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Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Roberto Arriola CARDENAS, et al., Defendants and Appellants.

No. H034519.
(Santa Clara County Super. Ct. No. CC894340).
May 23, 2011.

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

Randy Baker, Seattle, WA, Sixth District Appellate Program, Santa Clara, CA, Sara Ruddy, Berkeley, CA, for Defendants and Appellants.

ELIA, J.

*1 Following a jury trial, defendants Robert Arriola Cardenas and Timoteo Cabrera Plancarte were convicted of first degree robbery in concert of Baldimir Maraz in an inhabited place (Pen.Code,[FN1] § 213, subd. (a)(1)(A)) (count one), first degree robbery of Erendira Jiminez in an inhabited building (§§ 211–212.5, subd. (a)) (count two), and false imprisonment (§§ 236, 237, subd. (a)) (lesser included offense to count three, kidnapping to commit robbery). [FN2] The jury found the allegations that defendant Cardenas had personally used a firearm in committing the offenses (§ 12022.53, subd. (b)) to be not true. The court sentenced each defendant to 11 years in state prison. They both appeal.[FN3]

FN1. All further statutory references are to the Penal Code.

FN2. The jury also found defendants guilty of false imprisonment, a lesser included offense to count four, which charged kidnapping a child under age 14 (§§ 207, subd. (a), 208, subd. (b)). The court dismissed the charge.

FN3. In addition, defendant Plancarte has filed a petition for writ of habeas corpus, H036643, which we considered with this appeal. We resolve the petition by separate order.

I.
Evidence

A. *Prosecution's Case*

At the time of the crimes on January 30, 2008, Bladimir Maraz ("Maraz") lived at 398 El Cajon Drive in San Jose. He lived in a three bedroom house, which he rented, with his wife and three children. The converted garage was a separate unit, which was rented to another family. Erendira Jiminez lived with her husband, Elisandro Beceril, and two children in the converted garage at 398 El Cajon Drive.

On the night of the robberies, Jiminez was awakened by voices outside the garage and then she heard the sound of a window breaking. Her husband was not at home; she was home with only her two children. She looked out her bathroom window and saw a broken kitchen window in the main house.

In the early morning hours of January 30, 2008, Maraz was awakened by "a very, very loud noise." He called 9–1–1. This call came in at 2:28 in the morning.

Maraz's son B., who was 11 years old at the time of trial, was also awakened by a noise. He got up to go to the bathroom and saw that the kitchen window was broken. B. saw legs coming into the house. Then a man leaped in. The man was wearing a ski mask and had a gun in one hand, which he aimed at B.B. screamed "mom, dad." The man opened the front door to the house and admitted a number of others, B. thought perhaps as many as five. B. was scared.

Maraz's wife, Martha Camacho, awoke in bed to the sound of breaking glass and then heard her son B. screaming "mom" and "dad ." Their daughter G., who was 14 years old at time of trial, awoke to the sound of glass breaking. G. and her little sister, who was eight years old at the time of trial, were in their bedroom. G. then heard her brother B. screaming for their mom and dad; he sounded "really afraid."

B. saw the intruders, who were generally wearing dark clothing, searching for something. One man was wearing a bandana over his face and had a knife; the others were wearing ski masks and had guns. Two or three of them were wearing gloves. The family's dog was barking. The intruders were searching the house.

When Maraz heard his son yelling, he threw down the phone without speaking to the 9–1–1 operator. Maraz ran to his bedroom door and opened it and encountered a man with a gun pointed at him. The man asked Maraz where the money was. He ordered Maraz to get on the floor. Maraz threw himself to the ground because they said they were going to kill him. He was instructed to not look at them or he would be killed.

*2 Camacho, who had already gotten out of bed, saw five or six intruders in her home; two came into her bedroom. They were yelling and telling Camacho to put her head down in English, which Camacho did not understand, and her son, who was "very, very scared," told her in Spanish to drop to the floor. She was told in English not to look and her son translated because he did not know what was going to happen if she did not listen. She was lying face down on the bedroom floor facing the hallway. In addition to the two individuals in her bedroom, she saw the shoes of approximately three other strangers as they walked in hallway.

The intruders repeatedly demanded money. In response, Maraz offered his wallet. Maraz was told, " 'We don't want your fucking wallet. We want the money.' " From the floor, Maraz pointed to the location of his wallet. Camacho understood some English and she heard the men asking her husband where the money was and she heard her husband ask what money and offer his wallet. Maraz's hands were tied behind his back with gray duct tape while he lay face down on the floor. Maraz felt a gun on his neck; the assailant was speaking both Spanish and English but his English was not very good. Maraz's savings, Camacho thought about $200 to $300 dollars, were in his black jacket. At trial, Camacho identified the jacket in a photo taken after the incident, which showed their bedroom with things out of place.

The family's dog was barking a lot. One of the intruders, who was wearing a mask and armed with a round-tipped gun, told B. to control the dog or the dog would be shot.

A man, carrying a gun and holding the dog, came into G.'s room. She could see his face because his bandana was down on his neck; he had short dark curly hair and was wearing a baby blue shirt and latex-type gloves. That man was not defendant Cardenas or defendant Plancarte. The man said to take the dog

and keep it quiet. B. passed the dog to G. Through her open bedroom door, she saw another man wearing a black shirt and a ski mask go into her mother's room. G. heard people repeatedly shouting in her parents' room “give me the money” and cussing in English.

B. saw and heard the initial intruder who had entered through the window cussing at his dad in English. B. saw someone go into a drawer in his parents' bedroom. He then saw and heard another intruder talking in Spanish on a cell phone. B. heard him say that he had a wallet but he did not get the money.

A man wearing a camouflage shirt and a ski mask entered G.'s room. He took something from her room and then put it in his pocket and then he asked her what was in the garage. At first, G. answered that she did not know because she thought that the intruders were going to kill her family and she was trying to protect the family who was living in the garage. She was really scared. The man, who had a weapon, told her not to lie to him and pointed it at her. She then told him that a family was in the garage. Their conversation was in English even though G. speaks Spanish. The man then called someone on a cell phone and spoke in English. G. saw B. being forced to leave the house with one of the intruders wearing a mask. Things got quiet and she inferred that the intruders were leaving.

*3 Two of the men told B. to take them to the garage. One was wearing an ordinary ski mask and holding a gun to B.'s head. The other man was wearing a bandana and had a knife. Camacho saw her son B. being taken away and “started screaming and telling them not to do anything to him.” They told her to stop yelling and to not look at them.

B. and the two men walked out of the sliding glass back door and into the dark backyard. B. was scared and panicking because he thought that the intruders were going to shoot his parents. The shortest distance between the sliding glass door and the garage door was 16 feet.

When they reached the garage, the men instructed B., at whom a gun was still pointed, to knock on the door. He knocked on the door. When Jiminez looked out, she saw a man with a mask with B.B. asked her to open the door but she did not immediately comply. B., who was crying, asked her to open the door again. When she did not open the door, the man with the gun threatened to knock down the door and shoot B.B. thought he was about to die.

Jiminez opened the door and a man, wearing a mask, dark pants and dark gloves and carrying a knife, came inside and grabbed her. B. saw him push Jiminez. Despite the mask, Jiminez could see a one to one and half inch scar on the side of the man's face. Another man with a pistol was in the doorway.

B. said he wanted to go back to house but he was told to stay put. B. told the man that one of the other men told him to come back to the house to translate. B. saw someone run out of the back door of his house and jump over the fence. The man with the gun asked, “ ‘What's going on?’ “ B. said, “I don't know,” and ran back to the house and went to his parents' bedroom. He thought they might be dead.

The man inside Jiminez's home looked throughout the kitchen, the main room, and bathroom. He asked who else lived there and where her husband was. He spoke like a Chicano, that is in Spanish with an American accent. The man took her cell phone, which had picture of her husband and her son on it, and a pair of hoop earrings and then he left. Jiminez closed and locked her door, checked on her kids. When she looked out the front window, she saw police already on El Cajon Drive.

When B. returned to his parents' bedroom, he told his mother that the men had left. B. heard a voice coming from the phone and picked it up and began to tell the 9–1–1 operator what had happened. B. told the 9–1–1 operator that about five people with weapons had come into their house. B. was interrupted when one of the intruders, the same man who earlier had been talking in Spanish on his cell phone about the wallet, returned. B. stopped talking and ended the call.

The man was trying to hide a gray gun behind his back and B. saw the tip of the gun. The man asked what was going on. B. responded that he did not know. The man's mask was “messed up” and “funny” because its cutout was frayed and curling. B. saw the man's face clearly; he remembered the man's

eyebrows and mustache. That man was the only intruder that B. had seen with a mustache and B. stated that he was not the initial intruder or one of the men who took him to the garage. The man seemed upset, made a mad noise, and then headed straight toward the backyard. At trial, B. identified that man as defendant Cardenas.

*4 G. had not left her room while the intruders were in the house. G. called her mother who said it was okay, nobody was in the house and then G. and her sister went into their parent's bedroom. She saw her father on the floor with tape around his hands behind his back.

San Jose Police Officer Jeff Gaudin was dispatched to 398 El Cajon Drive at 2:28 a.m. on January 30, 2008. Within minutes, Officer Gaudin had driven in his marked police car to Costa Mesa Drive, the street to the rear of the El Cajon Drive address. He saw defendant Cardenas walking toward him on the sidewalk, and shined his spotlight on him. The officer got out of his car and drew his weapon; he contacted defendant Cardenas on the sidewalk area in front of 363 Costa Mesa Drive.

During an in-field show-up later that night, B. later positively identified defendant Cardenas as the man with the “messed up” mask. After the identification, defendant Cardenas was arrested and searched incident to arrest.

Officer Gaudin found a roll of gray or silver duct tape in the defendant's jacket pocket. The officer also found two cell phones and a brown glove in defendant Cardenas's pockets. A second brown glove had fallen while defendant Cardenas was walking toward Officer Gaudin and the officer picked it up. The screen saver on one cell phone was a photograph of Elisandro Beceril, Jiminez's husband. A toy cell phone was also among the items recovered from defendant Cardenas. Subsequently, a broken gold hoop earring was found inside one of the gloves.

At trial, B. identified his toy cell phone in the photo of items recovered from defendant Cardenas. At trial, Jiminez identified the earrings and her cell phone that had been taken.

Jiminez's husband was arrested later on the night of the robberies. At the time of defendants' trial, her husband was in jail on drug charges. Sergeant Nieves testified that a white substance packaged in plastic was located between the mattresses in the garage and items appearing to be drugs were located inside the oven.

At approximately 5:00 a.m. on January 30, 2008, San Jose Police Officer Solomon found a black knit ski mask, with one hole for the eyes, on the ground near 369 Costa Mesa Drive. A person jumping over the back fence of 398 El Cajon Drive would land at or near 369 Costa Mesa Drive. The officer also found a pair of blue latex gloves and a folding knife in that area. A roll of duct tape was found on a couch in victim Maraz's house. Sergeant Rafael Nieves with the San Jose Police Department testified at trial that he did not believe that ski mask was worn by either defendant in this case.

Incoming telephone calls to the cell phone found on defendant Cardenas that did not belong to victim Jiminez led to defendant Plancarte. Sergeant Nieves spoke with defendant Plancarte on March 12, 2008.

During that March interview, defendant Plancarte admitted that his role during the January 30, 2008 robbery was to drive the others away from the scene. He claimed to have been waiting at a nearby 7–Eleven. The sergeant found three cell phones on defendant Plancarte, which he admitted using. The three phones had different area codes; one had a 209 area code, the second had a 510 area code, and a third had a 970 area code. Defendant Plancarte said the target of the robbery was a drug dealer.

*5 Cardenas's cell phone had an outgoing call to Plancarte's 209 number at 6:20 p.m. on January 29, 2008. Cardenas's cell phone had an incoming call at 7:30 p.m. on January 29, 2008 from Plancarte's 209 number. Cardenas's cell phone had an incoming call at 1:58 a.m. on January 30, 2008, 30 minutes before the 9–1–1 call, from defendant Plancarte's 510 number. Cardenas's cell phone had two missed calls from defendant Plancarte's 510 number on January 30, 2008; one at 2:34 a.m. and a second at 2:49 a.m. His cell phone had other missed incoming calls from restricted numbers later on January 30, 2008.

B. *Defense Evidence*

1. *Defendant Cardenas*

Officer Martin Tracy testified that he arrived at the crime scene just before 4:00 a.m. on January 30, 2008. He brought Maraz, who spoke limited English, to the police department and interviewed him with the assistance of another officer who translated. Maraz said he had seen two males, who spoke English, and there may have possibly been a third male. One of the two men was 220 pounds and about 38 years of age; the other man was 190 pounds.

Officer Michael Montonye interviewed B. several hours after the robbery. B. said that only the man entering through the window spoke English and rest of the intruders spoke Spanish. B. told him that the man entering through the window had a silver bluish revolver. B. said that about two or three people came in through the door but he also said approximately four or five persons were involved in the crime. Officer Montonye could not remember B. saying that the men threatened to shoot him if the woman did not open the door to the garage. B. said that both men entered the garage with their guns pointed. B. indicated that he remained at the garage door and then walked back to the house to check on his dad. Officer Montonye showed B. one color photograph. B. identified defendant Cardenas in the photo as the man with the "funny" mask based on his skin color, his eyes, and the red marks by his nose. At trial, Officer Montonye approached defendant Cardenas and, at a distance of about four feet, he was able to see the same red marks on defendant Cardenas's face that were depicted in the photograph. B. said that the man with the mustache had been wearing a blue long-sleeved shirt.

Defendant Cardenas testified in his own defense. Cardenas testified that he was 56 years old and he could not speak English. He claimed that, on January 30, 2008, he had been in this country for about a year and four or five months. He was living in a trailer in East Palo Alto.

According to defendant Cardenas, he had met someone named Jesus, whom he called El Guero, while watching soccer on a field in East Palo Alto months before the robbery incident. El Guero had marks, like pock marks, on the sides of his face.

El Guero asked defendant Cardenas to help him collect a debt, which defendant Cardenas believed to be about $5,000, and defendant Cardenas agreed because he thought he might be rewarded. But defendant Cardenas claimed that, when El Guero picked him up from his home on the night of the incident, he went with El Guero but "not willingly." Defendant Cardenas said El Guero was driving a Suburban and there were two others in the back seat, neither of whom was defendant Plancarte. He said that he thought El Guero was going alone and became confused and scared when the saw there were two other men in the back seat of the Suburban. El Guero had a gun in his front waistband.

*6 Defendant Cardenas said that he was scared of El Guero and the other men "[b]ecause they are deep into gangs...." He indicated that members of El Guero's extended family in Mexico were gang members of Los Zetas.

Defendant Cardenas testified that they stopped in front of a house and the two men in the back got out went toward the house. Defendant Cardenas asked El Guero why he wanted defendant Cardenas since he had the others. El Guero, who had his gun out on his thigh, told defendant Cardenas to stop being "chindo," which meant something like "stop fucking up," and to follow the others. Defendant Cardenas indicated that he did not want to go to the house but he got out because he was afraid and thought his life would be threatened if he did not listen to El Guero. At one point, defendant Cardenas testified that El Guero stayed at the car and he did not know if El Guero got out after he did.

According to defendant Cardenas, when he reached the house, the main door was already open. Defendant Cardenas claimed that he did not have a gun, a knife, a ski mask, or gloves. He initially testified that, when he went into the house, he saw two persons on the floor and a standing child who was talking to two persons, one of whom was wearing a mask. At a latter point in his testimony, he described seeing only one person lying on the floor when he went inside the house.

Defendant Cardenas claimed that he left the house "right away" through the front door and he was in the house for 10 seconds at the most, and then he walked toward the garage. At one point, defendant Cardenas testified that El Guero came out through the sliding back door and asked him what he was doing and told him to stand there and to watch that nobody came in and out of the garage. Defendant Cardenas testified that he did not know whether or not El Guero went into the house because he left quickly. Defendant Cardenas inconsistently indicated that it was another man, not El Guero, who came outside through the sliding door and told him to stay and watch and the man then went back inside. According to defendant Cardenas, he ran over to the back fence, jumped it, and went out toward the street. He claimed never to have come face to face with B.

Defendant Cardenas testified that, after jumping the back fence, he received telephone calls from El Guero but he did not answer them because he did not want El Guero to know where he was. He recognized calls coming from El Guero because El Guero would call him from three different telephone numbers, each with a different area code.

According to defendant Cardenas, he saw two individuals running on the street, they dropped or threw things down when a four-door blue or black vehicle appeared and got in, and the vehicle left. He testified that he found a couple of gloves, two telephones, and "one of those things that you put over head" and picked up the items because he "just thought it would be the thing to do." He had put on one glove and was trying to put on the other glove, when he felt something metallic inside. According to defendant Cardenas, he had put on the mask and was trying to arrange it when the officer shined his light on him. He was wearing a jacket with white stripes on the sleeves.

*7 Defendant Cardenas admitted that, when he was stopped by police, he had duct tape in his jacket pocket. But he maintained that it had been there for about two months.

Defendant Cardenas claimed at trial that he had no intention to commit a robbery or to commit a kidnapping and never pointed a gun at anybody. But he admitted that, when he was interviewed and gave his statement, he had lied to Sergeant Nieves. He had been untruthful when he denied he was at the scene of the crime. He had told the sergeant that he had been left at a 7–Eleven store and walked to Costa Mesa Drive but that was not true. At trial, defendant Cardenas insisted he was telling the truth and he was not involved in the robberies or kidnapping and did nothing to help others commit those crimes.

Officer Daniel Navarro was called to scene of the robbery on January 30, 2008. He spoke with a 10–year–old boy, B. He took B. to the one person in-field show-up. Prior to making the identification, B. had not mentioned that he had seen a man with a mustache or wearing a frayed mask in his house. After the identification, Officer Navarro asked B. if the man he had identified had been wearing a mask because the officer had information that the men were masked during the incident. B. described the mask and the officer took a full statement from B.B. indicated that the initial intruder let two to three others into the house. B. had not mentioned that the men had threatened to shoot him if the garage door was not opened. B. had said that two men barged into the garage. B. told the officer that all the men had firearms.

2. *Defendant Plancarte*

No evidence was presented on behalf of defendant Plancarte.

C. *Prosecution's Rebuttal Evidence*

Sergeant Nieves testified that he took a tape-recorded statement in Spanish from defendant Cardenas the morning of the robbery. Defendant Cardenas had admitted that the telephone that was later admitted in evidence at trial as People's exhibit number 21 belonged to him. He claimed to have obtained the phone the previous day from somebody in Los Angeles and then traveled to the City of Jose. He indicated that he had been dropped off at a 7–Eleven store at Seven Trees and Capitol Expressway near El Cajon Drive. Defendant Cardenas had claimed to have picked up the two phones, gloves and a mask that had been dropped by two individuals walking on Costa Mesa. Sergeant Nieves stated that no mask had been found on defendant Cardenas. The sergeant described Cardenas's jacket as a hooded black jacket with stripes on

the sleeves. Defendant Cardenas had never said he had been forced to commit a crime or claimed to be under any form of duress on the night of the robbery. He had denied knowledge of or involvement in the crime. He had not mentioned Mexican gangsters called Los Zetas or someone named El Guero.

II
Defendant Plancarte

A. *Motion to Suppress*

1. *Motion*

Defendant Plancarte brought a motion to suppress his March 12, 2008 statements to police on the ground that they were involuntary. Attached to the motion was the unverified statement of a private defense investigator, which indicated that the tape-recorded interview was taped in six parts, each part ranging in duration from 7.14 to 25.05, which we presume refers to minutes.[FN4]

FN4. The appellate record does not show that the defense investigator's statement was made under penalty of perjury. The stated duration of the segments do not expressly refer to time.

*8 The defense investigator's statement reported that the second segment ended, according to an interpreter, with "the detective informing Mr. Plancarte that he is going to go and get some water and when he returns if Mr. Plancarte doesn't tell the truth, 'Life has ended.' " It indicated that segment five ended "with the detective telling Mr. Plancarte that he will bring him some food when he returns" and "[s]egment six begins with Mr. Plancarte admitting to involvement in the crime." According to the defense investigator's statement, Plancarte twice informed the police that he could not read and, when asked to sign something, he informed police that he could not write. Neither the tape nor a transcript of the interview was admitted into evidence at the hearing.

Defendant Plancarte's memorandum of points and authorities states he waived his *Miranda* rights at the beginning of the March 12, 2008 interview. According to the memorandum, "he was removed from the interview room towards the end of the interview and beaten and threatened by the police. He was then brought back into the interview room where he immediately confessed to the crime."

The prosecution opposed the motion on the ground that coercion was not employed to elicit the confession of defendant Plancarte.

2. *Hearing*

Sergeant Nieves testified that he was an officer in the San Jose Police Department's robbery unit and the investigating detective in this case. On March 12, 2008, Sergeant Nieves met with defendant Plancarte, whom he identified in court.

Sergeant Nieves recalled that, during the initial contact with defendant Plancarte and two other individuals, the sergeant told them that he was investigating a robbery, showed them a photograph of defendant Cardenas, and asked them if they knew him. Officers asked permission to search them and located a phone. Defendant Plancarte voluntarily agreed to be fingerprinted and photographed. As defendant Plancarte and he were reaching an interview room, defendant Plancarte acknowledged that he knew defendant Cardenas and started talking about how he knew about the home invasion robbery. The sergeant immediately read defendant Plancarte his *Miranda* rights and defendant Plancarte indicated he understood his rights and wished to waive them.

Sergeant Nieves, who was certified as bilingual, conducted the interview of defendant Plancarte in Spanish. The sergeant acknowledged that defendant Plancarte was handcuffed at all times during the

interview. The sergeant stated that he had a weapon in his leg holster, which was not visible. Defendant was cuffed to the table during the interview and his hands were cuffed in front of him when he went to the bathroom. Detective John Mitchell was in and out of the interview room during the interview.

Sergeant Nieves testified that he used a hand-held digital recorder in his shirt pocket to audio record the interview, which took place at the police station. The entire interview with defendant Plancarte in the interview room was recorded. The audio recording was stopped a number of times when defendant Plancarte used the bathroom, when he was escorted outside and allowed to smoke a cigarette, or when the sergeant took a break in questioning to check on information and to consult with Detective Mitchell regarding his approach. The sergeant indicated that he probably offered defendant Plancarte something to eat or drink several times. He usually offered water during interviews.

*9 Sergeant Nieves stated that, initially during the interrogation, defendant Plancarte minimized his role in the robbery. Defendant Plancarte admitted his criminal involvement only after several hours, during the final segment of interviewing following a cigarette break. Defendant Plancarte ultimately admitted that he was recruited to be a driver for the robbery.

Sergeant Nieves testified that he never observed Detective Mitchell doing anything physical to defendant Plancarte. The sergeant stated that he did not do anything physical to the defendant. He stated that neither he nor Detective Mitchell physically threatened or verbally threatened defendant Plancarte.

The sergeant was asked on cross-examination whether defendant Plancarte was "ever moved from the interview room and told that his life was over or something to that effect, that perhaps life is ended for you, you need to go back and tell us the truth...." The sergeant indicated that what he meant by the phrase "your life is over" is "you're not getting out of custody." He said, "when I talk to people I basically tell them, you know, prison is no life. There is no life in prison. So your life is basically done. The life that you know, the freedom that you have, you're under arrest and you're going to go to jail." At some point during the interview, he explained that the robbery charge under investigation carried a life prison term.

Sergeant Nieves testified that, at the end of interview, he asked defendant Plancarte to initial and date a photograph of defendant Cardenas and defendant Plancarte complied. The sergeant stated that defendant Plancarte did not say he could not read or write.

At the hearing, defendant Plancarte gave his version of the March 12, 2008 interview. He said: "They were taking me out. They were putting me lying down on the floor, they would take me out again. They were hitting me in my hands. They were putting the telephone in my face and they were erasing the pictures of my child, and they were getting close to me...."

Defendant Plancarte at first repeatedly claimed that Sergeant Nieves did not read his *Miranda* rights to him before questioning him. On cross-examination, he acknowledged that the detective had read him his *Miranda* rights but not during the interview. When asked whether the rights were read at a location other than the police station, defendant testified that he was dizzy.

Defendant Plancarte stated that the interview was 10 to 12 hours in duration. He acknowledged that he was allowed to use the bathroom and had a cigarette break. When asked whether he was offered anything to eat or drink, he answered "no" at first, but then he said "[o]nly water" and finally he said, "I asked for something to eat and the only thing they gave me [was] something like potatoes." He did not testify that he was aware that either officer was armed.

Defendant Plancarte claimed that both Sergeant Nieves and the other detective physically assaulted him. He said that the first thing the officers did when they entered the interview room was hit his hands and tell him that he was "going to say the truth." When asked on redirect examination whether Sergeant Nieves had told him that life had ended, defendant Plancarte replied, "Only I was threatened." Defense counsel did not pursue the matter further.

*10 Defendant Plancarte did not directly answer the cross-examination questions regarding his felony convictions, specifically a 1994 felony conviction for possession of drugs and 2004 conviction for grand theft. He admitted being released on OR on the drug possession charge and then using a different name to avoid arrest. He admitted using the aliases Jose Lionires and Castuolo Arzate in addition to the name Timoteo Cabrera Plancarte. He finally admitted that he had pleaded guilty to grand theft.

Defendant Plancarte's counsel argued that the defendant's statements to Sergeant Nieves were involuntary as a result of physical and verbal threats made against him. Counsel argued that it was highly suspicious that defendant Plancarte repeatedly denied involvement throughout the interview and at the very end of the interview, after the tape recording had been turned off for an unknown length of time, defendant is "brought back in the room or the recorder's turned back on, and suddenly he confesses...."

The trial court indicated that the officer's testimony was more straightforward and believable than defendant Plancarte's testimony with respect to whether the officers had threatened or touched the defendant. The court found it undisputed that Sergeant Nieves had made a statement to the effect "your life has ended" to defendant and the sergeant had explained the import of those words. The court observed that when defendant Plancarte was "given the opportunity to explain what happened, explain what the officer said, and explain the tone of voice or the gestures of the officer, the defendant replied with the conclusion that he was threatened." The court denied the suppression motion.

3. *Analysis*

"An involuntary confession may not be introduced into evidence at trial. (*Lego v. Twomey* (1972) 404 U.S. 477, 483, 92 S.Ct. 619, 30 L.Ed.2d 618.) The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. (*Id.* at p. 489, 92 S.Ct. 619; *People v. Williams* (1997) 16 Cal.4th 635, 659....) In determining whether a confession was voluntary, ' "[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." ' (*People v. Massie* (1998) 19 Cal.4th 550, 576....) Whether the confession was voluntary depends upon the totality of the circumstances. (*Withrow v. Williams* (1993) 507 U.S. 680, 693–694, 113 S.Ct. 1745, 123 L.Ed .2d 407; *People v. Massie, supra,* 19 Cal.4th at p. 576....) ' "On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review." ' (*People v. Holloway* (2004) 33 Cal.4th 96, 114....)" (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) To the extent that there is a conflict in the evidence regarding the factual circumstances surrounding the confession, "we accept the version favorable to the People if supported by substantial evidence." (*People v. Weaver* (2001) 26 Cal.4th 876, 921.)

*11 "In evaluating the voluntariness of a statement, no single factor is dispositive. (*People v. Williams* (1997) 16 Cal.4th 635, 661 ... [rejecting the view that an offer of leniency necessarily renders a statement involuntary].) The question is whether the statement is the product of an ' "essentially free and unconstrained choice" ' or whether the defendant's ' "will has been overborne and his capacity for self-determination critically impaired" ' by coercion. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854.) Relevant considerations are ' "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." ' (*People v. Williams, supra,* 16 Cal.4th at p. 660....)" (*People v. Williams* (2010) 49 Cal.4th 405, 436.) "A confession is not involuntary unless the coercive police conduct and the defendant's statement are causally related. [Citations.]" (*Id.* at p. 437.)

On appeal, defendant Plancarte argues that his confession was elicited by verbal coercion toward the beginning of the interview even though he mainly argued below that he was beaten and threatened off the record toward the end of the interview, immediately before he admitted his involvement in the robbery. He maintains that Sergeant Nieves's statement that "life has ended" if he failed to tell the truth was coercion under the circumstances because he was a "handcuffed, illiterate non-citizen" alone with two police officers in an interrogation room.

The sergeant's testimony indicated that the remark was neither a threat of harsher punishment if defendant Plancarte did not confess to robbery nor a promise of greater leniency if he did. Rather, the gist of the remark appears to be that, absent the "truth," life as defendant Plancarte knew it would end, which would seem to imply that the police already had a convincing case against defendant Plancarte unless the "true" facts put things in a different light. Exaggeration of the strength of the evidence against a defendant during interrogation does not necessarily render a confession involuntary. (See *People v. Jones* (1998) 17 Cal.4th 279, 299 [detective's statements implying that "he knew more than he did or could prove more than he could" was not constitutionally impermissible deception because it was not the type of deception reasonably likely to procure an untrue statement].) Although defendant Plancarte claimed that he felt threatened, he did not testify that, at the time of the interview, he took the statement literally or he ascribed a different connotation to the sergeant's words than suggested by the sergeant's testimony at the hearing. Defendant did not indicate that this statement had any causal connection to his decision to later confess. "Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise does not ... make a subsequent confession involuntary. (*People v. Jimenez, supra,* 21 Cal.3d at p. 611.)" (*People v.. Boyde* (1988) 46 Cal.3d 212, 238.)

*12 Defendant Plancarte argues that the circumstances of the interrogation, namely that he was "handcuffed [and] alone in an interrogation room with two police officers, at least one of whom was armed," amplified the coercive effect of the alleged threat. While it is true that defendant was handcuffed, there was no evidence that either officer was visibly armed. The use of handcuffs is a factor to be considered (see *People v. Cruz* (2008) 44 Cal.4th 636, 669), but it is not determinative. (See *People v. Williams* (1997) 16 Cal.4th 635, 661 [no single factor dispositive]; see also *Withrow v. Williams* (1993) 507 U.S. 680, 688–689 [113 S.Ct. 1745] [courts continue to apply totality of circumstances approach]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [93 S.Ct. 2041] [In determining whether a defendant's will was overborne in a particular case, the court assesses the totality of all the surrounding circumstances].)

The court impliedly determined that *Miranda* warnings had been given at the outset of the interrogation. Whether proper *Miranda* warnings are given during an interrogation is a factor bearing on the voluntariness of a suspect's statements. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1094 [absence of *Miranda* warnings].) "[T]he fact the [*Miranda*] warnings were given is an important factor tending in the direction of a voluntariness finding.... It bears on the coerciveness of the circumstances, for it reveals that the police were aware of the suspect's rights and presumably prepared to honor them. And, ... it bears upon the defendant's susceptibility, for it shows that the defendant was aware he had a right not to talk to the police." (2 LaFave et al., Criminal Procedure (3d ed.2007) § 6.2(c), p. 637, fn. omitted.)

Further, the evidence believed by the court showed that defendant Plancarte was not deprived of food, water, use of a restroom and not subjected to unduly prolonged questioning. The court clearly did not believe that defendant Plancarte faced physical abuse or threat of force by the officers.

Defendant Plancarte further contends that his personal characteristics "increased the coercive impact of the [alleged] threat." Citing to evidence outside the record of the suppression hearing, he states that he is uneducated and illiterate and he is a Mexican national. He also points out that he does not speak English. The evidence at the hearing did not show he was uneducated or illiterate or a Mexican National. There was no evidence or claim that defendant Plancarte did not understand the questioning. Defendant Plancarte's inability to speak English did not establish a greater susceptibility to coercion since the interview was conducted in Spanish. Further, evidence of past convictions and use of aliases suggests past experience with the criminal justice system, which would tend to suggest he is less susceptible than an inexperienced suspect.

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." (*Colorado v.. Connelly* (1986) 479 U.S. 157, 167 [107 S.Ct. 515].) In addition, "[c]oercive police activity ... ' "does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]' (*People v. Maury* (2003) 30 Cal.4th 342, 404–405....)" (*People v. Guerra, supra,* 37 Cal.4th at p. 1093.) Under the version of the facts stated in support of the suppression

motion, Sergeant Nieves's statement that "life is ended" if defendant Plancarte did not tell the truth occurred during the second segment of interrogation while defendant Plancarte admitted his criminal involvement only after more questioning and a number of breaks.

*13 Defendant Plancarte also argues that unexplained "selective recording" of the interrogation was an indicator that the confession was coerced, especially since Sergeant Nieves "offered no explanation for [the defendant's] sudden change of heart...." Sergeant Nieves's testimony at the hearing did explain the breaks in recording. He indicated that he did not record interactions with defendant Plancarte when they left the interview room for bathroom breaks and a cigarette break and, in addition, he turned off the recorder whenever he left to check on information or to strategize with Detective Miller. It was up to the trial court to assess Sergeant Nieves's credibility and the court impliedly found that the sergeant did not "selectively record" in order to omit portions of the interview that would have revealed physical force or threats. Mere breaks in the recording of an interrogation do not establish that a suspect's subsequent statements were involuntary or coerced. (See *People v. Smith* (2007) 40 Cal.4th 483, 507 [rejecting contention that "police 'did something' to make defendant change his story during the unrecorded portion of the tape"]; see also *People v. Holt* (1997) 15 Cal.4th 619, 663 [federal Constitution does not require custodial interrogations to be recorded], *People v. Gurule* (2002) 28 Cal.4th 557, 603 [*Holt* correctly decided].) The absence of a continuous recording under the circumstances described by the sergeant does not demonstrate that defendant Plancarte's recorded statements were involuntary or coerced.

After independently reviewing the record, we conclude that defendant Plancarte's admission of involvement in the robbery was voluntary under the totality of circumstances.

B. *Ineffective Assistance of Counsel*

1. *Alleged Failure to Adequately Present Suppression Motion*

Defendant Plancarte argues that to the extent his defense counsel failed to effectively present all the circumstances surrounding his statements, his defense counsel provided ineffective assistance. As indicated, in arguing that his admission of criminal involvement was involuntary, defendant Plancarte claims that he is an uneducated and illiterate Mexican National and his interview with Sergeant Nieves was "selectively recorded." He now points to his own statement in the probation report that he was born in Mexico, he had resided in Santa Clara County for two years, and he had never attended school. He also points to Sergeant Nieves's testimony at trial that the interview of defendant Plancarte took approximately four to five hours. Defendant Plancarte overlooks the fact that Sergeant Nieves also testified at trial that it took several hours to complete the interview because defendant Plancarte "kept changing his story" and the recording was stopped when defendant Plancarte took bathroom and cigarette breaks and when he checked on information provided by the defendant.

"Defendant has the burden of proving ineffective assistance of counsel. (*People v. Malone* (1988) 47 Cal.3d 1, 33....) To prevail on a claim of ineffective assistance of counsel, a defendant ' "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." ' (*People v. Hart, supra,* 20 Cal.4th at p. 623....) A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Strickland v. Washington* (1984) 466 U .S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.)" (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

*14 "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266....) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. (*Id.* at pp. 266–267.)" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

"Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (

Strickland v. Washington, supra, 466 U.S. at p. 694 [104 S.Ct. at p.2068].)" (*People v. Maury, supra,* 30 Cal.4th at p. 389; see *Harrington v. Richter* (2011) 131 S.Ct. 770, 791–792.)

During the suppression hearing, Sergeant Nieves indicated that several hours had already elapsed when defendant Plancarte admitted to his role in the robbery. Defense counsel did cross-examine Sergeant Nieves about the duration of the interview and the starting and stopping of the audio recorder. Counsel also questioned defendant Plancarte about the length of the interview, which he claimed lasted 10 to 12 hours. The record does not show that defense counsel provided ineffective assistance in adducing evidence regarding length or discontinuous recording of the interview.

As to defense counsel's apparent failure to elicit testimony from defendant Plancarte that he was an uneducated and illiterate Mexican national, the record contains no explanation for that omission and it does not reflect that defense counsel was asked for an explanation. Since there could be a satisfactory explanation, the appellate claim of ineffective assistance must be rejected. Furthermore, the record does not demonstrate a reasonable probability that the result of the suppression motion would have been different had that evidence of defendant's susceptibility been adduced since "coercive police activity" is a prerequisite to finding that a confession is involuntary. (*Colorado v. Connelly, supra,* 479 U.S. at p. 167; *People v. Maury, supra,* 30 Cal.4th at p. 404.) Defendant has failed to establish his claim of ineffective assistance of counsel.[FN5]

FN5. In his reply brief, defendant Plancarte additionally contends that his defense counsel should have renewed his motion to suppress at trial when Sergeant Nieves testified that the interview took approximately four to five hours. Contentions raised for the first time in a reply brief are ordinarily forfeited. (See *People v. Peevy* (1998) 17 Cal.4th 1184, 1206; *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) In any event, counsel might have reasonably concluded that the original motion adequately presented the length of the interview, the sergeant's trial testimony would not have altered the outcome of the suppression hearing (cf. *People v. Hill* (1992) 3 Cal.4th 959, 979–982 [defendant's confession was not involuntary where interrogation took place in five separate sessions involving approximately eight hours of actual interrogation over a 12–hour period], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), and a renewed motion would have been fruitless since the trial court had disbelieved defendant Plancarte. (See *People v. Thompson* (2010) 49 Cal.4th 79, 122 [counsel is not ineffective for not making futile motions]; cf. *People v. Maury, supra,* 30 Cal.4th 342, 391 [defense counsel could have reasonably decided not to renew the motion for a change of venue].)

2. *Failure to Bring Pitchess Motion*

Defendant Plancarte asserts that his defense counsel provided ineffective assistance by failing to bring a *Pitchess* motion to "disclose evidence of prior incidents in which the interrogating officers used force or threats to elicit statements or gave false testimony or filed false police reports." (See Evid.Code, §§ 1043, 1045; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) Defendant acknowledges that it is impossible to establish the prejudice prong of an ineffective assistance claim since the outcome of *Pitchess* discovery cannot be known. Nevertheless, he argues that the failure to bring such motion denied him a fair trial and the appropriate remedy is to conduct a *Pitchess* in camera hearing. He cites *People v. Gaines* (2009) 46 Cal.4th 172, 180–181, and *People v. Hustead* (1999) 74 Cal.App.4th 410, 419.

*15 Neither *Gaines* nor *Hustead* apply to an ineffective assistance of counsel claim. Both cases concerned the appropriate remedy when a trial court erroneously rejects a showing of good cause for *Pitchess* discovery and fails to hold an in camera hearing as required.

We cannot, as suggested on appeal, disregard the prejudice prong of an ineffective assistance claim simply because the argument is that defense counsel should have brought a *Pitchess* motion. (See *In re Avena* (1996) 12 Cal.4th 694, 730 [petition for a writ of habeas corpus].) "[U]nder *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance [by counsel] and (2) prejudice." (*Lockhart v. Fretwell* (1992) 506 U.S. 364, 370, fn. 2 [113 S.Ct. 838].) In this

instance, "a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced. See Strickland, supra, at 685, 104 S.Ct. 2052." (*U.S. v. Gonzalez–Lopez* (2006) 548 U.S. 140, 147 [126 S.Ct. 2557].)

There is nothing in the record to suggest that a *Pitchess* discovery motion would have led to any corroborating evidence. Defendant Plancarte has not established this ineffective assistance claim.

C. *Substantial Evidence of Aiding and Abetting*

1. *Robbery In Concert and Robbery*

Defendant Plancarte claims that his confession "showed that he knew and intended only to aid in a plan to rob the house of a drug dealer." He argues that there was no substantial evidence that he had "any intent or expectation Mr. Maraz would be robbed" and Mr. Maraz's home was "not the house targeted by the principals, and therefore [the robbery of Mr. Maraz] necessarily was not the robbery which [he] intended to aid and abet." Alternatively, he contends that "[a]ssuming *arguendo* the evidence indicates that the residence of Mr. Maraz was the robbery [he] intended to aid and abet, then his conviction for the robbery of Ms. Jim[i]nez ... must be reversed" because "there was no substantial evidence [he] intended to assist in the commission of a second robbery."

Citing *Chiarella v. U.S.* (1980) 445 U.S. 222 [100 S.Ct. 1108], defendant Plancarte maintains that this court cannot affirm those convictions based upon the natural and probable consequence doctrine because the jury was not instructed on the doctrine with regard to the robbery charges.[FN6] In *Chiarella,* the petitioner was indicted on and convicted of 17 counts of violating section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission rule 10b–5 even though he was not a corporate insider and had not received confidential information from a company targeted for takeover. (*Id.* at pp. 225, 231.) While working for a financial printer, petitioner had handled announcements of corporate takeover bids and deduced the names of the undisclosed target companies. (*Id.* at p. 224.) He "purchased stock in the target companies and sold the shares immediately after the takeover attempts were made public." (*Ibid .,* fn. omitted.) At trial, liability was predicated upon petitioner's failure to disclose material, nonpublic information before his stock purchases. (*Id.* at p. 236.)

FN6. The trial court instructed: "Under some specific circumstances if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." It made clear that a person may be guilty of a crime either as a direct perpetrator or as an aider and abettor. The court also instructed on the natural and probable consequence doctrine and told the jury "[t]he defendant is guilty of kidnap for robbery and/or kidnap if the People have proved that the defendant aided and abetted either robbery or robbery in concert and that kidnap for robbery or kidnap was the natural and probable consequence of either the robbery or robbery in concert."

*16 The United States Supreme Court held that "a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information" (*id.* at p. 235) and reversed. (*Id.* at p. 237.) The court declined to consider the government's new misappropriation theory raised for the first time on appeal because the jury had not been instructed on it and noted that, even if the jury had been instructed on both theories, the court would not have upheld the conviction because it would have been impossible to determine if petitioner had been punished for noncriminal conduct based on an improper legal theory.[FN7] (*Id.* at pp. 236, 237, fn. 21.)

FN7. The U.S. Supreme Court finally gave its imprimatur to the misappropriation theory in *U.S. v. O'Hagan* (1997) 521 U.S. 642, 647, 649–666 [117 S.Ct. 2199].

Unlike the petitioner in *Chiarella,* defendant Plancarte was not convicted based upon a legally invalid theory of guilt. The prosecution's theory of this case was that defendant Plancarte was an aider and abettor. The evidence shows that a number of men with the intent to rob went to 398 Cajon Drive in San Jose, where they believed a drug dealer with a large sum of money resided. When the perpetrators burst into the

home, they repeatedly asked where the money was. They searched all over the house. When it was discovered people also lived in the garage, two of the perpetrators went there to look for the money. The evidence does not demonstrate that defendant Plancarte or the perpetrators intended to take the money only if it was found in the sole possession of the drug dealer .[FN8] Rather, the perpetrators were looking for it anywhere on the premises. In addition, any mistaken belief that Maraz was that drug dealer was not a defense. (See *People v. Parker* (1985) 175 Cal.App.3d 818, 821–824 [mistaken belief that building was not an inhabited dwelling house did not constitute affirmative defense to first degree burglary]; *In re Jennings* (2004) 34 Cal.4th 254, 277 [a mistake of fact defense is generally unavailable unless the mistake disproves an element of the offense].)

FN8. "[N]either ownership nor physical possession is required to establish the element of possession for the purposes of the robbery statute. [Citations.] ... Two or more persons may be in joint constructive possession of a single item of personal property, and multiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken. [Citation.]" (*People v. Scott* (2009) 45 Cal.4th 743, 749–750, fn. omitted; see *People v. Nguyen* (2000) 24 Cal.4th 756, 764 [possession may be either actual or constructive].) A family member may be in constructive possession of property belonging to another family member. (See *People v. Gordon* (1982) 136 Cal.App.3d 519, 529, cited with approval in *People v. Scott, supra*, 45 Cal.4th at p. 753.)

Defendant Plancarte's defense at trial was not that the charged robbery offenses were committed against victims other than the intended victim or that either charged robbery was not a reasonably foreseeable consequence of the robbery aided and abetted. Rather, his defense at trial was that he had nothing to do with the robberies and his admissions to Sergeant Nieves did not prove that he had actually acted as the "getaway driver." The jury impliedly found that defendant Plancarte, knowing their criminal purpose to commit robbery at the El Cajon Drive address, acted with the intent to encourage and assist the direct perpetrators in the commission of the charged robberies and its determination was supported by substantial evidence.

Even if we were to accept that either the robbery in concert of Maraz or the robbery of Jiminez was not the target robbery, the evidence was factually sufficient to convict defendant Plancarte of those crimes as an aider and abettor under the natural and probable consequences doctrine.[FN9] An aider and abettor of a criminal offense is guilty of any crime that was a "natural and probable consequence" of the offense aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) Under the natural and probable consequences doctrine, an aider and abettor "need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator" and the aider and abettor's "knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator." (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

FN9. In this case, the trial court instructed the jury on the natural and probable consequences doctrine but not in relationship to the robbery charges. Defendant does not claim that the trial court prejudicially erred in failing to so instruct nor could he. Even if we were to accept that the charged robbery offenses were not the target offense, no reasonable jury would have concluded that those robberies were not the natural and probable consequences of the contemplated robbery at that El Cajon Drive address. "The factual determination whether a crime committed by the perpetrator was a reasonably foreseeable consequence of the crime or crimes originally contemplated is not founded on the aider and abettor's subjective view of what might occur" but is an objective test. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1587; see *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

2. *False Imprisonment*

*17 Defendant Plancarte states that the evidence shows that he agreed to act as the getaway driver for the robbery of a drug dealer but the perpetrators mistakenly robbed the wrong party and then falsely imprisoned a victim of that robbery to gain "access to the residence of the original target of the robbery."

He argues that false imprisonment was not a reasonably foreseeable result of his agreement and, therefore, the evidence was insufficient to sustain the false imprisonment conviction.

"Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535....)" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) There is no requirement to show a strong probability that the unintended crime may be committed; a possible consequence that might reasonably have been contemplated is enough. (*Ibid*.)

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) "In this context, ' "[p]ersonal liberty" ' is violated when 'the victim is "compelled to remain where he does not wish to remain, or to go where he does not wish to go." ' [Citations.]" (*People v. Reed* (2000) 78 Cal.App.4th 274, 280.) False imprisonment is a felony offense if it is "effected by violence, menace, fraud, or deceit." (§ 237, see § 17, subd. (a).) "Menace is a threat of harm express or implied by words or act. [Citations.]" (*People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1359.)

False imprisonment, effected by menace, of a resident who is the victim of a home invasion robbery is a reasonably foreseeable consequence of such robbery. It is reasonably foreseeable that the direct perpetrators may compel a resident by menace to lead them to valuables or force a residence to stay in a certain area while property is taken. In this case, defendant Plancarte's counsel argued in closing that the direct perpetrators did not take B. for purposes of kidnapping him; rather they made him to go to the garage "to finish the robbery they came to do in the first place." Such actions were reasonably foreseeable within the meaning of the natural and probable consequence doctrine. The evidence is sufficient to convict defendant Plancarte, as an aider and abettor of robbery, of false imprisonment of B. under the natural and probable consequences doctrine.

D. *Intent Instructions Regarding Robbery*

Defendant Plancarte asserts that his convictions of robbery in concert and robbery must be reversed because the court instructed the jury that those offenses were general intent crimes.

The trial court told the jury: "The crimes charged in Counts 1, 2, 3, and 4, require proof of the union or joint operation of act and wrongful intent. The following crimes require general criminal intent. One, robbery in an inhabited place, voluntarily acting in concert as charged in Count 1. Robbery in an inhabited building, trailer, coach or vessel as charged in Count 2.... [¶] For you to find a person guilty of these crimes or to find the allegations true, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he intentionally does a prohibited act on purpose. However, it is not required that he intend to break the law. The act required is explained in the instruction for that crime or allegation." The court then instructed that kidnapping to commit robbery as charged in count three required a specific intent or mental state and "to find a person guilty of this crime that person must not only intentionally commit the prohibited act, but must do so with a specific intent." As defendant Plancarte recognizes, when the trial court later instructed the jury regarding the elements of robbery, it specified that robbery required proof that "when the defendant used force or fear to take the property he intended to deprive the owner of it permanently."

*18 It is undisputed that the trial court erred by informing the jury that robbery was a general intent crime.[FN10] "[A] specific intent to steal, i.e., an intent to deprive an owner permanently of his property, is an essential element of robbery. [Citations.]" (*People v. Butler* (1967) 65 Cal.2d 569, 573, overruled on another ground in *People v. Tufunga* (1999) 21 Cal.4th 935, 956.) The instructional error, however, was not a structural defect necessitating automatic reversal under the federal Constitution. (See *Neder v. U.S.* (1999) 527 U.S. 1, 8–15 [119 S.Ct. 1827]; *Johnson v. U.S.* (1997) 520 U.S. 461, 468–469 [117 S.Ct. 1544]; *People v. Flood* (1998) 18 Cal.4th 470, 502–503.)

FN10. "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do

the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*People v. Hood* (1969) 1 Cal.3d 444, 456–457.)

"When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. [Citations.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 803–804.) In this case, the court mislabeled robbery in concert and robbery as "general intent" crimes in its general intent instructions but stated that the act required for the crimes was explained in the instruction for those crimes. The robbery instruction made clear that the People had to prove that force or fear was used to take property with the intent to deprive the owner of it permanently. The jurors were further instructed to "[p]ay careful attention to all of these instructions and consider them together." There was no jury question related to the issue of the intent required for robbery. The prosecutor argued in closing that property was taken from both victims with the intent to keep it. It is not reasonably likely that the jurors understood the instruction mislabeling the robbery offenses as crimes of "general intent," a legal term of art, as meaning the prosecution did not have to prove intent to permanently deprive as an element of robbery and, consequently, disregarded the express specific intent instruction.

Moreover, even if the instruction mislabeling the charged robbery offenses as crimes of "general intent" was a contradictory instruction that created a risk that the jury failed to find the specific intent element of robbery, the instructional error was harmless beyond a reasonable doubt under the *Chapman* standard.[FN11] (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824]; *Neder v. United States* (1999) 527 U.S. 1, 8–15 [119 S.Ct. 1827] [omission of element of an offense]; *Pope v. Illinois* (1987) 481 U.S. 497, 501–503 [107 S.Ct. 1918] [misstatement of element of an offense]; *People v. Lee* (1987) 43 Cal.3d 666, 676 [conflicting intent instructions].) The evidence showed that the contemplated crime involved a nighttime home invasion for the purpose of taking a large sum of money expected to be found at the residence of a drug dealer. The contemplated crime aided and abetted by defendant Plancarte unquestionably involved the direct perpetrators acting with the specific intent to permanently deprive. Armed and masked perpetrators entered Maraz's home. The intruders repeatedly demanded money from victim Maraz at gunpoint, bound his hands behind his back with duct tape, and took his wallet. When the money was not found, two armed men demanded entry into the converted garage where Jiminez lived. Then one of the men, armed with a knife, entered, grabbed victim Jiminez, and took her property while the other man armed with a gun stood by. Possessions of both victims were taken from the crime scene. The evidence that the direct perpetrators intended to permanently deprive the victims of their property was overwhelming. The instructional error was harmless beyond a reasonable doubt and did not contribute to the jury's verdict on counts one and two. (*Chapman v. California, supra,* 386 U.S. at p. 24, see *Neder v. U.S., supra,* 527 U.S. at p. 17.)

FN11. While we do not agree with defendant Plancarte's characterization of the instructional error as one that caused the case to be submitted to the jury on alternative theories of guilt, one of which was legally invalid, such characterization does not affect the analysis. The U.S. Supreme Court has determined that type of error is not structural. (*Hedgpeth v. Pulido* (2008) 555 U.S. 57, ——— [129 S.Ct. 530, 530–531].)

E. *Impact of Erroneous Instruction on False Imprisonment Conviction*

*19 Defendant Plancarte argues that his false imprisonment conviction must be reversed because the jury was incorrectly instructed that the crimes charged in counts one and two were general intent crimes. His reasoning is that, under the natural and probable consequences doctrine instructions, the jury had to first find him guilty of robbery in concert or robbery as an aider and abettor before finding him guilty of false imprisonment, the lesser and included offense of counts three and four. He maintains that the defective robbery instructions tainted those natural and probable consequence instructions. He insists that it is "impossible to ascertain beyond a reasonable doubt that the jury found all the elements of false imprisonment in this case."

As already explained, the instructional error with regard to the specific intent required for robbery was harmless beyond a reasonable doubt. Overwhelming circumstantial evidence established that the contemplated robbery involved the specific intent to deprive and the direct perpetrators of the robberies acted with the requisite specific intent. Defendant does not identify any error in the aiding and abetting instructions or the natural and probable consequences instructions or the false imprisonment instructions. The erroneous general intent instruction did not taint those instructions or render unreliable the jury's finding that defendant Plancarte was guilty of false imprisonment under the natural and probable consequences doctrine.

F. *Cumulative Prejudice*

Defendant Plancarte contends that the cumulative prejudicial impact of the alleged errors requires reversal of his convictions. Since we have found no error, his cumulative prejudice argument must be rejected.

G. Sentencing

The trial court imposed an upper term of nine years on the first degree robbery in concert conviction (count one), a consecutive term of one year and four months on the first degree robbery conviction (count two), and a consecutive term of eight months on the false imprisonment conviction (count three). Defendant Plancarte argues that the trial court abused its discretion by sentencing him to an aggravated term for robbery in concert and by imposing consecutive sentences on the other convictions.

1. *Upper Term*

The probation report concerning defendant Plancarte identified no mitigating circumstances related to the crimes but specified that defendant Plancarte's prior performance on probation or parole was satisfactory. It disclosed that, when he was interviewed by the probation officer, defendant Plancarte denied any criminal participation and declared he had been a victim of police brutality and falsely accused. The probation officer reported that defendant Plancarte took no responsibility for his actions.

At the time of sentencing, defendant Cardenas's counsel asserted that his client was not the "heavy" and was "the least culpable" intruder. Defendant Plancarte's counsel argued that "[i]f Mr. Cardenas is considered light in his involvement in this case, Mr. Plancarte would be super light" because the evidence showed that defendant Plancarte had merely agreed to be the getaway driver.

*20 The trial court first selected the upper term with regard to the robbery in concert conviction as to defendant Cardenas. The trial court recited the circumstances in aggravation and then agreed that defendant Cardenas's role was "relatively minor" compared to the role of the uncharged cohorts. The court then explained its reasons for imposing consecutive sentences on defendant Cardenas. The trial court stated on the record that it was adopting "the same analysis based on the same factors" to impose the upper term on court one and consecutive terms on defendant Plancarte.

As to the circumstances in aggravation, the court stated: "[T]his is a crime that involved violence, threat of bodily harm, and a high degree of cruelty, viciousness, and callousness.... [¶] The intruders kicked in a window, uncharged cohorts had guns, the victim was bound with duct tape, and the intruders separated ... the child from the parents. Threatened to kill the parents ... within the hearing of the child." (See Cal. Rules of Court, rule 4.421(a)(1).) [FN12]

FN12. All further references to rules are to the California Rules of Court.

In addition, the court found that the victims were particularly vulnerable. (See rule 4.421(a)(3).) It noted that the "crime occurred at night, the victims were sleeping" and "[t]here were children in both residences which were invaded." It determined that the manner in which the crime was carried out indicated planning and sophistication. (See rule 4.421(a)(8).) The court observed that the planning involved "the preparation of

masks, guns, tools, to restrain the victims, planning, for getaway drivers and use of cell phones." Lastly, the court determined that the crime was an attempt to take great monetary value. (See rule 4.421(a)(9).)

Defendant Plancarte argues that the record shows only that he agreed to be the getaway driver and there was no evidence that "he expected, intended or participated in any violence callousness or threats—certainly none in excess of that entailed in the offense of robbery." He further claims the trial disregarded several mitigating factors, including the fact that his role in the crime was minor (see rule 4.423(a)(1)), he lacked "apparent predisposition" to commit robbery and was induced by others to participate in the crime (see rule 4.423(a)(5)), and his prior performance on probation or parole was satisfactory (see rule 4.423(b)(6)).

Under California law, both perpetrators and aiders and abettors are liable as principals. (§ 31.) Defendant Plancarte maintains that an aider and abettor's culpability may not be equivalent to the direct perpetrator's culpability. It is true that California courts have recognized that an aider and abettor's mens rea may be different from the direct perpetrators, which, in an appropriate case, may justify a conviction of greater or lesser offense than the actual offense committed by the direct perpetrators. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1122 [an aider and abettor may be found guilty of a greater homicide-related offense than the actual killer]; *People v. Nero* (2010) 181 Cal.App.4th 504, 507 [an aider and abettor may be found guilty of a lesser homicide-related offense than the actual killer].) Further, "[a]n 'aider and abettor may be found guilty of a lesser [nontarget] crime than that ultimately committed by the perpetrator where the evidence suggests the ultimate crime was not a reasonably foreseeable consequence of the criminal act originally aided and abetted, but a lesser crime committed by the perpetrator during the accomplishment of the ultimate crime was such a consequence.' (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577 ...; accord, *People v. Hart* (2009) 176 Cal.App.4th 662....)" (*People v. Nero, supra,* 181 Cal.App.4th at pp. 513–514.) In this case, however, the jury found defendant Plancarte criminally liable as an aider and abettor for the robbery in concert committed by the direct perpetrators.

*21 The factors relied upon by the court in sentencing defendant to the upper term related to the crime committed. Defendant, as the admitted getaway driver, impliedly was aware that the contemplated crime that he was aiding and abetting involved a home invasion robbery at night. Defendant also stated to police that the target of the crime was a drug dealer, from which it may be inferred that defendant was at least aware that the contemplated offense would involve the use or threat of force by his confederates against the residents of the home invaded. The court did not abuse its discretion in relying on the factors related to the crimes of which defendant was convicted.

As to the mitigating circumstances, the relevant criteria applicable to the facts in the record of the case are deemed to have been considered by the sentencing judge unless the record affirmatively reflects otherwise. (See rule 4.409.) In addition, the court indicated it had considered the probation report, which specified defendant's satisfactory prior performance on probation or parole. The record does not reflect that the trial court rejected the asserted mitigating circumstances that defendant Plancarte played a relatively minor role in the crimes or that his prior performance on probation or parole was satisfactory.

As to the third asserted mitigating circumstance, that with no apparent predisposition do so, defendant Plancarte was induced by others to participate in the crime, the facts in the record do not establish that defendant Plancarte had "no apparent predisposition" to participate in the crime. The court noted that defendant had two prior felony convictions, one for possession of a controlled substance and the other for grand theft, and robbery was not his first theft crime.

The choice of the appropriate term rests within the sound discretion of the sentencing court. (§ 1170, subd. (b).) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) The trial court did not abuse its discretion in selecting the upper term as to count one.

2. *Consecutive Sentencing*

The trial court's decision to impose consecutive sentences on counts two and three was based on the facts that the crimes were "independent and involved different victims" and "involved separate acts of violence in separate places...." (Cal. Rules of Court, rules 4.425(a)(2), 4.408(a); *People v. Calhoun* (2007) 40 Cal.4th 398, 408 [multiple victims may be basis for imposing consecutive sentence].) Defendant asserts that he should not be held responsible for the violence or "the robbing of victims other than a drug dealer" since he neither intended nor participated in that conduct. He contends that there were numerous mitigating factors that the trial court disregarded. He cites *People v. Bradley* (2003) 111 Cal.App.4th 765 in support of his argument.

*22 As discussed above, the record does not reflect that the court failed to consider the mitigating circumstances shown by the record. In addition, *Bradley* is inapplicable.

In *People v. Bradley*, the defendant was a young woman who agreed to participate in a scheme to entice a "prosperous looking customer" at a casino into leaving with her "so her two male accomplices could rob him" and their plan was for her "to persuade the target to take her in his car" and "then get him to stop somewhere along the way." (*Id.* at p. 767.) She was convicted of robbery as an aider and abettor and of attempted murder as a natural and probable consequence of the robbery she aided and abetted. (*Id.* at pp. 767–769.) The trial court imposed consecutive sentences. (*Id.* at p. 767.) The appellate court determined that the defendant "had only one objective and one intent-to aid and abet a robbery of the victim" (*id.* at p. 768) and, because she was waiting in another vehicle when the victim was shot, she was "unaware that second crime was occurring until after it was completed...." (*Id.* at p. 771.) It held that "[section] 654 denies the trial court discretion to impose consecutive sentences on appellant for the robbery and attempted murder convictions." (*Id.* at p. 770.) Unlike *Bradley*, this case does not involve any section 654 issue because the convictions involve separate victims. (See *In re Ford* (1967) 66 Cal.2d 183, 184 [section 654 "does not apply when one lawless course of conduct harms more than one victim"]; *In re Wright* (1967) 65 Cal.2d 650, 656.)

"Section 669 grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes. [Citations.]" (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) A sentencing court's decision to impose consecutive sentences will not be disturbed in the absence of a clear showing of abuse of discretion. (*People v. Giminez* (1975) 14 Cal.3d 68, 72 .) No such showing was made here.

H. *Ineffective Assistance of Counsel Regarding Sentencing*

Defendant Plancarte contends that insofar as his defense counsel failed to adequately present the circumstances to support a more lenient sentence, he was deprived of effective assistance of counsel. Defendant has failed to demonstrate that he has grounds for an ineffective assistance of counsel claim. The record before us does not establish that his counsel's performance "fell below an objective standard of reasonableness" "under prevailing professional norms" or that there was "reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra,* 466 U.S. at pp. 688, 694.)

I. *Victim Restitution*

Defendant Plancarte joins in defendant Cardenas's restitution challenge for the first time in his reply brief. This argument was forfeited by his failure to present it earlier. (See *People v. Peevy, supra,* 17 Cal.4th at p. 1206; *People v. Smithey, supra,* 20 Cal.4th at p. 1017, fn. 26.) In any case, as we discuss below, the contention regarding victim restitution is without merit.

III
Defendant Cardenas

A. *Robbery Instructions*

*23 Defendant Cardenas argues that the trial court erred by giving contradictory instructions on the intent element of robbery and, consequently, all convictions must be reversed because the error may have affected the jury's guilty findings regarding robbery in concert and robbery and tainted any findings by the jury under the natural and probable consequences doctrine in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. He contends that "the trial court's misdefinition of the intent element of robbery permitted the jury to convict [him] of the second robbery and of false imprisonment without finding that he intended to aid and abet a robbery." Defendant Cardenas is not claiming, and has not identified, any error in the jury instructions regarding aiding and abetting, the natural and probable consequences doctrine, or false imprisonment.

The jury impliedly rejected defendant Cardenas's exculpatory version of what occurred. As already explained with regard to defendant Plancarte's substantially similar contention, overwhelming circumstantial evidence established that the contemplated robbery involved the specific intent to permanently deprive and the direct perpetrators of the robberies had the requisite specific intent to permanently deprive when they took the victims' property. The erroneous general intent instruction on robbery was harmless beyond a reasonable doubt under the *Chapman* standard. The jury's verdicts would have been the same even without the instructional error.

B. *Instruction Regarding Possession of Recently Stolen Property*

The trial court instructed the jury in accordance with CALCRIM No. 376 regarding the permissive inference that a jury may draw if it finds a defendant in possession of recently stolen property.[FN13] Defendant Cardenas now asserts that the instruction "diluted" and "undermined" the prosecution's burden of proof beyond a reasonable doubt and, thereby, violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. He maintains that "[r]eversal is required because it cannot be shown that the instructional error was harmless beyond a reasonable doubt." He cites several United States Court of Appeals, Fifth Circuit, cases: *U.S. v. Gray* (1980) 626 F.2d 494; *United States v. Partin* (1977) 552 F.2d 621; and *United States v. Hall* (1976) 525 F.2d 1254.

FN13. The court instructed: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you *may not* convict the defendant of robbery based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt then you *may* conclude that the evidence is sufficient to prove he committed robbery. The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property along with any other relevant circumstances tending to prove his guilt of robbery. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." (Italics added.)

The "slight evidence" instructions at issue in the Fifth Circuit cases concerned the evidence required to link a defendant to a proven criminal conspiracy. (See *U.S. v. Gray, supra,* 626 F.2d at p. 500 ["The Government need only introduce slight evidence of a particular defendant's participation, once the conspiracy is established, but must establish beyond a reasonable doubt that each member had a knowing, special intent to join the conspiracy"]; *U.S. v. Partin, supra,* 552 F.2d at p. 628["[o]nce the existence of the agreement or common scheme of conspiracy is shown, however, slight evidence is all that is required to connect a particular defendant with the conspiracy"]; *U.S. v. Hall, supra,* 525 F.2d at p. 1255 [" '(w)hen a conspiracy has been established by competent proof, only slight evidence is necessary to connect a person with the conspiracy' "].)

*24 Those Fifth Circuit cases are inapposite to this case. First, possession of recently stolen property is not "slight evidence" of a defendant's criminal involvement. The California Supreme Court has recognized that "[p]ossession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.]" (*People v. McFarland* (1962) 58 Cal.2d 748, 754 [burglary and theft].)

Second, the "slight evidence" instruction regarding possession of recently stolen property is "generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 375.) "In the presence of at least some corroborating evidence, it permits-but does not require-jurors to infer from possession of stolen property guilt of a related offense such as robbery or burglary." (*Ibid.*)

Third, the California Supreme Court has repeatedly approved the use of a permissive inference instruction with regard to possession of recently stolen property in theft-related prosecutions. (See *People v. Gamache, supra,* 48 Cal.4th at pp. 375–376 [CALJIC No. 2.15]; *People v. Parson* (2008) 44 Cal.4th 332, 355, 357 [same]; *People v. Prieto* (2003) 30 Cal.4th 226, 249 [same].) In *People v. Prieto,* the court rejected a contention that such instruction, which permitted the inference of guilt when possession of recently stolen property was coupled with slight supporting or corroborating evidence, "lowered the prosecution's burden of proof." (*People v. Prieto, supra,* 30 Cal.4th at p. 248.) The court stated: "CALJIC No. 2.15 did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt. Moreover, other instructions properly instructed the jury on its duty to weigh the evidence, what evidence it may consider, how to weigh that evidence, and the burden of proof. In light of these instructions, there is 'no possibility' CALJIC No. 2.15 reduced the prosecution's burden of proof in this case. (*Barker, supra,* 91 Cal.App.4th at p. 1177.)" (*Ibid.*)

Here, the same is true with respect to the trial court's instruction pursuant to CALCRIM No. 376. Further, the instruction in this case included a reminder to the jury that each essential fact had to be proved beyond a reasonable doubt.

Like CALJIC No. 2.15, CALCRIM No. 376 is an instruction concerning a permissive inference. "A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [105 S.Ct. 1965].) "When reviewing this type of device, the [U.S. Supreme] Court has required the party challenging it to demonstrate its invalidity as applied to him. [Citations.] Because this permissive presumption [or inference] leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." (*County Court of Ulster County, N.Y. v. Allen* (1979) 442 U.S. 140, 157 [99 S.Ct. 2213].) Thus, "[a] permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. *Ulster County Court, supra,* 442 U.S., at 157–163, 99 S.Ct., at 2224–2227." (*Francis v. Franklin, supra,* 471 U.S. at pp. 314–315.)

*25 Here, the evidence of defendant Cardenas's conduct, the time and place of his possession of recently stolen property, the calls between defendant Cardenas and defendant Plancarte around the time of the incident, and defendant Cardenas's false statements to police tended to show his guilt of the charged robbery offenses. The instruction pursuant CALCRIM No. 376 suggested a permissible inference that was reasonable in light of the evidence. The instruction did not lighten the prosecution's burden of proof in violation of due process. (See *People v. Prieto, supra,* 30 Cal.4th at p. 248; *People v. Parson, supra,* 44 Cal.4th at p. 356 .)

C. *Victim Restitution*

Defendant Cardenas maintains that the court's method of determining restitution violated due process. As a threshold matter, the People contend the objection is waived.

Defendant Cardenas asserts that no forfeiture occurred because "the *essence* of the claim was raised below." "When 'new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the

reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution,' a 'defendant's new constitutional arguments are not forfeited on appeal.' (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17....)" (*People v. Foster* (2010) 50 Cal.4th 1301, 1322, fn. 9 [objection to leg restraints].) But in such a situation, "rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) In this case, counsel for defendant Plancarte requested a hearing at which victim Jiminez would be asked to prove the value of her earrings, but Cardenas's defense counsel did not timely and specifically object to the lack of supporting documentation for the claimed losses or the absence of opportunity to cross-examine the victims. Defendant's due process claim with regard to victim restitution was not preserved by objection below. (Cf. *People v. Foster, supra,* 50 Cal.4th at pp. 1321–1322 [failure to object at trial to stun belt restraint forfeited constitutional challenges]; *People v. Catlin* (2001) 26 Cal.4th 81 [failure to object at trial to evidence admitted at penalty phase forfeited claim that admission violated due process].)

If not adequately preserved by objection, defendant Cardenas argues that any failure to object was excused because objection would have been futile under existing state law regarding determination of victim restitution. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 237–238.) Even if we concluded that defendant Cardenas may be excused for failing to object, we would find his due process claim without merit on this record.

*26 The probation report indicated that the Maraz family was seeking a total of $2,320 in restitution, which included a lost rental deposit of $800, $300 in rental cost for alternative housing for 10 days, $520 in stolen cash, a $500 rental deposit for their new residence, and $200 in moving costs. The probation report indicated that Jiminez was claiming a financial loss of $1200, which included $500 "move-in deposit," $400 for the stolen cell phone, and $300 for the stolen earrings. The probation reports recommended court-ordered victim restitution for those economic losses.

At the hearing on June 19, 2009, defendant Cardenas's counsel argued that Jiminez's $500 claim was not legitimate because the landlord had kicked her out due to the drugs in the home and her husband's arrest. When asked whether there was any evidence of the reason victim Jiminez moved out of the residence, defense counsel admitted he did not have any. Defense counsel then argued that the cell phone was not worth $400 and the earrings were worth about $5, not $300 as claimed. He admitted that he had no evidence to offer. Counsel also questioned whether $500 in cash had been taken during the robbery. The court set a restitution hearing for July 17, 2009.

On July 17, 2009, counsel representing both defendants indicated that she had no evidence to present and submitted the matter. Since there was no evidence calling into question the victims' claimed economic losses, the court followed the probation report's recommendations on victim restitution and ordered defendant to pay $2,320 to victim Maraz and $1200 to victim Jiminez.

The governing statute provides that, with exceptions not here applicable, "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, *based on the amount of loss claimed* by the victim or victims or any other showing to the court ." (§ 1202.4, subd. (f), italics added.) The trial court must "order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." (*Ibid*.)

Section 1202.4, subdivision (f)(3), provides: "To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct" and the statute provides an nonexclusive list of such reimbursable expenses.

Those reimbursable economic losses include "[f]ull or partial payment for the value of stolen or damaged property" and the "value of stolen or damaged property" is statutorily defined as "the replacement cost of like property, or the actual cost of repairing the property when repair is possible." (§ 1202.4, subd. (f)(3)(A).) They also include "Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items." [FN14] (§ 1202.4, subd. (f)(3)(I).)

FN14. Section 1202.4 requires that relocation expenses "be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim." (§ 1202.4, subd. (f)(3)(I) .) No issue was raised below or is being raised on appeal with regard to this specific statutory requirement.

*27 "The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion." (§ 1202.4, subd. (f)(1).)

Defendant Cardenas now complains that the trial court ordered victim restitution "without requiring the victims to present any evidence of the value of their [claimed] loss," without any declaration under penalty of perjury or corroborating documentation to support the victims' claims of loss, and without providing defendant with any "opportunity to cross-examine witnesses." He asserts that "[d]ue process requires that [he] have not just notice of the amount, but also an opportunity to examine the evidence, to cross-examine witnesses, and to be heard before the court makes its order" and the burden must be on the party seeking restitution to provide an adequate factual basis for the claim. He argues that placing the burden of proof on him to disprove the victims' unsubstantiated claims of loss violates due process. He maintains that due process requires a victim to establish "an adequate factual basis" for any restitution claim, citing *People v. Giordano* (2007) 42 Cal.4th 644, 654.

In addition to the statutory protections, a defendant has cognizable procedural due process rights with regard to court-ordered victim restitution. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citations.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [96 S.Ct. 893].)

In the *Giordano* case cited by defendant Cardenas, the California Supreme Court held that, under section 1202.4, courts have authority to award restitution to a surviving spouse of a crime victim for lost future economic support. (42 Cal.4th at pp. 656–662 .) The court stated: "Under [the abuse of discretion] standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*Id.* at pp. 663–664.) The court also made clear that the burden is on a surviving spouse "seeking restitution to provide an adequate factual basis for the claim." (*Id.* at p. 664.)

The *Giordano* decision did not address the issue of procedural due process to be accorded a criminal defendant in victim restitution proceedings. Rather, the court noted that defendant had not raised any due process challenges and it had no "occasion to address possible constitutional challenges to restitution hearings." (*Id.* at p. 662, fn. 6.)

*28 Further, *Giordano* does not stand for the proposition that a trial court cannot rely on a victim's statements of economic losses contained in a probation report. " '[T]he trial court is entitled to consider the probation report when determining the amount of restitution.' (*People v. Foster* (1993) 14 Cal.App.4th 939, 946....)" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048; see *Williams v. People of State of N.Y.* (1949) 337 U.S. 241, 250–252 [69 S.Ct. 1079] [due process does not require that information relied

upon in sentencing be "restricted to that given in open court by witnesses subject to cross-examination" and the defendant was not denied due process of law by the court's reliance on the presentence investigation report].) "[I]t is well settled that 'statements by the victims of the crimes about the value of the property stolen constitute "prima facie evidence of value for purposes of restitution." [Citations.]' [Citations.]" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 690, see *id.* at p. 691 ["A victim who has no receipts or appraisals for property received by gift, and who no longer has possession of the property, may have no way of providing a detailed description or obtaining an appraisal"].) " 'When the probation report includes a discussion of the victim's loss and a recommendation on the amount of restitution, the defendant must come forward with contrary information to challenge that amount. [Citation.]' (*People v. Pinedo* (1998) 60 Cal.App.4th 1403, 1406–1407 ...; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1275 ... [same]; but see *People v. Harvest* (2000) 84 Cal.App.4th 641, 653 ... [probation officer's report 'may satisfy notice requirements for due process [citation], but it cannot take the place of evidence. [Citation.]'].)" (*People v. Collins* (2003) 111 Cal.App.4th 726, 734.) Where there is a factual and rational basis for an amount of restitution to be ordered by the court (cf. *People v. Carbajal* (1995) 10 Cal.4th 1114, 1125), we cannot say that it is fundamentally unfair to place a burden of producing countervailing evidence, which would cast doubt on a victim's valuation or veracity with regard to economic losses claimed to have been suffered as a result of a defendant's criminal conduct, on the defendant. (See Evid.Code, § 550 [party with burden of producing evidence]; see Evid.Code, § 110 [defining "burden of producing evidence"].)

Defendant Cardenas has failed to show that he was deprived of a property interest without adequate notice or a meaningful opportunity to be heard. Both the cell phone and the earrings were clearly items that had been stolen from victim Jiminez and were displayed at the trial. Evidence at trial indicated that a sum of money had been in Maraz's jacket and his wallet had been stolen. Other economic losses related to the victims moving their residences, which would not be unexpected after traumatic home invasion robberies.

*29 Defendant Cardenas did not present any evidence to suggest that any claim of loss was falsified or inflated or that any victim relocated for reasons other than personal safety or emotional well-being related to the incident. The flexible demands of due process were satisfied by notice of the amounts of restitution being claimed and the holding of a restitution hearing, which provided defendant with the opportunity to contest the victim's claims and present rebuttal evidence.[FN15] (See *People v. Cain* (2000) 82 Cal.App.4th 81, 86 ["scope of a criminal defendant's due process rights at a hearing to determine the amount of restitution is very limited"], 87 [defendant has no right of confrontation but trial courts may exercise their discretion to permit cross-examination on a case-by-case basis]; see also *Morrissey v. Brewer* (1972) 408 U .S. 471, 481 [92 S.Ct. 2593] ["due process is flexible and calls for such procedural protections as the particular situation demands"].)

FN15. We need not decide whether due process might require an evidentiary hearing where a defendant presents evidence calling into question a victim's undocumented claim of economic loss. In addition, courts should be alert to possible abuses by crime victims in claiming restitution for economic losses and may exercise their discretion to hold an evidentiary hearing in a particular case.

DISPOSITION

The judgments of conviction are affirmed.

WE CONCUR: RUSHING, P.J., and PREMO, J.

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