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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. JORGE HERNANDEZ et al., Defendants and Appellants.	B280752 (Los Angeles County Super. Ct. No. KA111191)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed and remanded.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Hernandez.

Maggie M. Shrout, under appointment by the Court of Appeal, for Defendant and Appellant Fernando Hernandez.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant Jessica Vega.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant Yonkany Bojorquez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steve D. Matthews, Supervising Deputy Attorney General, J. Michael Lehman, Deputy Attorney General, for Plaintiff and Respondent.

Defendants and appellants Fernando Hernandez (defendant Fernando), Jorge Hernandez (defendant Jorge), and Yonkany Bojorquez (defendant Bojorquez), along with defendant Perla Castanon (Castanon),[1] committed an armed home invasion robbery of victims Michael Sanda (Michael), Alvaro Sanda (Alvaro), and Carlo Normandia (Normandia). The defendants were convicted of a range of crimes including robbery, carjacking, false imprisonment, and, as to defendants Fernando and Bojorquez, kidnapping. Defendant and appellant Jessica Vega (defendant Vega), who was not present during the robbery, was convicted of robbery, carjacking, and false imprisonment on conspiracy or aiding and abetting theory of liability. As to defendant Bojorquez, we consider whether the trial court abused its discretion when it denied his motion to discharge private counsel on the eve of trial. We also consider the sufficiency of the evidence supporting defendant Vega's conviction on all counts, defendant Fernando's conviction for kidnapping Normandia, and the jury's true finding on the firearm enhancements alleged against defendants Jorge and Fernando. Finally, defendant Fernando asks us to decide whether a remand is warranted to give the trial court an opportunity to exercise its newly-conferred discretion to strike the Penal Code section 12022.53 firearm sentencing enhancement (alleged as to each count charged against him) in the interest of justice.

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[1] Defendant Castanon filed a notice of appeal, but dismissed her appeal before briefing in this matter commenced.

I. BACKGROUND

A. The Sandas and Vega

In 2015, Alvaro, who was around seventy years old at the time, lived in a small home in South El Monte with his adult son Michael. Alvaro is an accountant who was being paid approximately $2,000 twice per month, on the fifteenth and last day of the month. Michael did not have a full-time job, but he performed odd jobs to earn money. Alvaro provided Michael free room and board, and also gave him around $40 to $70 per week, in return for performing household chores.

Michael previously was in a relationship with defendant Vega, whom he had known for five or six years. Michael often gave defendant Vega some of the money he received from Alvaro because he cared about her and liked her, and because he knew she was using the money to help her daughter. Defendant Vega visited Michael at Alvaro's house and stayed in Michael's room. Michael regularly used methamphetamine and defendant Vega occasionally supplied Michael with drugs.

Alvaro would sometimes discuss finances with Michael, including how much money he (Alvaro) was making and how he could not always afford to help Michael. Sometimes, defendant Vega was in Michael's bedroom when Michael had discussions of this nature with Alvaro in the living room. The living room was close to Michael's bedroom, and defendant Vega would have been able to hear their conversations.

Michael eventually decided defendant Vega was using him for his money and, in August 2015, told her he did not want her to come to his house anymore. Defendant Vega reacted poorly to Michael's decision and called him a "loser" and other epithets

during a subsequent phone call. Defendant Vega left three shopping bags full of her possessions in Michael's room.

B. The Offense Conduct

Michael communicated with defendant Vega in early November 2015. On November 15, 2015, defendant Vega sent Michael a text message stating "someone's about to jack you guys" and "I know the whole plan." Michael did not take her statements seriously.

That same night, Michael's friend Normandia drove to Alvaro and Michael's house and parked his truck in the driveway. Normandia and Michael smoked methamphetamine, and Normandia helped Michael set up a video game console Michael had recently purchased. Alvaro was also home that night.

At around 11:00 p.m., there was a knock on the door. Alvaro opened the door to find a woman, later identified as defendant Castanon, standing on his doorstop. Defendant Castanon told Alvaro her car had broken down and her phone did not work. She asked if she could have some double-A batteries for her phone. Alvaro thought this was odd, but he gave her batteries because she looked like she needed help. Defendant Castanon thanked him and left.

Michael and Normandia were in Michael's room and did not see the woman, but Michael asked his father what happened. Alvaro recounted the woman's story, waited by the door for a few minutes to see if she would come back, and then went to bed.

An hour or two later, Normandia decided to go home. When Michael opened the front door for him, he found defendant Castanon and a man standing there. They appeared surprised

when he opened the door, and asked if they could borrow his phone. Michael ultimately agreed.

Normandia then walked out of the house toward his truck and unlocked the door with a remote key. As he moved to open the driver's side door, he felt a hard metal object pressed into his back. Normandia turned around and saw two men, one of whom (later identified as defendant Fernando) was pointing a gun at him. Defendant Fernando, now pointing the gun at Normandia's head, ordered him to return to the house.

Michael saw Normandia walking toward him looking scared. As Normandia and the other men approached Michael, defendant Fernando pointed the gun at Michael's face and told him to go into the house.

Once inside, Michael and Normandia were instructed to go to the kitchen. Defendant Fernando pointed the gun at Michael's head three or four times and repeatedly claimed Michael owed him money. Defendant Fernando asked Michael where his father was, but Michael did not answer. Defendants Fernando and Bojorquez then kicked in Alvaro's bedroom door and defendant Fernando pointed the gun at Alvaro.

Alvaro woke to find someone standing in front of him with a gun. Defendant Fernando told Alvaro to get up and go to the kitchen. Alvaro was scared and had no idea what was happening.

Once back in the kitchen, defendant Fernando said Michael owed him $4,000 and told Alvaro to give him "the check" for that amount. Michael denied owing him any money and Alvaro did not know what he was talking about. Defendant Fernando repeated that he needed $4,000 and Alvaro replied he did not have the money. Defendant Fernando waved his gun around and

said they were going to "resolve this." He said he needed the money now and Alvaro better have the money or they would all be in deep trouble. Defendant Castanon similarly asked Alvaro where the check was and conveyed they were serious about needing the money.

While defendants Fernando and Castanon were making these demands, defendant Jorge alternated between standing nearby and walking between the kitchen and Michael's room. Defendant Castanon took the wallet in Alvaro's pocket and instructed defendant Bojorquez to take phones and wallets. Defendant Bojorquez took the keys to Normandia's truck, and Michael's video game console was also taken. Defendant Bojorquez also went through the other rooms and ransacked them. At some point, defendant Fernando asked for the "bags" inside Michael's room. (The evidence presented at trial indicated these bags were the bags defendant Vega had left in Michael's room.)

Defendant Fernando returned to Alvaro, again asked for $4,000, and asked how long it would take Alvaro to get the money. When Alvaro told him it would take time, defendant Fernando said they would return in two weeks for $2,000. Defendant Fernando told the victims not to call the police and said they (the robbers) had friends in the neighborhood. All told, the robbers were inside Alvaro and Michael's house around ten to twenty minutes.

Normandia saw defendants Bojorquez, Castanon, and Jorge drive away in Normandia's truck. Defendant Fernando walked away in the same direction. After waiting a few minutes, Normandia went to a neighbor's house and borrowed a phone to call 911.

Phone company records for phone numbers associated with defendants Fernando, Jorge, and Vega indicate defendant Jorge traveled east away from El Monte shortly after the incident, defendant Fernando traveled east around an hour later, and defendants Jorge, Fernando, and Vega were all in the San Bernardino area between 4:00 a.m. and 6:00 a.m. on November 16. The records further indicate the cell phones used by defendants Fernando and Vega were within one mile of each other during that period.

C. The Investigation and Defendants' Apprehension

Los Angeles County Sheriff's Department Deputies Ortega and Salas arrived at Alvaro and Michael's home in response to the 911 call. The deputies interviewed the three victims separately. Alvaro and Michael told Deputy Ortega one of the assailants held a black, semi-automatic pistol during the robbery.

Detective Juan Rivera of the Los Angeles County Sheriff's Department was the investigating officer assigned to the case. Detective Rivera interviewed Michael and Normandia (separately) the morning after the robbery. From their demeanor and speech, he concluded they were both under the influence of methamphetamine, which Michael ultimately admitted. During his interview with Michael, Michael described defendant Fernando's gun as a "submachine" gun that looked "a little like an Uzi" and had a long clip. Michael also told Detective Rivera that defendant Vega might be involved in the crime because of the message she had sent him stating someone was about to "jack" him. Normandia drew a picture of the gun defendant Fernando was holding and gave it to Detective Rivera.

The same morning, Sergeant Manuel Gaitan of the San Bernardino Police Department received a LoJack alert notifying him there was a stolen vehicle in the area. Sergeant Gaitan responded to the location of the vehicle—Normandia's truck. When he arrived, the truck's doors were open, defendant Bojorquez was kneeling near the driver's side, and defendant Castanon was standing on the passenger side. Defendants Bojorquez and Castanon ran when Sergeant Gaitan arrived. Sergeant Gaitan approached the truck and found defendant Jorge laying down in the backseat. Sergeant Gaitan ultimately apprehended all three defendants with assistance from other officers.

Later that day, Detective Rivera interviewed Alvaro. Alvaro described defendant Fernando's gun as black with a long magazineDetective Rivera also spoke to Michael again. Michael told Detective Rivera he had started going through his belongings and realized the three bags of defendant Vega's possessions that had been in his room were gone. Michael also told Detective Rivera he had looked at defendant Vega's Facebook profile and had seen a post stating she had recently been with someone named "Fernandez Hernandez."

Detective Rivera reviewed defendant Vega's Facebook profile and confirmed there was a post indicating defendant Vega had been with a "Fernandez Hernandez" earlier that month. Detective Rivera then reviewed Fernandez Hernandez's Facebook profile and friends list, which provided a basis to conclude it belonged to defendant Fernando. Defendant Fernando's profile photo featured two firearms and a magazine that appeared to be loaded. The friends list reflected defendant Fernando was friends with defendant Vega and an individual named "Jorge Alberto

Hernades Alcaraz." (The Facebook profile of Jorge Alberto Hernandes Alcaraz suggested it belonged to defendant Jorge.)

Defendant Fernando was arrested on November 24, 2015. Defendant Vega was with him when he was arrested.

D. Post-Arrest Communication from Vega

On December 2, 2015, Michael used one of Alvaro's cell phones to try to set up a meeting with defendant Vega to see what she would say to him. Michael ultimately did not meet with defendant Vega, and he had blocked her number on his phone so it could not receive text messages or phone calls from her. The next day, defendant Vega sent a series of text messages to the cell phone number Michael had used to text her the day before.

The first message read:

"Listen, you know what, Imma tell you right now if you testify on anything you do know you got more
people . . . watching over your house and your boy too, right, so put it to you like dis, you better drop the charges on two people and I'm not even jokin', you got that DFR is a rat n you have to go wit me MF. . . . Oh, n here is what I need to talk to you and who is guilty and not, do you got that so you better meet up with me and soon, and do the right thing 'cause if you only know what I'm going through of your dumb ass n that will go down. We all got kids, family, and you know you have to do the right thing."

A series of messages with similar sentiments followed. One stated, "We will all go down, do you got that? n I be dam I am goin' down for your bullshit." The next read, "So you better meet me ASAP before we run out of time." The final message said, "Cause you don't know me and don't want to get to know me. I'm a bitch n could be hell. Don't forget where I grew up at. And

believe my dad know what's up, and you know what I'm not bitch, a snitch, or a rat, but papers are gettin' done."

Defendant Vega was arrested that evening.

E. The Criminal Proceedings

1. The charges

The Los Angeles County District Attorney charged defendants Fernando, Jorge, Bojorquez, Vega, and Castanon in an eleven-count information. All defendants were charged with the following crimes: (a) home invasion robbery; (b) kidnapping to commit robbery; (c) dissuading a witness; and (d) carjacking.[2] The information alleged the counts for home invasion robbery and kidnapping to commit robbery of Alvaro were committed upon an elder in violation of Penal Code section 667.9, subdivision (a).[3] It further alleged that defendant Fernando had personally used a firearm within the meaning of section 12022.53, subdivision (b) in the commission of all counts charged against him and that a principal in the commission of each offense was armed with a firearm within the meaning of section 12022, subdivision (a)(1).

2. Bojorquez's motion to discharge counsel

The trial court heard pretrial motions on December 5, 2016—the day before trial voir dire was to commence. During the hearing, defendant Bojorquez made an oral motion to

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[2] The information alleged one additional count of dissuading a witness (Michael) against defendant Vega alone.

[3] Undesignated statutory references that follow are to the Penal Code.

discharge his privately retained attorney. As we will later describe in more detail, the trial court denied his motion as untimely. The trial court also denied subsequent requests to re-raise the issue.

3. Trial

At trial, the prosecution called numerous law enforcement witnesses from the Los Angeles County Sheriff's Department and San Bernardino Police Department, a California Department of Justice criminal intelligence analyst who specializes in call record analysis, a senior criminalist from the Los Angeles County Crime Lab who performs DNA analysis, and the three victims.

During their testimony, Alvaro, Michael, and Normandia had difficulty remembering many of the details they had previously related to law enforcement, made some statements that differed from or were inconsistent with testimony or interviews they had previously given, and made other statements that were consistent with their prior statements.[4] One topic on which their testimony differed was the type of gun defendant Fernando had used during the incident. In their initial conversations with the Sheriff's Deputies who responded to the 911 call, Alvaro and Michael had described the gun as a black, semi-automatic pistol. At trial, all three witnesses described it as some sort of submachine gun.

Among the many law enforcement officials who testified was Detective Dan Morgan of the Los Angeles County Sheriff's

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[4] The prosecution played audio recordings of the victims' initial interviews with Detective Rivera for the jury. The statements on those recordings were admitted for their truth.

Department. Detective Morgan, a member of the Fraud and Cyber Crimes Bureau's High Tech Task Force, described information that had been extracted from a cell phone associated with defendants Jorge and Fernando. The cell phone contained a photo of an arm holding a firearm. The metadata indicated the photo had been taken on that particular phone. When asked whether the weapon in the photo looked like a real firearm, Detective Morgan stated it was "either a real firearm or . . . a very good replica of a firearm." Alvaro, Michael, and Normandia testified the firearm in the photo looked like the gun that had been used during the robbery. The firearm in the photo also looked similar to the firearm Normandia had drawn for the police after the incident.

Defendants presented no evidence in their defense.

4. Verdicts and sentencing

The jury found defendants guilty on many of the charged counts. On counts one through three, home invasion robbery (§§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A)), the jury found all defendants guilty and further found defendant Fernando had personally used a firearm during the commission of the robbery. On counts four and five, aggravated kidnapping of Alvaro and Michael, the jury found all defendants guilty of the lesser-included crime of false imprisonment. On count six, the jury found defendants Fernando and Bojorquez guilty of kidnapping Normandia to commit robbery, and found the remaining defendants guilty of the lesser-included crime of false imprisonment. On count seven, the jury found all defendants guilty of carjacking. On counts eight through ten, the jury found defendants Fernando and Castanon guilty of witness dissuasion.

As to counts one through ten, the jury found true the allegation that a principal had been armed with a firearm during the commission of the crime. The jury also found the remaining alleged sentencing enhancements true.

Defendants were sentenced separately. Defendant Fernando was sentenced to an indeterminate life term with the possibility of parole after seven years, plus a determinate term of thirty-five years. Thirteen of those years were imposed based on the jury's true finding on the firearm enhancement under section 12022.53, subdivision (b). Defendant Bojorquez was sentenced to an indeterminate life term with the possibility of parole after seven years, plus a determinate term of sixteen years and eight months. Defendant Jorge was sentenced to fifteen years in prison. Defendant Vega was sentenced to fifteen years and eight months in prison.

II. DISCUSSION

Defendants' asserted grounds for reversal of their convictions lack merit. First, defendant Bojorquez's claim that the trial court abused its discretion in denying his motion to discharge counsel on the eve of trial fails because the motion was untimely. Second, defendant Vega's argument that there was insufficient evidence of her involvement in the robbery is controverted by ample circumstantial evidence: her connections to Michael and defendant Fernando, the pre-robbery "someone's about to jack you guys" text she sent Michael, the nature of the robbery, and her communications following the robbery. Third, defendant Fernando's argument that there was insufficient evidence to prove he kidnapped Normandia fails in light of the victims' testimony. Their testimony constitutes substantial

evidence that Normandia's movement from the Sandas' driveway back into the house was more than incidental to the robbery and increased the risk of harm to Normandia. Fourth, defendants Fernando and Jorge's contention that there was insufficient evidence to establish that the weapon defendant Fernando used during the robbery was a real gun is unavailing when considering the substantial evidence in the record concerning the nature of the weapon and how defendant Fernando used it during the robbery.

As to defendant Fernando's sentence, however, we agree he is entitled to a remand to permit the trial court to determine whether it wishes to exercise its discretion to strike or dismiss the firearm enhancement under section 12022.53, subdivision (h), a provision that only recently took effect. On remand, whether defendant Fernando is resentenced or not, the trial court should correct a clerical error in his indeterminate sentence abstract of judgment.

A. The Trial Court's Decision to Deny Defendant Bojorquez's Request to Discharge Counsel Was Not an Abuse of Discretion

1. Additional background

On Monday, December 5, 2016, the day before trial was set to start, counsel for defendant Bojorquez, who had been privately retained, informed the trial court that defendant Bojorquez wished to have her relieved as counsel. The trial court told defendant Bojorquez he had the right to remove his lawyer, but noted it was the eve of trial. The court then asked defendant Bojorquez if he had a lawyer ready to stand in and represent him. When defendant Bojorquez said he did not, the trial court asked

if he was prepared to represent himself. In response, defendant Bojorquez asked, "Can't you assign an attorney for me? The court replied as follows:

"The Court: I can if you are indigent. That will create additional difficulties. The difficulty is we are here with all five of you ready for trial. The court is available, you folks are certainly available, and the lawyers are ready.

"No competent lawyer would take a case for trial tomorrow morning, as complex as this case is, as lengthy as the preliminary transcript is, and be able to be prepared for trial overnight.

"So you certainly may discharge [counsel], but you will be representing yourself.

"Is that what you want to do?"

In response, defendant Bojorquez said he needed more time, which the trial court said it could not give him. Defendant Bojorquez asked, "How am I gonna represent myself?" to which the court replied, "Same way anyone else does." The trial court then stated it was going to deny the motion to relieve defendant Bojorquez's retained lawyer. The following colloquy ensued between counsel for defendant Bojorquez and the prosecutor:

"[Defendant Bojorquez's attorney]: I feel obligated to let the Court know that we do have conflicts of our opinion on this matter. I have spoken to Mr. Borjorquez about the fact that we were at the eve of trial and . . . to be honest with everybody involved, I have let him know . . . that [the prosecutor] had previously said that she had no problem separating, bifurcating his case.

"So I just wanted it clear, because I did say that to the client.

"[The Prosecutor]: To clarify, my statement was that if the Court ruled that Mr. Borjorquez was entitled to fire his counsel and the Court was inclined to allow him to represent himself or appoint an attorney, which would necessitate a continuance, given that all of the other attorneys are ready, I would agree to bifurcate him out in that instance.

"But just simply to bifurcate him out because I said I would be okay with it was not my intention. [¶] . . . [¶]

"The Court: Well, as we know from the *Marsden* line of cases, a conflict of opinion is not grounds for relieving a lawyer.

"But he is free to fire you if he wishes to. He's going to have to hire his own lawyer. Since obviously he hired you."

The trial court stated, "At this point, I'm going to deny his motion. I think it's untimely." The court asked defendant Bojorquez's counsel if she was ready for trial. After she responded affirmatively, the trial court declared, "All right. Motion will be denied."

The following day, after voir dire commenced but out of the presence of the prospective jurors, counsel for defendant Bojorquez informed the court her client was once again requesting she be dismissed from the case. She told the court, "It is his opinion that he can handle it as well as me, and that he retained me and that he can fire me. It is his request that I be relieved from this matter." The court responded its ruling from the prior day would stand.

The next day, during another break in voir dire, counsel for defendant Bojorquez informed the court her client would like to speak to the court directly regarding his position about her representation. The trial court confirmed counsel was privately retained and then denied the request. Counsel stated it was

defendant Bojorquez's position that he had fired her and she was representing him against his will. Later that day, after the jury had been selected but before opening statements, defendant Bojorquez asked to speak with the court. The court denied the request, stating it did not communicate with defendants.

2. The right to discharge retained counsel

"The right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution. [Citations.] In California, this right 'reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.' [Citations.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 310-311 (*Verdugo*).) Consistent with the Sixth Amendment right to counsel, a non-indigent defendant may discharge retained counsel "with or without cause." (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).)

"The right to discharge a retained attorney is, however, not absolute. [Citation.]" (*Verdugo*, *supra*, 50 Cal.4th at p. 311.) "[A] defendant who desires to retain his own counsel is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory or if he arbitrarily desires to substitute counsel at the time of the trial." (*People v. Blake* (1980) 105 Cal.App.3d 619, 623-624.) "The trial court has discretion to 'deny such a motion if discharge will result in "significant prejudice" to the defendant [citation], or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice" [citations].'" (*Verdugo*, *supra*, at p. 311.) In this context, while "'a defendant seeking to discharge his retained attorney is not *required* to demonstrate inadequate representation or an irreconcilable

conflict, this does not mean that the trial court cannot properly consider the absence of such circumstances in deciding whether discharging counsel would result in disruption of the orderly processes of justice.' (*People v. Maciel* (2013) 57 Cal.4th 482, 513[(*Maciel*)].)" (*People v. O'Malley* (2016) 62 Cal.4th 944, 1004.)

The trial court did not abuse its discretion when it denied defendant Bojorquez's motion to discharge retained counsel as untimely because granting the motion would have disrupted the "'orderly processes of justice.'" (*Ortiz*, *supra*, 51 Cal.3d at p. 983.) Defendant Bojorquez first notified the court of his request to discharge counsel on the eve of jury selection in a five-defendant case. Defendant Bojorquez had no substitute counsel ready to step in, or even anyone in mind. Nor was he prepared, on the day he first sought to discharge counsel, to represent himself.[5]

As the trial court recognized, even if another attorney had been identified, no competent attorney would have agreed to take the case and start trial the next day. New counsel would have certainly needed and requested a continuance, resulting in significant delays. This would either have required the entire five-defendant trial to be continued for an indefinite period or would have required the bifurcation of defendant Bojorquez's trial. While the latter option would not have delayed the other defendants' trials, the lengthy trial with numerous witnesses

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[5] The record indicates defendant Bojorquez later stated during voir dire that he thought he could handle the matter as well as his attorney. Because defendant Bojorquez does not argue on appeal that he was denied the right to represent himself, and because he never asserted his right to self-representation, we need not analyze a self-representation issue.

(including one elderly victim) would have had to be repeated at some indeterminate point in the future.

Furthermore, trial counsel did not abandon defendant Bojorquez and reported she was ready for trial. There is no claim there was a conflict of interest between defendant Bojorquez and his lawyer, and the only explanation provided for defendant Bojorquez's request to discharge her was that he and his counsel had differences of opinion about the case. "That [defendant Bojorquez] had inexplicably [determined there was a difference of opinion with] his experienced and fully prepared counsel did not constitute good cause for granting the continuance requested, nor justify the disruption to the judicial process that would have ensued." (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 429.) Denial of the motion was not an abuse of discretion.[6]

For identical reasons, we conclude the trial court did not abuse its discretion by denying defendant Bojorquez's subsequent requests, which he made after voir dire had commenced and after jury selection had been completed.

B. Substantial Evidence Supports the Challenged Convictions and True Findings

When considering a challenge to the sufficiency of the evidence to support a conviction or sentencing enhancement,

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[6] Based on the record before us, counsel's representation during trial was appropriate. Counsel gave an opening statement and a reasonably effective closing argument; cross-examined witnesses; joined in objections; joined in a motion for acquittal and presented additional argument; participated in discussions regarding jury instructions and verdict forms, and generally demonstrated she was engaged in the proceedings.

"'"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 determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281; see also *People v. Livingston* (2012) 53 Cal.4th 1145, 1170.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

When undertaking a substantial evidence inquiry, "the testimony of a single witness that satisfies the standard is sufficient to uphold the finding" even if there is a significant amount of countervailing evidence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; see also Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Robertson* (1989) 48 Cal.3d 18, 44.) And "[i]t is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility." (*People v. Richardson* (2008) 43 Cal.4th 959, 1030.)

1. Substantial evidence supports defendant Vega's convictions on counts one through seven

Because defendant Vega was not present at Alvaro and Michael's home, the prosecution argued she was guilty of the crimes committed as either an aider or abettor or a co-conspirator. The jury was accordingly instructed on conspiracy, direct aiding and abetting, and the natural and probable consequences doctrine. We assess the sufficiency of the evidence to support co-conspirator or aiding and abetting liability.

"'One who conspires with others to commit a felony is guilty as a principal.' [Citation.]" (*Maciel*, *supra*, 57 Cal.4th at p. 515.) A conspiracy consists of two or more persons agreeing to commit a crime, together with the commission of an overt act by one or more of these parties in furtherance of the conspiracy. (*People v. Homick* (2012) 55 Cal.4th 816, 870 (*Homick*).) "'"Each member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design." [Citations.]'" (*In re Hardy* (2007) 41 Cal.4th 977, 1025-1026.) '"'The existence of a conspiracy may be inferred from the conduct, *relationship*, interests, and activities of the alleged conspirators before and during the alleged conspiracy.'" [Citation.]" (*Homick*, *supra*, at p. 870.) If the evidence supports an inference that the parties explicitly or tacitly came to a mutual understanding to commit a crime, it is sufficient to prove a conspiracy. (*Maciel*, *supra*, at pp. 515-516.)

In addition, "a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*).) "An aider and abettor is one who acts 'with knowledge

of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) "[O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator." (*McCoy*, *supra*, at p. 1118.) "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Among the factors that may be considered when assessing aiding and abetting liability are a defendant's presence at the crime scene, companionship with others involved in committing the offense, and the defendant's conduct before and after the crime is committed. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5 (*Juan G.*).) Evidence of a defendant's involvement in a conspiracy to commit a crime will often also show the defendant intended to aid and abet the commission of the crime. (See, e.g., *Maciel*, *supra*, 57 Cal.4th at p. 518.)

Defendant Vega argues there was no direct evidence she aided and abetted or participated in a conspiracy with respect to the crimes, and she further asserts the circumstantial evidence was not substantial. Her arguments, however, rely on unavailing attacks on Michael's credibility and hypothetical explanations for the incriminating circumstantial evidence. Under the applicable standard of review, the question is not whether the evidence could support defendant Vega's theory, but whether substantial evidence supports the jury's findings. (See, e.g., *People v.*

Houston (2012) 54 Cal.4th 1186, 1215 ["'[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding'"].)

The evidence presented at trial is sufficient to sustain defendant Vega's convictions under either an aiding and abetting or conspiracy theory of liability. Michael's testimony established defendant Vega was previously in some sort of relationship with him, he broke it off, and she was unhappy with his decision. During defendant Vega's relationship with Michael, she spent time at his home and Michael and Alvaro occasionally discussed finances, including how much money Alvaro made and when he was paid. Though defendant Vega was not involved in those conversations, the jury could reasonably infer, given the small size of the house, that defendant Vega overheard some of those conversations. Similarly, the jury could reasonably infer defendant Vega had learned details like the days on which Alvaro was normally paid—on the 15th and on the last day of the month—and how much money he made per month—approximately $4,000. Significantly, the defendants that actually carried out the robbery did so on November 15, insisted Alvaro give them "the check," and said they needed $4,000.

None of the victims knew any of the four defendants who invaded the Sanda home on November 15. Michael did, however, know defendant Vega. And defendant Vega's Facebook profile and phone contacts indicated she knew defendants Fernando and Jorge and was spending time with defendant Fernando. The jury could reasonably infer defendant Vega was involved in planning the robbery and told defendants Fernando and Jorge details like

where the Sandas live, how much money Alvaro makes, and when he is paid.

Indeed, the text message Michael received just before the robbery is strong evidence defendant Vega did just that. The day of the incident, defendant Vega sent Michael a message stating someone was "about to jack you guys" and admitting "I know the whole plan." Furthermore, when defendant Vega and Michael ceased spending time together, defendant Vega left three bags of her possessions in Michael's room. Defendant Fernando asked for the bags inside Michael's room during the robbery. And while most of the Sanda house was ransacked during the incident, those three bags were simply taken.

In addition, cell phone records demonstrated the phones belonging to defendants Vega, Fernando, and Jorge were used in San Bernardino in the early morning hours after the home invasion robbery. Evidence indicated defendants Vega and Fernando's cell phones were in the same vicinity, permitting an inference that defendant Vega rendezvoused with defendant Fernando after the robbery.

Cell phone records further demonstrated defendant Vega sent a number of threatening text messages to Michael after defendant Fernando was arrested and shortly before she was arrested. For example, in one message defendant Vega wrote, "Imma tell you right now if you testify on anything you do know you got more people . . . watching over your house and your boy too, right . . . you better drop the charges." Other messages stated: "We will all go down, do you got that?"; "So you better meet me ASAP before you run out of time"; and "I'm not bitch, a snitch or a rat, but papers are gettin' done." Detective Rivera testified the latter statement regarding "papers" was a threat to

do Michael harm and meant he was being labeled as a snitch. Defendant Vega's text messages telling Michael to drop the charges and threatening him were further evidence the jury could reasonably use to infer she aided or conspired with those who carried out the robbery and was concerned about her criminal liability. (See *Homick*, *supra*, 55 Cal.4th at p. 870 [existence of conspiracy may be inferred from the relationships, conduct, interests, and activities of the alleged conspirators]; *Juan G.*, *supra*, 112 Cal.App.4th at p. 5 [factors to consider in determining aiding and abetting include presence at the crime scene, companionship, and conduct before and after the offense].)

Based on these facts, we additionally conclude there is substantial evidence to support defendant Vega's convictions for false imprisonment and carjacking under either a conspiracy theory of liability or under the natural and probable consequences doctrine. (*People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*); *In re Hardy*, *supra*, 41 Cal.4th at pp. 1025-1026.) A rational trier of fact could find the other defendants falsely imprisoned the victims and stole Normandia's car in order to facilitate the successful completion of the robbery, which was all part of the plan as defendant Vega well knew. Substantial evidence also permitted the jury to find the false imprisonment and carjacking offenses were natural and probable consequences of the robbery. It is reasonably foreseeable that robbing someone's home will involve detaining or falsely imprisoning them, and it is also reasonably foreseeable that robbing a home would involve stealing the car of one of the victims at the residence. In short, "'a reasonable person in . . . defendant's position would have or should have known that the [false imprisonment and carjacking were] a reasonably foreseeable

consequence of the [robbery] aided and abetted.' [Citation]." (*Medina*, *supra*, at p. 920.)

2. Substantial evidence supports defendant Fernando's kidnapping conviction

A conviction for kidnapping to commit robbery requires proof that the movement of the victim "is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in," the robbery. (§ 209, subd. (b)(2).) "These two elements are not mutually exclusive but are interrelated." (*People v. Vines* (2011) 51 Cal.4th 830, 870.) "'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* (2017) 7 Cal.App.5th 644, 667.)

"As to whether the movement was more than merely incidental to the commission of the crime, 'the jury considers the "scope and nature" of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy . . .' this element. [Citation.]" (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1471 (*Simmons*).) Additionally, "the fact that the movement of a robbery victim *facilitates* a robbery does not [alone] imply that the movement was merely incidental to it." (*People v. James* (2007) 148 Cal.App.4th 446, 454 (*James*).) The question is whether there was any gratuitous movement of the victims above that necessary to assist the robbers in obtaining the property. (See *People v. Washington* (2005) 127 Cal.App.4th

290, 299.) "Lack of necessity is a sufficient basis to conclude a movement is not merely incidental; necessity alone proves nothing." (*James*, *supra*, at p. 455.)

"The second prong . . . refers to 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." (*People v. Martinez* (1999) 20 Cal.4th 225, 233.)

Substantial evidence supported the jury's findings as to both elements. First, moving Normandia was not necessary to rob either of the other two victims. Normandia had already left the house and was walking toward his car when defendant Fernando accosted him. Normandia had gotten close enough to his car to unlock it. Defendant Fernando did not need to move Normandia back into Alvaro and Michael's house in order to rob Normandia. He could have simply demanded his wallet, phone, and keys in the driveway. Nor was moving Normandia into the house necessary to accomplish defendants' goal of robbing Alvaro and Michael. Michael was still in the doorway of the house when defendant Fernando stopped Normandia, so Normandia was not needed to gain access to the house. Normandia was apparently moved so defendants could avoid detection, and to decrease the likelihood he would escape. This, alone, is sufficient to establish the movement was more than incidental. (*People v. Salazar* (1995) 33 Cal.App.4th 341, 347 [movement that was incidental to

particular plan to avoid detection and make crime easier to commit was not incidental to actual commission of crime itself].) It is also significant here that the underlying crime planned was not the robbery of Normandia, but the robbery of Alvaro and Michael. (*James*, *supra*, 148 Cal.App.4th at p. 457 [movement of victim from outside of business to inside the business's premises was significant in part because the defendants intended to rob the manager of the business, not the victim].) Normandia's movement was thus neither "incidental to" nor "a necessary or natural part" of either robbery committed that night.

Second, moving Normandia from the driveway, where he was in view of the public, to the inside of the house, where he was not, increased the risk of harm to him. While defendant Fernando is correct that simply removing someone from public view does not necessarily increase a victim's risk of harm (*People v. Stanworth* (1974) 11 Cal.3d 588, 598), it did so here. Normandia was standing in a residential driveway, next to his truck and potentially in view of neighbors or passing drivers when defendant Fernando approached him. Moving Normandia into the house, away from public view and from an easy means of escape, increased the risk of harm to him. The movement provided defendant Fernando and the others "with new opportunities to engage in additional and more dangerous crimes out of public view, and it increased the possibility of something going awry." (*Simmons*, *supra*, 233 Cal.App.4th at p. 1472.) Additionally, the jury had ample grounds to believe the movement increased the risk of psychological harm to Normandia. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885-886 [increased risk of harm includes increase in risk of psychological trauma].) Rather than a brief exposure to an assailant with a

gun outdoors, he was forced to return to the house at gunpoint, and then forced to stay in a room while defendant Fernando threatened Michael and Alvaro with the gun for ten to twenty minutes.

Defendant Fernando's reliance on *People v. Killean* (1971) 4 Cal.3d 423, 424 (*Killean*)) does not compel a different conclusion. In *Killean*, the defendants intended to rob a jeweler and his companion. In the course of committing the robbery, the defendants caused them to move across the threshold of an apartment and through various rooms in search of valuables. (*Ibid.*) The robbers in *Killean* moved the victims from room to room in order to locate the items they wished to steal. Here, in contrast, Normandia was outside on the driveway before he was moved to the interior of the house, and his presence inside the house was unnecessary for the commission of either the planned robbery of the Sandas or the robbery of Normandia.

3. Substantial evidence supports the firearm enhancements

Section 12022.53, subdivision (b) states any person who personally uses a firearm in the commission of enumerated felonies, including robbery (§ 12022.53, subd. (a)(4)), "shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years." A "firearm" is "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion." (§ 16520, subd. (a).) The firearm need not be operable to support a finding of use. (§ 12022.53, subd. (b); *People v. Bland* (1995) 10 Cal.4th 991, 1005.) However, "toy guns obviously do not qualify as a 'firearm,' nor do pellet guns or BB

guns because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile." (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).)

Proof of a defendant's use of a firearm during a robbery does not require physical production of the weapon by the prosecution. (*People v. Aranda* (1965) 63 Cal.2d 518, 532 (*Aranda*), superseded by constitutional amendment on other grounds as stated by *People v. Fletcher* (1996) 13 Cal.4th 451, 465.) "If the weapon cannot be found, the jury may . . . draw an inference from the circumstances surrounding the robbery that the gun was [real]." (*Aranda*, *supra*, at p. 533.) "Circumstantial evidence alone is sufficient to support a finding that an object used by a robber was a firearm." (*Monjaras*, *supra*, 164 Cal.App.4th at p. 1436; *People v. Green* (1985) 166 Cal.App.3d 514, 516-517; *Aranda*, *supra*, at p. 532 ["Testimony by witnesses who state that they saw what looked like a gun, even if they cannot identify the type or caliber, will suffice"].) Indeed, "[m]ost often, circumstantial evidence alone is used to prove the object was a firearm. This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation." (*Monjaras*, *supra*, at p. 1436.)

Defendants Jorge and Fernando argue there is insufficient evidence to prove the object defendant Fernando brandished was a real firearm. Defendant Jorge argues the evidence was insufficient because the firearm was never recovered, Detective Morgan could not affirmatively tell from pictures of what was

allegedly the same firearm whether it was a real firearm or a "very good replica," none of the victims testified the gun was a real firearm, no bullets were ever fired, the gun was never cocked, and Michael's description of the firearm was inconsistent.

The Third Appellate District's decision in *Monjaras* illustrates why the argument fails. In that case, the defendant told the victim to give him money and pulled up his shirt to show the handle of a black pistol stuck in his waistband. The court found this was sufficient to support the jury's finding that the pistol was a real firearm even though it was never recovered and the victim could not definitively state it was a real gun. (*Monjaras*, *supra*, 164 Cal.App.4th at pp. 1436-1438.) Here, defendant Fernando brandished an item the victims consistently stated was a gun, though they alternately described it as a semi-automatic pistol or a submachine gun. Defendant Fernando stuck the firearm in Normandia's back and pointed it at Normandia, Alvaro, and Michael at various points. Though none of the victims directly testified they thought the gun was real, defendant Fernando's "'own . . . conduct in the course of [the] offense'" (*id.* at pp. 1436-1437) reasonably supports the jury's determination that he used a firearm. While it is conceivable the item defendant Fernando used during the incident was not a real firearm, "the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the [gun] was a real, loaded firearm and that he was prepared to shoot the victim[s] with it if [they] did not comply with his demand." (*Id.* at p. 1437.)

Defendant Jorge acknowledges *Monjaras* opines his firearm enhancement argument here has "been put to rest" (*Monjaras*, *supra*, 164 Cal.App.4th at p. 1435) but he argues the case is inapplicable because the evidence regarding the "true nature" of

the firearm was "equivocal." For the reasons already detailed, we are not persuaded and conclude instead that substantial evidence supports the section 12022.53 true findings.

C. Defendant Fernando's Request for Section 12022.53, Subdivision (h) Consideration

In supplemental briefing, defendant Fernando seeks a remand to permit the trial court to exercise its discretion to strike or dismiss his firearm enhancement under Penal Code section 12022.53, subdivision (h) if it so chooses. The jury found true, as to defendant Fernando, the firearm enhancement allegations under section 12022.53, subdivision (b). At sentencing, imposition of the enhancement was mandatory and the trial court imposed it without comment. (§ 12022.53, as amended by Stats. 2010, ch. 711, § 5.) Pursuant to Senate Bill No. 620 (effective January 1, 2018), however, section 12022.53, subdivision (h) has been amended to allow a trial court to exercise its discretion to strike or dismiss a section 12022.53 enhancement at the time of sentencing or resentencing. (Stats. 2017, ch. 682, § 2.)

The Attorney General concedes and we agree that section 12022.53, subdivision (h) applies retroactively to defendant Fernando. (*People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 76; *In re Estrada* (1965) 63 Cal.2d 740, 745, 747-748.) The Attorney General asserts, however, that remand is inappropriate because "no purpose would be served in remanding for reconsideration." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*).) Specifically, the Attorney General argues the trial court would not have exercised its discretion to strike the firearm enhancement because (1) there were five circumstances in aggravation in defendant Fernando's

probation report and only one in mitigation, (2) the trial court imposed the high term on count 1, and (3) the trial court imposed the maximum possible sentence in light of section 654.

We are not persuaded. During the initial sentencing hearing in *Gutierrez*, the trial court noted the defendant was the "'kind of individual the law was intended to keep off the street as long as possible'" and indicated it would not have exercised its discretion to lessen the sentence. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) Here, though the court did impose the high term on count one, it did not state or imply it would have imposed the firearm enhancement even if it had the discretion to decline to do so.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Because it is possible (though perhaps unlikely) the trial court would choose to exercise its discretion to strike the firearm enhancement under section 12022.53, we will adhere to the general rule and remand for resentencing.

D. Correction of Defendant Fernando's Abstract of Judgment

A clerical mistake appears in the abstract of judgment for defendant Fernando's indeterminate sentence. The trial court imposed an indeterminate sentence of life with the possibility of parole on count 6. Defendant Fernando's indeterminate abstract of judgment, however, indicates the sentence on count 6 is life *without* the possibility of parole. An appellate court has

jurisdiction to order correction of an abstract on its own motion so that the abstract accurately reflects the sentencing court's oral judgment. (*People v. Jones* (2012) 54 Cal.4th 1, 89.) Accordingly, we order defendant Fernando's indeterminate sentence abstract of judgment modified to reflect a sentence of life with the possibility of parole on count 6.

DISPOSITION

The judgments as to defendants Bojorquez, Jorge, and Vega are affirmed. As to defendant Fernando, the case is remanded for the sole purpose of permitting the trial court to exercise its discretion under section 12022.53, subdivision (h), if it so chooses, and to prepare a revised indeterminate abstract of judgment for Fernando's sentence on count 6 that indicates the sentence imposed was life with the possibility of parole. In all other respects, defendant Fernando's judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, J.*

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