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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN BURTON Defendant and Appellant.	A157309 (Alameda County Super. Ct. No. 172678A)

Defendant Christian Burton was convicted of committing first-degree murder (Pen. Code[1] § 187, subd. (a)) during the course of a carjacking (§ 190.2, subd. (a)(17)(L)) and sentenced to 25 years to life. On appeal he seeks a new trial on the basis of the court's denial of his motion to exclude from evidence his videotaped confession to the police. He also challenges the court's imposition of a restitution fine and court assessments, and seeks an amendment to the abstract of judgment.

We remand for amendment to the abstract of judgment and to the court's sentencing order, and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

[1] All further undesignated statutory references are to the Penal Code.

The murder charge arose from two related incidents that occurred on April 2, 2013, with the jury trial underlying this appeal taking place in 2018.

The prosecution's theory was that after the carjacking of a vehicle (first incident) in which defendant did not participate, defendant wound up in the stolen vehicle and participated with five accomplices (Nazhee Flowers, David McNeal, D.W., R.R., and M.S.[2]) in attempting a second carjacking. In the course of the attempted second carjacking, defendant fatally shot Quinn Boyer (Boyer) (second incident).

The defense theory was that defendant was not in the car stolen during the first incident and was not present at the second incident. While defendant confessed to being in the stolen car and participating in the attempted carjacking and shooting of Boyer, the defense asserted that the confession was obtained by coercive police tactics.

We set forth only those facts necessary to resolve this appeal.

A. People's Case

1. First Incident - Carjacking[3]

[2] At the time of the 2013 crime, defendant was 16 years old and his five accomplices were all juveniles. Defendant was charged as an adult in superior court, while charges against his younger accomplices were initially filed in juvenile court. D.W., R.R., and M.S. remained in juvenile court and were committed to the Department of Judicial Justice based on their admissions to first degree murder. Flowers and McNeal were remanded to superior court to be tried as adults. Flowers entered into a negotiated plea admitting to carjacking with the use of a firearm. McNeal went to trial and was convicted of first degree murder with the use of a firearm by a principal for his involvement in the murder of Boyer. After defendant's first trial ended in a mistrial, defendant unsuccessfully sought to transfer his case to the juvenile court and was retried as an adult in 2018.

[3] Pursuant to the California Rules of Court, rule 8.90, governing "Privacy in Opinions," we refer to certain persons by their initials.

Between 10:00 and 11:00 a.m. on April 2, 2013, Flowers, McNeal, D.W., and R.R. participated in the carjacking of a gold vehicle owned by R.J. While a nearby store surveillance video showed defendant and M.S. present at the time of the carjacking, they were not seen getting into the stolen car and their fingerprints were not later found on the stolen car. However, according to defendant's statement to the police[4], Flowers, McNeal, D.W., and R.R. picked up defendant and M.S. and they entered the stolen car.

2. Second Incident - Attempted Carjacking and Murder

For about an hour after the first incident, D.W. drove the stolen car in the Oakland hills; Flowers and D.W. were in the front bucket seats and defendant, McNeal, R.R., and M.S. were squashed in the back. During the drive, there was a discussion concerning their intent to find another vehicle to steal. At approximately noon, they spotted Boyer sitting in his blue Civic, which was parked at the curb of the southbound traffic lanes on a road in the Oakland hills. D.W., traveling northbound on the opposite side of the road, made a U-turn and parked in front of Boyer's car.

Defendant, armed with a loaded .22 caliber pistol, and Flowers approached the front of Boyer's car. Flowers stood at the passenger side and defendant stood at the driver's side. Neither D.W., R.R., nor M.S. saw who fired the gun but each heard one gunshot as Boyer drove

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[4] The jury watched an edited version of defendant's videotaped statement taken at the police station by Police Lieutenant (then Sergeant) Randolph Brandwood and Police Officer Phong Tran. The statements of defendant's accomplices taken by the police were presented to the jury through the testimony of Brandwood and D.W., R.R., and M.S.

away. When Boyer looked up, he started his car and drove around defendant trying to get away.

Defendant fired a single shot that shattered the closed front passenger side window and then struck Boyer in the right side of his head. Defendant told the police he believed the gun was not loaded and he intended to use it to scare Boyer, but "[t]he gun went off because the . . . little trigger thing got stuck." Boyer continued to drive his car, which first crashed into a tree in the center median, and then went over an embankment into a ravine where it came to rest. When the police arrived Boyer was still alive and made a statement recorded on a police body camera. Boyer said he had been shot by a young "Black male," who was "16 years old." He was not able to provide a description of the shooter's clothing, but said the shooter tried to rob him. Boyer later died from his gunshot wound.

After the shooting, D.W. drove everyone to a mall where he, defendant, and the others all appear at approximately 12:30 p.m. inside a shop in the mall on a surveillance video.

B. Defense Case

Witness, B.H., testified she was in her car stopped at a nearby intersection in the southbound lane when she saw a man (the shooter) exit the passenger side of a gold car parked at the curb across the intersection. The shooter fired two to four gun shots at a vehicle which then hit the median before going down an embankment. The shooter crossed the road, looked down the embankment, then returned and entered the passenger side of the gold car and the car drove away. B.H. was not able to see if there was anyone in the gold car other than the driver and the shooter. She never saw the shooter's face but she

recalled his clothing (beige jacket and white baseball cap), which matched the clothing worn by Flowers as seen in the surveillance video of the R.J. carjacking.

DISCUSSION

I. Denial of Motion to Exclude Defendant's Statement

A. Relevant Facts[5]

1. Defendant's Videotaped Statement

Two weeks after the shooting, on April 16, defendant was arrested at his home and taken to a police station where he was placed in an interview room at approximately 5:15 a.m. Officer Tran and another officer settled defendant into the room; the officers un-handcuffed defendant and asked him for his belt and shoelaces as "a safety thing." Defendant was asked his age and if he had ever been arrested before. He said he was 16 and had previously been arrested for a "BB gun charge and a knife charge" on "school property." Tran twice asked defendant if he wanted a "Coke" or anything to drink, but each time defendant declined saying, "Nah, I'm cool." Tran explained to defendant the reason for the early morning arrest, saying that the officers had been there all night, they had been talking to a lot of people and defendant's name "popped up, so we had to go grab you real quick. Okay? You probably know what this is about already, so I mean, I'm not going to beat around the bush, uh, kind of serious matters, um, but we'll take care of everything." Tran said he had to speak with his

[5] The facts are taken, in part, from a transcript of the videotape recording of what was said in the police station interview room from 5:16 a.m. to 9:28 a.m. The transcript was submitted to the trial court as part of the People's motions in limine papers. During the trial, the jury viewed a redacted version of the videotape recording showing what occurred during the interview from 7:00 a.m. to 7:45 a.m.

partner and would be back in about an hour, inviting defendant to nap during that time. Tran said when he returned defendant should let him know if he wanted anything. At 6:30 a.m., an officer returned to check on defendant. Thirty minutes later, at about 7:00 a.m., Tran and Brandwood entered the interview room and questioned defendant for 45 minutes.

At the beginning of the interview, Brandwood told defendant that he was there because they were conducting an investigation. Tran noted defendant had been in the interview room for "an hour or so" and asked him if he needed to use a restroom or wanted anything to drink; defendant replied, "No, I'm cool." Tran replied that if defendant needed anything he should tell the officers.

Brandwood again informed defendant that the officers were conducting an investigation, "we got a lot of information that we want to talk with you about," but before doing so he had to read defendant something "just like the movies." Brandwood read defendant his *Miranda* rights and defendant indicated he understood his rights and, at the officer's request, initialed a document affirming the officer read his rights. Defendant does not challenge the officer's recitation of his *Miranda* rights or the waiver of his rights and agreement to talk with the officers.

Brandwood asked if defendant had any idea why he was at the police department, and defendant replied, "I don't know." Brandwood then went back to asking some questions, including what grade defendant was in (10th grade), and whether he had a "pretty good" memory ("Yeah"). Brandwood then asked a series of questions about where defendant was during the first two weeks of April. Defendant

stated he had gone to school, “in the office a lot,” and had done “some make-up work.” Brandwood was specifically interested in what defendant was doing on Tuesday, April 2, and had “some things” that could refresh defendant’s recollection of that day. The officer explained:

> Brandwood: “We’ve talked to a lot of people. Okay? Had a lot of people coming in and out of here for the last couple of weeks, okay? And basically, a lot of people have told us . . . pretty much a lot of the same stuff. Everything kind of matches up with everybody. Something bad happened, okay? We don’t necessarily think it was an overtly intentional act, although it was – but something resulted in somebody getting hurt. Okay? And what I’m asking you is this, do you remember that day, back on that Tuesday out on the second of April, of being with your friends . . . in the morning?”

Defendant again replied that on that morning he had gone to school.

Tran then asked a series of questions about defendant’s friends. His initial replies were “muffled” in part, prompting Tran to say, “Look hey, you need to speak up my man. I know you’re tired and all that, but you’re kinda, kinda fading on me.” Tran then continued questioning defendant about his ownership of a jacket with a photograph on its back of his friend T.J., a youth who had committed suicide. Tran said he was asking about T.J. and the jacket because the officers had a photograph of defendant wearing the jacket so they knew he was not at school.

Tran then asked if defendant knew that the police had picked up another youth, and defendant replied he knew the police had picked up “Nazhee,” but did not know what they talked about with him. To which Tran said: “But there’s something really important. What Nazhee –

through talking to Nazhee we are able to identify you. The kid with . . . the jacket. And other kids. We talked to other kids. And, they also identified you. And, we're here because you ain't got nothing in your background," and "then, you're hanging out with some people that do some things you get caught up with," commenting that Nazhee was "a bad kid" who did "shit all the time."

Tran continued:

> "We're not saying you did anything, . . . But, I think, what it is, you hang around with people – peer pressure. You got a bunch of friends, they want to do something, and you don't want to be a punk. Ain't no one want to be a punk. Not in front of their friends, right? So that day, let me recall your memory. That day you were wearing that jean jacket. Now do you recall that day?"
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> Defendant: "No. . . ."
>
> Tran: "Can we show the man a picture? Yeah, let's look at that picture . . . . [M]aybe this will help you out. And I need you to wake up for this, because this is important stuff. Cause this is going to help you out, how to figure out, we gotta figure out, where, how far are you into this? Cause Nazhee's trying to put you over."

Brandwood asked defendant to look at a photograph that depicted defendant "with [his] buddies," and asked defendant to identify the people in the photograph. During this questioning, Tran told defendant,

> "Listen, it's kind of gut-check time, you gotta be honest about this. You can't, you can't, do this halfway. There's no . . . we're way too deep in this to go halfway. Once you're in this situation, there's only one way out. The only way out is the truth . . . .
>
> We kinda know what happened already. Okay? Right here? (gestures at photo). No-one got hurt right here. . . . This is just to show you that we know you were there. This

is not even the hard stuff. This is the easy stuff. Okay? But the thing is, we gotta know that you're being truthful with us and credible, so when you tell us the big thing, like 'naw, I didn't do that,' then we could believe you. Right? But if you tell, like you lie about the little stuff, when we ask you about the big stuff, like 'hey, did you do this?' And you say like 'naw, it wasn't me, it was him,' then we'll say, 'how could we believe you?' That's the same situation we have with Nazhee. He kinda told us a lot of little things that didn't make sense, and then the big thing, says, 'naw, that's Christian.' So, we're trying to figure out . . . . You understand what I'm saying? . . . So you gotta help yourself out here, my man. Cause we only know what people tell us. What the witnesses and the surveillance tell us."

After defendant identified the other people in the photograph and the location where the photograph was taken, Tran asked him to describe where he was on Tuesday, April 2 before the photograph was taken. During defendant's response, Brandwood interrupted to tell defendant not to say, " 'I guess,' " or " 'I think' " because "we're too far in the game right now to be playing that " 'I guess' it. Alright? We talked to a lot of people. If we're asking you a question, there's a pretty good chance we already know the answer to it, so if you're not being truthful, we gonna know that. Okay?", to which defendant replied, "Yeah."

Brandwood then questioned defendant about what happened at the scene of R.J.'s carjacking:

Defendant: "I guess, . . . Nazhee, he tried to take somebody's car."

Brandwood: "He tried to, or he did?"

Defendant: "(Inaudible) he did."

Brandwood: "How did he take it?"

Defendant: "Well, he pulled him out of his car, and the guy ran off."

Brandwood: "And that's the last you ever saw of everybody?"

Defendant: "Yeah."

Brandwood: "Okay. Let me explain something to you. Okay? This . . . you're gonna end up hurting yourself. Like, if you keep on with this kind of story. You understand what I'm saying?"

Defendant: "Yeah." [¶] . . . [¶]

Brandwood: "You know that we've talked to almost every single person here (gestures at photo) except for you. Okay? Everybody's given us pretty much the same story. Okay? You made a mistake that day, it's killing you right now, I can see it in your face. I can tell. I can tell when you came walking in here that you got a lot of stuff on your head right now. You're not happy. You made a mistake, you made a terrible mistake, but we need to take care of that. We need to get this taken care of so you can move on. Okay? You're a young guy, alright? This isn't the end of the road, but we need to get this taken care of, alright? If you keep doing this kind of stuff, it's not going to work out for you, because everybody in there is giving a different story than you're giving. Do you understand that?"

Defendant: "Mmm-hm."

When Brandwood again asked, "What happened?," defendant said that he and Nazhee had gone into the store and "he jacks somebody for they [sic] car," and then D.W. "ran up to the driver's seat," and those two socked the victim and took him out of his car. When asked what happened, who got into which side of the car, defendant said: "Nazhee got into the driver's seat," and D.W. got in the other side of the car; they asked defendant to get into the car but he "ran off, like I ain't getting in trouble, I ain't trying to get into no stolen car . . . they ain't nothing to do with me. And then they following me, like 'get in, get in,' and I'm like 'no, no.' "

Brandwood continued: “Check this out man. You’re just rambling, not even making no sense right now. I’m gonna[sic] give you something for free, alright? Every person in there (taps photo) admitted that everybody got in that car. Okay? So you’re telling me everybody’s lying, giving information that’s gonna[sic] hurt – that doesn’t bode well for them, and they’re just gonna say you were in that car when you weren’t in that car?”

Defendant: “I mean like I did.”

Brandwood: “You did get in that car?”

Tran: “You know we can pull fingerprints right?”

Defendant: “Uh-huh.”

Tran: “You been fingerprinted before? Cause you got a felony, right?”

Defendant: “Yeah.”

Tran: “Right? Come on, man. Listen. This ain’t rocket science. You think we just go to anybody’s house in the middle of the night and grab them?”

Defendant: “Nope.” [¶] . . . [¶]

Brandwood: “There’s a reason you’re here.”

Tran: “There’s a reason you’re here man. You can’t start spinning this . . . . what it does is it shows that you’re uncredible, and when people look at this they’ll say, ‘this kid’s a monster.’ ‘This kid, there’s something, it could be a horrible accident, but this kid, he act like he don’t care.’ ”

Brandwood: “ ‘He’s lying and making stuff up.’ ” [¶] . . .[¶] You need to come clean. This is not . . . you’re a young man, this is not the end of the road, but you need to take care of this, alright?” [¶] . . . [¶] Because right now, all you got is what these guys are saying, and what they’re saying,

> isn't making you look very good, okay? What happened? What happened when you got in the car?"
>
> Defendant: "Okay, when I got in the car, it was like, we just driving around."

When Brandwood asked whether there was a gun in the car, defendant initially replied that he did not think so. When Brandwood then stood to leave and said, "You know what?", defendant admitted there was a gun and described it as black with a "super long" barrel, and belonging to R.R.

In response to where did he go after getting into the stolen car, defendant said, "[W]e were just riding around, like you know, on the freeway. And then they went to like, they was trying to rob somebody, I told them not to. And then, we went up to the hills." When asked who they were trying to rob, defendant replied, "They was trying to rob a lady, then they tried to rob a dude," and then defendant told them to drop him off down the hill, and they dropped him off down the hill. Brandwood then asked defendant to look at a document and point out the location where they "tried to rob a guy." When defendant was asked what the potential robbery victim was doing, he stated the man was sitting in a dark blue Civic that was parked by the side of the curb.

> Brandwood: "Okay, . . . [t]his is a part you need to be very careful on . . . . Okay. Cause not only do we have all those guys I showed you the picture of, there was also an older lady, right here. Okay? There was also an older lady right there in a car, and she started to go, she saw this car make a u-turn. That would be the car you were in, a gold car. Okay? Saw this car make a u-turn, and she pulls up here and she stops. And she says, 'two people got out of that car.' Okay? So think about this, because if you start lying, there's nothing we can do for you. Think about it. You need to be very careful right here. What happened from

> there? . . . Slow down. You're talking, you're trying to put this all out there, but like I said, if we're asking you something, there's a pretty good chance we know the answer to that question . . . . We know what happened. You're not in here for nothing. Alright? So what happened?" [¶] . . . [¶]
>
> Defendant: "We followed the lady, and . . . I told him . . . stop . . . trying to take her car, and I was trying to turn to Nazhee, why don't you stop the car, and . . . then he over there trying to rob the lady for her car, so he can get a second car, cause the car was hot . . . cause of what they did at the store, and soon, Nazhee . . . seen the dude in the car, sitting . . . like on his phone or something (pantomimes texting), and then Nazhee was like, he has an iPhone, . . . take that out of his car, and then . . . I was like drop me off, and I guess I heard something like, it was all, like, in the car, he did a u-turn I guess and went by his car, or something, and then they shot him or something, they did."

In response to defendant's explanation of what had occurred at the scene of the attempted carjacking and shooting, Brandwood continued to question defendant on the issue:

> Brandwood: "Okay. Here's what . . . This is hard for you, man. I know it's hard for you. I know it's really hard for you. Cause one, you're not the type of guy to do this. But when you get pressured into things by people who aren't necessarily your friend, bad things happen. Okay? . . . What happened? . . . Remember what I told you this lady said right here? . . . Whose picture do you think she picked getting out of the car? Two people. Whose picture?
>
> Defendant: "Mine. And, uh, Nazhee's."
>
> Brandwood: "Right. Okay. Here's the thing. . . . I can tell about you, you're a mild mannered kid, man, okay? Sometimes it's kids like you that get forced into things that you don't want to do. Okay? But keep in mind, I'm not even thinking about what they're telling us. I'm thinking about

what this lady is telling me right here (gestures). Okay? What do you think she said?

Defendant: "That I shot him, or something."

Brandwood: "Yeah. What happened? Was it an accident?

Defendant: No. Um, when me and Nazhee got out of the car, and then Nazhee . . . grabbed the gun out the trunk . . . . And I went, I was talking, I went at the car like (inaudible) 'don't do that, don't do that' and he didn't listen, and I (inaudible) 'Nazhee, don't shoot that gun,' and then him and the dude, he was slumped in the car like this (lowers chin to chest), and then he fall on the hill."

Brandwood: "Okay. You're trying to make it sound better than it is. And this is what I honestly think – I don't think you intended to hurt this guy, but here's the problem. Okay? Let me lay it out for you. Nazhee didn't get out of the car with the gun. Okay? Did someone hand it to you before you got out of the car? Said, 'do this?' "

Defendant: "Like, [R.R.], but I gave it to Nazhee got like (inaudible) out of the car.

Brandwood: "Remember what I said about this lady here? Why would she tell me something different? . . . . [S]he doesn't know you. These guys? Maybe. Maybe you're the outsider, they may make something up. But this lady right here? She doesn't know you. What happened? Was it an accident? Are you familiar with guns?

Defendant: "No."

Brandwood: What happened?

Defendant: "We all, like, it was me and Nazhee both out the car, and then, Nazhee told me get out of his car, 'here it is,' and then . . . ."

Brandwood: "Did he give you the gun?"

> Defendant: “Uh, Yeah.” [¶] . . . [¶]
>
> Brandwood: “And how did it go off?”
>
> Defendant: “Cause Nazhee talking about, there wasn’t no bullet in there, and then Nazhee talking about trying to scare him, and then there ended up being a bullet up in there.”
>
> Brandwood: “So, you . . . tried to scare the guy with the gun, and as far as you know, it was unloaded?”
>
> Defendant: “Yeah.”
>
> Brandwood: “So when you pulled the trigger did it go off?”
>
> Defendant: “Yeah.”

When the gun “went off,” defendant thought he was on the passenger side but immediately said, “no, on the driver’s side, driver’s side” of the victim’s car. The victim drove off and then crashed his car.

When Brandwood asked how the gun went off, defendant replied, “The gun went off because the thing got stuck, the little trigger thing got stuck.” [¶] Brandwood: “So you pulled the trigger thinking there was no bullet in there?” [¶] Defendant: “Yeah.” [¶] Brandwood: “But the gun went off.” [¶] Defendant: “Yeah.” Defendant was surprised when the gun fired one shot. When he returned to the stolen car, the others were laughing about it but defendant did not think it was funny because he did not know about guns, and he had not been told to check anything. Defendant asked the others to “call the police,” and to “drop me off at the police station;” defendant wanted to take the gun to the police station but the others took the gun.

In response to Tran's question as to where he shot at the car, defendant said that as the victim drove away defendant fired the gun through the passenger side window; according to defendant it looked like the bullet "ricocheted through" the closed window breaking it. When asked where the victim's car went, defendant replied, "I thought there was no bullet in there and I tried to scare him – and then it went off, and soon he tried like to turn . . ., but he wrecked . . . and then he went down the hill – like he tried to stop the car but he went down."

2. Motion to Exclude

Before trial, defendant's counsel moved to exclude defendant's videotaped statement on the ground it was involuntary and taken in violation of his constitutional rights to due process under the Fifth and Fourteenth Amendments.

The trial court ruled from the bench. Having viewed the entire videotape recording of what occurred while defendant was in the interview room in the police station, the court explained its reasons for denying the motion to exclude:

> I would say that in looking at the statement, obviously it's not particularly long. It was conducted at the police station at the Oakland Police Department. I did not find that the officers conducted themselves in what I would say was an overly aggressive or persistent manner. They weren't sort of engaged in sort of rapid-fire, accusatory questions on a consistent basis. Obviously there were some situations where they pressed [defendant] for some information.

After comparing defendant's videotaped statement to those interviews described in seminal cases, the court found that in this case the officers were neither "dominating, unyielding, nor intimidating," and the statement "was not an involuntary statement."

B. Applicable Law

"Both the state and federal Constitutions bar the prosecution from introducing a defendant's involuntary confession into evidence at trial." (*People v. Linton* (2013) 56 Cal.4th 1146, 1176 (*Linton*).) "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." (*People v. Williams* (2010) 49 Cal.4th 405, 436 (*Williams*).)

" 'In order to introduce defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] When, as here, the interview was [video]tape-recorded, the facts surrounding the giving of the statement are undisputed,' " and we may " 'independently review the trial court's determination of voluntariness.' " (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

"In evaluating the voluntariness of a statement, no single factor is dispositive." (*Williams*, *supra*, 49 Cal.4th at p. 436.) Instead, "courts apply a 'totality of the circumstances' test, looking at the nature of the interrogation and the circumstances relating to the particular defendant. [Citation.] With respect to the interrogation, among the factors to be considered are ' " 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity. . . .' " ' [Citation.] With respect to the defendant, the relevant factors are ' " 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' " ' " (*People v. Dykes* (2009) 46 Cal.4th 731, 752.)

A confession may be found involuntary if, among other things, it was " ' "extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a resulting confession is involuntary.' [Citation.]" ' " (*Linton*, *supra*, 56 Cal.4th at p. 1176.) "In assessing allegedly coercive police tactics, '[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' " (*People v. Smith* (2007) 40 Cal.4th 483, 501.) "A confession is not involuntary unless the coercive police conduct and the defendant's statement are causally related." (*Williams*, *supra*, 49 Cal.4th at p. 437.) In other words, "[a] confession is not rendered involuntary by coercive police activity that is not the 'motivating cause' of the defendant's confession. " (*Linton*, *supra*, 56 Cal.4th at p. 1176.)

C. Analysis

Defendant contends the trial court should have excluded his incriminating statements as involuntary based on the totality of the circumstances, including his age, lack of law enforcement experience, learning disability and cognitive and mental limitations, as well as his early morning isolation in an interview room at a police station for one and a half hours without a telephone call before questioning and the interrogation techniques used by the police. With these arguments in mind, this court viewed the videotaped statement that was shown to the jury. Based on the totality of the circumstances, we agree with the trial court that defendant's admissions were not, as he contends, the

product of coercive interrogation tactics such that they served to overbear his free will or rendered his statement involuntary.

Defendant initially argues he was motivated to confess by the timing of his arrest ("pre-dawn hours"), his placement in a small interview room ("appears to be . . . roughly eight-by-eight foot"), the delay in questioning him (from approximately 5:15 a.m. to 7:00 a.m.), and the failure to offer him a phone call. While we have no doubt that defendant was tired and anxious, it does not appear that his decision to make incriminating statements was affected by the timing of his arrest, the delay in questioning him, or the officers' failure to specifically tell him he could make a telephone call.

The transcript of the audio recording made when defendant was placed in the interview room reflect the facts as set forth above. The officers explained to defendant the reason why he was at the police station and the reason for the delay in questioning him. He was twice offered a drink, which he declined, and was told he could take a nap and to ask the officers if he needed anything. This case is distinguishable from *People v. Neal* (2003) 31 Cal.4th 63, in which the court found involuntary the confession of an 18-year-old defendant of limited education and low intelligence, based, in part, on the fact that the defendant's incriminating statements were not elicited until after his faculties had been impaired by a lengthy police custody (overnight) during which he was not given any food or allowed access to restroom facilities and he had no contact with any nonpolice personnel (*id.* at p. 84).

The transcript of the video recording made when defendant was interviewed between 7:00 a.m. and 7:45 a.m. reflects the

facts as set forth above. Defendant asks us to consider "extracted sentences and phrases from the interview and presented them . . . separated from the remainder of the interview as evidence of the presence or absence of coercion. We do not think the interview can be properly analyzed in such piecemeal fashion. Rather, it must be considered as a whole in the context of the development of the dialogue between [the officers and defendant] and in light of the totality of circumstances surrounding the confession." (*People v. Andersen* (1980) 101 Cal.App.3d 563, 578.) Based on our consideration of the totality of the circumstances, we now discuss defendant's arguments.

It is true the officers urged defendant to tell the truth and suggested the shooting may have been accidental. (See *People v. Andersen*, *supra*, 101 Cal.App.3d at p. 579.) " '[M]ere 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 render a subsequent confession involuntary. . . . "[W]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made.' " (*People v. Holloway* (2004) 33 Cal.4th 96, 115 (*Holloway*).) Nor is there any impropriety "in pointing out that a jury probably [would] be more favorably impressed by a confession and a show of remorse than by demonstrably false denials." (*Williams*, *supra*, 49 Cal.4th at p. 444.)

The officers' statements that defendant's " 'only way out is the truth,' " and they could not do anything for him if he started to lie to them, were not improper promises of lenient treatment in exchange for a confession. (*Holloway*, *supra*, 33 Cal.4th at p. 116 [detective's

statement that extenuating "circumstances could make [ ] a lot of difference,' " was not a promise of lenient treatment in exchange for cooperation]; but cf. *People v. Vasila* (1995) 38 Cal.App.4th 865, 874-875 [permissible to tell defendant "that a truthful statement would be to his advantage," but investigators went too far when they promised defendant that one officer would not institute a federal prosecution and another officer promised to release defendant on his own recognizance].) As to the mention of an accidental shooting in this case, the officers " 'merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible.' " (*Williams*, *supra*, 49 Cal.4th at p. 444.) The officers did "no more than tell defendant the benefit that might ' "flow[ ] naturally from a truthful and honest course of conduct" ' [citation], for such circumstance can reduce the degree of a homicide, or at the least, serve as [an] argument[ ] for mitigation in the penalty decision." (*Holloway*, *supra*, 33 Cal.4th at p. 116.)

We also reject defendant's arguments that his incriminating statements were compelled when he was confronted with evidence that the officers asserted was proof of his guilt: still photographs showing his presence with the other minors at the time of the R.J. carjacking, telling him that his accomplices had incriminated him, that his fingerprints would be found in R.J.'s stolen car, and an "older lady" had made statements about seeing two youths get out of a parked gold car at the scene of the attempted carjacking and shooting of Boyer. During the interrogation the officers did not misrepresent the implications of

the still photographs and some of the accomplices' statements[6] from which the officers could reasonably suspect that defendant had knowledge of the theft of R.J.'s car and that defendant got into the stolen car and was present at the time of the attempted carjacking and shooting at Boyer's vehicle.

"Not only is the practice of confronting a suspect with the confession of an accomplice approved," an officer is also permitted "to pretend an accomplice has confessed to persuade the suspect to confess." (*People v. Felix* (1977) 72 Cal.App.3d 879, 885-886.) Similarly, the reference to the possibility of finding fingerprints in the stolen car, which implied the officers could prove more than they could, was not " 'per se sufficient' " to rendered defendant's incriminating statements involuntary. (*People v. Farnam* (2002) 28 Cal.4th 107, 137, quoting *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240; see *People v. Jones* (1998) 17 Cal.4th 279, 299 [the detective's deceptive statements implying at times that "he knew more than he did or could prove more than he could" were not " ' "of a type reasonably likely to procure an untrue statement" ' "]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125 [rejecting defendant's argument that his confession was involuntary as the result of deception because during the interrogation a detective falsely said defendant's fingerprints were found on the getaway car].) Lastly, while the officers falsely told defendant that an "older lady" had said she saw two young people get out of a gold car, they did not say that the eyewitness had identified defendant or that the eyewitness had said defendant was the shooter.

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[6] At the time the officers questioned defendant, they had already questioned three accomplices, and following defendant's interview, the officers questioned the other two accomplices.

Rather, the officers asked defendant what he thought the eyewitness had told the officers, giving the defendant the opportunity to say he was not identified as one of the youths and he had not shot Boyer. Instead, defendant stated he thought the eyewitness identified defendant and Flowers and she said defendant had "shot him or something."

Defendant raises the manner in which the officers questioned him – i.e. Brandwood's allegedly "contemptuous" conduct, and alternatively, Tran's allegedly "sympathetic" conduct. " 'Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect . . . .' " (*Holloway*, *supra*, 33 Cal.4th 96, 115.) Defendant was advised of his *Miranda* rights, affirmatively stated or indicated he understood those rights, and did not demonstrate any reluctance to talk with the officers. (See *People v. Jones*, *supra*, 17 Cal.4th at p. 298 ["[t]o be sure, the detective [truthfully] told [the defendant] that his answers could affect the rest of his life," but there was "no indication that [the] defendant was frightened into making a statement that was both involuntary and unreliable"].)

We also see no merit to defendant's arguments that the officers exploited his immaturity and naiveté to get a confession out of a criminally inexperienced 16-year-old with a learning disability, cognitive and mental impairments, and low IQ. The record shows both officers were aware defendant was 16 years old, in the 10th grade, and

had limited experience with law enforcement. There was no evidence that the officers were aware of defendant's learning disability and cognitive and mental impairments or that his IQ placed him in the " 'mild range of intellectual impairment.' "

On appeal, defendant asks us to consider that even if the officers were not aware of his personal characteristics, those characteristics made him more susceptible to coercion. However, based on our viewing of the videotape it does not appear that the officers "exploited any personal characteristics" to obtain defendant's incriminating statements. (*Linton*, *supra*, 56 Cal.4th at p. 1179 [court rejected defendant's claim that his statements were involuntary as no showing police exploited defendant's personal characteristics (including he was 20 years old, but looked 15, had a history of learning disabilities, and had no experience in the criminal justice system)].) Brandwood's one-time observation that he could see it in defendant's face that he had "a lot stuff on his head" and he was "not happy" does not demonstrate exploitation of defendant's immaturity and naiveté, his lack of criminal experience, or his learning disability and cognitive and mental impairments.

We are not persuaded by defendant's assertion that his situation, while not as problematic, is similar to the police interrogation in *In re Elias V.* (2015) 237 Cal.App.4th 568 (*Elias V.*). In that case, 13-year-old Elias was alleged to have sexually molested three-year-old A.T. (*Id*. at p. 571.) Our Division Two colleagues found Elias's statements made to the police were involuntary based on a number of factors including: the detective's "accusatory interrogation was dominating, unyielding, and intimidating"; the detective's use of "deception and overbearing

tactics" likely induced "involuntary and untrustworthy incriminating admissions"; and there was an "absence of any evidence corroborating Elias's inculpatory statements." (*Id.* at pp. 586-587.)

The *Elias V.* court took specific note of the detective's persistent and relentless questions "all" insinuating Elias had improperly touched A.T. and the detective's deceptive statements that Elias's improper touching had actually happened because A.T. had " 'explained it perfectly' " and A.T.'s mother " 'walked in and saw' " him touch A.T.'s vagina, although the detective knew her statements were false and no one had even witnessed Elias unzipping A.T.'s pants, an act he had freely admitted. (237 Cal.App.4th at pp. 582, 583.) The detective also used techniques that were likely to result in false confessions, including threatening to subject Elias against his will to a lie detector test that would definitively reveal the falsity of his denials. (*Id.* at p. 584.) Toward the end of the interrogation, the detective shifted tactic and made "repetitive queries whether Elias touched A.T. 'out of curiosity' " or because it was " 'exciting,' " "precisely the sort of forced-choice" questions "that can easily induce an adolescent such as Elias to falsely incriminate himself when confronted with false evidence of his guilt." (*Id.* at p. 589.) Also, the court's "review of the interrogation" left it with "considerable" questions as to "what Elias meant to be saying when he made the statements that incriminated him, or whether he understood their significance," and "[i]f Elias did not understand that his answers conveyed an admission that he touched A.T. improperly, it would make no sense to view them as voluntary and a product of his free will." (*Id.* at pp. 593-594.) The mere recitation of *Elias V.* distinguishes it from

the circumstances under which defendant made his statement as we have discussed above.

In sum, based on our independent viewing of the videotape of defendant's statement and the totality of the circumstances, we conclude neither the officers' questions nor their conduct improperly induced defendant to make his incriminating statement or rendered his statement involuntary. While the officers suggested the shooting may have been an accident, they did not offer any details regarding how such an accidental shooting may have occurred. Instead it was defendant who offered the details – he said he thought the gun was not loaded and there was a problem with the trigger. The fact that defendant ultimately told the officers what had occurred, in his own words, does not show his free will was overborne.

Because we find no error in the admission of defendant's statement, we do not address his arguments that its admission was prejudicial.

II. Restitution Fine and Court Assessments

As part of defendant's sentence, and following the probation department's recommendations, the trial court imposed the following fines and assessments: (1) the maximum $10,000 restitution fine (§ 1202.4, subds. (a)-(d))[7], together with an additional $10,000 restitution

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[7] Section 1202.4 requires a trial court to impose a restitution fee in a sum no greater than $10,000 for every felony criminal conviction. In determining whether to impose a restitution fee, "[a] defendant's inability to pay shall not be considered a compelling or extraordinary reason not to impose a restitution fine," but the court may consider a defendant's inability to pay when considering whether to increase the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b). (§ 1202.4, subd. (c).) "In setting the amount of the fine pursuant to subdivision (b) in excess of the

fine that was suspended unless defendant's parole, mandatory supervision, or PRCS was revoked (§ 1202.45); (2) $40 court operations assessment (§ 1465.8)[8]; and (3) $30 immediate critical needs (criminal conviction) assessment (Gov. Code, § 70373)[9]. The court also ordered defendant to pay direct victim restitution of $9,949. (§ 1202.4, subd. (f).) Defendant lodged no objection either in his sentencing memorandum or at the sentencing hearing to the imposed fines, fees, or direct victim restitution.

Defendant now argues the matter is required to be remanded because the trial court erred as a matter of law in imposing the restitution fine and court assessments absent an ability-to-pay hearing because the "record establishes" he will not be able to pay the imposed

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minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required." (§ 1202.4, subd. (d).)

[8] Section 1465.8 requires the trial court to impose a $40 court operations assessment for every criminal conviction. There is no provision allowing the court to waive the assessment based on a defendant's ability to pay.

[9] Government Code section 70373 requires the trial court to impose a $30 immediate critical needs assessment for every criminal conviction. There is no provision allowing the court to waive the assessment based on a defendant's inability to pay.

sums from any future prison wages. However, no remand is required because defendant has forfeited appellate review of his argument by failing to assert it in the trial court. (*People v. Avila* (2009) 46 Cal.4th 680, 729.)

A. *Forfeiture of Challenge to Restitution Fine*

Under the current section 1202.4, and the statute in existence in 2013, a restitution "fine in any amount greater than the statutory minimum, and up to $10,000, is subject to the court's discretion. (§ 1202.4, subds. (b)(1), (d).) Moreover, under the statute in [2013] and now, a defendant bears the burden of demonstrating his inability to pay, and express findings by the court as to the factors bearing on the amount of the fine are not required. (§ 1202.4, subd. (d); see *People v. Romero* (1996) 43 Cal.App.4th 440, 449, 51 Cal.Rptr. 2d 26 [the statute ' "impliedly presumes a defendant has the ability to pay" ', and leaves it to the defendant to adduce evidence otherwise].)" (*People v. Avila, supra,* 46 Cal.4th at p. 729.) Thus, if defendant believed the trial court had given inadequate consideration to his inability to pay the restitution fine, he could have brought his arguments to the court's attention for its consideration when ascertaining the amount of the restitution fine; and accordingly, the failure to do so forfeits appellate review of the amount imposed as a restitution fine. (*People v. Gamache* (2010) 48 Cal.4th 347, 409.)

Defendant concedes the statutory language in section 1202.4 would have supported a challenge to the restitution fine in the trial court but contends his constitutional challenges "would have been futile" and "likely denied" because the case law would not have supported his arguments, as *People v. Aviles* (2019) 39 Cal.App.5th

1055 was decided after his sentencing, and *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas),* was decided a mere two months before his sentence with its validity currently pending before our Supreme Court.[10] We disagree.

At the time of his sentencing in March 2019 defendant could have made a meaningful constitutional challenge to the imposition of the restitution fine, supported by *Dueñas,* as well as the cases cited in his appellate briefs that were decided before *Dueñas* and *People v. Aviles, supra,* 39 Cal.App.5th 1055. Having failed to make such a challenge, defendant is now foreclosed from advancing his constitutional arguments on appeal. (See *People v. Trujillo* (2015) 60 Cal.4th 850, 859 [constitutional nature of the defendant's claim regarding his ability to pay did not justify deviation from forfeiture rule].)

B. Forfeiture of Challenge to Court Assessments

We agree with those courts that have held that a defendant who fails to object to an imposed $10,000 restitution fee, as in this case, also forfeits appellate review of any imposed court assessments under section 1465.8 and Government Code section 70373, in substantially lesser amounts. "Although both statutory provisions mandate the assessments be imposed, nothing in the record of the sentencing hearing indicates that [defendant] was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments. [Defendant] plainly could have made a

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10 In *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13,2019, S257844, the Supreme Court has limited review to the following issues: (1) whether the trial court "must . . . consider a defendant's ability to pay before imposing or executing fines, fees and assessments," and (2) if so, "which party bears the burden of proof regarding defendant's ability to pay."

record had his ability to pay actually been an issue. Indeed, [he] was obligated to create a record showing his inability to pay the maximum restitution fine, which would have served to also address his ability to pay the assessments. Given his failure to object to a $10,000 restitution fine based on inability to pay, [he] has not shown a basis to vacate assessments totaling $[70] for inability to pay." (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 (*Frandsen*); see ***People v. Montelongo*** (2020) 55 Cal.App.5th 1016, 1034 [accord], citing *People v. Smith* (2020) 46 Cal.App.5th 375, 395 [defendant forfeited his challenge to court assessments because he "did not object in the trial court on the grounds that he was unable to pay, even though the trial court ordered him to pay the $10,000 statutory maximum restitution fine"]; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 ["[a]s a practical matter, if [the defendant] chose not to object to a $10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional $1,300 in fees"].)

In sum, we see no reason to deviate from "the traditional and prudential value of requiring parties to raise an issue in the trial court if they would like appellate review of that issue." (*Frandsen*, *supra*, 33 Cal.App.5th at pp. 1154-1155.)

III. Sentencing Order and Abstract of Judgment

At sentencing, the trial court imposed a sentence of 25 years to life pursuant to section 190.5, subdivision (b), which provides for "two sentencing options" of "life without parole or 25 years to life" for 16- and 17-year-olds convicted of special circumstance murder (§§ 187(a); 190.2(a)(17)(L)). (*People v. Ochoa* (2020) 53 Cal.App.5th 841, 849.) The court's March 22, 2019 minute order reflects that defendant was

sentenced to a term of 25 years to life with the possibility of parole for count 1 (murder), and an "enhancement" under Penal Code section 190.2(a)(17)(L) "time imposed sentence is stayed;" and the abstract of judgment reflects the special circumstance murder sentence in both box 1 (charges section) and in box 2 (enhancements section). We conclude that the minute order and abstract of judgment should be amended to correctly reflect the court's oral pronouncement of judgment.

As correctly argued by defendant, section 190.2, subdivision (a)(17)(L) prescribes an alternate penalty for carjacking-related, special circumstance murder, not a sentence enhancement. (See *People v. Jones* (2009) 47 Cal.4th 566, 576 [court held section 190.2, subdivision (a)(2) prescribes alternative penalty for gang-related, special circumstance murder, not a sentence enhancement]; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899 [" '[a] penalty provision prescribes an added penalty to be imposed when the offense is committed under specified circumstances,' " and is distinguishable from " ' "enhancement" ' [defined] as ' "an additional term of imprisonment added to the base term" ' because the penalty provision " 'establishes an increased *base* term for the crime . . . upon a finding of specified circumstances' "].)

The People contend there is no obvious place in the abstract of judgment to reflect the special circumstance murder sentence except in the enhancements section or the charges section. Defendant contends the special circumstance murder sentence should be reflected in box 8 (other) of the abstract of judgment to show that defendant was sentenced pursuant to the penal code sections for a special circumstance murder.

We conclude the special circumstance sentence should not be reflected in box 2 (enhancements section), as defendant contends, but rather in box 1 (charges section) and box 8 of the abstract of judgment. Accordingly, we shall remand the matter to the trial court with directions (1) to amend its March 22, 2019 minute order by deleting enhancement information for count 1 and adding that defendant was sentenced pursuant to section 190.5, subdivision (b) to a term of 25 years to life for special circumstance murder under sections 187(a) and 190.2(a)(17)(L), and (2) to amend the abstract of judgment by deleting in box 2 (enhancements section) the enhancement information for count 1; modifying the information in box 1 (charges section) for count 1 to reflect violations of sections "187(a)/190.2(a)(17)(L)" for "special circumstance murder", and adding in box 8 (other) that defendant was sentenced pursuant to "PC 190.5(b)". (See *People v. Mitchell* (2001) 26 Cal.4th 181, 188 [appellate court may direct trial court to correct minute order and abstract of judgment to reflect oral pronouncement of judgment].)

DISPOSITION

The matter is remanded to the trial court with directions (1) to amend its March 22, 2019 minute order by deleting enhancement information for count 1 and adding that defendant was sentenced pursuant to section 190.5, subdivision (b) to a term of 25 years to life for special circumstance murder under sections 187(a) and 190.2(a)(17)(L); and (2) amend the abstract of judgment by deleting in box 2 (enhancements section) the enhancement information for count 1; modifying the information in box 1 (charges section) for count 1 to reflect violations of sections "187(a)/190.2(a)(17)(L)" for "special

circumstance murder"; and adding in box 8 (other) that defendant was sentenced pursuant to "PC 190.5(b)". The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Petrou, Acting P.J.

WE CONCUR:

Jackson, J.

Wiseman, J.*

People v. Burton/A157309

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.