopez in jail in April 2009, and he told her to visit Brousseau in jail, and tell her he was going to take all the blame and she should not say anything. Peralez had never met Brousseau. Peralez wrote down the message, and held it up to the visiting room window. Lopez had told her to write the message down, to avoid being recorded, and told her what to say. The message said, "Chris says not to worry, just don't say nothing, it will all be okay, he's going to take the blame for it[.]" It said nothing about a rape. Brousseau looked at the note, then "[s]he was crying. And she said that they had already found DNA on a condom, and that was that." Brousseau mouthed the words. Brousseau also made a gesture, mimicking a condom. The next time Peralez visited Lopez, she told him what Brousseau said. Brousseau's counsel asked Peralez if she could read lips, and she testified she could.

Detective Jason Cvitanov testified Peralez visited with Lopez on April 12, 2009, saw Brousseau on April 14, 2009, and

next visited Lopez on April 19, 2009. Nothing could be heard on the recording for the Peralez-Brousseau visit. However, it was common for jail visitors to bypass the recording system by mouthing words or using notes.

E. Brousseau's Testimony

Brousseau testified on her own behalf. She had been homeless at the time of the murder, but sometimes stayed with Anthony Jimenez during November 2008, on the other side of a duplex from Crawford, who was Jimenez's sister-in-law. Brousseau used drugs, worked as a prostitute, and had two misdemeanor theft convictions. Late on the night of the shooting, after midnight, Brousseau left Jimenez's house to buy some cigarettes and turn a trick. On the way to the store she met Crawford and Lopez, whom she knew. They were talking about "coming up on"--or robbing--"a dude on a bike," but Brousseau never discussed robbing anyone with them, or taking anyone into the alley. Because it was so cold, Brousseau turned around and walked back towards home. When the victim pulled up in his car, she got in and directed him to the alley, where she "usually" took customers; she felt safe there because it was near where she was staying and people in the area knew her. The victim unbuckled his trousers and leaned back as Brousseau searched in her bag for a condom. Then she heard the victim cry out, "Oh, my God, he's got a gun." As she fled, she saw Lopez by the driver's side door. Although she had not seen a gun, and knew it was Lopez, she "felt safer running towards Stockton Boulevard." When she reached the end of the alley, she ran into

Crawford, "heard a pop" and knew someone had been shot, and they "ended up" in Lynch's back room. Brousseau had not been at Lynch's house earlier. After a short while, Lopez came in, and the three spent the night.

Brousseau testified Peralez visited her in jail, but Brousseau did not know who Peralez was, and was confused by her visit. Peralez held up a note that said in part, Brousseau "needed to tell the cops that I was being raped," and Brousseau began to cry, because she was being further entangled in something she was not part of. Brousseau never mouthed anything to Peralez about a condom or DNA. When asked why she had never told this story before, Brousseau said she was afraid of being a snitch.

F. Lopez's Testimony

Lopez testified on his own behalf. He was 23 and had known Lynch since he was about 10, they had been best friends, and he had known Crawford since he was 13. He met Brousseau early in 2008, "around the neighborhood." On the night of the shooting, he was intoxicated. He was "[o]n ecstasy, a little bit of meth, and I was drinking." While wandering around he met Crawford and Brousseau, and the trio "were just kind of chatting, talking while we were walking." They were going to go to Lopez's mother's house, but he decided to go to Lynch's house, to hang out with "the girls" in Lynch's back room, which Lopez had used before. Lynch allowed them to use the room. They were there for about 15 minutes, with Lopez drinking beer and taking more

ecstasy pills, while his companions used methamphetamine. They decided to go get more beer.

At some point, Lopez got his brother Bictoriano's gun from Lynch's house. The trio first went to Crawford's house, so she could get a jacket, and as Lopez waited by a picnic table, Brousseau left and said she would be back. When Crawford came out, she and Lopez talked about what to do "because we didn't have any money. We were trying to see if we could get some beer." During trial, Lopez conceded that if Brousseau turned a trick, the trio would have had money for beer, although he maintained that particular topic was not discussed at the time. As Lopez and Crawford talked, a car pulled up into the alley, which was not unusual, as people used the alley for drugs and prostitution. When Lopez saw the car shaking for about three minutes, he approached, and saw Brousseau jump out and run, after she cried out. Lopez claimed that he had no intent to rob anyone, but was trying to help, or stop the occupants from "causing a mess, causing trouble." When Lopez asked the driver what he was doing, the driver reached toward his side, and Lopez got scared and shot him.

Lopez ran back to Roosevelt Avenue and went to Lynch's back room, where the "girls" joined him. He testified he returned the gun to Lynch's room, but also testified, "I told him I fucked up and to put it up." He did not call the police because he "had no right to shoot the man." Lopez testified he had sex with both Crawford and Brousseau that night. He admitted telling Peralez to see Brousseau and tell her he was

taking responsibility, but he did not tell Peralez to say anything about a rape. He could not clearly explain why, if no robbery had been planned, it was important for Brousseau not to say anything. He admitted that he told Peralez during one jail call or visit that he could get less time if he had been trying to protect somebody. He denied he had told his brother Bictoriano that something went wrong; he said instead that he had told his brother, "I fucked up." Lopez denied discussing a robbery with Brousseau or Crawford, and said that neither knew he had a gun. When questioned by the police, he had said he saw a "guy" who was "getting on," i.e., raping his "home girl," whom he also described as "Amy's home girl." Lopez also had told the police Brousseau and Crawford knew he had a gun and they could have planned "to jack the guy" behind Lopez's back. Lopez was impeached with one car theft conviction and two burglary convictions.

G. Argument

The People argued Brousseau had to know Lopez was going to commit robbery, and she intended to aid him in that endeavor. Her act of fleeing from the car was part of robbery plan, to give her the ability to say she did not know of the robbery, if the victim identified her. If she really had been scared, she would have run to Jimenez's house, which is why she used the alley regularly, and she would not have joined Lopez and Crawford at Lynch's house after the murder. There was no reason for Crawford to lie to the authorities, and her statement put her "in the middle" of the planned robbery. Crawford knew of

the planned robbery and did nothing to stop it, and knew that Lopez had a gun.

The People emphasized that, if the jury were to find that Crawford was an accomplice, only slight evidence would be needed to corroborate her story. Bictoriano and Lynch were not accomplices, because they only helped after the crime, and there was no evidence they knew about the robbery earlier.

Brousseau's counsel argued the only evidence supporting an attempted robbery came from Crawford, who lacked credibility. Lopez's counsel, too, argued the felony murder theory hinged on Crawford, and suggested the jury convict Lopez of second degree murder or voluntary manslaughter.

H. Verdicts

The jury convicted defendants of first degree murder and attempted robbery, with a robbery-murder special circumstance. (§§ 187, subd. (a), 190.2, subd. (a)(17), 664/211.) The jury found Lopez personally and intentionally discharged a firearm, causing death (§ 12022.53, subds. (b), (c), & (d)), and found Brousseau was a principal in the attempted commission of a felony where another principal was armed with a firearm (§§ 12022, subd. (a)(1)).

DISCUSSION

I

Special Circumstance

Brousseau contends no substantial evidence supports the robbery-murder special circumstance finding, because the evidence does not show she acted with reckless indifference to

human life. Although this was not a capital case, the issue she raises arises from capital sentencing rules formulated by the United States Supreme Court, explained as follows:

> "[Penal Code section 190.2, subdivision (d)] was added to existing capital sentencing law in 1990 as a result of the passage of the initiative measure Proposition 115, which, in relevant part, eliminated the former, judicially imposed requirement that a jury find intent to kill in order to sustain a felony-murder special-circumstance allegation against a defendant who was not the actual killer. [Citation.] Now, pursuant to section 190.2(d), in the absence of a showing of intent to kill, an accomplice to the underlying felony who is not the actual killer, but is found to have acted with 'reckless indifference to human life and as a major participant' in the commission of the underlying felony, will be sentenced to death or life in prison without the possibility of parole. [Citations.]
>
> "The portion of the statutory language of section 190.2(d) at issue here derives verbatim from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127] (hereafter *Tison*). In *Tison*, the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a defendant convicted of first degree felony murder who was a 'major participant' in the underlying felony, and whose mental state is one of 'reckless indifference to human life.' (*Tison*, *supra*, 481 U.S. at p. 158 & fn. 12 [95 L.Ed.2d at pp. 144-145].) The incorporation of *Tison*'s rule into section 190.2(d)--in express terms--brought state capital sentencing law into conformity with prevailing Eighth Amendment doctrine." (*People v. Estrada* (1995) 11 Cal.4th 568, 575.)

Brousseau contends there was no evidence she intended to kill, and argues that even if the record supports a finding she was aware of Lopez's purpose to commit robbery, and aided him by luring the victim into the alley, there was no evidence she knew he had a gun, therefore "the theft or robbery was likely to come off without anyone getting hurt."

In assessing this claim, we view the evidence and reasonable inferences in the light favorable to the verdict. (*People v. Proby* (1998) 60 Cal.App.4th 922, 928 (*Proby*).)

The jury was instructed that in order to return a true finding on the special circumstance, it had to find Brousseau acted with reckless indifference, and a person so acts "when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death."

Although Lopez testified at trial that he did not show Crawford or Brousseau the gun, nor did he mention a robbery to them, he had previously told law enforcement that both women knew he had the gun, and they may have been planning "to jack the guy" behind Lopez's back. The jury could have believed Lopez's inconsistent statement that the women knew he had a gun. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1219.) There was evidence the women were with Lopez when he presumably picked up the gun from Lynch's house, although they did not go inside Lynch's house. Given the evidence of joint activities, the jury could rationally find Lopez told the authorities a partial truth--the women knew he had the gun--and then lied about it at trial. The fact Brousseau knew Lopez had a gun shows that she acted with reckless indifference to the life of the man she lured into the alley. (See *Proby*, *supra*, 60 Cal.App.4th at pp. 928-930.)

Brousseau dismisses Lopez's inconsistent statement, arguing "this was merely part of his initial effort to shift the blame to the women and away from himself. [Citation.] This version

was not relied on by the prosecutor in argument, and it was implicitly rejected by the jury's verdict convicting [Lopez] of the Saelee murder." We disagree. That this evidence was not mentioned in argument does not mean it was not considered, and the fact the jury did not credit a portion of Lopez's statement to the authorities does not necessarily mean that it discredited the earlier statement in its entirety. The People invited the jury to infer from other evidence that Brousseau knew Lopez had a gun, and did not disclaim reliance on Lopez's inconsistent statement about the gun.

Further, Brousseau's knowledge of the gun before the robbery is not necessary to uphold the jury's finding of special circumstances.

In *People v. Hodgson* (2003) 111 Cal.App.4th 566 (*Hodgson*), Hodgson aided Salazar, who planned to rob the victim (Nam) when she drove into a gated parking garage. Hodgson held the sliding garage door open, and tried to keep the door open to allow Salazar to get out of the garage. (*Hodgson, supra,* 111 Cal.App.4th at pp. 570, 576-577.) The court upheld a robbery-murder special circumstance:

> "The present case does not present evidence appellant supplied the gun, or was armed, or personally took the loot, or the like. Nevertheless, his role in the robbery murder satisfies the requirement his assistance be 'notable or conspicuous in effect or scope.'[Fn.]
>
> "To begin with, this is not a crime committed by a large gang or a group of several accomplices. Instead only two individuals were involved. Thus, appellant's role was more 'notable and conspicuous'--and also more essential--than if the shooter had been assisted by a coterie of

> confederates. . . . Because appellant was the only person assisting Salazar in the robbery murder his actions were both important as well as conspicuous in scope and effect.
>
> "A rational juror could also have found the evidence established appellant acted with 'reckless indifference to human life.' This phrase 'is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.'[Fn.] Even after the first shot it must have been apparent to appellant Ms. Nam had been severely injured and was likely unconscious. . . . Appellant had to be aware use of a gun to effect the robbery presented a grave risk of death. However, instead of coming to the victim's aid after the first shot, he instead chose to assist Salazar in accomplishing the robbery by assuming his position at the garage gate and trying to keep it from closing until Salazar could escape from the garage with the loot." (*Hodgson*, *supra*, at pp. 579-580.)

Similarly, in *People v. Smith* (2005) 135 Cal.App.4th 914 (*Smith*), disagreed with on another point in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291-292, the court upheld a robbery-murder special circumstance as to a man who acted as a lookout outside a room while a codefendant beat and stabbed the victim in the room, and who did not seek help when the codefendant left the room, finding his actions reflected reckless indifference to the victim's life. (*Smith, supra,* 135 Cal.App.4th at pp. 927-928.)

Brousseau's act of luring the victim into the secluded alley was critical to the robbery's success. After hearing what she knew was a gunshot, she failed to help the victim or call 911. Instead she went to Lynch's house and stayed with defendant and Crawford for the rest of the night and, on the

evidence, engaged in sexual intercourse with Lopez. Her actions reflect utter indifference to the victim's life.

Brousseau claims the secluded location *lessened* the chance of violence, stating "the increased vulnerability of the victim here made it less likely that there would be resistance and injury." We disagree. A person trapped in a secluded place, with no help in the offing, might resist an attempted robbery, or the robber might be emboldened to act violently, with reduced fear of capture, in a secluded place.

We conclude substantial evidence supports the robbery-murder special circumstance as to Brousseau.

II

Aiding Instruction

Brousseau contends the trial court erred by instructing the jury that a perpetrator and an aider are "equally guilty" of the crime. Any error was harmless.

The introductory instruction to the series of instructions on aiding, CALCRIM No. 400, as given in this case, provides:

> "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

Generally, a person who is found to have aided another person to commit a crime *is* "equally guilty" of that crime. (§ 31; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122-123, italics added.)

However, in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114-1122 [an aider might be found guilty of first degree murder, even if shooter is found guilty of manslaughter on unreasonable self-defense theory]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578 [aider might be guilty of lesser crime than perpetrator, where ultimate crime was not reasonably foreseeable consequence of act aided, but a lesser crime committed by perpetrator during the ultimate crime was a reasonably foreseeable consequence of the act aided].)

Because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on Brousseau to request a modification if she thought it was misleading on the facts of this case. Her failure to do so forfeits the claim of error. (*People v. Lang* (1989) 49 Cal.3d 991, 1024 [party may not claim "an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"]; see *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165 (*Samaniego*) [challenge to CALCRIM No. 400 forfeited for failure to seek modification]; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518 (*Nero*) [construing CALJIC No. 3.00, also using the "equally guilty"

language, and finding it misleading "even in unexceptional circumstances"].)[5]

Further, we see no prejudice. Brousseau contends the jury may have found she intended to commit a theft from the person of the victim, not a robbery. But the gist of her testimony was that she had no criminal purpose and was surprised by Lopez's actions. As we will explain, there was no evidence she intended to help Lopez steal from the victim, other than by use of force or fear. (See part IV, *post*.)

To the extent Brousseau contends the instruction reduced the People's burden of proof by eliminating the need to *prove* Brousseau's intent, we disagree. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Other instructions elaborated on the required intent.

CALCRIM No. 401, as given in this case, provided in part:

> "To prove that defendant, Rebecca Brousseau is guilty of attempted robbery crime [*sic*] based on aiding and abetting that crime, the People must prove that:
>
> "1. The perpetrator committed the crime;
>
> "2. The defendant knew that the perpetrator intended to commit the crime;
>
> "3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

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[5] We note that CALCRIM No. 400 has been amended to remove the "equally guilty" language. (Judicial Council of Cal., Crim. Jury Instns. (2011) p. 167.)

"AND

"4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

By specifying attempted robbery, and stating the aider must share the perpetrator's purpose to commit "that" crime, the instruction told the jury it had to find Brousseau shared Lopez's purpose to commit a robbery. Further, CALCRIM No. 540B, defining Brousseau's liability for murder, required the jury to find she "committed or attempted to commit, or aided and abetted a robbery" before finding murder liability. Robbery was defined, and the jury was told, "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery."

Thus, even if we were to accept Brousseau's premise that CALCRIM No. 400 impairs the intent element, the error was harmless because the point was covered elsewhere. (*People v. Stewart* (1976) 16 Cal.3d 133, 141; *Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.)[6]

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[6] In *Nero*, *supra*, 181 Cal.App.4th 504, when asked by the jury whether there could be different levels of liability between perpetrator and aider, the trial court twice referred it to an instruction using the "equally guilty" language, and there was evidence supporting different levels of liability. *Nero* found the error prejudicial. (*Id.* at pp. 518-520.) No jury confusion is evidenced in this case, nor is there evidence showing Brousseau could be guilty of something less than felony murder,

Contrary to Brousseau's claim in the reply brief, the other instructions given (CALCRIM Nos. 401 and 540B) did not *conflict* with the "equally guilty" language in CALCRIM No. 400; they *defined* and detailed the circumstances under which Brousseau could be found liable for the same crimes as Lopez.

In the absence of evidence of Lopez's intent to commit any crime other than robbery, and considering the detailed instructions requiring the jury to find Brousseau aided a robbery, no rational jury would have misused the "equally guilty" language to convict her of attempted robbery without finding she intended to aid a robbery. Therefore, any error was harmless.

III*

Peralez Testimony

Brousseau contends Peralez's testimony lacked foundation because Peralez described statements by Brousseau that were not spoken aloud, but were mouthed and "lip-read." In a related contention, Brousseau argues Peralez's testimony did not show any adoptive admission by Brousseau, and the jury was not properly instructed on adoptive admissions. We disagree.

A. Foundation for "Lip-Reading"

Brousseau's counsel lodged a hearsay objection to Peralez's testimony, but did not make a foundational objection to "lip-

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along with Lopez. Therefore, even if *Nero* were correctly decided, it does not require reversal in this case.

reading." Accordingly, Brousseau's foundational challenge to Peralez's testimony is forfeited.

Objections must be timely and specific. (Evid. Code, § 353, subd. (a).) "The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." (*People* v. *Morris* (1991) 53 Cal.3d 152, 187-188, overruled on another ground by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Had Brousseau lodged her foundational claim in the trial court, the point could have been litigated.

Brousseau claims in the reply brief that her trial court hearsay objection, in context, alerted the parties that she was challenging Peralez's ability to understand Brousseau. But the hearsay objection challenged whether Brousseau's crying in reaction to the note Peralez held to the window qualified as an adoptive admission. (See part III-B, *post*.) Brousseau's counsel never objected that Peralez's interpretive ability had not been demonstrated.

Moreover, Brousseau's counsel asked Peralez on cross-examination whether she could read lips, and Peralez testified she could. No contrary testimony was presented. The foundation for her testimony was unrebutted and unchallenged at trial.

It cannot be attacked for the first time on appeal. (See *People v. Price* (1991) 1 Cal.4th 324, 429-430.)

B. Adoptive Admissions

Brousseau contends her reaction to Peralez's note does not qualify as an adoptive admission. We disagree.

The evidence, if believed, showed that Peralez, who had never met Brousseau, visited her in jail and held a note up to the window, stating "Chris says not to worry, just don't say nothing, it will all be okay, he's going to take the blame for it[.]" Brousseau looked at the note, then cried, "And she said [by mouthing the words] that they had already found DNA on a condom, and that was that." Brousseau also made a gesture, mimicking a condom.

Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

The California Supreme Court has stated as follows:

> "There are only two requirements for the introduction of adoptive admissions: '(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his *adoption* of, or his *belief in*, the truth of such hearsay statement.' [Citation.] '[A] typical example of an adoptive admission is the accusatory statement to a criminal defendant made by a person *other* than a police officer, and defendant's conduct of silence, or his words or equivocal and evasive replies in response. With knowledge of the accusation, the defendant's conduct of silence or his words in the nature of evasive or equivocal replies lead reasonably to the inference that he

believes the accusatory statement to be true." (*People v. Silva* (1988) 45 Cal.3d 604, 623-624 (*Silva*).)

"Admissibility of an adoptive admission is appropriate when '"a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution[.]"'" (*People v. Combs* (2004) 34 Cal.4th 821, 843.)

The jury was instructed on adoptive admissions with CALCRIM No. 357, and was told it "may" conclude a defendant admitted an inculpatory statement if it found the following to be true:[7]

"1. The statement was made to the defendant or made in his or her presence;

"2. The defendant heard and understood the statement;

"3. The defendant would, under all the circumstances, naturally have denied the statement if he or she thought it was not true;

"AND

"4. The defendant could have denied it but did not."

Brousseau contends the evidence in this case "fails almost every criterion of the test for adoptive admissions." She contends that because she was in jail on these charges, "any failure to explain or deny the implied accusations" shows she

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[7] At Brousseau's request, the instruction did not identify to which defendant it might apply. The jury was also instructed that such an admission by one defendant could not be used against the other defendant.

exercised her right to silence, she had no opportunity to reply to the note, and it did not call for a response.

But Brousseau did *not* remain silent, except in a literal sense. She chose to respond to the note by crying, mouthing words, and making gestures that placed her at the scene of the shooting. (See *Silva*, *supra*, 45 Cal.3d at pp. 623-624 [Shelton listened to someone describe a murder Shelton committed and smiled without protest].) Brousseau could have challenged Peralez by asking who she was and stating she did not know what the note meant, as an innocent person might have done.

Assuming the evidence was properly admitted, Brousseau argues that because she testified and placed herself at the scene, the only remaining issue was whether she intended to aid a robbery. She claims Peralez's testimony did not establish any admission to that intent by Brousseau. Accordingly, she argues no instruction on adoptive admissions should have been given and the prosecutor should not have argued the point.

But Brousseau's plea of not guilty put at issue every element of the crime, and there is no way to know "what quantum of evidence is necessary to convince a jury beyond a reasonable doubt of a defendant's guilt." (*People v. Accardy* (1960) 184 Cal.App.2d 1, 4; see *People v. Steele* (2002) 27 Cal.4th 1230, 1243-1244.) Further, because Brousseau cried and signaled Lopez's plan to take responsibility would not work, the jury could rationally infer she was guilty of the charges she was

facing. Although that interpretation was not *compelled*, it was a permissible inference from the evidence.

Accordingly, we find no error.

IV*

Lesser Included Offense Instruction

Brousseau contends she was entitled to voluntary manslaughter instructions, on the theory that she aided attempted grand theft rather than robbery.[8]

Brousseau reasons as follows: Theft is necessarily included within robbery. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351 ["Theft is a lesser and necessarily included offense in robbery; robbery has the additional element of a taking by force or fear"].) The jury could have found she aided an attempted grand theft from the victim's person. (§ 487, subd. (c).) If so, felony murder would not apply because grand theft is not an enumerated felony for felony murder. (§ 189.) She might instead be liable for voluntary manslaughter by aiding the commission of a felony not inherently dangerous. (See *People v. Garcia* (2008) 162 Cal.App.4th 18, 31.)

Assuming for the sake of argument that the legal framework Brousseau constructs is sound,[9] we reject her predicate

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[8] Brousseau's counsel agreed no included offense instructions should be given. Later, *Lopez* sought and obtained instructions on lesser offenses. But there is no forfeiture or waiver of Brousseau's claim, because the duty to instruct on included offenses does not turn on counsel's wishes. (*People v. Golde* (2008) 163 Cal.App.4th 101, 115.)

[9] The People cite authority to the effect that voluntary manslaughter and second degree murder are not included

contention that substantial evidence would support a finding that she aided attempted grand theft.

"[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Brousseau and Lopez both testified they had no intent to rob the victim. Neither claimed the intent to take property from the victim *without* force, nor did any other witness provide testimony from which such intent rationally could be inferred.

Brousseau suggests the victim could suffer a grand theft "by the perpetrator reaching in and stealing the victim's cash," and other ways. In the reply brief, she elaborates:

> "[A]n attempted theft could occur if the victim took out his entire money roll ($200) in order to pay appellant Brousseau 20 or 40 dollars [as bargained for an act of prostitution]. Unseen, Cristo Lopez would approach from the rear in the dark and snatch the entire money roll for a 'quick come up.' Something like this, involving no gun and no force, is probably what was contemplated under the version described by Amy Crawford."

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offenses of *felony* murder. (See *People v. Anderson* (2006) 141 Cal.App.4th 430, 444-445 [assuming the point, but information alleged murder, not felony murder].) We need not address this point, however, and shall refrain from doing so.

This scenario, while creative, is completely lacking in evidentiary support. An instruction on a lesser offense must be based on *evidence*, not imagination. While the jury may have rejected any piece of evidence, we see *no* evidence, either accepted or rejected, that shows a plan to steal without force or fear. Therefore there was no basis for an instruction on attempted grand theft, and no basis for an instruction on an alternate form of homicide to felony murder as to Brousseau.

V*

Accomplice Testimony

Brousseau contends the trial court should have instructed the jury on Lynch's possible role as an accomplice. Lopez joins this contention, and adds that Brousseau was also an accomplice. We find no prejudicial error.

The California Supreme Court recently summarized the general rules regarding accomplice testimony as follows:

> "An accomplice is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (§ 1111.)
>
> "'The general rule is that the testimony of all witnesses is to be judged by the same legal standard. In the case of testimony by one who might be an accomplice, however, the law provides two safeguards. The jury is instructed to view with caution testimony of an accomplice that tends to incriminate the defendant. It is also told that it cannot convict a defendant on the testimony of an accomplice alone.' [Citations.]
>
> "Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court

must evaluate whether it is reasonably probable that such error affected the verdict. [Citation.]

"Any error in failing to instruct the jury that it could not convict defendant on the testimony of an accomplice alone is harmless if there is evidence corroborating the accomplice's testimony. '"Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense."'" (*People v. Williams* (2010) 49 Cal.4th 405, 456 (*Williams*).)

"'"[W]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice,"' the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice." (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Mere presence at the scene, or failure to prevent a crime, does not show aiding and abetting. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.) An aider "acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets." (*People v. Avila* (2006) 38 Cal.4th 491, 564.)

We now consider defendants' contentions in turn.

A. Lynch as an Accomplice

Following the above principles, the trial court instructed the jury (CALCRIM No. 334) it could find Crawford was an accomplice, and if so, her testimony "should be viewed with

caution" and could be used to convict only if corroborated. Corroboration required only slight independent evidence tending to connect a defendant to the crime.[10]

Defendants now contend there was evidence from which the jury could find Lynch was also an accomplice, because he stored the gun Lopez used (as Bictoriano testified), and allowed Lopez to take it (as Lopez's testimony suggested).

However, there was no testimony that Lynch *knew Lopez's purpose*. Brousseau states Lynch "knew that Lopez was headed out on the street near midnight with a loaded firearm." Absent evidence Lynch knew what Lopez was going to do with that firearm, the knowledge Lopez was armed does not expose Lynch to liability for attempted robbery and felony murder. One can (and many people do) carry a loaded firearm at night, whether lawfully or unlawfully, for reasons *other* than to commit a robbery, and absent evidence Lynch knew Lopez's purpose, Lynch was not an accomplice.

Although Lynch's testimony was dubious in part, and the jury could disbelieve all or part of it, there was no affirmative *evidence* that Lynch shared defendant's criminal purpose of robbery or intended to aid that purpose.[11] (See

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[10] One accomplice cannot corroborate another. (*People v. Belton* (1979) 23 Cal.3d 516, 534.) However, because the trial court did not identify any other possible accomplices for the jury, the portion of CALCRIM No. 334 so stating was omitted.

[11] For example, Lopez emphasizes Lynch's "I don't think so" response when asked if Lopez retrieved the gun on Lopez's first visit to Lynch's house that night. But discrediting that statement does not provide affirmative evidence that Lopez did

People v. Drolet (1973) 30 Cal.App.3d 207, 217; *People v. Samarjian* (1966) 240 Cal.App.2d 13, 18.) "'A reasonable inference, . . . "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work."'" (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

In short, a rational jury could not have inferred that Lynch shared Lopez's criminal intent based on the evidence adduced at trial, and therefore the trial court properly did not include Lynch as a possible accomplice.[12]

B. Brousseau as an Accomplice

Lopez further contends the trial court had a duty to instruct the jury that *Brousseau* was an accomplice.

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retrieve a gun at that time, or that Lynch knew of Lopez's purpose to use the gun in a robbery attempt. Nor does the fact that Lynch gave Lopez permission to use his back room before the robbery speak to Lynch's knowledge of Lopez's purpose. It is speculation to infer he knew any more than that Lopez wanted the room to party (and have sex with) with the "girls" in Lopez's company later that night, as apparently happened.

12 At oral argument, counsel for Lopez cited *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*), to support the view that Lynch's knowledge of the gun showed he was an accomplice, or at least that the jury could have found he was an accomplice. We find *Medina* distinguishable. *Medina* addressed the "reasonably foreseeable consequences" test for aider liability, and held it was foreseeable that a gang-related verbal challenge and ensuing fistfight would lead to a gang-related shooting, based partly on expert testimony about the tendency of gang members to escalate the level of violence when attacked, and evidence that the members of the particular gang at issue regularly committed gun offenses. (*Id.* at pp. 919-928.) In contrast, there is no evidence in this case showing Lynch did anything more than store a gun for Lopez, and no evidence he knew of Lopez's past criminal usage of the gun or future intentions regarding it.

The People argue that such instruction is not required except upon request:

> "To be sure, our Supreme Court once held that the court must instruct the jury sua sponte to view incriminating accomplice testimony with distrust, regardless of which party calls the accomplice as a witness. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569[.]) But the Supreme Court later clarified that when the testifying accomplice is a *codefendant*, an accomplice instruction must be given only 'when requested by a defendant.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1209[.]) Thus, these cases have not disturbed the long-standing rule that an accomplice instruction need not be given sua sponte when the testifying accomplice is a codefendant." (*Smith*, *supra*, 135 Cal.App.4th at p. 928.)

But the Bench Notes to CALCRIM No. 334 state the instruction must be given on the court's own motion. (Judicial Council of Cal., Crim. Jury Instns. (2011) Bench Notes to CALCRIM No. 334, p. 110; see also Use Note to CALJIC No. 3.11 (Fall 2006 ed.) p. 112.)

There is support for both views in recent California Supreme Court cases. Some cases indicate a request is required; if no request is made, the trial court has discretion whether or not to give such instruction. (See *People v. Avila* (2006) 38 Cal.4th 491, 561-563 [trial court erred by denying defense request for accomplice instruction]; *People v. Box* (2000) 23 Cal.4th 1153, 1208-1209 [same], disapproved on another point, *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10; *People v. Alvarez* (1996) 14 Cal.4th 155, 217-219 [trial court had authority to give accomplice instructions].)

However, our Supreme Court has also said:

> "Because the evidence abundantly supported an inference that each defendant acted as an accomplice to the other, and because each testified and, to some extent, sought to blame the other for the offenses, *the court was required to instruct the jury* that an accomplice-defendant's testimony should be viewed with distrust to the extent it tended to incriminate the codefendant." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104-105, emphasis added.)

We conclude we need not resolve this apparent conflict, because any error was harmless.

First, Brousseau was not testifying under a false aura of veracity: She was a prostitute and drug user with two theft convictions, and was on trial for murder, giving the jury numerous reasons to be suspicious of anything she said.

Second, the failure to give an accomplice instruction will be deemed harmless "if there is evidence corroborating the accomplice's testimony." (*Williams*, *supra*, 49 Cal.4th at p. 456.) "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 986; see *People v. Sanders* (1995) 11 Cal.4th 475, 534-535.)

Lynch was not an accomplice, therefore his testimony could be used to corroborate Crawford and Brousseau, assuming both were accomplices. His testimony showed Lopez stored a gun shortly after the shooting, and other evidence showed it could

have been used in that shooting. Bictoriano's testimony explained why Lopez went to Lynch's house before the shooting, namely, to get the gun kept there, and Bictoriano testified Lopez later told him something went wrong. The fact that Lopez obtained a gun before the shooting, and later said something went wrong, corroborates the theory Lopez had planned to rob the victim. Peralez testified Lopez asked her to tell Brousseau not to say anything, which tended to show Lopez's consciousness of guilt, and testified Lopez told her he accidentally shot someone. The position of the victim's body in the car, reclined and with his pants unbuckled, corroborated the theory of a plan to rob the victim during a feigned act of prostitution. Moreover, as the People emphasize, Lopez *admitted he shot the victim*. That was a key element of the crime. Therefore, testimony unconnected to Brousseau or Crawford linked Lopez to the crime. Any error in the trial court's failure to classify Brousseau as an accomplice was harmless.

VI*

New Trial Motion

Brousseau contends the trial court misapplied legal standards in denying her motion for a new trial. She argued that no substantial evidence showed she acted with reckless indifference to human life.

During the hearing, the trial court questioned counsel about the appropriate standard of review, and then stated it had looked at the cases, "And it's actually sort of a hybrid. [¶] I am permitted to reweigh the evidence; however, obviously, I

can't be in a [position] where I think I shouldn't give some deference to what the jury has done in this case. But the issue is whether or not there's substantial evidence to support the verdict."

Ultimately, the trial court denied the motion, finding sufficient evidence of Brousseau's reckless indifference based on planning to lure the victim into an alley to rob him. In making its ruling, the trial court in part stated "the question is whether or not there's substantial evidence to support that verdict. [¶] And I can't say that based upon my independent review of what took place here, that I conclude that the jury . . . acted without that substantial evidence or that substantial evidence doesn't exist."

Brousseau argues the trial court improperly relied on a substantial evidence standard, rather than exercising its independent judgment. We disagree.

The trial court questioned counsel about the correct standard to apply, stated it had looked at some cases and determined a "hybrid" standard applied, and in its ruling stated it had conducted an "independent review" of the evidence.

The trial court correctly viewed the standard it had to apply as a "hybrid" standard, that is, neither a mere evaluation whether substantial evidence supported the verdict, nor a pure de novo review of the evidence: "It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does not mean, however, that the court should

disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict." (*People v. Robarge* (1953) 41 Cal.2d 628, 633; see *People v. Davis* (1995) 10 Cal.4th 463, 523-524 [trial court's independent review is "guided by a presumption in favor of the correctness of the verdict and proceedings supporting it"].)

The trial court's comments do not show it misapplied the correct standard of review over Brousseau's new trial motion.[13]

VII*

Life Without Parole Sentence

In two related arguments, Brousseau contends her sentence of life without parole violates state and federal constitutional norms, and the trial court should have granted her motion to strike the robbery-murder special circumstance finding.

Taking the last point first, the People did not seek the death penalty. Accordingly, upon the verdict finding the robbery-murder special circumstance to be true, the statutorily

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[13] As stated in part I, *ante*, substantial evidence supports the special circumstance finding as to Brousseau. In her reply brief, Brousseau cites *People v. Soojian* (2010) 190 Cal.App.4th 491, involving a new trial motion based on fresh evidence. Nothing in it is relevant to this case, except that it states a trial court abuses its discretion if it applies the wrong legal standard. (*People v. Soojian, supra,* 190 Cal.App.4th at p. 521.)

mandated punishment was life in prison without the possibility of parole. The trial court lacked discretion to strike the robbery-murder special circumstance finding to reduce the punishment. (§§ 190.2, subd. (a), 1385.1; see *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1283-1285 (*Johnwell*); *People v. Mora* (1995) 39 Cal.App.4th 607, 614-615 (*Mora*).)

However, the trial court had the obligation to reduce the sentence if required under compulsion of the United States or California Constitutions. (See *Mora*, *supra*, 39 Cal.App.4th at p. 615; see also *Johnwell*, *supra*, 121 Cal.App.4th at p. 1285.)

We have summarized the federal standards as follows:

> "The Eighth Amendment to the United States Constitution proscribes 'cruel *and* unusual punishment' and 'contains a "narrow proportionality principle" that "applies to noncapital sentences."' [Citations.] That principle prohibits '"imposition of a sentence that is grossly disproportionate to the severity of the crime"' [citations], although in a noncapital case, successful proportionality challenges are '"exceedingly rare."' [Citation.]
>
> "A proportionality analysis requires consideration of three objective criteria, which include '(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.' [Citation.] But it is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play." (*People v. Meeks* (2004) 123 Cal.App.4th 695, 707 (*Meeks*).)

Considering the offense--murder with special circumstances--was among the gravest possible, and could have led to capital

punishment, we find no disproportionality, gross or otherwise, between the offense and the sentence. Thus, we need not examine the remaining two federal criteria. (*Meeks*, *supra*, 123 Cal.App.4th at p. 707.)[14]

We have summarized the California standards as follows:

> "The California Constitution prohibits "cruel *or* unusual punishment." (Cal. Const., art. I, § 17, italics added.) A punishment may violate the California Constitution 'although not cruel or unusual in its method, [if] it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* [(1972) 8 Cal.3d 410, 424].)
>
> "The court in *In re Lynch* spoke of three 'techniques' the courts have used to administer this rule, (1) an examination of the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' [citation], (2) a comparison of the challenged penalty with the punishments prescribed for more serious offenses in the same jurisdiction [citation], and (3) 'a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision' [citation]." (*Meeks*, *supra*, 123 Cal.App.4th at p. 709.)

As stated earlier, Brousseau's life without parole sentence is not disproportionate to the crime of first degree murder, and certainly not "so disproportionate . . . that it shocks the conscience and offends fundamental notions of human dignity."

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14 Although Brousseau purports to make intra- and interstate comparisons, she fails to provide any citations to authority, and therefore has forfeited those contentions. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408; *People v. Anderson* (2007) 152 Cal.App.4th 919, 929.)

(*In re Lynch*, *supra*, 8 Cal.3d at p. 424; see *People v. Em* (2009) 171 Cal.App.4th 964, 972-976 (*Em*) [50-years-to-life murder based on aiding a gang-related robbery in which a person was killed with a firearm was not disproportionate for a 15 year old].)

Brousseau relies on *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), a divided decision on unique facts,[15] partly summarized as follows:

> "*Dillon*, *supra*, 34 Cal.3d at page 479, on which defendant relies, holds that murder committed in the commission of a robbery is a serious crime presenting a high level of danger to society. In that case, however, our Supreme Court concluded the facts of the specific crime in question and the defendant's culpability weighed in favor of concluding the imposition of a life sentence constituted cruel or unusual punishment. . . . The shooting in Dillon occurred during an attempt to steal marijuana plants the victim was cultivating. (*Id.* at pp. 451–452.) The defendant had previously overheard the victim threaten to shoot anyone coming on his property. (*Id.* at p. 451.) An accidental firearm discharge during the attempted robbery alerted the victim to the presence of the defendant and his cohorts. (*Id.* at p. 452.) The defendant heard the victim approaching, saw him carrying a shotgun, and, '[w]hen [the victim] drew near, defendant began rapidly firing his rifle at him.'" (*Em*, *supra*, 171 Cal.App.4th at p. 973.)

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[15] Justice Richardson dissented in part, stating Dillon "was personally responsible for, and morally guilty of, a homicide committed in the attempted perpetration of a robbery. Although defendant, had he been a year older, could have been sentenced to death or life imprisonment *without* parole, by reason of his youth he received a far less severe sentence." (*Dillon*, *supra*, 34 Cal.3d at p. 502 (conc. & dis. opn. of Richardson, J.).) Justices Kaus and Broussard, too, disagreed with the majority holding. (*Id.* at p. 490 (conc. opn. of Kaus, J.), p. 504 (conc. & dis. opn. of Broussard, J.) [noting Dillon planned the robbery].)

Dillon was 17, and "unusually immature and childlike, even for a person of 17" (*People v. Young* (1992) 11 Cal.App.4th 1299, 1310) and both "the judge and the jury believed that the sentence was excessive in relation to [his] culpability." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197.)

In contrast, Brousseau was 32 years old and there was no evidence she was unusually immature or had any cognitive impairment. She planned with Lopez to ambush the victim in his car, and was not a minor participant. This case is not like *Dillon*. (See *Em*, *supra*, 171 Cal.App.4th at p. 973 ["The facts in *Dillon* contrast dramatically with the ambush robbery and murder of . . . an innocent person sitting in his car"].)

Brousseau argues she was a homeless methamphetamine addict and prostitute, with two misdemeanor theft convictions, "a wife and a mother" who did not know Lopez was armed, and argues the offense was an "aberration." Putting aside the evidence showing she knew Lopez was armed (see part I, *ante*), Brousseau was not an immature youth. She willingly agreed to lure the victim into a secluded alley so Lopez could rob him, apparently because her companions had run out of beer. After the shooting, she did nothing to help the victim or alert the authorities. She hung out, did drugs, and had sex with Lopez after the shooting. She *never* reported the crime, which remained unsolved for many months.

Brousseau's liability for murder satisfied constitutional norms, because she acted with reckless indifference to the victim's life. (See part I, *ante*.) In short, a life without

parole sentence is not disproportionate punishment for an adult who actively participates in a felony murder, either in the abstract, or as applied to Brousseau's particular case.

VIII*

Parole Revocation Restitution Fine

Defendants contend, and the People correctly concede, that the trial court should not have imposed $4,000 in parole revocation restitution fines (§ 1202.45) as to each defendant, because they have no possibility of parole. We agree. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 380.) We shall strike those fines as to each defendant. (§ 1260.)

IX*

Abstract Modification

An abstract of judgment must fully and accurately capture all components of a felony sentence. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Zackery* (2007) 147 Cal.App.4th 380, 389-390.) In this case, the determinate and indeterminate abstracts of judgment for each defendant describe their murder convictions as "1st degree murder w/malice aforethought." There is no indication which special circumstance applied. The trial court should, therefore, modify the indeterminate abstracts in paragraph 11, entitled "Other

orders (*specify*)" by noting the robbery-murder special circumstance as to each defendant.[16]

DISPOSITION

The parole revocation restitution fines are stricken. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation modified abstracts of judgment consistent with this opinion. In all other respects, the judgments are affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

NICHOLSON, J.

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[16] We respectfully suggest that the Judicial Council consider modifying its indeterminate abstract form to provide for the recording of special circumstances when applicable.