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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO NAVARETTE et al., Defendants and Appellants.	B286031 (Los Angeles County Super. Ct. No. BA443603

APPEALS from judgments of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed; remanded with directions as to Defendant and Appellant Daniel Acosta.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant Alejandro Navarette.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Acosta.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Alejandro Navarette and Daniel Acosta were convicted by a jury of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1))[1] and first degree home invasion robbery (§ 211). The jury found true the allegations that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). It also found true the special allegations that Navarette personally used a deadly or dangerous weapon—a blunt object—in the commission of the crimes (§ 12022, subd. (b)(1)), and that the robbery was committed in concert by three individuals.

Following the jury's verdict, the trial court found true the allegations that Navarette served three prior prison terms (§ 667.5, subd. (b)), and that Acosta suffered a prior conviction of a serious felony, constituting a strike under the three strikes law (§§ 667, subds. (a)(1), (b)-(j), 1170.12). The court sentenced Navarette to 15 years to life for the kidnapping, stayed sentence on the robbery (§ 654), and added three years for the three prior prison terms. The court sentenced Acosta to 15 years to life for the kidnapping, doubled as a second strike to 30 years to life, stayed sentence on the robbery (*ibid.*), and imposed five additional years for the prior serious felony conviction. The trial court further imposed a $300 restitution fine (§§ 1202.4, subd. (b), 1202.45), an $80 court operations fee (§ 1465.8), and a $60 criminal conviction assessment (Gov. Code, § 70373), against both Navarette and Acosta.

On appeal, Navarette and Acosta raise numerous claims of error with respect to trial and sentencing. We affirm Navarette's

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[1] All further statutory references are to the Penal Code unless otherwise specified.

conviction and sentence. We affirm Acosta's judgment of conviction but remand to permit the trial court to exercise its new found sentencing discretion under Senate Bill No. 1393 with regard to Acosta's prior serious felony.

BACKGROUND

A. The Kidnapping and Robbery

In the early evening of January 25, 2016, Froilan Tapia was gardening in the front yard of his duplex in Boyle Heights. The yard had a fence around it, but the gate was unlocked. The house had a video surveillance system, including cameras covering the front yard and front porch.

Tapia observed Navarette, Acosta, and a woman approach the house together on the street. Navarette and Acosta entered the front yard through the gate. The woman remained outside the gate, watching the area. Navarette or Acosta loudly demanded money. Hoping a neighbor would hear him, Tapia screamed back in response that he did not have any money.

Navarette and Acosta pulled Tapia to the front porch. Acosta took Tapia's house keys from Tapia's pants pocket. Tapia again screamed for help. Navarette hit Tapia on the arm. He then hit Tapia on the head with a blunt object, causing a gash and Tapia's head to begin bleeding.[2]

Acosta unlocked the front door, and Acosta, Navarette and Tapia entered the house. Tapia was pushed onto the sofa. Navarette stood watch over Tapia while Acosta looked around the home. Acosta found two guitars, a DVD player, and some other

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[2] Tapia testified that his memory of the events was poor, in part due to the blow to his head.

items. Navarette took Tapia's phone. Navarette and Acosta then left with the items they had taken.

Tapia held his head, trying to stop the bleeding. His roommate, Robert Cabuto, arrived home a few minutes later. Cabuto discovered the lock on the door to his room had been destroyed, and that items had been taken from his room.

B. The Investigation

The following day, Tapia identified Navarette and Acosta from photographic lineups. The police also showed Tapia a photographic lineup containing a photograph of a woman named Sandra Ordaz. Tapia was unable to identify Ordaz as the person who had accompanied Navarette and Acosta, and stood watch in the street.

In the early morning hours of January 28, 2016, a Los Angeles Police Department (LAPD) officer stopped a vehicle leaving the Estrada Courts housing project for reasons unrelated to the Tapia robbery. Ordaz was driving; Navarette was in the front passenger seat. Navarette was arrested. Ordaz was released.

The police brought Ordaz to the station on February 4, 2016. A LAPD detective took her phone and examined its contents. The detective found numerous text messages between Ordaz and Acosta on January 29. Acosta wrote: "Hey I got some electric guitars I am trying to sell half of the money is going on his books. Do you know anyone interested[?]" Ordaz replied: "No I dnt but send me pics." She also asked: "Do u knw wen he has court," and "Have you talked to [Navarette]?" Acosta wrote "No," adding: "I am getting money together in a couple of days let's go put money on his books." Ordaz asked when he wanted to

go. Acosta agreed to go the following Friday "[t]o put money on [Navarette's] books."

C. Gang Evidence

1. *The Motion To Bifurcate*

Navarette and Acosta were charged with kidnapping to commit robbery and home invasion robbery. The information against both defendants included a special allegation that the offenses were committed for the benefit of a criminal street gang. Prior to trial, both defendants requested the trial court bifurcate trial of the gang allegation. They argued identity was not an issue because video from the surveillance cameras was "crystal clear," the gang allegation was not "inextricably intertwined" with the charged offenses,[3] and the gang evidence was otherwise unduly prejudicial and inflammatory. The prosecutor opposed, arguing the gang evidence was relevant not only to prove the gang allegation, but also to prove motive and identity on the substantive charges.

The court denied bifurcation, explaining: "Well, I think it was somewhat of a close question in this case because, unlike other cases I've tried where there's been some mention of gang membership, some statement of 'Where you from?' some identification by the victim of tattoos—nevertheless, it seems to me the gang evidence bears on intent and motive." While the crime could have been committed for personal reasons, if Acosta and Navarette "are fellow gang members, . . . [it] seems to me

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[3] In support of this claim, defense counsel argued Tapia did not see any tattoos (the defendants were wearing long sleeve hoodies), there was no evidence Acosta or Navarette said anything about the gang during the offense, and there was no evidence of tagging on Tapia's property.

that is evidence the People are entitled to put in to show the motive for the crime, the intent, particularly in terms of aiding and abetting. . . . [I]f they are fellow gang members, that certainly is relevant to that." The court added that it would instruct the jury pursuant to CALCRIM No. 1403 that it was not to consider the gang evidence as evidence of bad character.

2. *People's Gang Expert*

LAPD Sergeant Jose Vazquez testified as the prosecution's gang expert. One of the gangs he monitored was Vario Nueva Estrada, or VNE. VNE's territory included the Estrada Courts housing project. Tapia's duplex, which was near Estrada Courts, was located in territory claimed by VNE. Indeed, there was VNE graffiti in the alley behind Tapia's house.

Sergeant Vazquez discussed the way gangs generally operate, with gang members "putting in work," i.e., committing crimes with other gang members to raise money for the gang and to increase their status within the gang. Sergeant Vazquez had investigated a number of crimes involving VNE, such as burglaries, robberies, narcotics sales, gun possession, and vandalism. He opined that VNE's primary activities included narcotics sales, robberies, shootings, and gun possession.

Sergeant Vazquez also explained the term "putting money on somebody's book" meant putting money into the account of someone who was in jail or prison. Sergeant Vazquez knew, from the experience of having family members in gangs, that the person could then use that money "to survive in there, either eating or paying somebody so they don't get beat up inside the jail."

Sergeant Vazquez had met both Navarette and Acosta in the past, and believed that both were VNE members. Both had

VNE tattooed on their chests. Navarette's gang moniker was Little Wicked, and Acosta's was Cartoon or D Boy.

When asked a hypothetical question mirroring the facts of this case, Sergeant Vazquez opined that the crime was committed for the benefit of the VNE gang. The robbery both provided proceeds to the gang and bolstered the gang's reputation in the community, resulting in intimidation of community members. It also increased the individual gang members' status within the gang.

3. *Defense Gang Expert*

Martin Flores testified as a gang expert for the defense. Flores testified as to the factors indicating that a crime was committed for the benefit of a criminal street gang. They included yelling out the name of the gang, targeting a member of a rival gang, wearing gang clothing during the commission of the crime, planning activity by the gang, and bragging about the crime through social media or graffiti.

Flores noted that the mere fact gang members commit a crime does not mean that the crime was committed for the benefit of the gang. Especially when a crime is committed in the gang's own territory, it is likely a gang member committed the crime for personal reasons, such as to sustain a drug habit.

When presented with a hypothetical question based on the facts of this case, Flores opined that the crime was not committed for the benefit of VNE but was likely a crime of opportunity or a personal matter. The factors on which he based his opinion were that the gang members were accompanied by a woman who was not a gang member, they did not yell out a gang name or throw gang signs, and they were not wearing gang clothing.

D. Defense Closing Argument

In closing argument, Navarette's counsel conceded that the prosecution met its burden of proving Navarette and Acosta robbed Tapia. Counsel also conceded that the prosecution proved the lesser included offenses of simple kidnapping and false imprisonment, and the only remaining issue was whether the prosecution proved kidnapping for the purpose of robbery. Acosta's counsel agreed that the prosecution met its burden of proof for some of the charges, and the only question to decide was "is this a kidnap for robbery or is it a kidnap and a robbery."

DISCUSSION

Navarette and Acosta's challenges to their convictions include contentions that (1) the trial court abused its discretion in refusing to bifurcate the gang enhancement allegation, (2) prosecutorial misconduct occurred in asserting the identity of the woman who remained at the gate, (3) certain testimony from the People's gang expert was erroneously admitted and mandates reversal, (4) there was insufficient evidence to support the asportation element of kidnapping, the jury finding on the gang enhancement allegation, and the special allegation that the robbery was committed in concert among three individuals, and (5) defense counsel was ineffective because they conceded guilt on certain charges in closing argument.

With regard to the sentences imposed, Navarette and Acosta argue the trial court violated their right to due process by imposing a restitution fine and two assessments without determining ability to pay. Acosta separately contends remand is necessary so the court can exercise its discretion whether to strike his prior serious felony conviction pursuant to Senate Bill No. 1393.

A. The Trial Court Did Not Abuse Its Discretion in Refusing To Bifurcate the Gang Enhancement Allegation

1. *Standard of Review*

"Bifurcation of gang allegations is appropriate where the gang evidence is 'so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.' " (*People v. Franklin* (2016) 248 Cal.App.4th 938, 952, quoting *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Evidence as to gang membership is admissible " 'if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative.' [Citations.]" (*Franklin*, *supra*, at p. 953.) "Given the public policy preference for the efficiency of a unitary trial, a court's discretion to deny bifurcation of a gang allegation is broader than its discretion to admit gang evidence in a case with no gang allegation. [Citation.] Thus, '[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself . . . a court may still deny bifurcation.' [Citation.]" (*Id.* at p. 952; accord, *Hernandez*, *supra*, at pp. 1049-1050.)

We review the trial court's denial of a bifurcation motion "for abuse of discretion, based on the record as it stood at the time of the ruling. [Citations.]" (*People v. Franklin*, *supra*, 248 Cal.App.4th at p. 952.) The trial court abuses its discretion where it acts in a manner that is arbitrary, capricious, or patently absurd, resulting in a manifest miscarriage of justice. (*Ibid.*)

2. *Denying Bifurcation Did Not Result in a Manifest Miscarriage of Justice*

The trial court's determination not to bifurcate the gang allegations was not arbitrary or capricious. While Acosta's counsel acknowledged outside the presence of the jury there was a clear video of the defendants' faces during the crime, she did not concede identity and the burden remained on the People to prove that issue beyond a reasonable doubt. Navarette and Acosta's membership in the same gang, and the fact the victim's residence was inside territory claimed by that gang, was relevant to establishing the defendants' identity as the perpetrators. With regard to motive and intent, the People contended this was not a crime of opportunity, but a coordinated effort between the defendants and a third person. Navarette and Acosta disputed that claim. The gang affiliation between the defendants was accordingly relevant to motive as well as to whether the defendants were acting in concert. Additionally, the trial court properly instructed the jury as to the limited purpose for which it could consider the gang evidence, and we presume the jury followed this instruction. (*People v. Franklin*, *supra*, 248 Cal.App.4th at p. 953.)[4]

Nor was the gang evidence of little relevance to the issues ultimately decided by the jury. Navarette and Acosta conceded in closing argument that they committed the robbery, and disputed only whether the kidnapping was for purposes of the robbery.

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[4] Navarette additionally argues admission of the text messages was prejudicial as to the jury's consideration of the gang allegation as against him. However, the jury was instructed that the text message evidence was admissible only as to Acosta.

The defendants also disputed the special allegation of whether the robbery was committed in concert, in addition to the gang enhancement allegation. The gang evidence was relevant to the special allegation that the robbery was committed in concert, and given the concessions on the underlying offenses the gang evidence was not unduly prejudicial as to the sole remaining non-gang enhancement issue of whether the kidnapping was for the purpose of a robbery. The court accordingly did not abuse its discretion in declining to bifurcate trial of the gang enhancement.

B. There Was No Prosecutorial Misconduct

Navarette and Acosta claim the prosecutor lied in his opening statement when he identified Ordaz as the third person involved in the robbery in concert, knowing that he could not prove it was her.

1. *Proceedings Below*

In his opening statement, the prosecutor told the jury that while Tapia was gardening, "three individuals came up, two males and a female. The two males trespassed, walked onto his property while he was gardening while the female stayed out by the sidewalk." After describing the crime, the prosecutor showed the surveillance video to the jury. He then identified the three individuals—Navarette, Acosta, "and another individual by the name of Sonia Ordaz." He told the jury that "Ordaz is friends with both of them. She lives in the area."

Later, in discussing the jury instructions, the prosecutor requested that the court redact CALCRIM No. 1601, on robbery in concert, to remove "with Sonia Ordaz" and "[j]ust say another

person."[5] When the court questioned this, the prosecutor stated: "I don't have to prove beyond a reasonable doubt that it was Sonia Ordaz." The court responded: "But there's no evidence of any other person." The prosecutor argued: "Your honor, I don't believe that the state of the law is I have to prove the identity of every one of the perpetrators in a home invasion robbery."

The court asked where there was evidence that the woman in the video was someone else. The prosecutor explained: "We pled out Sonia Ordaz prior to trial because her case was particularly weak for other reasons." Her family provided the prosecutor with evidence it could have been another woman. He added, "Obviously, I think, by a preponderance of the evidence, it's probably her, and that's why I put it in there, but I think that this is unfairly burdening the People by forcing us to prove to the jury that it was Sonia Ordaz."

The court reminded the prosecutor that he identified Ordaz as the third person during his opening statement. The court, in good faith, "filled in the name of the person who you have argued throughout was the third person." The prosecutor responded that "the defense brought out in cross on Mr. Tapia that he failed to identify her in the six-pack." Therefore, they "could argue . . . that this is not a robbery in concert because . . . it wasn't Sonia Ordaz."

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[5] CALCRIM No. 1601 instructs the jury that robbery in concert requires that a defendant commit the robbery "with two or more other people who also committed or aided and abetted the commission of the robbery." As given, it told the jury: "To decide whether the defendants or *the other person who is female* aided and abetted robbery, please refer to the separate instructions . . . on aiding and abetting." (Italics added.)

Defense counsel objected that the prosecutor took the position the woman was Ordaz, the jury heard him say it was her, so "[i]t makes sense to have that in the jury instruction." The court responded: "Then you can argue whatever you want. You can argue that [the prosecutor] told them it was Sonia Ordaz and now he's backtracking on that." The court agreed to take Ordaz's name out of the instruction and just refer to "another person who is female."

2. *The Prosecutorial Misconduct Claim Was Forfeited, and in Any Event Is Meritless*

Preliminarily, we address the question whether the claim of prosecutorial misconduct was forfeited. To preserve a claim of prosecutorial misconduct for appeal, " ' "a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety." ' [Citation.] The lack of a timely objection and request for admonition will be excused only if either would have been futile or if an admonition would not have cured the harm. [Citations.]" (*People v. Powell* (2018) 6 Cal.5th 136, 171.)

Navarette and Acosta argue they could not have objected to the claimed misconduct, because they had no way to know at the time of opening statement the prosecutor would later take the position that the lookout was not necessarily Ordaz. While this is true, when they did learn of the prosecutor's change of position, defendants did not object on the ground of prosecutorial misconduct and request a curative admonition. To avoid forfeiture of their prosecutorial misconduct claim, Navarette and Acosta argue that by the time the misconduct was discovered, it had "infected the trial with such prejudice that [they were]

deprived of due process requiring reversal." This argument is not well taken.

It is well established that " ' "[a] prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]" [Citations.]' [Citation.]" (*People v. Powell*, *supra*, 6 Cal.5th at p. 172.) Under California law, reversal for prosecutorial misconduct is not required unless the defendant has been prejudiced by the misconduct (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564; see, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 209), which occurs only if it is reasonably probable the defendant would have obtained a more favorable result absent the misconduct (Cal. Const., art. VI, § 13; *People v. Tully* (2012) 54 Cal.4th 952, 1010; *People v. Crew* (2003) 31 Cal.4th 822, 839.)

Our Supreme Court has observed that " 'remarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor "was 'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.' " ' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 762.) The prosecutor here did not infect the trial by referring to inadmissible evidence. The prosecutor had a good faith belief Ordaz was involved—indeed, she was charged in connection with the crime. At worst, the prosecutor made a

statement of fact that he knew was subject to challenge and doubt—doubt that defendants' counsel in fact sowed when cross-examining Tapia and eliciting his failure to identify Ordaz. The prosecutor then made a tactical decision not to take on a burden he did not have, namely to prove the specific identity of the person that served as the lookout, and asked the court to take Ordaz's name out of the jury instruction. That request was not improper, and not misconduct.

We also fail to see how Navarette and Acosta were prejudiced by the identification of Ordaz as the lookout in the opening statement, followed by the People backtracking on that identification. The surveillance video showed that the two defendants were accompanied by a woman when they arrived at Tapia's house. Whether that woman was Ordaz or someone else was not an element of the offense. The only issue concerning the woman was whether she acted in concert with Navarette and Acosta. Committing that Ordaz was the lookout in the prosecutor's opening statement, and then backtracking, did not advantage the prosecution but rather created an opportunity for the defense to raise questions about the People's case that would not have existed had the prosecutor not named Ordaz in the opening statement.

Counsel for the defendants addressed this issue—as well as the prosecution's failure to prove the woman in the video was Ordaz as promised in the People's opening statement—in their arguments. Navarette's counsel argued that the jury could look at the surveillance video themselves to determine whether she was acting as a lookout. Counsel noted: "What happens to her when you see later the shot of somebody coming out with a guitar? She ain't there. So you have to decide, have they proven

robbery in concert beyond a reasonable doubt? No. Not without more information on Miss Ordaz, not without more evidence that this third person was involved."

Acosta's counsel pointed out, with respect to the text messages between Acosta and Ordaz: "If Sonia Ordaz, whose phone contained these text messages, if she was there that night of the robbery, why would Daniel Acosta have to tell her, 'I've got some guitars I want to sell[?'] She already knows what was taken there. So this whole Sonia Ordaz being the person, again, is another red herring. She wasn't identified and . . . you can decide how that impacts the case."

As in *People v. Dykes*, *supra*, 46 Cal.4th 731, "the jury was instructed that the prosecutor's opening statement did not constitute evidence. [Thus], '[a]ny inconsistency between the opening statement and the evidence was inconsequential. [Navarette and Acosta were] permitted to confront all witnesses and to challenge and rebut all evidence offered against [them]. Under these circumstances, [they] suffered no conceivable prejudice.' [Citation.]" (*Id*. at p. 762.)

C. Testimony by the Prosecution's Gang Expert Does Not Require Reversal

Navarette and Acosta raise two claims of error with respect to Sergeant Vazquez's testimony. They claim the trial court erred in allowing Vazquez give an impermissible opinion as to defendants' guilt, and further permitted him "to offer inflammatory irrelevant opinions that had no bearing on . . . [the] case."

1. *Standard of Review*

We apply the abuse of discretion standard to trial court rulings on the admissibility of evidence. (*People v. Waidla* (2000)

22 Cal.4th 690, 717.) Even if the admission of certain evidence was erroneous, reversal results only if the "error[] complained of resulted in a miscarriage of justice." (Evid. Code, § 353, subd. (b).) A miscarriage of justice results only when it is reasonably probable the defendant would have received a more favorable result absent the erroneous admission of the evidence. (*People v. Munoz* (2019) 31 Cal.App.5th 143, 168.)

2. *Testimony Regarding Commission of a Robbery in Concert*

In response to a hypothetical question on whether crimes like those in this case were committed for the benefit of a criminal street gang, Sergeant Vazquez testified: "Here we have two gang members from a gang committing a crime in their gang territory, and they have a third person, and from the scenario that you described, to me, she's acting as a lookout. The two—the three of them, they're working in concert, which means together, to commit this type of crime." Acosta's counsel objected "to that being a legal conclusion" and moved to strike the testimony. The trial court overruled the objection, saying "he's not a lawyer. He's talking about just plain English."

When Sergeant Vazquez continued, stating that the gang members threatened the victim "with robbery," Navarette's counsel again objected that Sergeant Vazquez was testifying as to a legal conclusion. At that point, the trial court explained the nature of hypothetical questions to the jury. It stated that "[t]he jury instruction that you're going to get says it's up to you to decide whether there's any basis for [the expert's] opinion, whether anything underlying the expert's opinion has been proved or not proved. That's all up to you to decide. You are the judges who are going to decide was any crime committed; if so,

who committed it and so on. And you're also going to decide whether the People have proved the gang allegation."

The court told Sergeant Vazquez that it would prefer that he "just stick to whether the conduct—regardless of whether you think in this hypothetical a crime has been committed, whether the conduct benefits the gang or is at the gang's direction, et cetera." Sergeant Vazquez then testified that his "opinion is yes, that it's committed for the benefit of the gang based on the three individuals' actions. And that's the way a gang operates. They do everything in concert for the most part."

Relying on cases stating the oft-repeated principle that a witness may not express an opinion on a defendant's guilt (e.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77), defendants argue Vazquez improperly opined that Navarette and Acosta were gang members acting "in concert" to commit "robbery." Defendants' argument, however, does not accurately characterize the expert testimony. Vazquez did not opine that Navarette and Acosta were guilty. Instead, he gave an opinion based on a hypothetical set of facts that the individuals in that hypothetical committed crimes for the benefit of a criminal street gang.

Expert testimony in the form generally given by Vazquez is permissible. In *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), the California Supreme Court addressed the propriety of permitting a gang expert to respond to hypothetical questions from the prosecution regarding whether the crime was gang related. (*Id.* at p. 1044.) The court explained that experts are permitted to give opinions on the basis of hypothetical questions which ask the experts to assume the truth of their facts, provided the hypothetical questions are rooted in facts shown by the evidence.

(*Id*. at pp. 1045-1046.) The court rejected the claim that such expert opinion is " 'objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citations.]" (*Id.* at p. 1048.) The court held that while an expert may not express an opinion on *the defendant's* guilt, which is " 'the ultimate issue of fact for the jury,' " the expert may express an opinion on the ultimate issue based on hypothetical questions rooted in the facts of the case. (*Ibid*.)

As *Vang* permits, Sergeant Vazquez expressed an opinion on the ultimate issue based on hypothetical questions rooted in the facts of the case. Sergeant Vazquez was asked to assume crimes occurred involving forcing a victim from his yard into his home, hitting the victim in the head, and then stealing items from the home. Sergeant Vazquez was not asked to opine if that hypothetical conduct was criminal and if so how, as defendants suggest. He was asked if those hypothetical crimes benefitted a street gang, and explained why he believed that they did. Moreover, the trial court's admonition clarified for the jury the nature of a hypothetical question and that the jury was the ultimate judge of the facts in this case, including whether there was a factual basis for the expert testimony. We presume the jury understood and followed this admonition. (*People v. Pearson* (2013) 56 Cal.4th 393, 414.) There was no prejudicial error requiring reversal.

3. *Testimony Regarding Putting Money on Somebody's Books*

The prosecutor asked Sergeant Vazquez if he had ever heard the term "putting money on somebody's books" as was used in the text message after the robbery. Sergeant Vazquez was familiar with the term, and explained it meant funding someone's

commissary account in jail. He further testified that for a gang member to survive in prison, "either eating or paying somebody so they don't get beat up inside the jail, a relative or fellow gang member or somebody puts in money into their name inside the jail or prison."[6]

Navarette's counsel objected that this testimony "about putting money on the books and people getting beat up, that is not relevant to this case whatsoever." The trial court noted the testimony was relevant, because "[t]he People's theory is that Mr. Acosta put money on Mr. Navarette's books and that shows an association between them." Acosta's counsel objected that "not just gang members put money on books, but this whole they put money . . . in order not to get beat up, that is inflammatory." The trial court replied that counsel could cross-examine Sergeant Vazquez, and denied a request to strike the testimony.

On cross-examination, Sergeant Vazquez acknowledged that he did not know what products could be purchased with money on a person's books, that he knew about the money being used to prevent a person from getting beat up from "[f]riends and family," and no one told him that money was put on Navarette's books to prevent him from being beaten up.

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[6] While Acosta claims this testimony lacked any factual basis, defendants' gang expert Martin Flores agreed with Sergeant Vazquez's description. Flores testified putting money on the books "in most cases, it's putting money into someone's account so they can get . . . soup, toothpaste, lotion, shampoo, chips, whatever, in most cases. There are exceptions, the extreme situations where it's more in the politics level where you have the example that Vazquez talked about."

Testimony regarding the meaning of the term "putting money on somebody's books" was relevant, as it helped explain the text messages between Acosta and Ordaz regarding Navarette and the association among the three of them. The brief mention that one potential use of money on one's books could be to prevent a person in custody from being assaulted was not unduly prejudicial, and the trial court did not abuse its discretion in declining to strike the testimony. It was general background information on the uses of a commissary account which was given not only by Vazquez but also Mr. Flores, the defense gang expert. Further questioning of Sergeant Vazquez established it was not applicable to the facts of this case. In closing, the prosecutor did not mention or rely on this part of the Vazquez testimony, and instead focused only on the fact that Acosta was sufficiently close enough to Navarette he was willing to help Navarette out financially.

Even if we considered the admission of the testimony about a potential use of commissary money including avoidance of an assault to be erroneous, the error would not require reversal. It is not reasonably probable the defendants would have obtained a more favorable result had that one aspect of Vazquez's testimony been excluded. (Evid. Code, § 353, subd. (b); *People v. Covarrubias* (2015) 236 Cal.App.4th 942, 951.)[7]

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[7] We further reject the claim that any erroneous admission of the evidence also deprived Navarette and Acosta of their constitutional rights "because this case falls within the general rule that 'violations of state evidentiary rules do not rise to the level of federal constitutional error.' [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 120; see *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 751 ["Our Supreme Court has

D. Sufficiency of the Evidence Challenges

Defendants challenge the sufficiency of the evidence on the asportation element of their kidnapping for robbery conviction, the special allegation that the offenses were committed to benefit a criminal street gang, and the special allegation that the robbery was committed in concert among at least three individuals.

1. *Standard of Review*

In determining the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

2. *There Was Substantial Evidence of Asportation*

(a) *Applicable Law*

We discussed the asportation element of kidnapping for the purpose of robbery in *People v. Williams* (2017) 7 Cal.App.5th 644. We noted: "Aggravated kidnapping for the purpose of robbery under section 209, subdivision (b)(1), 'requires movement

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rejected the attempt to transform evidentiary claims into errors of constitutional proportion"].)

of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself. [Citations.] "These two aspects are not mutually exclusive, but interrelated." ' " (*Id*. at p. 667.)

With regard to the first prong, " '[i]n determining "whether the movement is merely incidental to the [underlying] crime . . . the jury considers the 'scope and nature' of the movement. [Citation.] This includes the actual distance a victim is moved. However, we have observed that there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong." ' " (*People v. Williams*, *supra*, 7 Cal.App.5th at p. 667.)

The second prong of the test requires a determination " ' "whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in [the underlying crime]. [Citations.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased." ' [Citation.] 'Whether the forced movement of the victim was merely incidental to the target crime, and whether that movement substantially increased the risk of harm to the victim, "is difficult to capture in a simple verbal formulation that would apply to all cases." ' [Citation.]" (*People v. Williams*, *supra*, 7 Cal.App.5th at p. 667.)

Williams involved the movement of the victims to various locations within the premises in which the robberies took place. (*People v. Williams*, *supra*, 7 Cal.App.5th at pp. 668-669.) We

observed that " '[w]hen in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence . . . or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209.' " (*Id.* at p. 667.) Such " 'brief movement inside the premises where a robbery is being committed is considered incidental to the crime and does not substantially increase the risk of harm otherwise present.' [Citation.] '[F]or aggravated kidnapping, the victim must be forced to move a *substantial distance*, the movement cannot be merely *incidental* to the target crime, and the movement must *substantially increase* the risk of harm to the victim. Application of these factors in any given case will necessarily depend on the particular facts and context of the case.' [Citation.]" (*Id.* at p. 668.)

(b) *There Was Substantial Evidence the Movement Was Not Incidental to the Robbery*

Defendants argue that "the prosecutor never established a measurement of the distance Tapia was moved." Therefore, there is no evidence to support a finding Tapia was forced to move a substantial distance. However, " ' "there is no minimum number of feet a defendant must move a victim in order to satisfy" ' " the substantial distance requirement. (*People v. Williams*, *supra*, 7 Cal.App.5th at p. 667.) The jury heard from Tapia, and could see on the surveillance video, that Acosta and Navarette moved Tapia from the front yard to the front porch, and from there inside the house. Without knowing the exact distance, Tapia's testimony and the video footage were sufficient evidence the distance was substantial.

Defendants further argue the movement of Tapia was incidental to the robbery, relying on *People v. Washington* (2005) 127 Cal.App.4th 290. In *Washington*, the defendants entered a bank in which the victims were working. One victim was moved approximately 45 feet, the other approximately 35 feet, while they got the keys to the vault room and opened it for the defendants. (*Id*. at p. 299.) The court found this movement was incidental to the robbery and insufficient to support a conviction of aggravated kidnapping. (*Ibid*.) The court explained: "We reach this conclusion because the movement occurred entirely within the premises of the bank and each victim moved the shortest distance between their original location and the vault room. Thus, there was no excess or gratuitous movement of the victims over and above that necessary to obtain the money in the vault. Also, given that the cooperation of two bank employees was required to open the vault, the movement of both [victims] was necessary to complete the robbery." (*Ibid*.)

Washington is dissimilar. Tapia was not in his house when Navarette and Acosta approached him and demanded money. The movement of Tapia was not incidental to the crime initially undertaken—the theft of money from Tapia. Nor did defendants need to move Tapia from the front yard when they decided to rob the house after Tapia said he had no money on his person. The movement therefore was not incidental to the robbery. (See *People v. James* (2007) 148 Cal.App.4th 446, 457.)

(c) *There Was Substantial Evidence the Movement Increased the Risk of Harm*

With regard to the second element of asportation, defendants argue that the movement did not increase the risk of harm to Tapia, because (1) Tapia testified that he yelled when he

was outside, but nobody heard him, and (2) once inside the house he was pushed down onto the sofa and stayed there until Navarette and Acosta left the house. As noted above, the determination whether the movement subjected the victim to a substantial increase in risk of harm does not require that the harm actually occur. (*People v. Williams*, *supra*, 7 Cal.App.5th at p. 667.) It is enough that the defendant " 'moves a victim from a public area to a place out of public view' " (*People v. Aguilar* (2009) 120 Cal.App.4th 1044, 1048), decreasing the possibility of detection, escape, or rescue (*People v. James*, *supra*, 148 Cal.App.4th at p. 457).

Here, the video showed persons passing by on the street around the time of the crime. Tapia was not hit in the head until Navarette and Acosta had forced him out of the yard and away from the street, onto the porch, and right before they made Tapia go inside the house. Furthermore, the movement not only subjected Tapia to an increased risk of harm, it resulted in actual harm. Once on the porch, Tapia was stuck on the head with a blunt object, and defendants then concealed their injured victim and his bleeding head by forcing Tapia into the house and out of public view.

We conclude there is substantial evidence to support the jury's finding that Navarette and Acosta moved Tapia a substantial distance, the movement was not merely incidental to the crime, and the movement substantially increased the risk of harm to Tapia. There was thus sufficient evidence to support the asportation element of kidnapping for the purpose of robbery. (§ 209, subd. (b)(1); *People v. Williams*, *supra*, 7 Cal.App.5th at p. 668.)

3. *The Gang Enhancement Allegation*

(a) *Applicable Law*

There are two prongs to the criminal street gang enhancement, both of which must be supported by substantial evidence. (*People v. Perez* (2017) 18 Cal.App.5th 598, 606.) " 'First, the prosecution is required to prove that the underlying felonies were "committed for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22[, subd.](b)(1).) Second, there must be evidence that the crimes were committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' [Citation.]" (*Id*. at pp. 606-607.)

The gang enhancement applies " 'only if the crime is "gang related." ' [Citation.] Not every crime committed by gang members is related to a gang." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 60; accord, *People v. Perez*, *supra*, 18 Cal.App.5th at p. 607.) "Otherwise, . . . [the] 'gang enhancement would be used merely to punish gang membership.' [Citation.]" (*Perez*, *supra*, at p. 607.) Therefore, "the record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, italics omitted; accord, *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.)

Typically, "expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach . . . a finding on a gang allegation. [Citation.]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) However, "[a] gang expert's testimony

alone is insufficient to find an offense gang related." (*People v. Ochoa*, *supra*, 179 Cal.App.4th at p. 657.) The expert testimony must be accompanied by "some substantive factual evidentiary basis" (*id.* at p. 661) from which "the jury could reasonably infer the crime was gang related" (*Ferraez*, *supra*, at p. 931). That is, "something more than an expert witness's unsubstantiated opinion that a crime was committed for the benefit of, at the direction of, or in association with any criminal street gang is required to justify a true finding on a gang enhancement." (*Ochoa*, *supra*, at p. 660.)

(b) *Substantial Evidence Supported the Jury's Finding on the Gang Enhancement*

Substantial evidence in the record demonstrated the following: Defendants were both VNE gang members, and committed the crime together. Tapia, the victim of the kidnapping and home invasion robbery, lived in VNE territory, including the alley behind his house being tagged with VNE graffiti. While the defendants did not yell out their gang's name, there was no need as they were not in rival or neutral territory but rather on home turf when they committed the crime. While Tapia did not see tattoos or gang signs during the crime, he had seen the defendants at least once before in the neighborhood and recognized them. Tapia was outside his home when the defendants accosted him. While in his front yard, Tapia yelled in response to their demands for money, and no neighbor was willing to respond. Tapia yelled again once inside his home, sufficiently loud for dogs to begin barking, and still no neighbor was willing to respond. While Acosta suggests no one responded because no one heard Tapia, as opposed to neighbors being too intimidated to respond, we must view the evidence in the light

most favorable to the People, and presume every fact which the trier of fact could reasonably have deduced from the evidence in favor of the judgment. (*People v. Albillar*, *supra*, 51 Cal.4th at pp. 59-60.)

Expert testimony established that gang members commit crimes together, as Navarette and Acosta did, to be able to vouch for one another about the crime and increase their status within the gang. Gang members also victimize individuals in their own territory because it is easier to intimidate local residents into not cooperating with the police—an opinion concordant with the failure of anyone to come to Tapia's aid. Expert testimony also established VNE committed economic crimes like robbery to benefit the gang by obtaining funds, and the evidence established that Acosta sought to sell items taken in the robbery to fund his fellow gang member's jail commissary account.

This case is accordingly unlike those on which defendants rely, in which a gang member acted alone outside of any gang territory (e.g., *People v. Perez*, *supra*, 18 Cal.App.5th 598; *People v. Ochoa*, *supra*, 179 Cal.App.4th 650), or where two gang members took no action other than possessing stolen property (e.g., *People v. Ramon* (2009) 175 Cal.App.4th 843). Here, two VNE gang members worked together to commit a home invasion robbery in VNE territory. The jury could infer that VNE's grip on the neighborhood was sufficient to discourage anyone from coming to Tapia's aid despite his cries for help. The crime, a robbery, was a typical example of criminal behavior engaged in by the gang. The proceeds of the crime were used for gang related purposes—to help fund a gang-related commissary account in jail. This was substantial evidence supporting the jury's conclusion finding the gang enhancement allegation true.

(See, e.g., *People v. Albillar*, *supra*, 51 Cal.4th at pp. 60-64; *People v. Castenada* (2000) 23 Cal.4th 743, 753; *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20.)

4. *There Was Substantial Evidence Defendants Committed the Robbery in Concert with a Third Person*

Robbery in concert requires that a defendant commit the robbery "with two or more other people who also committed or aided and abetted the commission of the robbery." (CALCRIM No. 1601; accord, § 213, subd. (a)(1)(A); *People v. Petznick* (2003) 114 Cal.App.4th 663, 681.) Navarette and Acosta contend the evidence is insufficient to prove that they committed the robbery in concert with the woman with them when they approached Tapia's home.

The evidence on whether Navarette and Acosta committed the robbery in concert with a third person consisted of Tapia's testimony about Navarette and Acosta being accompanied by a woman that stayed at the gate watching, and the surveillance video. The video shows Navarette and Acosta walking with a woman toward Tapia's gate. When Navarette and Acosta enter the front yard and walk toward Tapia, the woman stands in or by the gateway, arms crossed, periodically looking in both directions. As Navarette and Acosta enter the home with Tapia, one of them looks back toward the gateway. The woman moves out of view before the time one of the two comes out of the home holding two guitars.

A person's "[m]ere presence at the scene of a crime is not sufficient to constitute aiding and abetting . . . ." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529; *People v. Allen* (1985) 165 Cal.App.3d 616, 625.) However, an inference of aiding and

abetting may be supported by evidence the person " 'is present for the purpose of diverting suspicion, or to serve as a lookout.' " (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743-744.) "[A] lookout necessarily encourages and facilitates the commission of the offense. 'Such conduct is a textbook example of aiding and abetting.' [Citation.]" (*In re Gary F.* (2014) 226 Cal.App.4th 1076, 1081.)

The inference that a person acted as a lookout and thus was an aider and abettor may be based on such factors as " 'presence at the scene of the crime, companionship, and conduct before and after the offense.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.) Based on the surveillance video, the jury could reasonably have inferred that the woman acted as defendants' lookout. She accompanied them prior to the crime. She stood in the gateway actively watching the street in both directions for several minutes. She continued to watch the street while Navarette and Acosta yelled at Tapia for money, and Tapia screamed back he did not have any, within her earshot. She further continued to watch the street after Tapia was hit in the head, Navarette and Acosta took Tapia into the home, and Tapia again yelled in distress. She did not move away from the gate until after Navarette and Acosta were safely inside Tapia's residence. These facts are substantial evidence that supports the jury's finding Navarette and Acosta committed the robbery in concert with the woman. (*People v. Hutchinson* (2018) 20 Cal.App.5th 539, 546.)

E. Defense Counsel Was Not Ineffective

Acosta contends that his counsel's admission during closing argument that the People had proved he committed simple kidnapping constituted ineffective assistance of counsel. As

discussed above, Acosta's counsel agreed that the prosecution met its burden of proof for some of the charges, including kidnapping. She told the jury "[w]e are here because is this a kidnap for robbery or is it a kidnap and a robbery."

"In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. [Citation.] To demonstrate deficient performance, defendant bears the burden of showing that counsel's performance ' " ' "fell below an objective standard of reasonableness . . . under prevailing professional norms." ' " ' [Citation.] To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. [Citations.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

" 'Recognizing the importance of maintaining credibility before the jury, [courts] have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt.' [Citation.]" (*People v. Davenport* (1995) 11 Cal.4th 1171, 1237; see, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 598.) " ' "[G]ood trial tactics often demand complete candor with the jury, and . . . in light of the weight of the evidence incriminating a defendant, an attorney may be more realistic and effective by avoiding sweeping declarations of his or her client's innocence." ' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 435.)

Here, Tapia testified that Navarette and Acosta surrounded him and pulled him to the front door. He also testified they took items from the home, including guitars. The surveillance video portrayed exactly the same, corroborating

Tapia's testimony and capturing the faces of Navarette and Acosta during the crime. In light of this evidence, counsel's decision to concede that Acosta was guilty of robbery and simple kidnapping, while arguing that the more serious crime of kidnapping for the purpose of robbery was "not proven was a reasonable tactical choice." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 435; accord, *People v. Lopez* (2019) 31 Cal.App.5th 55, 66-67.) Acosta was not deprived of the effective assistance of counsel by the concession.

F. Remand Is Appropriate To Permit the Trial Court To Exercise its Discretion Under Senate Bill No. 1393

Section 1385 provides the trial court with discretion to strike an enhancement in the furtherance of justice. At the time of sentencing, subdivision (b) of that section provided: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Senate Bill No. 1393, effective January 1, 2019, deleted former subdivision (b). (Stats. 2018, ch. 1013, § 2.)

The People concede that, because the judgment in this case is not yet final, the new law applies retroactively to Acosta. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973, review denied Jan. 16, 2019; see *People v. Brown* (2012) 54 Cal.4th 314, 319-324.) They agree that the case must be remanded to allow the trial court to exercise its discretion under section 1385 as to whether to strike the prior serious felony enhancement.

G. The Trial Court Did Not Err in Imposing a Restitution Fine and Assessments Without Determining Ability to Pay

The trial court imposed several hundred dollars in restitution fines (§§ 1202.4, subd. (b), 1202.45) and court

assessments (§ 1465.8; Gov. Code, § 70373) on Navarette and Acosta. They did not request, and the court did not make, a finding as to their ability to pay. On appeal, Navarette and Acosta request that we reverse these amounts based on their inability to pay, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We decline to do so.

The People argue that defendants' failure to object below to the fines and assessments, or to raise the issue of inability to pay, caused them to forfeit any such argument on appeal. The Courts of Appeal are divided on the issue of forfeiture in these circumstances. (Compare *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [no forfeiture] and *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [same], with *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeiture] and *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155 [same].) We find it unnecessary to weigh in on this debate because in our view *Dueñas* was wrongly decided. (*People v. Kingston* (2019) ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 1038] (*Kingston*); see also *People v. Caceres* (2019) 39 Cal.App.5th 917.)[8]

In *Kingston*, we agreed with the opinion of our colleagues in Division Two of this district in *People v. Hicks*, *supra*, 40 Cal.App.5th 320 that, contrary to the analysis in *Dueñas*, "due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant's incarceration." (*Kingston*, *supra*, ___

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[8] Other courts have also disagreed with *Dueñas*. (See *People v. Allen* (2019) ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 1040]; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068; *People v. Kopp* (2019) 38 Cal.App.5th 47, 93-98.)

Cal.App.5th at p. ___ [2019 Cal.App. LEXIS 1038 at p. *9], citing *Hicks*, *supra*, at pp. 325-326.) Here, the "imposition of the [restitution fines] and fees in no way interfered with [defendants'] right to present a defense at trial or to challenge the trial court's rulings on appeal . . . . And their imposition did not result in [defendants'] incarceration." (*Kingston*, *supra*, at p. ___ [2019 Cal.App. LEXIS 1038 at pp. *13-*14].)

Defendants still have a number of years remaining on their indeterminate sentences to make bona fide efforts to repay the restitution fines and assessments, including from prison wages. At this point in time, due process does not deny Navarette and Acosta the opportunity to try to satisfy these obligations. (*People v. Hicks*, *supra*, 40 Cal.App.5th at p. 327.) The trial court accordingly did not violate defendants' due process rights by imposing the restitution fines and assessments without first ascertaining their ability to pay them.

DISPOSITION

The judgments of conviction are affirmed, as is Navarette's sentence. With regard to Acosta only, the matter is remanded to the trial court for it to consider striking the section 667, subdivision (a)(1) recidivist enhancement in view of Senate Bill No. 1393. If the court strikes this enhancement, it shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.
NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.