Filed 10/30/13 P. v. Montoya CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY THOMAS MONTOYA et al., Defendants and Appellants.	B239198 (Los Angeles County Super. Ct. No. GA079537)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed in part, vacated in part, and remanded with directions as to appellant Gregory Thomas Montoya. Modified and, as modified, affirmed with directions as to appellant Mario Barrientos.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant Gregory Thomas Montoya.

Doreen Beth Boxer, under appointment by the Court of Appeal, for Defendant and Appellant Mario Barrientos.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Gregory Thomas Montoya appeals from the judgment entered following his convictions by jury for grand theft from a person (Pen. Code, § 487, subd. (c), a lesser offense of count 1 – second degree robbery (Pen. Code, § 211)), and on count 3 – driving under the influence (Veh. Code, § 23152, subd. (a)), count 4 – driving with a blood alcohol level of at least .08 percent (Veh. Code, § 23152, subd. (b)), and count 5 – driving with a suspended or revoked driver's license (Veh. Code, § 14601.1, subd. (a)), with court findings he suffered two prior felony convictions (Pen. Code, § 667, subd. (d)) and two prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced Montoya to prison for 25 years to life. As to Montoya, we affirm the judgment in part, vacate it in part, and remand the matter for resentencing with directions.

Appellant Mario Barrientos appeals from the judgment following his conviction by jury on count 1 – second degree robbery (Pen. Code, § 211)) with court findings he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)). The court sentenced Barrientos to prison for 11 years. As to Barrientos, we modify the judgment and, as modified, affirm it with directions.

FACTUAL and PROCEDURAL SUMMARY

1. *Pertinent Facts of Appellants' Offenses.*

a. *People's Evidence.*

(1) *Testimonial Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence established about 12:20 a.m. on January 26, 2010, Desi Lucero was at the 7-Eleven store at 1723 West Main in Alhambra. Lucero

testified as follows.[1] Lucero, a homeless paraplegic, was seated in a wheelchair outside the store. A colostomy bag was attached to his wheelchair.

A man approached Lucero and a confrontation began. In particular, the man approached and told Lucero to "get into the car." Lucero replied, " 'I don't know who you are. I'm not going to any car.' " When Lucero tried to enter the store he was punched in the face. Lucero testified "[a]t that point there began to be two individuals," i.e., two men.

The following then occurred during the People's direct examination of Lucero: "Q . . . And so one of them punched you in the face, and what was the other individual doing? [¶] A Pulled the wheelchair because then I began to unbalance up and I was on the floor. I saw the other individual with the wheelchair. The other individual took off." (*Sic*.)

After Lucero fell from the wheelchair, both men left. The men took with them the wheelchair and clothing that had been on the back of the wheelchair. Lucero did not know, and did not want to give his property to, either man. Lucero was not afraid. Lucero was never able to identify either man and did not identify either in the courtroom. Lucero's property was returned to him. During cross-examination, Lucero testified that just before he was at the store, he had been at J.D.'s Bar where he had drunk three beers that night.

Alex McKeever, a general contractor remodeling the 7-Eleven store, testified as follows. McKeever had seen Lucero in a wheelchair in front of the store on nights prior to January 26, 2010. Shortly after midnight on January 26, 2010, McKeever arrived at the store, saw Lucero slouched on the ground near the store's double doors, but did not see a wheelchair. McKeever asked if Lucero was okay. Lucero replied no and said two guys beat him up and took his wheelchair. Lucero had a head injury with a little blood coming from it. Lucero also had a bruise on each side of his face, as if someone had hit

---

[1] Lucero's preliminary hearing testimony was admitted into evidence against Montoya only. Appellants were jointly tried before separate juries.

him. Lucero asked McKeever to call the authorities and paramedics, and McKeever did so.

About 12:25 a.m. on January 26, 2010, Alhambra Police Officer Eugene Ramirez went to the store and saw Lucero sitting on the ground in front of the store. Ramirez saw the same facial injuries McKeever had seen. Alhambra Police Officer John Stone testified about 12:25 a.m. on January 26, 2010, he heard a broadcast about a possible robbery of a wheelchair from a homeless man. At 1:50 a.m., Stone was at Atlantic and Valley when he saw a white car. Its driver committed traffic violations and Stone stopped the car. Appellants were the car's sole occupants. Montoya was the driver and Barrientos was the front seat passenger. The stop occurred about a mile and a half from the store. Lucero's wheelchair was in the back seat and what looked like a colostomy bag was attached to the wheelchair.

Montoya told Stone the following. The wheelchair belonged to Montoya's uncle, Raul Rodriguez, who was not in the car. Montoya later said Rodriguez was "like" an uncle to Montoya. Earlier that evening, appellants and Rodriguez were drinking at J.D.'s Bar on Main. Montoya had planned to take Rodriguez to Victory Outreach (Outreach), a homeless shelter, but Rodriguez did not want to go. Rodriguez became vulgar and left the bar without appellants. Later, Montoya saw Rodriguez in front of 7-Eleven near the bar. Montoya tried to help Rodriguez into the car to go to Outreach, but Rodriguez refused.

Montoya also told Stone that Rodriguez "gave up his chair." Stone asked how Lucero did that, and Montoya said Rodriguez "jumped out of [the wheelchair]." Appellants took the wheelchair and bags and "put it in the car to hold for [Lucero]." Appellants went to Belly's West Bar, and were later coming from that bar when Stone stopped them.[2]

---

[2] Montoya's above statements to Stone were admitted into evidence against Montoya only.

(2) *CD Video Evidence.*

A CD (People's exhibit No. 9) containing a surveillance video of the incident at the store was admitted into evidence and played to the jury. This court has reviewed the CD and, fairly viewed according to the usual rules on appeal (*Ochoa*, *supra*, 6 Cal.4th at p. 1206), the CD (although somewhat grainy) provides substantial evidence as follows.

Montoya drove up in a car, parked, exited, and approached Lucero, who was seated in the wheelchair. It appeared the two conversed. Barrientos later exited the car and approached. Montoya's left hand was on or near Lucero when Montoya's right hand quickly moved towards, then away from, Lucero. Montoya steered the wheelchair near the store's doors while Barrientos took bags that had been attached to the back of the wheelchair. Lucero held onto one of the doors but Montoya continued steering and pivoting the wheelchair with the result Lucero fell from the wheelchair and Montoya pulled it away from him. Montoya and Barrientos walked together towards the car with Montoya pulling the wheelchair and Barrientos carrying the bags. Appellants went to the car and drove away.

The jury was not obligated to believe the CD demonstrated Lucero spit on Montoya, Montoya looked down and saw Lucero had spit on Montoya's pants, or Montoya hit Lucero because Lucero had spit on Montoya.

Ramirez went to the site of the traffic stop and Ramirez testified Barrientos told Ramirez the following (and the below statements were admitted against Barrientos only). Barrientos was at J.D.'s Bar prior to the traffic stop. Montoya, Barrientos's nephew, was driving the car. The wheelchair belonged to someone. Appellants went to a 7-Eleven to meet someone they were going to take to Outreach. When appellants arrived at the store, the person was not there but the wheelchair was in front of the store. Appellants took the wheelchair and the belongings that were with it. Barrientos spontaneously told Ramirez, " 'It wasn't me.' " Ramirez asked what Barrientos meant, and Barrientos replied, " 'I don't know what you're talking about.' " Ramirez asked whether either appellant had placed the wheelchair in the car, and Barrientos replied, " 'I don't know what you're talking about.' " Barrientos did not identify the person to whom the wheelchair belonged.

b. *Defense Case*.

In defense, Montoya, who had been convicted of four felonies, i.e., forgery, commercial burglary, taking a vehicle without the owner's permission (a violation of Vehicle Code section 10851), and identity theft, testified as follows. During the evening of January 26, 2010, appellants met Lucero at J.D.'s Bar. Montoya called Henry Vera at Outreach to arrange for Lucero to stay there. Montoya told Lucero about it and Lucero was excited at the prospect. However, Lucero later left the bar.

About an hour and 45 minutes later, appellants left the bar and went to the 7-Eleven. Montoya saw Lucero and approached him. Montoya tried to get Lucero to go to Outreach with Montoya, but Lucero refused. Montoya testified he "motioned to grab" the wheelchair's handles, and told Lucero to come and Montoya wanted to help him. The wheelchair turned and Lucero "wiggled back" and began cursing at Montoya because, Montoya guessed, Lucero had been drinking. Lucero spit on Montoya, Montoya looked down and saw Lucero had spit on Montoya's pants, and Montoya struck Lucero on the right side of his face.

Montoya then steered Lucero to the car to try to get him to go to Outreach and Lucero resisted. At that time, "Lucero tipped over on the side." Montoya took the wheelchair because he was trying to get Lucero or Lucero's property into the car so Montoya could take him to Outreach. Montoya also took the wheelchair because he was upset that Lucero had spit at him. Montoya testified "[i]t was basically tough love" and he was going to return. Montoya did not know when he was going to return and testified when one had been drinking so much, one forgot about time.

Montoya drove to the Belly's West bar. After drinking there, Montoya went East on Valley, passing Atlantic, then north to Sixth Street towards Lucero's location. Montoya was returning to the store to get Lucero. Police then stopped Montoya. Montoya never wanted to keep the wheelchair, two bags of clothing, or colostomy bag.

During cross-examination, Montoya testified he steered Lucero towards the car, Lucero struggled, and "he fell over at that time during the time of the struggle." After

Lucero was on the ground, Montoya picked up the wheelchair and continued to the car. Montoya positioned the wheelchair in the back seat so there would be room for Lucero to sit. Montoya denied hitting Lucero more than once.

Vera testified that on January 25, 2010, he worked at Outreach. Vera had known Montoya for 30 years. Montoya had brought people to Outreach on several occasions. During the evening of January 25, 2010, Montoya called Vera and the two arranged for Montoya to bring a handicapped person to Outreach. Vera also spoke to Barrientos. However, no one showed up at Outreach that night.[3]

2. *Procedural History as to Barrientos.*

Based on the January 26, 2010 incident, an amended information filed October 25, 2011, alleged Barrientos committed count 1 – second degree robbery and count 2 – receiving stolen property and, based on a 1990 conviction for a violation of Penal Code section 245, subdivision (a)(1), he suffered a prior felony conviction under the Three Strikes law and a prior serious felony conviction under Penal Code section 667, subdivision (a). On September 14, 2011, the court denied his *Romero*[4] motion. On October 19, 2011, the court denied Barrientos's *Marsden*[5] motion. On November 1, 2011, the court ordered appellants would be jointly tried but have separate juries. On November 2, 2011, the court denied Barrientos's motion to exclude his statements to Ramirez on *Miranda*[6] grounds, and a jury was sworn. On November 8, 2011, the jury

---

[3] In Barrientos's defense, Mike Hassan testified that on January 26, 2010, Hassan was a bartender at J.D.'s Bar and working the 6:00 p.m. to 2:00 a.m. shift. About 9:30 p.m., Lucero was in the bar. About 10:30 p.m., a male and female couple bought Lucero a drink. Perhaps about 11:00 p.m., Lucero left. Hassan denied recognizing appellants as having been with Lucero in the bar.

[4] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

[5] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[6] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

convicted Barrientos as previously indicated[7] and the court found true the prior conviction allegations.

On February 9, 2012, after again denying a *Romero* motion, the court sentenced Barrientos to prison for 11 years, consisting of six years on count 1 (the three-year middle term, doubled pursuant to the Three Strikes law) plus five years pursuant to Penal Code section 667, subdivision (a). The court imposed various fines. The court awarded 571 days of custody credit. Barrientos moved for a new trial based on inconsistent verdicts and the court denied the motion.

ISSUES (as to Montoya)

Montoya claims (1) there is insufficient evidence of grand theft from a person, (2) the trial court violated his constitutional right to confrontation by admitting into evidence at trial Lucero's preliminary hearing testimony, (3) the trial court erroneously denied Montoya's *Romero* motion, and (4) the matter must be remanded to permit the trial court to impose or strike the Penal Code section 667.5, subdivision (b) enhancements.

DISCUSSION (as to Montoya)

1. *There Was Sufficient Evidence of Grand Theft from the Person as to Montoya.*

Montoya claims there is insufficient evidence he committed grand theft from the person. He argues he lacked intent to steal because he formed an intent to take the wheelchair only "after Lucero tipped out of the chair" and because Montoya intended to return the property. We reject Montoya's claim.

Our power begins and ends with the determination whether there is substantial evidence, *contradicted or uncontradicted*, to support the judgment. (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.)

---

[7] Jury instructions indicated if the jury convicted Barrientos on count 1, the jury could not convict him on count 2. The February 9, 2012 minute order reflects the court dismissed count 2 pursuant to Penal Code section 1385.

First, Lucero testified in essence that after a man approached and told Lucero to get in a car, Lucero, in a wheelchair, refused, telling the man that Lucero did not know him, and the man then struck Lucero in the face. Another man approached. One man pulled the wheelchair and Lucero wound up on the ground. The men took without permission the wheelchair and clothing that had been attached to the wheelchair. Lucero told McKeever two guys beat up Lucero and took his wheelchair.

The CD video of the incident provided substantial evidence as follows. Lucero was seated in the wheelchair when Montoya struck Lucero. Montoya, overcoming Lucero's resistance, later steered the wheelchair, containing Lucero, near the double doors. Lucero grabbed one of the doors and Montoya continued steering and turning the wheelchair. As a result, even though Lucero had been seated in, and in actual physical possession of, the wheelchair, he fell out of it. Montoya then continued pulling the wheelchair away from Lucero and brought it to the car. Moreover, the jury reasonably could have concluded Montoya put the wheelchair in the car and drove away, and the wheelchair remained in the car until, almost two hours later, Stone conducted the traffic stop.

Intent to steal may be inferred when one person takes the property of another, particularly if the person takes it by force. (*People v. Tufunga* (1999) 21 Cal.4th 935, 943.) Moreover, Montoya's felony convictions for forgery, commercial burglary, and identity theft were each relevant, not merely as impeachment evidence, but as evidence he intended to steal in the present case.

Viewing the evidence in the light most favorable to the People, the jury reasonably could have believed Lucero was in *actual physical possession* of the wheelchair when Montoya took it from him with intent to steal. (Cf. *In re Jesus O.* (2007) 40 Cal.4th 859, 863-865 (*Jesus O.*); *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1658.) The jury was not obligated to believe any evidence Lucero fell out of and separated from the wheelchair without wrongful involvement of Montoya, and Montoya only *later* gained possession of the wheelchair, with the result no taking from the person occurred. Nor

was the jury obligated to believe any evidence Montoya intended to return the wheelchair. Moreover, we would conclude Montoya took the wheelchair from Lucero with intent to steal even if the above facts were the same except there was no evidence Montoya struck Lucero.

Second, even if the facts were the same as we have stated except Lucero fell out of and separated from the wheelchair and Montoya only later gained possession thereof, there was, for the reasons discussed below, substantial evidence Montoya committed grand theft of the wheelchair from the person of Lucero.

As mentioned, intent to steal may be inferred when one person takes the property of another, particularly if the person takes it by force, and Montoya's three previously mentioned felony convictions were evidence of intent to steal in this case. Moreover, there was substantial evidence Lucero, a paraplegic, did not voluntarily lay aside the wheelchair but, instead, Montoya took the wheelchair from Lucero in two steps, i.e., (1) Montoya, with intent to steal, struck Lucero and later wrongly caused Lucero to separate from the wheelchair by overcoming Lucero's resistance and steering and turning the wheelchair while Lucero had actual physical possession of it, causing him to fall out of it and (2) Montoya, with intent to steal, then gained possession of the wheelchair. (Cf. *Jesus O.*, *supra*, 40 Cal.4th at pp. 861, 865-866, 868; *People v. Smith* (1968) 268 Cal.App.2d 117, 120.)

Third, in light of the fact intent to steal may be inferred when one person takes the property of another, particularly when the person takes it by force, and the fact that the three previously mentioned felony convictions were each evidence of intent to steal in the present case, the jury reasonably could have concluded beyond a reasonable doubt appellants were working together when Montoya struck Lucero and later restrained him and the wheelchair, and Barrientos then took Lucero's property that was attached to the wheelchair that Lucero actually physically possessed and in which Lucero was seated. That is, the jury reasonably could have concluded Montoya was an accomplice to Barrientos's commission of grand theft from Lucero of his property attached to the

wheelchair. (Cf. *Jesus O., supra,* 40 Cal.4th at pp. 863-864; *People v. Beeman* (1984) 35 Cal.3d 547, 561; *In re George B.* (1991) 228 Cal.App.3d 1088, 1090, 1092; Pen. Code, § 31.)

Again, in the last two scenarios above, like the case in the first, the jury was not obligated to believe defense evidence, and we would reach the same conclusion even if Montoya had not struck Lucero. Sufficient evidence supported Montoya's conviction for grand theft from the person.

2. *The Trial Court Properly Admitted into Evidence Lucero's Preliminary Hearing Testimony Against Montoya.*

a. *Pertinent Facts.*

On September 9, 2010, Lucero testified at Montoya's preliminary hearing. After various continuances, the court called the cases for jury trial on November 1, 2011. After the prosecutor represented he would proffer Lucero's preliminary hearing testimony against Montoya at trial, the court conducted an admissibility hearing.

At the hearing, Alhambra Police Detective Tai Seki testified as follows. Seki was the investigating officer in this case. On September 7, 2010, Seki determined Lucero was disabled and in a wheelchair, and Seki served Lucero with a subpoena to appear at Montoya's September 9, 2010 preliminary hearing. Lucero told Seki that Lucero was homeless.

Seki testified that approximately June 12, 2011, a district attorney investigator told Seki that that investigator had located Lucero in the Los Angeles Community Hospital in East Los Angeles. Several days after Seki received that information, he went there to subpoena Lucero but Lucero had left the hospital. Seki checked two other hospitals, but Lucero was at neither. All three hospitals were in the East Los Angeles area, so Seki gave a flyer pertaining to Lucero to the sheriff's department in East Los Angeles. The court continued the case several times for trial until November 1, 2011. During that period, Seki used various databases to try to locate Lucero, including DMV and Social

Security information, booking records, any police field identifications of Lucero, and employment applications. Seki also contacted many hospitals.

Los Angeles County District Attorney Investigator Christopher Briggs, a supervising investigator, testified at the admissibility hearing as follows. Briggs was asked to help locate Lucero. Later, other investigators determined Lucero was using Medi-Cal at various convalescent hospitals in the area, so Briggs's investigative team tried to locate Lucero at those hospitals. In June 2011, Briggs's team located Lucero in a convalescent hospital in East Los Angeles. The prosecutor asked Briggs whether, inter alia, Briggs gave Lucero a subpoena. Briggs replied, "Yes. I served Mr. Lucero. He was cooperative, willing to come to court. He didn't know how long he was going to be at the hospital. We had made arrangements for a service to pick him up and bring him to court on the day we served him for. And on that particular day the service arrived and Mr. Lucero had been transferred to another convalescent hospital, I believe."

Briggs continued trying to locate Lucero until November 1, 2011. His efforts included contacting multiple hospitals, including one from which Lucero had discharged himself on June 14, 2011. Briggs's team consulted booking, Medi-Cal, and address databases, and searched for Lucero in various places in Arcadia and Alhambra. Briggs did not check for Lucero at homeless shelters near Alhambra or surrounding cities and did not check for him at churches that served homeless people in that area.

After argument, the court concluded the People had exercised reasonable diligence to locate Lucero, and ruled Montoya's preliminary hearing testimony would be admitted into evidence against Montoya only. We will provide additional facts below where pertinent.

b. *Analysis.*

Montoya claims the trial court violated his constitutional right to confrontation by admitting into evidence, at his trial, Lucero's preliminary hearing testimony. We reject Montoya's claim.

There is no dispute Lucero's preliminary hearing testimony was admissible at Montoya's trial if Lucero was constitutionally unavailable for purposes of the Confrontation Clause. In *People v. Herrera* (2010) 49 Cal.4th 613, 620-621 (*Herrera*), our Supreme Court stated, "A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial." (*Id.* at p. 622.) The lengths to which the People must go to produce a witness is a question of reasonableness. (*Ibid*.)

The proponent of the evidence has the burden of showing the witness is unavailable. (*People v. Smith* (2003) 30 Cal.4th 581, 609.) "We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*Herrera*, *supra*, 49 Cal.4th at p. 623.)

In the present case, the prosecutor represented on June 9, 2011, that Lucero had been personally served with a subpoena and was currently in a care facility. Briggs testified that in June 2011, he personally served Lucero with a subpoena at a convalescent hospital.

On June 9, 2011, the prosecutor indicated he would ask the court to issue and hold a body attachment for Lucero. The June 9, 2011 minute order reflects the trial court granted the prosecutor's request. The trial court could not lawfully have issued the body attachment except "upon proof of the service of the subpoena" (Code of Civ. Proc., § 1993, subd. (a)(1)) on Lucero. (See *Allison v. County of Ventura* (1977) 68 Cal.App.3d 689, 701-702.) We presume the trial court knew this law. (Evid. Code, § 664.) In sum, the record demonstrates the People served a subpoena on Lucero requiring him to appear at trial on June 9, 2011.

In *Gaines v. Municipal Court* (1980) 101 Cal.App.3d 556, 559-560 (*Gaines*), the court stated, "We think that until [the prosecutor] [who had subpoenaed a witness] received information to the contrary, he was entitled to *assume* that his duly subpoenaed witness would respond to the order of the court and appear at the trial . . . . Our judicial

system is grounded on the sanctity of compulsory process, and it operates on the assumption that a subpoenaed witness . . . will either obey an order to appear in court or present his excuses sufficiently in advance of the appearance date to enable the court to adjust its business . . . ." (*Id.* at pp. 559-560, italics added.) *Gaines* later stated, "We conclude, therefore, that the prosecutor exercised due diligence in subpoenaing his witnesses for trial, and was not required to employ any additional mode of process, either formal or informal." (*Id.* at p. 561.)

When the People served Lucero with a subpoena, the People were entitled to assume Lucero would appear in court on June 9, 2011, unless the People received information to the contrary. The record fails to demonstrate the People received such information at or after the time the People served the subpoena. The court found the People served Lucero with a subpoena and believed he was cooperative. Moreover, the service of the subpoena under the above circumstances rendered moot the issue of any alleged deficiency in the People's due diligence prior to said service. We reject Montoya's argument the People were required to implement the procedures set forth in Penal Code section 1332, applicable to material witnesses. The record fails to demonstrate the People knew or should have known on June 9, 2011, Lucero would not be available for transportation to court.

Lucero did not appear in court on June 9, 2011. The People requested a body attachment, i.e., the legislatively authorized judicial process for enforcement of a subpoena. The People's remaining task was to find Lucero to execute the body attachment. We have set forth in detail the testimony of Seki and Briggs concerning the People's extensive but unsuccessful efforts after June 9, 2011, and up to and including November 1, 2011, to locate Lucero.

We hold that during the period from September 9, 2010, through November 1, 2011, the People exercised due diligence to secure Lucero's attendance at trial, Lucero was constitutionally unavailable, and the trial court properly admitted into evidence, at

Montoya's trial, Lucero's preliminary hearing testimony. No violation of Montoya's constitutional right to confrontation occurred.

3. *The Trial Court Properly Denied Montoya's Romero Motion.*

a. *Pertinent Facts.*

The probation report prepared for a June 24, 2010 hearing reflects as follows. Montoya was born in May 1965, had five aliases, and his moniker was Apache. When Montoya was 17 years old, he was convicted of forcible rape and committed to the California Youth Authority for eight years.

Montoya's adult criminal history is as follows. Montoya suffered a 1987 conviction for assault with a deadly weapon and the court sentenced him to prison for two years. In August 1995, he suffered convictions for being under the influence of a controlled substance and driving under the influence. In both cases, the court placed him on summary probation. In March 1996, he suffered convictions for misdemeanor possession of burglar tools, felony second degree burglary, felony taking of a vehicle without the owner's consent, and felony forgery, and the court sentenced him to prison for four years. In 1999, Montoya violated parole and the court returned him to prison.

In 2000, Montoya suffered a misdemeanor conviction for driving under the influence with a blood alcohol level of at least .08 percent. The court placed him on summary probation for three years. In 2001 and 2002, Montoya violated parole and the court returned him to prison. In 2003, he suffered a conviction for identity theft with a prior conviction. The court sentenced him to prison for five years. Montoya was on parole for that offense when he committed the present ones.

The probation report reflects Lucero told police that during the present offenses, Montoya asked Lucero, " 'What gang do you run with?' " Montoya admitted to the probation officer that Montoya had made many mistakes. The probation officer recommended the court impose the maximum possible prison term.

At the February, 9, 2012 sentencing hearing, Montoya asked the court to strike one of his strikes. The court refused to do so. The court sentenced Montoya to prison for 25

years to life for grand theft of a person. The reporter's transcript reflects the court sentenced Montoya to time served on count 3, and stayed sentences on counts 4 and 5.

b. *Analysis.*

Montoya claims the trial court erroneously denied his *Romero* motion. We disagree. The court presided at Montoya's jury trial on the present offenses and at his court trial on the prior conviction allegations. The court heard argument of counsel on the *Romero* motion. In light of the nature and circumstances of Montoya's current offenses and strikes, and the particulars of his background, character, and prospects, he cannot be deemed outside the spirit of the Three Strikes law as to the strikes, or either of them, and may not be treated as though he previously had not suffered one or both of them. (Cf. *People v. Williams* (1998) 17 Cal.4th 148, 161-164 (*Williams*).) We hold the trial court's order denying Montoya's *Romero* motion was not an abuse of discretion. (Cf. *Williams*, at pp. 158-164; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054-1055 (*DeGuzman*); *People v. Askey* (1996) 49 Cal.App.4th 381, 389 (*Askey*).)

4. *Remand is Appropriate to Permit the Trial Court to Impose or Strike the Penal Code Section 667.5, Subdivision (b) Enhancements Pertaining to Montoya.*

The trial court found Montoya suffered two prior felony convictions for which he served separate prison terms for purposes of Penal Code section 667.5, subdivision (b), one based on a 1996 burglary conviction in case No. GA025076, and the other based on a 2003 identity theft conviction in case No. BA252155. During the sentencing hearing, the court purported to "stay" the two one-year Penal Code section 667.5, subdivision (b) enhancements. Respondent concedes this was error. We accept the concession. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390, 401; see *People v. Bonnetta* (2009) 46 Cal.4th 143, 145-146.) We will vacate Montoya's prison sentence and remand the matter to permit the trial court either to impose, or strike pursuant to Penal Code section 1385, one or both of the enhancements. We express no opinion as to how the trial court should exercise its discretion as to either of the enhancements, or as to what Montoya's ultimate sentence should be.

ISSUES (as to Barrientos)

On June 1, 2012, Montoya filed his opening brief. After examination of the record, counsel for Barrientos filed, on November 26, 2012, an opening brief for Barrientos which raised no issues and requested this court to conduct an independent review of the record.

By notice filed November 26, 2012, the clerk of this court advised Barrientos to submit within 30 days any contentions, grounds of appeal, or arguments he wished this court to consider. After this court granted Barrientos an extension of time to submit same, Barrientos, on January 30, 2013, filed his supplemental opening brief. In his supplemental opening brief, Barrientos claims (1) there was insufficient evidence he committed robbery, (2) the trial court violated the Confrontation Clause by admitting into evidence at trial Lucero's preliminary hearing testimony, (3) Ramirez obtained statements from Barrientos in violation of *Miranda*, (4) the trial court erroneously denied Barrientos's *Romero* motion, and (5) Barrientos's appellate counsel provided ineffective assistance of counsel by failing to raise the above issues.[8] Moreover, pursuant to our

[8] On May 29, 2013, respondent filed respondent's brief, which addressed the issues in both Montoya's opening brief and the supplemental opening brief filed personally by Barrientos. On June 11, 2013, Montoya filed a reply brief. On September 10, 2013, counsel for Barrientos filed "Appellant's Request For An Extension Of Time Within Which To File Appellant's Reply Brief." In this filing, counsel for Barrientos indicated Barrientos personally wanted to file a reply brief, and Barrientos was requesting an extension of time to file same. Because Barrientos was represented by counsel, this court on September 13, 2013, denied Barrientos's request without prejudice to counsel for Barrientos filing a brief within 15 days. Barrientos's counsel filed no such brief. On October 15, 2013, this court received "Appellant's Reply Brief". It purports to be signed by Barrientos, and the proof of service, purportedly signed by Barrientos, indicates he served a copy of the reply on his appellate counsel. On October 16, 2013, Barrientos's counsel advised the clerk of this court that Barrientos's counsel did not submit the reply to this court.

Permission to file "Appellant's Reply Brief," received by this court on October 15, 2013, is denied. Even if we had granted permission to file said reply, Barrientos already raised, in the supplemental opening brief he personally filed on January 30, 2013, the

independent review of the record, we address below an issue regarding restitution and parole revocation fines.

REVIEW ON APPEAL (as to Barrientos)

1. *There Was Sufficient Evidence Barrientos Committed Robbery*.

Barrientos claims there was insufficient evidence he committed robbery. We disagree. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Based on Lucero's statements to McKeever, the CD video of the incident, and the evidence Montoya committed grand theft from the person (excluding any evidence admitted against Montoya only), Barrientos's jury reasonably could have concluded, beyond a reasonable doubt, Barrientos robbed Lucero of his wheelchair.

That is, Barrientos's jury reasonably could have concluded Montoya feloniously took from Lucero's person, with intent to steal, the wheelchair Lucero possessed, Montoya did this against Lucero's will, and Montoya accomplished this by force (with intent to steal) when he struck Lucero and later overcame Lucero's efforts to retain the wheelchair. Barrientos's jury also reasonably could have concluded beyond a reasonable doubt Barrientos was an accomplice to this robbery. Moreover, by similar reasoning, Barrientos's jury reasonably could have concluded beyond a reasonable doubt appellants jointly robbed Lucero of the bags Barrientos took from the back of the wheelchair.

Barrientos's jury was not obligated to believe any evidence Montoya hit Lucero because Lucero spit on Montoya, or that Barrientos, without intent to steal, took property on the back of the wheelchair merely to help Lucero go to Outreach.

2. *No Violation of Barrientos's Confrontation Right Occurred*.

Barrientos claims the trial court violated the Confrontation Clause by admitting into evidence at trial Lucero's preliminary hearing testimony. We disagree. No violation

---

substance of the issues raised in the reply, and we would have rejected his arguments in the reply on their merits for the reasons discussed later in this opinion.

of Barrientos's confrontation right occurred because Lucero's preliminary hearing testimony was not admitted into evidence at trial before Barrientos's jury.

3. *No Violation of Barrientos's Miranda Rights Occurred.*

Barrientos claims Ramirez obtained statements from Barrientos in violation of *Miranda*. Barrientos made a motion in limine to exclude the statements on that ground and, at the admissibility hearing on the motion, Ramirez testified as follows. About 1:50 a.m. on January 26, 2010, Ramirez received a call to assist Stone conduct a traffic stop. Ramirez went to the location and saw Stone talking with Montoya and apparently conducting a driving under the influence (DUI) investigation. Barrientos was sitting on the curb. Another officer was at the scene. Barrientos was not in handcuffs. Ramirez made no show of force such as drawing his gun. Ramirez did not tell Barrientos that Barrientos was under arrest, because Barrientos was not under arrest.

Barrientos tried to initiate conversation, and Ramirez did as well. Ramirez asked Barrientos where appellants were coming from and what they were doing. Barrientos said appellants were earlier at J.D.'s Bar on Main. They were also at a 7-Eleven but Barrientos did not know its location. Appellants had gone there to meet a person to take him to Outreach, but the person was not there. Appellants picked up a wheelchair at the 7-Eleven and placed the wheelchair in their vehicle. Barrientos and Ramirez spoke for about five to 10 minutes. At one point, Barrientos said " 'It wasn't me' " and Ramirez asked what Barrientos meant. Barrientos kept saying he did not know what Ramirez was talking about.

During cross-examination, Ramirez testified he went to the 7-Eleven before he contacted Barrientos. Ramirez was aware the robbery occurred at a 7-Eleven and a disabled person's colostomy bag and wheelchair had been taken. Ramirez was also aware the suspects were described as two male Hispanics. Officers at the scene probably asked Ramirez to come to the site of the traffic stop to see if there was a connection between the traffic stop and the robbery. Ramirez arrived at the site of the traffic stop

within about three to five minutes. Barrientos was not the object of the DUI investigation.

Ramirez did not see the wheelchair when he first arrived, but later saw it in the vehicle's back seat and concluded the wheelchair matched the one described in an earlier report. Barrientos asked during cross-examination whether, when Ramirez noticed the wheelchair matched, Ramirez was focusing on a robbery investigation and not a DUI. Ramirez replied it was "two-prong," Ramirez was asking questions based on Barrientos's statements " 'It wasn't me. I don't know what you're talking about,' " but Ramirez did not ask Barrientos anything specifically about Lucero.

When Barrientos said appellants took the wheelchair, it was obvious appellants did not need it, so that raised the issue of to whom the wheelchair belonged. Ramirez asked to whom the wheelchair belonged, but Barrientos never identified the person. When Barrientos asked during cross-examination whether Barrientos had been free to leave, Ramirez indicated it was Stone's decision because he had conducted the stop. Ramirez indicated he later arrested Barrientos based on the totality of the information. Ramirez did not advise Ramirez of his *Miranda* rights.

After argument, the trial court concluded Barrientos was not in custody for purposes of *Miranda* and denied Barrientos's motion to exclude his statements to Ramirez.

We conclude when Ramirez obtained Barrientos's statements, Ramirez did so during brief, on-the-scene questioning when Ramirez was trying to confirm or dispel his suspicions about whether Barrientos was a person involved in the robbery of the wheelchair, and Barrientos was not then in custody for purposes of *Miranda*. We similarly conclude no interrogation for purposes of *Miranda*, i.e., no words or actions on Ramirez's part that he should have known were reasonably likely to elicit an incriminating response, occurred. (Cf. *People v. Leonard* (2007) 40 Cal.4th 1370, 1400; *People v. Clair* (1992) 2 Cal.4th 629, 679-680; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, fn. 1, 1404; *People v. Lopez* (1985) 163 Cal.App.3d 602, 608.)

3. *The Trial Court Properly Denied Barrientos's Romero Motion.*

Barrientos claims the trial court erroneously denied his *Romero* motion. An information filed May 10, 2011 alleged he suffered a Three Strikes law prior felony conviction (strike) and a Penal Code section 667, subdivision (a) prior serious felony conviction based on a 1990 conviction for assault with a deadly weapon in case No. BA023178.

A probation report pertaining to Barrientos and prepared for a May 2011 hearing reflects as follows. Barrientos was born in July 1964. His adult criminal history (five felonies and three misdemeanors, some from Colorado) is as follows. Barrientos suffered a felony conviction for assault with a deadly weapon or force likely to cause great bodily injury. In 1990, the court placed him on three years' formal probation. He suffered a Colorado felony conviction for third degree assault and, in 1998, the court placed him on probation for two years. After May 2000, Barrientos suffered a felony conviction for aggravated motor theft, for which the court sentenced him to prison for six years. After September 2000, he suffered a Colorado felony conviction for robbery, for which the court sentenced him to prison for six years.

Barrientos also suffered a Colorado misdemeanor conviction for a traffic offense, for which the court sentenced him in 2009. The report does not reflect what that sentence was. He suffered another Colorado misdemeanor conviction for a traffic offense, and the court imposed a disposition in that case in 2010. The report does not reflect what that disposition was. Barrientos suffered a Colorado felony conviction for third degree assault, for which the court placed him on probation for three months in 2010. He also suffered a Colorado misdemeanor conviction for smuggling contraband, for which the court sentenced him to serve time in jail. The report also discussed Barrientos's involvement in the present offense.

The probation officer stated, "The violent manner in which Barrientos committed the instant offense is consistent with his prior record of felony offenses involving violent behavior and violence towards others. Attempts made on behalf of the judicial system to

correct and deter [Barrientos]'s criminal conduct have met to [no] avail. As evidenced in the instant matter, his crimes are ongoing and increasing in seriousness. He continues to be a major threat to the community." The report recommended the court sentence Barrientos to prison.

In June 2011, Barrientos filed a "Motion to Dismiss Prior 'Strike' Conviction Pursuant *Romero*." The motion asked the court to strike his 1990 conviction "for 1170.12.12(a)-(d) purposes." (*Sic*.) The motion cited 14 alleged mitigating circumstances.

During argument at the September 14, 2011 hearing on the motion, Barrientos reiterated various considerations set forth in his written motion, indicated he had been participating in a merit program in prison, he had a character letter from his Colorado pastor, and he had participated in rehabilitation programs in Colorado and California.

Following argument, the court indicated as follows. Barrientos's involvement was less than Montoya's, but Lucero was particularly vulnerable because his wheelchair was taken. The strike was old and Barrientos did not commit serious or violent felonies after the strike. However, the court later stated, "[G]iven the nature of this offense and the fact that the defendant has not been perfect in the interim and has had felony convictions and contact with law enforcement, I am denying the request at this juncture to strike the strike."

Barrientos claims the trial court abused its discretion by denying on September 14, 2011, his *Romero* motion. For reasons similar to those we employed to reject Montoya's similar claim, we reject Barrientos's claim. (Cf. *Williams*, *supra*, 17 Cal.4th at pp. 158-164; *DeGuzman*, *supra*, 49 Cal.App.4th at pp. 1054-1055; *Askey*, *supra*, 49 Cal.App.4th at p. 389.) We note the mere age of Barrientos's strike did not require the trial court to strike it, particularly where, as here, he did not live a legally blameless life after his

commission of the offense underlying the strike, but before his commission of the present offense. (Cf. *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)[9]

4. *No Ineffective Assistance of Barrientos's Appellate Counsel Occurred.*

Barrientos claims his appellate counsel provided ineffective assistance of counsel by failing to raise the above issues. We disagree. There was no merit to the issues; therefore, Barrientos's appellate counsel did not provide ineffective assistance of counsel by failing to raise them and by filing only a *Wende*[10] brief.

We have examined the entire record and are satisfied counsel for Barrientos has complied fully with counsel's responsibilities (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *Wende, supra*, 25 Cal.3d at p. 443) except to the extent we address below issues concerning fines.

5. *The Restitution and Parole Revocation Fines Must Be Reduced*.

By letter to counsel for the parties dated October 2, 2013, we notified counsel that, following our independent review of the record as to Barrientos, this court tentatively intended to modify Barrientos's judgment by reducing his Penal Code section 1202.4, subdivision (b) restitution fine, and his Penal Code section 1202.45 parole revocation fine, each from $240 to $200. We asked counsel to advise this court within seven days from the date of that letter if they had any objection to the modification. By letter filed October 7, 2013, respondent objected. For the reasons discussed below, we conclude the proposed modifications of the judgment are proper.

---

[9] Barrientos, referring to an amended information filed on October 25, 2011, suggests the prior conviction supporting the strike also supported a Penal Code section 667.5, subdivision (a) enhancement. The amended information alleged such an enhancement against Montoya only.

[10] *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

During Barrientos's February 9, 2012 sentencing hearing, the following occurred: "[The Court]: The defendant is to pay a restitution fine of $200. A parole revocation fine of $200. [¶] The Clerk: It's $240 *now*. [¶] The Court: $240 restitution fine. $240 parole revocation fine, which at this time the court's going to stay." (Italics added.)

Barrientos's offense occurred in 2010. At the time, former Penal Code section 1202.4, subdivision (b)(1) stated, in relevant part, "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than *two hundred dollars ($200)*, and not more than ten thousand dollars ($10,000), if the person is convicted of a felony." (Italics added.)

Effective January 1, 2012, the Legislature amended former Penal Code section 1202.4, subdivision (b)(1)[11] to state, in relevant part, "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than *two hundred forty dollars ($240)* starting on January 1, 2012." (Italics added.) (Former Pen. Code, § 1202.4, subd. (b)(1) as amended by Stats. 2011, ch. 358, § 1, eff. Jan. 1, 2012; *People v. Kramis* (2012) 209 Cal.App.4th 346, 349, fn. 2 (*Kramis*).)

The applicable restitution fine statute was former Penal Code section 1202.4, subdivision (b)(1) as it read at the time of Barrientos's 2010 offense. (*Kramis, supra*, 209 Cal.App.4th at pp. 349, 351; cf. *People v. Martinez* (2005) 36 Cal.4th 384, 389 (*Martinez*)), not former Penal Code section 1202.4, subdivision (b)(1) as it read at the time of the 2012 sentencing hearing in this case.

The record of the 2012 sentencing hearing reflects the trial court ultimately imposed a $240 former Penal Code section 1202.4, subdivision (b) restitution fine. A $240 fine was within the statutorily permissible range of potential fines provided by former Penal Code section 1202.4, subdivision (b)(1) as it applied at the time of Barrientos's offense.

---

[11] Former Penal Code section 1202.4, subdivision (b)(1) was amended again effective January 1, 2013, in respects not pertinent here.

However, as discussed below, the record demonstrates the trial court not only imposed a $240 former Penal Code section 1202.4, subdivision (b) restitution fine but imposed that fine as the *minimum fine required* by that subdivision.

The trial court initially imposed a $200 fine. This was the *minimum fine required* by former Penal Code section 1202.4, subdivision (b)(1) as it applied at the time of Barrientos's offense. The clerk then, on February 9, *2012*, stated, "It's $240 *now*." (Italics added.) However, the fine was not $240 "now" under former Penal Code section 1202.4, subdivision (b)(1) as it applied at the time of Barrientos's offense. Instead, under that subdivision, the fine could have been any amount from $200 to $10,000. Moreover, it is unlikely the clerk was directing the court to impose a $240 fine in the exercise of the court's discretion under former Penal Code section 1202.4, subdivision (b)(1) as it applied at the time of Barrientos's offense, or that the court would accept any such direction.

Moreover, the fine would not have been $240 "now" even under former Penal Code section 1202.4, subdivision (b)(1) as it applied at the time of the 2012 sentencing hearing. Instead, even under that subdivision, the fine could have been any amount from $240 to $10,000. After the clerk said, "It's $240 *now*" (italics added), the court stated, "$240 restitution fine," clearly adopting the clerk's statement.

In sum, fairly read, the record demonstrates the only way the fine could have been, as stated by the clerk and adopted by the court, $240 "now," implying the fine would have been different previously, was if the court, erroneously, imposed the *minimum fine required* under former Penal Code section 1202.4, subdivision (b)(1) as it applied "now," i.e., at the time of the 2012 sentencing hearing. The court imposed a $240 fine only because it erroneously believed, based on the clerk's statement, that the minimum required fine was $240. The restitution fine the trial court initially imposed was the correct one, i.e., $200. (*Kramis, supra*, 209 Cal.App.4th at pp. 349, 351; cf. *Martinez, supra*, 36 Cal.4th at p. 389.) This is a case in which the record demonstrates the trial

court not merely imposed a $240 restitution fine (which would have been authorized), but imposed it intending the fine to be the *minimum required* fine (which was unauthorized).

An unauthorized sentence may be corrected at any time. (*People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.) We will modify the judgment by reducing appellant's restitution fine to $200. We will also reduce the former Penal Code section 1202.45 parole revocation to $200, since it must be equal to the restitution fine. (*People v. Smith* (2001) 24 Cal.4th 849, 853.)

DISPOSITION

The judgment as to Montoya is affirmed, except his prison sentence is vacated and the matter is remanded for resentencing to permit the trial court to impose or strike each of his Penal Code section 667.5, subdivision (b) enhancements consistent with this opinion. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment as to Montoya. The judgment as to Barrientos is modified by reducing his former Penal Code section 1202.4, subdivision (b) restitution fine from $240 to $200, and by reducing his former Penal Code section 1202.45 parole revocation fine from $240 to $200 and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment as to Barrientos.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.