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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BERNARD MITCHELL et al., Defendants and Appellants.	B281809 (Los Angeles County Super. Ct. No. BA422497)

APPEAL from judgments of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed in part and conditionally reversed with directions.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant Bernard Mitchell.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Reed Watts.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy

Attorney General, and William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.

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Defendants Bernard Mitchell (Mitchell) and Anthony Reed Watts (Watts) (collectively, defendants) each stand convicted of six counts of second degree robbery and one count of being a felon in possession of a firearm for their roles in robbing two banks. On appeal, they challenge one of the trial court's evidentiary rulings; Watts challenges the sufficiency of the evidence; both defendants challenge the substitution of the trial judge prior to closing argument; both defendants allege prosecutorial misconduct; and one or both defendants raise a number of sentencing issues. None of these arguments warrants disturbing defendants' underlying convictions. However, defendants are correct that the trial court erred in imposing a sentencing enhancement based on the amount taken during the robbery and that they are entitled to a remand so that the trial court may consider whether to exercise its discretion to strike the firearm enhancements using its newfound discretion to do so under Penal Code section 12022.53, subdivision (h).[1] Accordingly, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The first bank robbery*

On August 13, 2013, two men armed with guns "stormed" the front door of the One West Bank on National Boulevard in Los Angeles around 9:00 a.m., shortly after the bank opened. The first man wore a ski mask and the other had tied a bandana

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1 All further statutory references are to the Penal Code unless otherwise indicated.

around the lower portion of his face. The men ordered the branch manager and two tellers inside the bank to "get down, get on the ground." Each of the men jumped over the tellers' desks. After demanding to know which employee was the bank manager, the first gunman directed the manager to the vault while the second gunman held the tellers at gunpoint. The first gunman grabbed money from the vault and shoved it into a large duffel bag. After the second gunman said, "We got to go. We have to go. We got to go now", both gunmen ran out of the bank to the parking lot, hopped into a waiting BMW SUV, and sped off. The BMW SUV had been stolen two weeks earlier. The robbers got away with $73,740 in cash.

B. ***The second bank robbery***

On December 28, 2013, two men armed with guns entered the One West Bank on North La Brea Avenue in Los Angeles around 9:00 a.m., shortly after the bank opened. One of the men wore a black mask. The men pointed their guns at the three bank employees inside the bank, shouting, "This is a robbery, get your ass on the floor." The first gunman stepped on one of the prone teller's backs and leapt over the teller's counter. After demanding to know which employee was the bank manager, the first gunman directed the assistant manager and one of the tellers to the vault while the second gunman held the remaining teller at gunpoint. The first gunman had the assistant bank manager put money into a bag the first gunman had brought with him. The gunmen then ran out of the bank and got into a white Chevy van and sped off. The Chevy van had been stolen two weeks earlier. The robbers got away with $63,800 in cash

C. *Links to Mitchell and Watts*

One of the two bank tellers at the second robbery location picked Mitchell out of a photospread as the first gunman wearing a black mask; she did so based on the similarity of his lips and moustache as well as his physical posture. A gun was also found in Mitchell's apartment during a subsequent search.

Watts's DNA was found on a pair of torn latex gloves recovered from the ground near the driver's side of the stolen getaway car from the first robbery. Watts's DNA was also found on the steering wheel, gear shift, and center console of the stolen getaway car from the second robbery as well as on a gun recovered from his bedroom.

Cell phones were recovered from Mitchell's and Watts's apartments. Mitchell's phone had Watts's telephone number in its "contacts" under the name "Scrap," a shortened version of Watts's self-proclaimed nickname, "Scrappy." Watts's phone had Mitchell's telephone number in its "contacts" under the name "Crip," a nickname Mitchell used.

Between November 2013 and January 2014, Mitchell and Watts exchanged 661 calls or text messages.

The night before the first robbery, Watts texted Mitchell, "What time cause are you going to have the other homies with you." Mitchell responded, "Att 8.30. We all will be there." "See U end [*sic*] the morning." A few hours before the first robbery, Watts texted, "Top of the morning, . . . It's time. Rise and shine . . . Got to get it today." Approximately an hour before the robbery, Watts texted, "Get ready. . . . I'm almost there." Approximately 30 minutes before the robbery, Mitchell texted, "I'm on my way." Phone records indicate that Watts and Mitchell were in contact during the robbery: Watts placed calls to

Mitchell at 8:54 a.m., 9:05 a.m., and 9:07 a.m., while Mitchell placed calls to Watts at 8:57 a.m., 9:03 a.m., and 9:10 a.m. At the time of the robbery and flight, both phones pinged off of cell towers near the One West Bank and the location where the first getaway car was abandoned.

The morning of the second bank robbery, Watts placed calls to Mitchell at 8:16 a.m., 8:58 a.m., 9:08 a.m., 9:10 a.m., 9:12 a.m., 9:13 a.m., and 10:06 a.m. Mitchell's cell phone pinged off of cell towers near the One West Bank between 9:08 a.m. and 9:14 a.m., and Watts's cell phone pinged off of cell towers near the bank and the street where the second getaway car was abandoned between 9:05 a.m. and 9:13 a.m.

II. Procedural Background

A. *Charges*

With respect to the first bank robbery, the People in the operative information charged Watts, Mitchell, and Michael Callender (Callender) with three counts of second degree robbery (§ 211)—one count for each bank employee. Because the People believed that Mitchell and Callender were the gunman who entered the bank while Watts was the getaway driver, the People also alleged that Mitchell and Callender had personally used a firearm during the robbery (§ 12022.53, subd. (b)).

With respect to the second bank robbery, the People charged Watts and Mitchell with three counts of second degree robbery (§ 211)—one count for each bank employee. Because the People believed that Mitchell and Watts were the two gunmen (and Watts did double duty as the getaway driver), the People also alleged that Mitchell and Watts had personally used a firearm during the robbery (§ 12022.53, subd. (b)).

As to each robbery, the People alleged that the pertinent defendants "took, damaged, and destroyed property of a value exceeding $50,000, within the meaning of . . . § 12022.6(a)(1)."

The People further charged Mitchell and Watts with being felons in possession of a firearm (§ 29800, subd. (a)(1)) for the guns recovered in each defendant's apartment. The People charged Watts and Callender with grand theft auto (§ 487, subd. (d)(1)) for stealing the first getaway car.[2]

The People lastly alleged that Watts's 1988 robbery conviction constituted a "strike" within the meaning of our Three Strikes law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)).

B. *Trial and verdicts*

The matter proceeded to a jury trial. The jury acquitted Callender of all counts and acquitted Watts of grand theft auto. The jury convicted Mitchell and Watts of all counts of second degree robbery associated with each of the two bank robberies, found true the allegations that Mitchell personally used a firearm during the first robbery and that Mitchell and Watts personally used firearms during the second robbery, and convicted Mitchell and Watts of being felons in possession of a firearm. Watts admitted his prior strike conviction.

C. *Sentencing*

Before imposing sentence, the trial court noted that the statute governing the enhancement for the amount taken had a $65,000 minimum threshold, not the $50,000 minimum alleged in the operative information, stated in the jury instructions, and found by the jury. However, the court found that "the evidence

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[2] The People initially charged Callender with first degree residential burglary (§ 459) in conjunction with the theft of the first getaway car, but dismissed that count prior to trial.

on both incidents was over $65,000," and denied defendants' motions to strike that enhancement.

The trial court then sentenced Mitchell to 40 years in state prison. The court used one of the second degree robbery counts from the first robbery as the principal count and imposed a sentence of 16 years, which was comprised of a high-term base sentence of five years plus 10 years for the personal use of a firearm and one year for the amount taken. For the remaining five robbery counts, the court imposed consecutive sentences of four years and eight months, comprised of a base sentence of one year (calculated as one-third the midterm, three-year base sentence for robbery) plus three years and four months for the personal use of a firearm (calculated as one-third of the 10-year enhancement) plus four months for the amount taken (calculated as one-third of the one-year enhancement). To that, the court added a further consecutive sentence of eight months for the felon-in-possession count (calculated as one-third of the midterm sentence of two years).

The court sentenced Watts to 40 years and eight months in state prison. The court used one of the second degree robbery counts from the second robbery as the principal count and imposed a sentence of 21 years, which was comprised of a base sentence of 10 years (a five-year, high-end sentence, doubled due to the prior strike) plus 10 years for the personal use of the firearm and one year for the amount taken. The court then imposed a consecutive sentence of five years and eight months for the two remaining robbery convictions from the second robbery, comprised of a two-year base sentence (calculated as one-third of the midterm, three-year sentence, doubled due to the prior strike) plus three years and four months for the personal use of a

firearm (calculated as one-third of the 10-year enhancement) plus four months for the amount taken (calculated as one-third of the one-year enhancement). The court next imposed three consecutive sentences of two years and four months for the second degree robbery convictions from the first robbery, comprised of a two-year base sentence (calculated as one-third of the midterm, three-year sentence, doubled due to the prior strike) plus four months for the amount taken (calculated as one-third of the one-year enhancement). To that, the court added a consecutive sentence of 16 months, calculated as one-third of the midterm, four-year sentence.

Both defendants filed timely notices of appeal.

DISCUSSION

I. Evidentiary Ruling

Both defendants argue that the trial court erred in allowing the People's witnesses and Callender to identify defendants by their nicknames, "Scrappy" and "Crip," because those nicknames are evocative of criminal street gangs and thus more prejudicial than probative under Evidence Code section 352 and violative of due process.

A. *Pertinent facts*

The trial court initially barred Callender from referring to Mitchell by his nickname in Callender's opening statement, but subsequently ruled that the People and Callender could refer to Mitchell and Watts by their nicknames because a witness would testify that these were their nicknames, that the nicknames were "just . . . a term of identification," and that they were not gang related. Defendants asked the trial court to sanitize the nicknames to something else, but the trial court said it would do so only if all parties agreed, and the parties did not so agree. The

court offered to "instruct [the jury] that" the nicknames were "in no way gang referenced" and asked defendants to remind him to do so; however, the parties never reminded the court and no such instruction was given.

During trial, Callender testified that he knew Mitchell as "Crip." The People's cell phone expert listed the nicknames as names found on Mitchell's and Watts's cell phones corresponding with each other's numbers, and a law enforcement officer testified to Watts's acknowledgment that his nickname was "Scrappy." At no point did any evidence or argument link the nicknames to any gang activity.

B. *Analysis*

Evidence Code section 352 grants a trial court the "discretion" to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will," among other things, "create substantial danger of undue prejudice." (Evid. Code, § 352.) In this case, Mitchell's and Watts's nicknames were probative of (1) the extent to which Mitchell and Watts knew each other because each's nickname appeared in the contact list in the other's cell phone (implying an additional level of familiarity over and above the 661 texts and calls between them), and (2) Callender's defense that Mitchell's phone number was on his phone because his friend had told him to call "Crip" to buy tires (rather than to plan a bank robbery). The nicknames themselves were not unduly prejudicial. The names were introduced solely for identity, and no evidence was introduced tying those names to gang activity or implying that either Mitchell or Watts was involved in any criminal street gang. On these facts, the trial court did not abuse its discretion in admitting the nicknames. Because the ruling complied with

the rules of evidence, it did not violate due process. (*People v. Jones* (2013) 57 Cal.4th 899, 957.)

Defendants make two arguments in response.

First, they assert that their nicknames constitute "evidence of gang membership" and cite to several cases noting that such evidence is "potentially prejudicial." (E.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) We reject the premise of this assertion: Neither "Scrappy" nor "Crip" is "evidence of gang membership." Defendants state that "Scrap" is a term used by one particular gang to disparage another particular gang, but no one introduced any evidence to that effect at trial, and we presume that the jury heeded the trial court's instruction not to investigate the facts any further. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) In the absence of this evidence, "Scrap" could just as well refer to Watts's penchant for junkyards, for underdog pugilists, or for Scooby-Doo's obnoxious nephew puppy. Defendants also state that "Crip" is the singular version of the more widely known "Crips" criminal street gang, and that people who use that name without being members of the gang risk reprisal from *actual* Crips members. Again, however, no one introduced any evidence of the latter point. In the absence of such evidence, the jury would know nothing beyond the fact that Mitchell decided to name himself after a gang. (Accord, *People v. Brown* (2003) 31 Cal.4th 518, 548, 551 [trial court did not err in allowing in evidence of defendant's nickname, "Bam Bam"].) Critically, there was no evidence indicating that either Mitchell or Watts was associated with any gang. The chief danger of admitting gang evidence—"'where its sole relevance is to show a defendant's criminal disposition or bad character'"—is absent here. (*People v.*

Albarran (2007) 149 Cal.App.4th 214, 223.) And even if we treat the nicknames as "evidence of gang membership," such evidence is still admissible if its probative value is more than "minimal" (*ibid.*), and here it is.

Second, defendants contend that the trial court erred in not sanitizing their nicknames to "S" for "Scrap" and "C" for "Crip." We reject this contention. The nicknames were relevant because they proved *identity*; sanitizing them to be one of just 26 letters of the alphabet would greatly dilute the probative value of finding Mitchell's and Watts's nicknames on one another's phones, or of tying Mitchell to Callender's proffered defense. The nicknames themselves were not so unduly prejudicial that the trial court was required, as a matter of law, to sanitize them into a form that would water down their probativeness to nearly nothing.

II. Sufficiency of the Evidence

Watts argues that there was insufficient evidence to support his six convictions for robbery. In assessing this argument, we ask whether there is "'"substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."'" (*People v. Casares* (2016) 62 Cal.4th 808, 823.) In undertaking this inquiry, we view the evidence in the light most favorable to the jury's verdicts, which includes "resolv[ing] conflicting inferences" and credibility findings in favor of those verdicts. (*Ibid.*; *People v. Reed* (2018) 4 Cal.5th 989, 1006.)

Substantial evidence supports Watts's robbery convictions. There is no dispute that the two bank robberies occurred; the sole dispute is whether Watts was one of the participants in those two robberies. Ample evidence supports the jury's verdicts that

Watts *was* a participant. With respect to the first robbery, Watts texted Mitchell the night before to ask, "what time," and Mitchell gave the time of 8:30. At around 8:30 a.m. on the morning of the robbery, Watts texted, "I'm almost there." When the robbery occurred around 9:00 a.m., Watts's cell phone was pinging towers near the One West Bank and, thereafter, where the getaway car was abandoned. Watts's fingerprints were found on a glove just outside the driver's door of the getaway car. A jury viewing this evidence could reasonably infer that Watts's pre-robbery texts were to confirm the time and place, that he (and his cell phone) were present at the robbery, and that he fled with the two robbers who went into the bank and then abandoned the car. With respect to the second robbery, Watts's phone was at the location of the One West Bank while the robbery was happening and at the location where the getaway car was abandoned. What is more, Watts's DNA was found in three separate places in the second getaway car used in that robbery. A jury viewing this evidence could reasonably infer that Watts (and his cell phone) were present at the robbery, and that he and his fellow robber fled together in the getaway car. The similarity between the two robberies—they occurred just as the bank opened, they involved two armed gunmen who entered the bank, and the robbers asked for the bank manager and then took her to the vault—only serves to reinforce that the same individuals were involved in both robberies.

Watts points to a number of what he views as deficiencies in the evidence, but, as explained below, none of them calls into question the substantiality of the evidence supporting the verdicts. Watts notes that no one identified him in either robbery, but this is of little import given that Watts was the

getaway driver who never entered the bank in the first robbery and that he covered his face when he *did* enter the bank during the second robbery. Watts asserts that his DNA in or near the two getaway cars means only that he is a car thief, not a bank robber; but it could also mean that he is a car thief who robs banks using stolen cars. In reviewing convictions for substantial evidence, we cannot reject the reasonable inference drawn by the jury for another inference more favorable to the defendant. Watts contends that the cell phone evidence did not exactly pinpoint him inside the two banks, but even his own cell phone expert acknowledged that the cell phone data did not rule out the possibility that Watts was in the vicinity of the banks and getaway cars during the time of the robberies.

Relatedly, Watts argues that the calls between himself and Mitchell as the robberies were occurring exonerates him because none of the bank employees inside the two banks noticed a cell phone ringing or either gunman talking on the phone. A jury could reasonably infer from the phone records and the lack of any audible ringing that Mitchell and Watts were using their phones to communicate with the phones set to vibrate; no witness testified that the robbers never touched a phone or put his hand in his pocket to dial. We cannot second guess this reasonable inference.

III. Substitution of Trial Judge After Close of Evidence

Defendants argue that the trial judge erred because he allowed another judge to preside during the closing arguments and jury deliberations. To the extent this argument requires us to examine section 1053 (dealing with a judge's power to substitute in another judge during trial), our review is de novo (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1275); to the

extent it requires us to apply that section to the facts of this case, our review is for an abuse of discretion (see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712).

A. *Pertinent facts*

On the last day evidence was presented at trial, the trial judge reminded counsel of his prior off-the-record advisements that he would be "dark" the next day for a "meeting in San Francisco" as well as for the next two weeks due to a trip to Cuba where he was "told there [was] absolutely no Internet or cell phone service." The judge indicated that a second judge would preside over closing arguments and jury deliberations and explained that the second judge had been given copies of the daily transcripts from the trial. The sole question from defense counsel was whether the substitution of a new judge meant defendants could exercise a new peremptory challenge under Code of Civil Procedure section 170.6; the original judge said, "No." The second judge presided over the closing arguments and jury deliberations, and the original judge returned to preside over the sentencing of both defendants.

B. *Analysis*

If, "after the commencement of the trial of a criminal action or proceeding," the trial judge originally assigned to the case "die[s], become[s] ill, or for any other reason [is] unable to proceed with the trial," section 1053 authorizes the court to substitute a new judge to "proceed with and finish the trial." (§ 1053; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1211 (*Gonzalez*).)

The substitution of the trial judge in this case does not require reversal. To begin with, the original trial judge explained why he was "unable to proceed with the trial"—namely, he would be out of town at a meeting for one day and then out of the

country for the following two weeks. (Cf. *People v. Truman* (1992) 6 Cal.App.4th 1816, 1826-1827 [trial judge not "unable to proceed" when he is present but attending to "his preexisting supervisory court responsibilities"].) Defendants suggest that a trial judge that commences a jury trial should be prohibited from leaving town until the trial is over; that is not the law.

Further, it is well settled that "a well-justified change of judges, even if technically erroneous, is no basis for reversal if the accused failed to object and no substantial prejudice resulted." (*Gonzalez*, *supra*, 51 Cal.3d at p. 1211.) Here, defendants did not object to the substitution of the second judge. Contrary to what defendants assert, asking whether they can challenge a second judge once the second judge is assigned is *not* a challenge to the second judge's assignment; indeed, defendants' question *presumed* that the assignment has occurred. And contrary to what defendants further assert, an objection would not have been futile. Defendants point to the original judge's indication that he would not "accept" a request to continue the trial, but the judge's indication that he was not open to one remedy does excuse the failure to object to the violation of the right. What is more, the record discloses numerous instances in which the trial judge entertained objections from the parties.

There was also no substantial prejudice. Here, the second judge ruled on a few objections to the closing arguments and answered one jury question; he had the daily transcripts at his disposal when he did so. Because the second judge "made no evidentiary or instructional rulings that would have required familiarity with the particulars of the case" that he did not have available to him (*People v. Halvorsen* (2007) 42 Cal.4th 379, 429), any error was harmless beyond a reasonable doubt. (*People v.*

Rogers (2009) 46 Cal.4th 1136, 1172-1173.) Defendants assert that they were prejudiced because the second judge, in response to defense objections to the prosecutor's closing argument, simply overruled the objections and informed the jury that the jurors' recollection controlled over anything the attorneys argued; in defendants' view, the court should have combed through the record to fact check the accuracy of the prosecutor's argument. The second judge's instruction to the jury was legally correct, and defendants point us to no authority for the proposition that a litigant is automatically prejudiced if a trial judge declines to fact check every statement of counsel in closing argument in favor of relying upon a legally correct instruction.

IV. Prosecutorial Misconduct

Defendants argue that the prosecutor improperly commented on their right not to testify, thereby running afoul of *Griffin v. California* (1965) 380 U.S. 609. We independently review claims of *Griffin* error. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

A. *Pertinent facts*

At trial, the People introduced the post-arrest statements of both Mitchell and Watts denying any involvement in either bank robbery. Mitchell did not testify in his own defense and did not call any witnesses. Watts did not testify in his own defense, but called two defense witness—a cell phone expert to contest the accuracy of the cell tower records placing Watts and Mitchell near the scene of both robberies while they were occurring and Watts's uncle, who said Watts sometimes helped him at work but who could not recall specifically whether Watts was with him on the dates of the two robberies.

During the initial closing argument, the prosecutor argued to the jury that "[b]oth Mitchell and Watts's phone[s] are pinging off towers within the range of where the bank is." She then went on to question defendants' denial of any involvement: "And it's just coincidence that Mitchell's and Watts's phones [are] pinging on those same dates near the banks when they said, 'I have no bank accounts. There is no reason for me to go to a bank.'" Then she argued: "And you haven't heard any evidence here, any evidence about what they were doing in that area, other than what the People have presented." "So for you to guess about what they were doing there," she wrapped up, "come up with things about what they were doing there, that would be pure speculation and not allowed." In rebuttal, the prosecutor again touched on the "coincidence" point, arguing, "Mitchell and Watts's phones in the area. What is it doing there? That it's just a coincidence that it happens to be pinging in the area at the time when the robberies go off."

B. *Analysis*

The privilege against self-incrimination secures the right not to "be compelled to testify against oneself." (*People v. Hardy* (1992) 2 Cal.4th 86, 153-154; U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) A corollary of the privilege is that a prosecutor may not—directly or indirectly—comment upon a defendant's failure to take the witness stand. (*People v. Hovey* (1988) 44 Cal.3d 543, 572 (*Hovey*).) This corollary does not bar a prosecutor from commenting upon "the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) If, however, the evidence that the prosecutor faults the defense for not introducing can only come

from the defendant himself, the prosecutor's argument functions as an indirect comment on the defendant's failure to testify and is accordingly impermissible. (*People v. Thomas* (2012) 54 Cal.4th 908, 945; *People v. Johnson* (1992) 3 Cal.4th 1183, 1229; e.g., *People v. Medina* (1974) 41 Cal.App.3d 438, 457-458 [prosecutor's argument that "there is no denial at all that [defendants] were there"; impermissible, indirect comment on defendants' silence].)

Although defendants in this case forfeited the right to object to the prosecutor's comment by not objecting to her argument at the time (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1019-1020 (*Denard*)), we have the discretion to reach the merits of the issue and will do so in this case to stave off any claim of ineffective assistance of counsel (*ibid.*).

The prosecutor's argument in this case crossed the admittedly hazy line that separates proper comment on the state of the evidence and impermissible comment on a defendant's failure to testify. The prosecutor's statement that "you haven't heard any evidence here, any evidence about what they were doing in that area, other than what the People have presented" is a challenge to defendants' failure to present evidence. What makes this argument constitutionally problematic is that the only two people who can explain "what they were doing in that area" are defendants themselves. The inference that only defendants could explain what they were doing near the banks was made all the more obvious by the prosecutor's reference, just moments before, to defendants' post-arrest denials of involvement. Thus, by challenging the absence of the evidence, the prosecutor was indirectly commenting on defendants' failure to testify.

The People offer what boil down to two reasons why there was no so-called "*Griffin* error." First, the People argue that Watts put on a defense and the prosecutor was merely commenting on the state of evidence vis-à-vis that defense. This is true, but ultimately beside the point because both Watts's cell phone expert and his uncle tried to explain why Watts *was not* near the banks, but made no attempt to explain why Watts *was* near the banks. Second, the People contend that the prosecutor's challenge was not directly to information that could have only come from defendants themselves because Mitchell or Watts could have called some third party witness to testify that he (or she) had defendants' phones and had some innocent reason for being near both banks at the time of both robberies. This contention ignores that defendants—and only defendants—were uniquely situated to know what they were doing in that area at the time of the robberies. It also ignores that defendants had not offered a "someone else had my phone" defense; because there was no such defense to counter, the prosecutor's comments—as far as the jury was concerned—were indirect comments on defendants' failure to testify.

But reversal is not required. "Our Supreme Court has held most indirect *Griffin* error to be harmless." (*Denard*, *supra*, 242 Cal.App.4th at p. 1022.) That is especially so where the prosecutor makes "indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom." (*Hovey*, *supra*, 44 Cal.3d at p. 572.) This case involves precisely that type of oblique *Griffin* error.

V. Sentencing Errors

A. *Enhancement for the amount taken*

Section 12022.6, subdivision (a)(1) provides for a one-year sentence enhancement if a defendant "takes, damages, or destroys any property in the commission . . . of a felony, with the intent to cause that taking, damage, or destruction . . . [i]f the loss exceeds . . . $65,000[.]" (§ 12022.6, subd. (a)(1).) Ostensibly relying on the pre-2008 version of the statute (Stats. 1997, ch. 551, § 2), the People charged, the trial court instructed the jury, and the jury returned a verdict based on a loss exceeding *$50,000*, not $65,000. Defendants argue that this error entitles them to have the enhancement stricken in whole or in part because (1) the enhancement was not properly pled in the operative information, (2) the jury did not find the $65,000 amount beyond a reasonable doubt, and (3) even if the enhancement is valid, it may only be applied once per robbery. We review all three issues de novo. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240 [defective pleadings]; *People v. Coelho* (2001) 89 Cal.App.4th 861, 879 [jury findings]; *People v. Martin* (2005) 133 Cal.App.4th 776, 781-782 [section 654 inapplicable as a matter of law].)

1. *Failure to plead*

Defendants argue that the People violated their due process right to notice of the charges against them by misstating the threshold amount for the one-year enhancement as $50,000 rather than $65,000. A criminal "defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.) This right was not violated by the People's typographical error in

listing the threshold amount for the enhancement. That is because both defendants were on notice that the People were seeking an enhancement based on the amount of money taken during the two robberies and on notice that the enhancement was pursuant to section 12022.6, subdivision (a)(1). Had defendants looked at the statutory provision listed in the operative information, they would have immediately seen that the threshold amount was $65,000, and known that the $50,000 amount listed in the information was a typo. On these facts, defendants were not denied due process. Defendants cite *Mancebo* for the proposal that any error—no matter how small or obvious—is grounds for automatic reversal. We need not decide whether *Mancebo* stands for that broad proposition because *Mancebo* interpreted our One Strike law (§ 667.61), and subsequent cases have refused to extend *Mancebo*'s mode of analysis to other sentencing enhancements (*People v. Riva* (2003) 112 Cal.App.4th 981, 1002-1003; *People v. Perez* (2015) 240 Cal.App.4th 1218, 1227). We will adhere to this precedent.

2. *Failure to prove beyond a reasonable doubt*

The Sixth and Fourteenth Amendments require the prosecution to prove all elements of a crime and all sentencing enhancements to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326.) However, a jury's failure to make a finding on an element due to a trial court's misinstruction on that element is harmless if the evidence presented at trial regarding that element is "overwhelming and uncontroverted." (*People v. Merritt* (2017) 2 Cal.5th 819, 829, 832.) Here, the evidence that the amount taken from the first robbery was $73,740 was both overwhelming and uncontroverted; thus, the

trial court's instructional error and the jury's subsequent finding regarding a lower threshold amount are harmless beyond a reasonable doubt. Conversely, the evidence that the amount taken from the second robbery was $63,800 is also overwhelming and uncontroverted; because that amount is *less* than the $65,000 threshold, we must vacate the enhancement with respect to the counts arising from the second robbery (counts 4, 5, and 6).

3. *Section 654*

Section 654 generally prohibits a court from imposing more than one punishment for the same act or omission. (§ 654, subd. (a); *People v. Deloza* (1998) 18 Cal.4th 585, 591.) It is well settled, however, that "[s]ection 654 does not . . . preclude multiple punishment when [a] defendant's violent act injures different victims." (*Deloza*, at p. 592; *People v. King* (1993) 5 Cal.4th 59, 78.) Because robbery is a violent crime (*Deloza*, at p. 592) and because multiple bank employees can possess the bank's money at the same time and thus be victimized by the same acts of robbery (*People v. Scott* (2009) 45 Cal.4th 743, 750-754), the trial court's imposition of multiple enhancements for the amount taken during a robbery does not violate section 654.

B. *Imposition of high-term sentence*

A trial court has the discretion to impose a two-, three-, or five-year base sentence for the crime of second degree robbery (§§ 213, subd. (a)(2), 1170, subd. (b)), and the trial court here selected the high term of five years for each robbery count. Mitchell argues that this was error because (1) the sole reason the trial court cited during sentencing was Mitchell's "various felony convictions", and (2) Mitchell's prior convictions—which consist of a 1992 felony conviction for cocaine possession, a 1992 misdemeanor conviction for weapons possession, and a 1995

federal felony conviction for distributing cocaine—are too remote in time and too nonviolent to warrant a high-end sentence. We review a trial court's selection of which term to impose for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.)

Although Mitchell forfeited this argument by not objecting to the imposition of a high-end sentence before the trial court (*People v. Scott* (1994) 9 Cal.4th 331, 356), we will address the merits to stave off Mitchell's alternative ineffective assistance of counsel claim.

The trial court did not abuse its discretion in selecting the high term for two reasons. First, although defendant's prior convictions were from the early 1990's, his 1995 federal conviction resulted in a 20-year prison sentence; thus, the absence of more crimes in the years leading up to the two robberies was not the result of an upstanding life but rather the result of being incarcerated. (Cf. *People v. Burns* (1987) 189 Cal.App.3d 734, 738 [being out of custody for long period of time suggests remoteness of prior conviction].) Thus, Mitchell's criminal history is more constant than remote. Second, the trial court also said that it had "read and considered the [probation] sentencing report", which itself listed six other aggravating factors counseling in favor of a high-end sentence—namely, that (1) the robberies involved great violence evincing a high degree of cruelty, viciousness, or callousness, (2) the manner of the crimes indicated planning, sophistication, or professionalism, (3) Mitchell's violent conduct indicated a serious danger to society, (4) Mitchell was on probation when the robberies were committed, (5) Mitchell had served a prior prison term, and (6) Mitchell's prior convictions were of increasing seriousness.

Because "'one legally sufficient aggravating circumstance'" is sufficient to support a high-term sentence (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992), any deficiency in relying solely on Mitchell's criminal history is harmless in light of the trial court's reliance on these other reasons that independently support the court's selection of a high-end sentence.

C. *Remand for exercise of newly granted discretion to strike the firearm enhancements*

As of January 1, 2018, trial courts have the discretion to strike the sentencing enhancements regarding use of firearms set forth in section 12022.53. (§ 12022.53, subd. (h).) This newfound discretion applies retroactively to all cases not yet final on direct appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.) Consequently, defendants are entitled to a remand for the trial court to exercise its newfound discretion. The People urge us not to remand, arguing that the trial court's selection of high-end base terms as well as consecutive sentences for each robbery evinces an intent to give defendants the maximum possible sentence, rendering it highly unlikely the court would strike any of the firearm enhancements on remand. Although the People's argument is not without some persuasive force, the trial court did not expressly declare or otherwise clearly indicate an intent to impose the greatest possible sentence. Consequently, we fall back on the general rule that entitles defendants to a sentence made in the "informed discretion" of the trial court. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

DISPOSITION

The section 12022.6, subdivision (a)(1) enhancements imposed on counts 4, 5, and 6 are stricken as to defendants Mitchell and Watts. The case is remanded for resentencing to allow the trial court to consider whether the enhancements under section 12022.53 should be stricken pursuant to section 1385.

In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ