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Court of Appeal, First District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,

v.

Sikai Fano TELEA, Defendant and Appellant.

No. A110926.

(San Mateo County Super. Ct. No. SC055569).

Nov. 25, 2008.

Office of the Attorney General, San Francisco, CA, for Plaintiff and Respondent.

First District Appellate Project, Neil Jacob Rosenbaum, San Francisco, CA, for Defendant and Appellant.

MARGULIES, J.

*1 Defendant Sikai Telea was convicted of felony murder, attempted murder, and robbery after he participated with several others in a series of armed robberies, during which a bank employee was shot to death. Defendant contends that the trial court excluded critical evidence, the prosecutor violated his Fifth Amendment rights by commenting on defendant's failure to disclose certain facts during police interrogations, and the trial court erred in admitting tapes and transcripts of the interrogations. We affirm.

I. BACKGROUND

Defendant was charged along with three codefendants in an information filed February 9, 2004.FN1 The charges against defendant included one count of murder (Pen.Code, § 187; count 1), five counts of attempted murder (Pen.Code, §§ 664, 187; counts 2, & 8-11), and seven counts of robbery (Pen.Code, § 212.5, subd. (c); counts 3-7, 12, & 13). Counts 2-7 included allegations that defendant personally discharged a firearm and caused great bodily injury. (Pen.Code, § 12022.53, subd. (d).) Counts 8-11 included allegations that defendant was armed with or discharged a firearm and attempted to kill a police officer engaged in his or her official duties. (Pen.Code, §§ 664, subd. (f); 122022, subd. (a)(1) .)

FN1. There were actually five participants in the charged crimes. All five defendants were included in a subsequent amended information, which included only 11 counts. The parties agree that defendant was tried on the charges included in the earlier 13-count information.

A. The Crimes

Because defendant's contentions on appeal do not depend on the details of the evidence presented about his crimes, we only briefly summarize the extensive evidence presented at a long trial. Following that summary, we discuss the evidentiary background and trial court rulings relevant to defendant's appellate contentions.

Defendant was tried separately from his codefendants. The evidence demonstrated that he and the codefendants robbed a Wells Fargo bank branch in Burlingame on October 11, 2002. In the course of the robbery, codefendant Seti Scanlan shot and killed one bank employee, and defendant shot, but did not kill, a second employee. On November 1, 2002, a man robbed a Carl's Jr. restaurant in Mountain View at gunpoint. Soon after on the same night, two men robbed a Mountain View market. A police officer responding to the robbery report from Carl's Jr. encountered and began to follow an SUV that was leaving the area. As the officer pulled the SUV over, a man emerged and shot at the officer, shattering the car windshield and striking the officer in the face. Other responding officers began a high-speed chase of the SUV. During the chase, persons inside the SUV, including defendant, fired shots at various pursuing officers. After the vehicle came to a stop, two of the codefendants were caught, but the remainder of the occupants escaped. Defendant was not among those caught that night, but he later admitted his involvement in all three robberies.

The jury found defendant guilty of the first 12 counts and found true the associated enhancement allegations. A mistrial was declared with respect to count 13, the robbery of the Carl's Jr. restaurant, when the jury was unable to agree. Defendant was sentenced to life without the possibility of parole on the murder charge, count 1, and to other consecutive and concurrent sentences on the remaining counts and allegations.

B. Defendant's Interrogations

*2 The primary evidence linking defendant to the robberies were tapes and transcripts of his statements during police interrogations. He was first questioned by police on November 7, after he had been named by one of the apprehended codefendants and his phone number was found in a cell phone located in or near the SUV. Officers from Burlingame contacted defendant that day and asked him to accompany them from San Francisco to Burlingame for questioning. The officers made clear that the questioning was voluntary, and defendant cooperated. When the Burlingame officers questioned defendant about the Wells Fargo Bank robbery, he denied any involvement. Defendant was then interviewed by Mountain View officers about the November 1 robberies. When that interview was over, the officers drove him home.

The next day, November 8, Scanlan was arrested, confessed, and identified defendant as a participant. On the basis of Scanlan's statements, defendant was

arrested the following day, November 9, and taken into custody by Burlingame police officers. He was then advised of his Miranda^{FN2} rights and questioned for two hours. At the beginning of the interrogation, and for a substantial portion of it, defendant maintained that he had nothing to do with the Wells Fargo robbery. The officers refused to accept this answer, urging defendant “this is your chance to help yourself out” and “[w]e need to hear what really happened.” Defendant responded, “I have nothing to say.” Defendant did not otherwise suggest that he wanted to end the interrogation and did not ask for an attorney.

FN2. *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

The officers continued to attempt to persuade defendant to confess, telling him that Scanlan and the other participants had already told them that he was a participant and representing falsely that Scanlan claimed defendant had fired the fatal shot. The officers often spoke without interruption for two or three pages of transcript, after which they would once again give defendant an opportunity to admit his involvement. At virtually every such pause, defendant would respond in the same way, telling the officers, “That's all I have to say” or “I got nothing else to say.” In total, defendant told the officers that he had nothing further to say six different times over the space of 60 pages of interrogation transcript. One of the officers testified later that he did not interpret defendant's statements that he had nothing more to say as an attempt to invoke his right to silence or to end the interrogation.

Other than to deny his involvement, defendant said little else about the crimes during the November 9 interrogation until after he had made a telephone call to his girlfriend. Although the exact content of the call was unclear because only defendant's half was recorded and made part of the record, defendant resolved during the call “to tell them the truth.” Immediately afterwards, he described his role in the bank robbery to the Burlingame officers.

*3 During this interrogation, both before and after defendant's conversation with his girlfriend, the officers falsely encouraged defendant to believe that the charges against him would be limited to robbery if he acknowledged his role in the robbery but denied committing the shooting of the bank employee. One of the questioning officers later testified that he had never heard of the felony-murder rule, did not understand its application, and did not have it in mind when he discussed with defendant his culpability for murder. The other officer testified that, although he had a rudimentary understanding of the felony-murder rule, he did not have it in

mind during the interrogation and did not realize he had made a misrepresentation until "I learned the hard way that it was brought up in court there was a problem."

After the Burlingame officers completed their interview on November 9, defendant was interviewed by Mountain View officers about the other robberies. Defendant was interviewed again two and four days later, on November 11 and 13. Prior to the November 11 interview, defendant was informed of his Miranda rights. He again voluntarily discussed the crimes, acknowledging his participation in the bank robbery and his shooting of the second bank employee. The November 13 interview was similar.

Defendant moved to suppress the interrogation evidence, contending, among other arguments, that he had repeatedly invoked his right to silence when he told the officers he had nothing to say and that the officers had misled him by suggesting that he would not be criminally culpable for the murder if he had not personally done the killing. The trial court ruled that: (1) the November 7 interviews were admissible because defendant was not in custody when they occurred; (2) defendant was not attempting to terminate the November 9 Burlingame interview when he told the officers he had nothing to say; (3) the officers unintentionally misled defendant about the impact of the felony-murder rule, rendering the portions of the November 9 interviews discussing the Wells Fargo robbery inadmissible; and (4) the November 11 and 13 interviews were not tainted by the November 9 interview and were therefore admissible.

In ruling on the claim defendant had invoked his right to silence, the court said, "[T]hose comments have to be viewed within the context of him trying to hold to his story that he had no involvement in the case. [¶] When his comments are viewed in the entire [context] of the statement it's quite clear to me that his statements do not reflect any intent to cut off the questioning and they cannot be viewed as an invocation of the defendant's right to remain silent..."

Explaining its decision not to exclude the November 11 and 13 interrogations, the court stated: "I find the officer credible when the officer explains that he did not understand the felony murder rule so it was not an intentional attempt to [mis]lead [defendant], in my mind... [¶] ... And I'm going to find that the November 11th and November 13th statements were sufficiently attenuated" because defendant was given Miranda warnings before both subsequent interviews, there were two- and four-day time differences and changes in location for the interviews, the violation was not flagrant, defendant was allowed to make calls to his family in the interim, and defendant signed the booking sheet on November 9, which charged him with

murder. The court concluded that the latter fact constituted “strong circumstantial evidence that he was aware that he was charged with murder by the time he was arrested on November 9th.”

C. Defendant's Testimony

*4 Defendant's primary defense was that he had participated in the crimes under duress by Scanlan. He testified that he had known Scanlan in American Samoa, where defendant was born and raised. He met him again the summer before the robberies, when Scanlan first asked defendant to sell drugs for him and later forced defendant, at gunpoint, to participate in a robbery. The next time defendant saw Scanlan, in October, defendant was outside a gymnasium. Two of the codefendants approached defendant and told him they had been instructed by Scanlan to take him to a car. Fearing for his life as a result of his prior experience with Scanlan, defendant cooperated. Scanlan gave defendant some clothes to wear and a gun and told defendant that his role in the robbery would be to “watch the doors” of the bank. Fearing he would be shot if he did not cooperate, defendant participated in the bank robbery. Defendant testified that he participated in the November 11 robberies under similar circumstances, out of fear of Scanlan.

D. Excluded Evidence

Prior to the commencement of defendant's case, defense counsel informed the court that he wanted to introduce records subpoenaed from the Mountain View Police Department regarding robberies committed in the city between January 2000 and October 31, 2001. According to counsel, the evidence would demonstrate that during that time there were 102 robberies reported in the city and in none of those robberies were the police fired upon after having intercepted the robbers. Counsel argued this evidence would be used to rebut the prosecution's claim that the police shootings were “natural and probable consequences” of the planned armed robberies, and therefore defendant was responsible as an aider and abettor for the shootings committed by his codefendants. The trial court ruled the evidence irrelevant, concluding that “a jury can very well find that here because the defendants were bold enough to pull off two robberies at the same time with a similar location, ... a police officer might be called to the scene which can then lead to the next reasonable inference that since the defendants were armed that they might take evasive action and/or perhaps shoot at the police officers to get away.... There's no leap of faith in any of that.” The court also ruled that such evidence was inadmissible under Evidence Code section 352.

Prior to trial, defendant had also indicated his intent to introduce evidence of a series of violent crimes committed by Scanlan in Washington State in 1999 and 2000, and in Mountain View in 2002, which did not involve defendant. There was no evidence that Scanlan had attempted to intimidate any of the participants in these crimes, and defendant was unaware of them. Defendant argued that, even though the crimes had no connection to him, their commission tended to prove that Scanlan was a violent person, thereby bolstering defendant's claim of duress. The trial court ruled evidence of the crimes inadmissible, concluding they were irrelevant to defendant's duress defense because (1) defendant was unaware of the activities, and therefore could not have been intimidated by the criminal acts themselves; and (2) in none of the crimes did an accomplice claim to have been intimidated. The court also found the evidence likely to produce confusion and unduly consume time under Evidence Code section 352.

E. Prosecution Comment on Defendant's Failures to Disclose

*5 During cross-examination, defendant was asked how he returned home after the car crash that ended the Mountain View robberies. When defendant answered that he called a friend to pick him up, the prosecutor asked defendant whether he had told the police about this friend; when defendant answered he had not, the prosecutor noted this was "another new item" that had not been disclosed before trial. Later in his cross-examination, the prosecutor also pointed out that defendant had never told the police that Scanlan had forced him to sell drugs at gunpoint. In closing argument, the prosecutor argued to the jury that defendant's claim of duress lacked credibility because he had not told the police about it when detained.

F. Evidence of Defendant's Childhood

During his opening statement, defense counsel told the jury about defendant's personal history. As counsel recounted, defendant was raised in a rural area of American Samoa, came to the United States for the first time at age 13, and settled in Long Beach, where he lived for four years in the home of a stepbrother. When defendant was 16, one of his brothers was shot to death on a street in Long Beach. Defendant later moved to Reno, had a child by a woman from San Francisco, and moved to Hunter's Point to be near the woman and his son. It was then that he renewed his childhood acquaintance with Scanlan.

Prior to the commencement of defendant's case, the trial court asked defense counsel for an offer of proof "as to how [defendant's] upbringing or background was relevant to ... the defense you plan to present." Counsel initially described character evidence that he intended to elicit from defendant's mother and the step-family members. The prosecutor did not object to the admission of this testimony, but he resisted the admission of details of defendant's upbringing.

The trial court ruled that the defense could introduce testimony from "relatives [to] primarily discuss character evidence, specific character evidence that would involve the accusation of robbery, to wit, that [defendant] was generous, he was honest, and he wasn't violent and he didn't like guns," which the court held to be "focused character evidence that would be admissible under [Evidence Code section] 1102." The court excluded as "not ... directly related to any of the charges" evidence that defendant "was quiet, responsible, and that he took care of his nephews presumably well" and other evidence of his personal background. Defense counsel also failed to persuade the court that evidence of defendant's background was relevant to the defense of duress, the court noting, "I'm not seeing a nexus at all between what you're talking about with respect to a life experience in Long Beach and Hunter's Point and a threat [from] Mr. Scanlan, who's from Mountain View." In addition, the court ruled the personal background evidence "unduly consumptive of court time" under Evidence Code section 352.

II. DISCUSSION

A. Admission of Defendant's Statements to Police

*6 Defendant contends that the post-November 7 interrogation tapes should have been suppressed because (1) the police improperly disregarded his invocation of the right to silence during the November 9 Burlingame interrogation, prior to his confession; and (2) the interviews after that interrogation were tainted by the police officers' suggestion to defendant that he would not be culpable for the murder if he was not the shooter, contrary to the felony-murder rule.

1. Defendant's Statements

“Even if a defendant voluntarily has waived his or her Miranda rights to remain silent and to have counsel present, the defendant later may revoke the waiver. In such a case, ‘once a defendant has indicated an intent to assert his right to remain silent or to counsel, all further attempts at police interrogation should cease.’ [Citation.] ‘In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect “must unambiguously” assert his right to silence or counsel. [Citation.] It is not enough for a reasonable police officer to understand that the suspect might be invoking his rights.’ “ (People v. Rundle (2008) 43 Cal.4th 76, 114-115 (Rundle).)

In determining whether a defendant's conduct or statements constituted a legally effective invocation of Fifth Amendment rights, courts are directed to apply an objective test. (Davis v. United States (1994) 512 U.S. 452, 458-459 (Davis).) FN3 As our Supreme Court has articulated the test, a reviewing court “must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant.” (People v. Gonzalez (2005) 34 Cal.4th 1111, 1125.) The requirement that a request be “unequivocal and unambiguous” is designed to strike a balance between recognizing a suspect's demonstrated resolve to invoke his or her Fifth Amendment rights and avoiding interference with legitimate police questioning of suspects who have not definitively decided to invoke those rights. (Davis, at p. 459.) Accordingly, a defendant has not invoked his or her right to silence when the defendant's statements are merely expressions of passing frustration or animosity toward the officers or amount only to a refusal to discuss a particular subject covered by the questioning. (Rundle, supra, 43 Cal.4th at p. 115 .)

FN3. Although Davis addressed invocation only of the Fifth Amendment right to consult counsel during an interrogation, the California Supreme Court has applied Davis equally to an invocation of the right to remain silent. (Rundle, supra, 43 Cal.4th at pp. 114-115; People v. Stitely (2005) 35 Cal.4th 514, 535.)

“On appeal, we review independently the trial court's legal determinations of whether a defendant's statements were voluntary [citation], whether his Miranda waivers were knowingly, intelligently, and voluntarily made [citation], and whether his later actions constituted an invocation of his right to silence [citations]. We evaluate the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers, and ‘ “ ‘accept the trial court's resolution of

disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.’ “ “ “ (Rundle, supra, 43 Cal.4th at p. 115.)

*7 We have reviewed the transcript and videotape of the November 9 Burlingame interrogation and reach the same conclusion as the trial judge. FN4 It is certainly true that defendant's repeated comment that he had nothing else to say could have signaled his desire to end the interrogation; viewed in isolation, the words he chose might have been intended to invoke his right to remain silent. More was required, however, before the officers were required to cease their questioning. Under Davis, defendant was required to express himself in a manner that “a reasonable officer would have understood ... to be an unequivocal and unambiguous request” to stop the interrogation. (People v. Gonzalez, supra, 34 Cal.4th at p. 1125.)

FN4. Because the parties did not make the videotape of the interrogation part of the appellate record, we requested the videotape from the clerk of the superior court. Under California Rules of Court, rule 8.340(c), this court has the authority on its own motion to augment a criminal appellate record as provided in California Rules of Court, rule 8.155. In turn, rule 8.155(a)(1)(A) permits the court, on motion of a party or its own motion, to augment the appellate record with “[a]ny document filed or lodged in the case in superior court.” We exercise our authority under rule 8.340(c) to augment the appellate record with the videotape of the interrogation provided by the superior court.

The words chosen by defendant also have a second, different meaning. As noted in *In re Joe R.* (1980) 27 Cal.3d 496, in which the defendant also claimed to have invoked the Fifth Amendment when he said, “That's all I have got to say,” (*id.* at p. 515), “[i]t was not unreasonable for the court to endorse the prosecutor's inference that what defendant was saying was, That's my story, and I'll stick with it.” (*Id.* at p. 516.) The same inference was reasonable here. Defendant did not tell the officers at the beginning of the interrogation that he had nothing to say, as might have been expected if he intended to remain silent. Instead, he participated in the interrogation for a considerable period of time before making any statement. Throughout the interrogation he answered freely any questions that were not directed at his participation in the Wells Fargo robbery, both before and after telling the police he had nothing more to say. While it is true that the defendant in *In re Joe R.* made such a statement only once, defendant's repetition of the statement does not necessarily imply that he was attempting to end the interrogation. It is significant that his statement always occurred in response to the same type of questioning by the police. It was only when the officers pressed him to “tell the truth” about the robbery-in other words, to change his story-that defendant told them he had

nothing more to say. When defendant's statements are viewed in context, it becomes clear the officers acted reasonably in interpreting this phrase to mean that defendant had told them what he had to say on the topic of the robbery and would not change his story in continuing the interrogation. For that reason, the trial court's rejection of the motion to suppress on this ground must be affirmed. (See similarly *People v. Ashmus* (1991) 54 Cal.3d 932, 968, disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [“ ‘I ain't saying no more’ “ not an invocation of right to silence]; *People v. Jennings* (1988) 46 Cal.3d 963, 977-978 [“ ‘That's it. I shut up’ “ not an invocation of right to silence].)

In contending that he properly invoked his right to silence under the Fifth Amendment, defendant relies initially on *People v. Esqueda* (1993) 17 Cal.App.4th 1450. The conduct of the officers in *Esqueda*, however, was dramatically different from that of the Burlingame police. In *Esqueda*, the court found the police conduct to have been “outrageous,” involving, among other things, constant badgering and questioning over a period of eight hours and complete disregard of defendant's repeated comments that he did not want to talk further. (*Id.* at pp. 1484-1486.) A suspect's statement that he or she does not want to talk further suggests that the suspect wants to end the interrogation, although even that statement is not wholly unambiguous. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1239-1240; *People v. Silva* (1988) 45 Cal.3d 604, 629-630 [both affirming conclusion that, under the circumstances, the defendants did not intend to terminate the interrogations by saying “I don't want to talk about this”].) Because defendant's comments, taken in context, were less direct and clear, *Esqueda* provides little guidance here. Similarly, in *People v. Peracchi* (2001) 86 Cal.App.4th 353, also cited by defendant, the defendant equivocated at the beginning of the interrogation, but he eventually told the police, “ ‘I don't want to discuss it right now.’ “ (*Id.* at p. 359.) As the court concluded, this statement, essentially the same language used by the defendant in *Esqueda*, was a relatively unambiguous statement that he did not want to talk to the police and required them to cease the interview. (*Id.* at p. 361.) FN5

FN5. In the federal case cited by defendant, the suspect used similarly unambiguous language. (*McGraw v. Holland* (6th Cir.2001) 257 F.3d 513, 515 [“ ‘I don't want to talk about it’ “].)

2. Dissipation of the Taint

*8 When a defendant has made an inculpatory statement in response to police questioning that violates the rules developed under Miranda to prevent coercive interrogations, subsequent interrogations are not necessarily rendered inadmissible. (Oregon v. Elstad (1985) 470 U.S. 298, 309-310 (Elstad).) If the violation during the initial questioning did not result in actual coercion, any subsequent interrogation conducted properly under Miranda is freely admissible. “ [A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.’ “ (People v. Haley (2004) 34 Cal.4th 283, 304, quoting Elstad, at p. 314.)

“To determine whether a statement was voluntary or coerced, we examine the totality of the circumstances. [Citation.] Coercive police activity is a necessary predicate but does not itself compel a finding that a resulting confession is involuntary.” (People v.. Bradford (1997) 14 Cal.4th 1005, 1041.) Even “unethical ... [police] conduct is only relevant to defendant's voluntariness ... to the extent it deprived defendant of the ability to freely and deliberately choose to speak” with police. (Id. at p. 1042 .)

Even if the initial statement was coerced, “admissibility of any subsequent statement should turn ... solely on whether it is knowingly and voluntarily made.... When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.” (Elstad, supra, 470 U.S. at pp. 309-310.)

We find no error in the trial court's conclusion that the November 11 and November 13 statements were admissible, despite the police suggestions to defendant on November 9 that he could not be charged with murder unless he was the shooter, which are contrary to the felony-murder rule. First, defendant's inculpatory statements on November 9 do not appear to have been coerced. He spoke freely with the police officers. There is nothing in their conduct or the circumstances of the interrogation to suggest that their conduct “deprived defendant of the ability to freely and deliberately choose to speak.” (People v. Bradford, supra, 14 Cal.4th at p. 1042.) Further, the trial court found that these misrepresentations about defendant's culpability were not deliberate, a factual finding supported by substantial evidence. Accordingly, there is no reason to deem these tactics coercive as a matter of law. (See Elstad, supra, 470 U.S. at p. 314 [“absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a

suspect has made an unwarned admission does not warrant a presumption of compulsion” (italics added)].) Finally, it does not appear that the officers' misrepresentations about defendant's potential culpability were the cause of his confession. Throughout the portion of the interrogation prior to defendant's call with his girlfriend, he maintained firmly that he had not been involved, despite the officers' misrepresentations. During the telephone call, defendant appears either to have been persuaded or to have come to his own conclusion that he should confess. He then resolved to tell the truth to the police, and immediately after the call he admitted his involvement. It appears to have been the conversation with his girlfriend, rather than the officers' misrepresentations, that induced the confession. All of these circumstances suggest that defendant's confession on November 9 was voluntary.

*9 Second, even if defendant's confession resulted from coercive police conduct on November 9, the evidence demonstrates that there was no lingering taint at the time he gave the statements on November 11 and November 13. As the trial court noted, defendant was given Miranda warnings before both subsequent interviews, there were two- and four-day time differences and changes in location for the later interviews, and defendant was allowed to make calls to his family in the interim. These circumstances would tend to dissipate the taint induced by the misrepresentations. (Elstad, supra, 470 U.S. at pp. 309-310.)

More important, it appears that by the time of the November 11 interview defendant was no longer under any misimpression, if he ever was, that he could be and had been charged with murder. As the trial court noted, the murder charge was found on the booking sheet he signed. In addition, during the Mountain View interrogation on November 9, defendant, in denying he was a “snitch,” explained, “That's why, you know, that's why I just make a right choice to just come and tell all the, you know, the whole truth, you know, whatever happened to me, they gonna sentence, sentence me life.” As the trial court noted, this “seems to imply that [defendant] knows that murder is in fact something that he's clearly looking at.” FN6

FN6. Later in the interview, defendant asked the police when he would find out his “charge, like sentence, stuff like that?” He was anxious to make clear that “I'm not trying to be a murderer or attempted murderer, you know, 'cause I know I, I shot nobody. I didn't kill nobody.”

More definitively, comments during the November 11 interview suggest that by the time that interrogation began, defendant was aware he had been charged with murder or, at a minimum, attempted murder. During a telephone call with a family member made in the middle of that interrogation, and conducted largely in the Samoan language, defendant is recorded as saying, "Hello. Yo. Yo. [Speaking Samoan] Attempted murder [speaking Samoan] Attempted murder. Hello. [Speaking Samoan] Yo. [Speaking Samoan] Attempted murder."

Soon after that call, the following colloquy occurred:

"Defendant: They charge me, charge me...."

"[Officer]: That's what they charge everybody, they charge everybody with that. And then it comes up to court. And then they, they [unintelligible] or whatever from there. Like I said, that's all on the judge and everything. But that's the charges. That's the charges, [listing three codefendants' names, including Scanlan]. [Scanlan] got charged with that and then [Scanlan] admitted to shooting some guy in Pacifica, too.... [¶] ... [¶] [Scanlan's] in big trouble."

"Defendant: Well, it's like, all I know is, I didn't shot nobody, I didn't kill nobody."

Although neither participant mentioned the specific charge they were discussing during this conversation, the clear implication of the interchange is that defendant recognized he had been charged with a crime more serious than robbery and the officer was attempting to calm him about that prospect. The officer's comment, "[Scanlan] got charged with that," suggests that the charge was murder, since at that point both men knew that Scanlan had fired the fatal shot. The officer's comment that Scanlan shot a person in Pacifica "too" further suggests that Scanlan had been charged with murder.

*10 Accordingly, we conclude that evidence of the November 11 and 13 interrogations was admissible, both because defendant's confession on November 9 does not appear to have been coerced and because, even if it was coerced, any taint had been dissipated by the time of the subsequent interviews.

B. Evidence of Defendant's Childhood

Defendant contends that the trial court erred in excluding the evidence of his personal background. He argues that his “background, particularly the proffered evidence regarding the contrast between the peaceable lifestyle in American Samoa during his first 13 years, compared to the far more violent milieus of urban Long Beach and Hunter's Point thereafter” was “relevant both to the particular character trait of non-violence that defense counsel sought to present, and also relevant to the mental state defense of duress [sic].”

Under defendant's theory, his background was relevant to demonstrate that he was a person readily susceptible to intimidation. Evidence Code section 1101 ordinarily precludes the admission of evidence of a person's character or character trait to prove his or her conduct on a specified occasion. Evidence Code section 1102, however, is a specific exception to this general rule. (*People v. Felix* (1999) 70 Cal.App.4th 426, 430 (*Felix*).) Under section 1102, “evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation” may be admitted if “[o]ffered by the defendant to prove his conduct in conformity with such character or trait of character.” While such evidence may be admitted “ ‘in the form of an opinion or ... reputation’ “ about a defendant's character, the exception does not extend to specific instances of the defendant's conduct. (*Felix*, at p. 431; *People v. Honig* (1996) 48 Cal.App.4th 289, 348 (*Honig*).) Further, the opinion or reputation evidence offered “must relate to the particular character trait involved in the charged offense.” (*Honig*, at p. 349.) We review the trial court's evidentiary rulings under the abuse of discretion standard. (*People v. Cox* (2003) 30 Cal.4th 916, 955.)

Defendant's argument that the background evidence was relevant to his claim that he is not a violent person fails. Evidence Code section 1102 permits proof of a character trait only through opinion or reputation evidence, not evidence of specific conduct. (*Felix*, supra, 70 Cal.App.4th at p. 431; *Honig*, supra, 48 Cal.App.4th at p. 348.) Because evidence of defendant's background is specific conduct evidence, it is not covered by section 1102. Accordingly, unless the evidence of defendant's background was directly relevant to his commission of the crime or the duress defense, it was properly excluded. (See, e.g., *People v. McAlpin* (1991) 53 Cal.3d 1289, 1309 (*McAlpin*).)

There is no claim that the evidence was relevant to defendant's commission of the crime, and the trial court did not abuse its discretion in concluding there is no connection between defendant's background and Scanlan's intimidation of him. Although the two of them grew up together in American Samoa, there was no testimony that this shared background in any way influenced Scanlan's intimidation

of defendant or otherwise gave Scanlan personal influence over defendant.FN7 In any event, the trial court did not abuse its discretion in concluding the evidence was inadmissible under Evidence Code section 352 because any connection between the defendant's background and his experiencing duress was sufficiently attenuated.

FN7. Defendant also argues it is “rational” that a person who has grown up in a sheltered environment and moves to a violent culture “would be particularly vulnerable to threats by a more hardened criminal.” Disregarding the essentially character-based nature of such a line of argument, we fail to see the logic. Many individuals grow up in rural and comparatively nonviolent environments and move to urban areas where violence is more common. There is no evidence this fact alone makes those persons more susceptible to duress by other persons.

*11 Defendant's argument that defense counsel “was entitled to present the same type of evidence ... as a mental state expert would have been entitled to rely on” lacks merit. It is commonly recognized that under Evidence Code section 801 an expert may, in forming his or her opinion, rely on and testify about evidence that is “otherwise inadmissible.” (E.g., *People v. Gamez* (1991) 235 Cal.App.3d 957, 967, disapproved on other grounds in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10.) By definition, such evidence is “inadmissible” in the absence of expert testimony. The persons presenting character evidence for defendant were not experts, and neither section 801 nor section 1102 provides an equivalent exception for the admission of evidence underlying lay opinions. Although defendant cites *McAlpin*, supra, 53 Cal.3d 1289, to support this argument, the *McAlpin* court authorized admission only of opinion evidence by lay persons, not evidence of the observations of specific conduct on which the lay opinions were based. (*Id.* at p. 1309.)

C. Evidence of the Frequency of Police Intervention

Defendant also contends that the trial court erred in excluding robbery statistics from the City of Mountain View. He argues the trial court erred because “the objective information regarding the actual incidents of police officer shootings in the aftermath of robberies is directly relevant to a jury's determination of whether the shootings ... were the natural and probably [sic] consequences of the preceding robberies, or whether they were highly unusual and aberrational incidents that a reasonable person would not have anticipated.”

A person who aids and abets a particular offense can be found guilty not only of the offense he or she intended to facilitate but also of any “reasonably foreseeable” offense committed during the course of that offense by the other participants. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-107.) Although the standard jury instruction, CALJIC No. 3.02, characterizes such collateral crimes as those that are “a natural and probable consequence of the crimes originally aided and abetted,” the factual issue is one of foreseeability. (*People v. Coffman and Marlow*, at p. 107.) Indeed, the jury instruction defines “natural and probable consequence” to mean “what a person of reasonable and ordinary prudence would have expected likely to occur,” determined “in light of all of the circumstances surrounding the incident.” Under this definition, murder is generally held to be a reasonably foreseeable consequence of robbery, even though murder is “contingent and less than certain”- and, indeed, as a statistical matter is rarely a consequence of robbery. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.)

We find no abuse of discretion in the trial court's ruling that the evidence is irrelevant. As the trial court noted, the jury was required to make its determination on the basis of the unique facts presented at trial about this particular robbery. The issue before the jury was therefore whether shooting at police was a reasonably foreseeable result of the two Mountain View robberies, committed very near to each other in time and place, by armed codefendants. The statistics, in contrast, were based on a wide variety of robberies in a wide variety of contexts, and the statistics themselves provided no information about the particular circumstances of the robberies recorded. As a result, the evidence defendant sought to introduce would have been of no assistance to the jury in determining whether the shootings were a foreseeable consequence of these particular robberies.

*12 Defendant's essential argument is that shooting at police could not have been a reasonably foreseeable consequence of this robbery because shooting at police does not occur as a part of most robberies. Whether shooting at police is reasonably foreseeable result of a particular robbery, however, depends entirely on the nature of the robbery and its participants. The bare fact that a particular occurrence is rare does not mean it is not a “natural and probable” consequence of a given set of circumstances. It may mean only that the occurrence of those circumstances is itself unusual. Because defendant's statistics provided the jury with no help in determining whether the circumstances of the Mountain View robberies were unusual, the statistics were of no relevance.

In support of his argument, defendant cites *Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, in which the court dismissed an assault charge against an HIV-

positive man who had unprotected sex with a woman. The court concluded that because no evidence regarding the transmission of the HIV virus had been presented, the court did not have the evidence necessary to support the assault element that bodily injury was “likely” to occur. (*Id.* at pp. 869-870.) Transmission of the HIV virus, however, is not a matter within common knowledge of most jurors and therefore requires expert testimony. While it may be true most jurors have no personal knowledge of robbery, they are familiar with the various issues that factor into the foreseeability of shooting at police in these circumstances—the circumstances affecting the ability of police to respond to a reported crime, the likelihood of such a report under particular circumstances, and the behavior of individuals under stress. There was no need for the type of statistical evidence proffered by defendant, and, indeed, that type of evidence would have been of little or no use for the reasons discussed above.

In any event, we find no error in the trial court's ruling that the evidence was inadmissible under Evidence Code section 352. As noted above, the evidence was of little relevance unless the circumstances of individual robberies comprising the statistics were explored. Yet such exploration would require a substantial expenditure of trial time that was likely to outweigh any probative value of the statistics themselves.

D. Refusal to Admit Evidence of Scanlan Crimes

Defendant contends that the trial court erred in excluding the evidence of unrelated violent crimes committed by Scanlan because the crimes were “highly probative of Scanlan's pattern of violent conduct when committing crimes and confronted by someone who did not behave as directed.”

We find no abuse of discretion in the trial court's ruling. Assuming for purposes of argument that, as defendant contends, he was entitled to demonstrate that Scanlan was a violent person because such a person is more likely to intimidate his accomplices, the jury was already well aware of Scanlan's violent conduct from the testimony about the crimes for which defendant was tried. As the trial court noted in making the same point, evidence from the Wells Fargo robbery showed that Scanlan shot through a closed door after a fleeing bank employee, striking and killing her. In demonstrating Scanlan's character, the proffered evidence of other violent crimes would have added little to this evidence, other than to reinforce what was already clear. Further, because the other crimes were unknown to defendant and did not feature the intimidation of accomplices, they were no more directly probative of his duress defense than the existing evidence. As the trial court held in

excluding the evidence under Evidence Code section 352, the other crimes were, at best, cumulative evidence bearing on the undisputed issue of Scanlan's violent nature.

*13 Defendant cites several self-defense cases, arguing that because this type of evidence is admissible to support a claim of self-defense, it should be admissible to support a claim of duress. In none of the self-defense cases, however, was the evidence offered merely to prove a character trait. For example, in *People v. Pitchess* (1981) 11 Cal.3d 531, the defendant responded to a charge of battery on police officers by claiming he had acted in self-defense against the officers' use of excessive force. (*Id.* at p. 534.) He requested discovery of police files containing prior citizen complaints of similar conduct against the same officers, which the court found proper to use in cross-examination of the officers. (*Id.* at p. 537.) The discovery requested by the defendant in *Pitchess* was therefore not merely evidence of the officers' character, but evidence of prior similar conduct by the officers. For a parallel situation to exist here, defendant would be required to show that Scanlan's prior violent acts were accompanied by intimidation of his accomplices. In the other cases cited by defendant, *People v. Tafoya* (2007) 42 Cal.4th 147, and *People v. Minifie* (1996) 13 Cal.4th 1055, the courts held that a defendant could introduce evidence demonstrating that the victim was dangerous or had made prior threats to support a claim of self-defense only if there was proof that the defendant was aware of the dangerous acts or threats. (*Tafoya*, at p. 165; *Minifie*, at pp. 1066-1068.) Because defendant was unaware of the alleged prior violent acts by Scanlan, they were irrelevant to his defense of duress under *Tafoya* and *Minifie*.

E. Prosecutorial Misconduct

Defendant contends that the prosecutor violated his right against self-incrimination by arguing that defendant had not told police all of the information to which he testified at trial.

Doyle v. Ohio (1976) 426 U.S. 610, holds that "it is fundamentally unfair to use post-Miranda silence against the defendant at trial in view of the implicit assurance contained in the Miranda warnings that exercise of the right of silence will not be penalized." (*People v. Coffman and Marlow*, supra, 34 Cal.4th at p. 65.) Accordingly, "[t]he prosecutor cannot use the defendant's invocation of his right to remain silent or refusal to answer questions as evidence against him. [Citation.] Particularly, the defendant's silence may not be used to impeach his credibility." (*People v. Champion* (2007) 134 Cal.App.4th 1440, 1448.) It is well recognized, however, that *Doyle* applies only when a defendant exercises his or her right to post-arrest silence.

“ ‘ Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda ... warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.’ “ (People v. Osband (1996) 13 Cal.4th 622, 694, quoting Anderson v. Charles (1980) 447 U.S. 404, 408; see similarly People v. Evans (1994) 25 Cal.App.4th 358, 369 [“ Doyle ... will permit a defendant who presents exculpatory testimony at trial to be questioned about a post- Miranda statement if that statement is inconsistent with the version unveiled at trial”]; People v. Poon (1981) 125 Cal.App.3d 55, 84-85, disapproved on other grounds in People v. Lopez (1998) 19 Cal.4th 282, 292; People v. Love (1977) 75 Cal .App.3d 928, 933-934.) Because defendant waived his right to silence and spoke to police, and because the questions and comments cited by defendant were directed at those statements, they were not within Doyle.

*14 Defendant relies on People v. Galloway (1979) 100 Cal.App.3d 551, and People v. Lindsey (1988) 205 Cal.App.3d 112, but both cases are inapposite because in neither case did the defendant give a post-arrest statement.

III. DISPOSITION

The judgment is affirmed.

We concur: MARCHIANO, P.J., and SWAGER, J.

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Not Reported in Cal.Rptr.3d, 2008 WL 4997608 (Cal.App. 1 Dist.)

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