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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,	B280392
Plaintiff and Respondent,	(Los Angeles County
v.	Super. Ct. No. VA133685)
ROHASAN HAKEEM DAVIS et	
al.,	
Defendants and Appellants.	

APPEAL from judgments of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed and remanded, in part.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant Rohasan Hakeem Davis.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant Justin Forbes Delane Lemon.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Rohasan Hakeem Davis and Justin Forbes Delane Lemon (and a third defendant, Rondell Jermaine Mitchell, who is not a party to this appeal) were charged by information with multiple counts of robbery (Pen. Code, § 211; counts 1, 2, 8 & 9), kidnapping to commit robbery (§ 209, subd. (b)(1); counts 3 & 4), and false imprisonment (§ 236; counts 6, 7, 10 & 11). Defendant Davis was also charged with two counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1); counts 5 & 12). The information included firearm, gang, and prior offense allegations. As to Davis, it was alleged that he personally used a firearm, that a principal personally used a firearm, and that a principal personally used a firearm during the commission of the offenses. (§§ 12022.53, subds. (b) & (e)(1), 12022, subd. (a)(1).) As to Lemon, it was alleged that a principal was armed with a firearm during the commission of the offenses. (§§ 12022.53, subds. (b) & (e)(1), 12022, subd. (a)(1)).

The case was tried in a joint trial to separate juries. Defendant Davis's jury found him guilty as charged on all counts, except that it found him guilty of the lesser included offense of simple kidnapping on counts 3 and 4, and not guilty of kidnapping to commit robbery. Defendant Lemon's jury found him guilty as charged. The juries found the gang and firearm allegations to be true. The trial court found true that each defendant served a prior prison term and suffered a strike conviction.

Defendant Davis was sentenced to an aggregate term of 81 years, consisting of the high term of five years for count 1, doubled because of his prior strike, plus 10 years for the firearm enhancement, 10 years for the gang enhancement, and five years for his prison prior. He received consecutive sentences of one-third the midterm for counts 2, 3, 4, 8, and 9, doubled because of his prior strike, plus one-third the firearm and gang enhancements for each

of these counts. He received midterm sentences on the remaining counts, which were stayed pursuant to Penal Code section 654.

Defendant Lemon was sentenced to an aggregate term of 68 years to life, consisting of the midterm of three years on count 1, doubled because of his strike prior, plus 10 years for the firearm enhancement, and five years for the gang enhancement. Lemon's *Romero*<sup>1</sup> motion was granted as to the remaining counts. He received consecutive sentences of one-third the midterm for counts 2, 8, and 9, plus one-third the firearm enhancements. He received indeterminate terms of seven years to life on counts 3 and 4, plus 10 years for the firearm enhancements on each of these counts. He received the low terms on the remaining counts, which were stayed pursuant to Penal Code section 654.

Defendants timely appealed.

Davis makes numerous claims of error on appeal. He contends that revocation of his in propria persona (hereafter pro. per.) jail privileges infringed on his right of self-representation, and that the trial court erroneously denied his renewed request to represent himself for the trial on his priors and sentencing. Defendant also contends there was insufficient evidence of the gang enhancement. He contends that his sentencing counsel was ineffective for failing to prosecute the *Romero* motion filed by his trial counsel.

Lemon contends there was insufficient evidence supporting his convictions for kidnapping to commit robbery, reasoning that his movement of the victims in the RadioShack robbery was merely incidental to the robbery.

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<sup>1</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Both defendants contend that remand is required for the trial court to consider its discretion under Senate Bill No. 620 regarding their firearm enhancements under Penal Code section 12022.53.

We find no merit in any of the contentions raised on appeal, except that Lemon is entitled to remand under Senate Bill No. 620. We otherwise affirm the judgments in their entirety.

## **BACKGROUND**

### **1. GoWireless Robbery**

On January 16, 2014, M.S. and L.C. were working at a GoWireless mobile phone store in Long Beach. Defendant Davis walked into the store, said something about iPhones, and then left. Later that day, around closing time, Lemon entered the store, and M.S. told him about the features of the iPhones. A short time later, Davis walked into the store. Davis gestured to a gun concealed in his pants pocket, and ordered M.S. and L.C. to the back room of the store. Once in the back room, Davis pulled out the gun. Lemon asked where the iPhones were, and M.S. told him they were in the safe. Davis directed M.S. to open the safe, and when M.S. struggled to open it, Davis placed the gun to his head and told him to “hurry up.” After M.S. opened the safe, Davis told him to place its contents into a mesh bag.

Davis told L.C. to kneel on the ground, and directed Lemon to tie her up. Lemon bound her hands behind her back with duct tape. Defendants told M.S. to sit in a chair, and Lemon bound his hands as well.

Defendants left the back room with iPhones, iPads, Samsung Galaxy phones, and other “top tier” electronics. Several minutes later, M.S. walked out of the back room and saw that defendants had left the store.

## **2. RadioShack Robbery**

On the morning of January 29, 2014, E.P. and J.T. were working at a RadioShack store in Lakewood. E.P. was helping a customer, D.M., at the front counter. Defendants Lemon and Davis entered the store, and J.T. greeted them. As J.T. attempted to help defendants with a controller they asked about, Davis put a gun to D.M.'s back, and told everyone to go to the back room. D.M. was "terrified." Once in the back, defendants zip tied D.M.'s and J.T.'s wrists. Lemon told E.P. to get the key for the merchandise. She retrieved the key from the cash register, and handed the \$100 in the register to Davis. Defendants then walked E.P. to the back room, to the locked metal cage where merchandise was stored. The cage was 20 or 30 feet from the public area of the store, and was not visible to the public. Lemon told E.P. to help load merchandise into bags, including phones, tablets, computers, and GPS units.

While the robbery was underway, delivery driver L.G. arrived with office supplies at the RadioShack. He noticed the front of the store was empty, and as he walked toward the back of the store with his delivery, Davis approached L.G. with a gun, and demanded his phone. Davis then took L.G. to a remote corner of the back of the store, where J.T. and D.M. were bound. Lemon tied up L.G., and then joined in loading electronics into bags.

After the merchandise was loaded, defendants took E.P. "further back" into the back room of the store, where the others were bound. There were no windows in the back area of the store, and it was not visible from the front of the store. Davis bound E.P.'s hands with zip ties.

Defendants told the victims not to move and left with the merchandise.

E.P. summoned police after defendants left the store. She was able to get loose from her bindings, and freed the others.

### **3. Police Pursuit and Arrest**

Some of the merchandise taken from the RadioShack was equipped with tracking devices that triggered upon motion. Every six or seven seconds, the devices would record the location of the merchandise. Los Angeles County sheriff's deputies, with the help of a helicopter unit, were able to track the movement of the merchandise, and saw three men flee an SUV, corresponding with the location of the tracking devices. A search of the vehicle revealed iPad minis, Kindle Fires, digital cameras, latex gloves, and a gun. Davis, Lemon, and Mitchell, who had been driving the SUV, were found in the surrounding neighborhood and arrested.

Merchandise connected with the GoWireless store was found during a subsequent search of Lemon's girlfriend's home.

### **4. Lemon's Confession**

After Lemon was arrested, he spoke with Los Angeles County Sheriff's Department Sergeant Stephanie Mandujano. Lemon's recorded confession was played only to his jury. Lemon's description of the crime was consistent with the evidence adduced at trial. According to Lemon, the robbery was Mitchell and Davis's idea, and Lemon was just along for the ride. Davis had a gun and Mitchell was driving. Lemon admitted that he tied up the victims, and put merchandise into bags.

### **5. Gang Evidence**

Raul Ibarra, a detective with the Los Angeles County Sheriff's Department gang unit, testified as an expert on the Southside Compton Crips. The gang has 250 members, with territory extending from Compton Boulevard in the North, Santa Fe Avenue to the West, Greenleaf to the South, and Long Beach Boulevard to the East. Detective Ibarra had personal knowledge that both defendants Lemon and Davis were members of the Southside Compton Crips. He had contacted them in the field, and they had

admitted their membership in the gang to him and other deputies. Lemon went by the moniker of Little J-Roc. Davis's moniker is Y-Roc or Young Roc. Mitchell was also a member of the gang, going by the moniker Little E-Dog. Davis has tattoos associated with the gang, including "SS" and "CC."

Detective Ibarra testified that gang members elevate their status within a gang by "put[ting] in work," e.g., by committing crimes that benefit the gang or any of its members. For example, the crime of shoplifting could benefit a gang member who needs a particular item. Gang members will often commit crimes with other members of their gang because they are comfortable with each other, and trust one another. Gang members often have designated roles during the crime; one member will carry a gun, the other will secure merchandise, and another will act as a getaway driver. When multiple gang members commit a crime together, they can vouch for each other and tell others about their role in the crime.

Based on a hypothetical mirroring the facts of the RadioShack robbery, Detective Ibarra opined that the robbery was committed for the benefit of, and in association with, a criminal street gang. The fact that two gang members came together with the same goal of committing a robbery demonstrated an association. The gang also benefitted because the crimes enhanced the reputation of the individual gang members and the gang as a whole. "Take-over" robberies, where individuals are bound and threatened with a gun, make common citizens feel "terrified." Because gang members like to brag about their crimes to fellow gang members, "females," and rival gang members, the gang benefits because rival gang members become scared to harm the gang. The crime benefits both the gang and the individual members.

Following a hypothetical based on the facts of the GoWireless robbery, Detective Ibarra similarly concluded that the crime benefited, and was in association with, the Southside Compton Crips.

#### **6. Lemon's Defense Evidence**

Lemon had been a member of the Southside Compton Crips since he was 12 or 13. He knew Davis "from the streets." Lemon also knew Mitchell from the "neighborhood." He met Mitchell through another gang associate, and they would see each other socially at a "drug house" where Lemon bought drugs. Lemon started to buy drugs from Mitchell on credit over a period of seven or eight months. Mitchell eventually demanded the money Lemon owed him, but Lemon could not pay him. This led to tension and animosity between Lemon and Mitchell.

Mitchell asked Lemon to drive him to Las Vegas to pick up some drugs and weapons. Lemon agreed, but did not drive Mitchell as planned, and Mitchell was unable to consummate the deal. He told Lemon that he owed him the money for the drugs, as well as \$60,000 for the lost opportunity in Las Vegas. Mitchell threatened to kill Lemon and his wife and children over the debt.

On the day of the GoWireless Robbery, Mitchell and Davis drove up to Lemon, and told him to get in the car. Mitchell told Lemon that since he did not have his money, "we're going to go get the money" by any means necessary. Mitchell then drove to Long Beach. Mitchell threatened Lemon's wife and children if Lemon did not go through with the robbery. Mitchell and Davis also threatened to kill Lemon if he did not go through with it. Lemon knew that Davis had a gun. He also saw that Mitchell had a gun tucked into his waistband.

Upon arriving at the store, Davis told Lemon to wait outside. Davis went inside, and came out without robbing the store,



explaining that there were customers present. They drove back to Compton.

Lemon spent several hours at a drug house he frequented, without a means to get home. Later that evening, Mitchell and Davis arrived where Lemon was hanging out, and Mitchell renewed his threats. The three returned to the same phone store.

Davis instructed Lemon to follow him into the store. Davis drew the gun, and as they were walking the employees to the back of the store, Davis told Lemon to get the phones from the front of the store. However, there were no phones, so Lemon walked to the back of the store. Davis told Lemon to tie up the female employee. After the male employee opened the safe, Davis told Lemon to bind him as well. Davis filled up bags with the merchandise from the safe. After they left, the group switched cars, and drove to Cerritos where they sold the merchandise for \$20,000 or \$30,000. Davis gave Lemon a phone and a WiFi box as a means of preventing him from talking to authorities.

On January 29, 2014, Lemon was “stranded” in Compton, and Mitchell offered him a ride home to Orange County. Mitchell insisted that Lemon call Davis, and at Mitchell’s request, Davis met up with Lemon and Mitchell. Mitchell then told Lemon that they were going to do another robbery because Lemon’s debt had not been paid in full. The three men got into Mitchell’s truck, and they drove to the RadioShack in Lakewood. Davis had a gun.

Davis and Lemon entered the store, where Davis pointed his gun at a customer, and told everyone to go to the back of the store. Davis handed zip ties to Lemon, and told him to tie up everyone. Lemon was afraid of Davis and complied. Lemon told one of the employees, and the “older lady” that “everything was going to be okay . . . nobody’s going to hurt you.”

Lemon and Davis heard a chime indicating that someone had entered the store. Davis brought the person to the back of the store, and told Lemon to tie him up as well. Eventually, Davis and Lemon left with bags full of merchandise.

As the group sat in traffic on the way back from the robbery, they noticed a helicopter hovering above their vehicle, and they exited the freeway. They got out of the car, and split up. Lemon was found hiding in a trash can in a backyard before he was arrested.

## **DISCUSSION**

### **Davis's Appeal**

#### **1. *Pitchess*<sup>2</sup> Review**

Before trial, Davis moved to discover complaints of violations of constitutional rights, fabrication of evidence and probable cause, illegal search and seizure, false reports, among other categories, for several Los Angeles Sheriff's deputies and detectives involved in this case. The motion was granted in part, with the trial court concluding that defendant demonstrated good cause for discovery of records relating to false testimony and manufacture of evidence as to gang expert, Detective Ibarra. An in camera hearing was held on August 14, 2015, and the custodian of records for the Sheriff's Department was present, was sworn in, and provided records from Ibarra's personnel file for the court to review. At the conclusion of the hearing, the court ordered discovery of one complaint investigated by internal affairs.

A criminal defendant is entitled to discovery of relevant documents or information in the confidential records of the peace officers, provided it does not concern officer conduct occurring more than five years before the incident, the results of internal police

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<sup>2</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

investigations, or facts with no practical benefit to the defense. (*People v. Gaines* (2009) 46 Cal.4th 172, 179, 182; see also Evid. Code, § 1045, subd. (b).) We review the trial court's determination on the discoverability of material in peace officer personnel files for an abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

Defendant has requested that this court conduct an independent examination of the in camera *Pitchess* proceedings to determine whether any responsive documents were wrongly withheld. Such a review is authorized under *People v. Mooc, supra*, 26 Cal.4th at page 1228. We have reviewed the record of the trial court proceedings, including a sealed reporter's transcript of the trial court's in camera review of the records. Based upon our review, we conclude the trial court's order concerning the disclosure of *Pitchess* materials was correct, and that no additional discoverable documents existed.

## **2. Revocation of Pro. Per. Jail Privileges**

Davis contends that revocation of his pro. per. jail privileges infringed on his right of self-representation, reasoning there was no good cause to terminate all of his in-custody privileges. He also contends he was "compelled to relinquish his fundamental right of self-representation as he was not provided with reasonable resource[s]" once his in-custody pro. per. privileges were revoked. Defendant acknowledges that "a limitation of the use of the library" might have been warranted under the facts of this case, but that the denial of other resources, such as a runner and pro. per. funds "was not in any way designed to assure jail security or to safeguard [jail] staff or other inmates from [defendant]."

### **a. Procedural history**

On October 15, 2014, before trial began, the court granted Davis's request to represent himself. One year later, on October 16,

2015, the Los Angeles County Sheriff's Department conducted an administrative hearing, pursuant to *Wilson v. Superior Court* (1978) 21 Cal.3d 816 (*Wilson*), to revoke defendant's in-custody pro. per. privileges for cause.

According to the Sheriff's Department, defendant had numerous disciplinary incidents related to the exercise of his pro. per. privileges. On October 13, 2015, Deputy Lawrence Ontiveros asked defendant to move from a private booth to a phone booth in the attorney room, during a legal visit with his gang expert, due to the high security status of the "next inmate." Defendant refused to comply, and began to argue with Deputy Ontiveros. Defendant asked to speak with a superior officer, and then continued to argue with Sergeant Ha, and used profanity. He called Deputy Ontiveros a "bitch." Defendant's disruptive behavior delayed operations in the attorney room, including a meeting between an attorney and his client. Defendant also "created an unsafe situation for the high security inmate and deputy [personnel]."

The Sheriff's Department also stated defendant "has an extensive history of misconduct" including "[i]nsubordination, profanity towards staff, fighting, being recalcitrant, and challeng[ing] the staff to fight." For example, on June 8, 2015, defendant entered inmate Deblane Arthur's cell in the "pro[.] per[.] module" where they were both housed, and assaulted Mr. Arthur. Mr. Arthur thereafter "gave up his pro[.] per[.] status, to avoid any further physical altercations." According to the Sheriff's Department, many altercations in the "pro[.] per[.] module" occur in the law library, because lines of inmates accumulate to enter the library. Under these circumstances, the defendant "has the means and potential to seriously harm deputy personnel and/or other pro[.] per[.] inmates." The Sheriff's Department alleged that defendant's conduct violated the Los Angeles County Pro. Per. Policy and

Memorandum, which provides that inmates exercising pro. per. privileges have an “affirmative duty to exercise the privileges in such a manner as not to infringe upon [p]ro[.] [p]er[.] privileges of other inmates.”

In response to the Sheriff’s Department’s allegations, defendant requested to have his gang expert and the high security inmate involved in the October 13, 2015 incident present for the *Wilson* hearing. The Sheriff’s Department denied his request for “security concern[s].” According to defendant, he had a court order to use a booth in the attorney room, and Deputy Ontiveros violated that order by asking him to move. He admitted to using profanity and calling Deputy Ontiveros a “bitch.” Defendant wanted to keep his pro. per. status.

The *Wilson* hearing was held on October 16, 2015. After receiving the evidence, the hearing officer, Lieutenant Gunnels, concluded that defendant had violated jail rules and the Los Angeles County Pro. Per. Policy and Memorandum. He concluded that defendant’s in-custody pro. per. privileges should be revoked for cause.

The administrative record of the hearing was provided to the trial court, which included a copy of the rules for pro. per. inmates, defendant’s notice of the administrative hearing, numerous Sheriff’s Department inmate discipline reports, defendant’s request for witnesses at the hearing, and the order revoking defendant’s pro. per. privileges.

The inmate discipline reports provided the details of the attorney room incident, as well as defendant’s assault on Mr. Arthur. An inmate misconduct history report showed eight disciplinary incidents, occurring between March 31, 2014, and November 4, 2015. Many of incidents involved defendant wandering around in restricted areas of the jail. Defendant used

profanity and was argumentative with staff when confronted about his wandering, and responded that he was allowed to roam freely because he was “pro[.] per.” In one of the incidents, defendant was returning from using the law library when he entered an area he was not allowed to access.

On December 17, 2015, the trial court held a hearing pursuant to *Wilson* to determine whether Davis would permanently lose his pro. per. privileges in jail. The court reviewed a tape recording of the *Wilson* hearing, as well as a video of the hearing, a video of the October 13, 2015 incident (which was inaudible), and the administrative record provided by the Sheriff’s Department. The court also reviewed a declaration from defendant’s expert regarding the October 13, 2015 incident, and a declaration from defendant’s investigator.<sup>3</sup>

When asked if he had any objection to how the hearing was conducted, defendant argued that he was not allowed to present witnesses, and that the video of the October 13, 2015 incident was not played at the hearing. Defendant stated that the evidence would have shown that he never called Deputy Ontiveros the “B-word.” However, defendant admitted that he told the deputy to “shut the F up.”

The court found no substantial difference between the two statements, reasoning that they were “both inappropriate.”

The court then reviewed the disciplinary records provided by the Sheriff’s Department. Defendant did not deny that he got into a fight with Mr. Arthur, but argued that it was “mutual conflict.” He denied one incident, where he was found roaming in a restricted area of the jail after visiting the law library, but generally admitted the other allegations concerning incidents of wandering were true.

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<sup>3</sup> These declarations are not part of the record on appeal.

The court found that the declarations provided by defendant's gang expert and investigator did not contain any helpful evidence.

The court concluded that the administrative hearing was properly conducted, and that defendant's pro. per. privileges were properly revoked for his violation of the jail and pro. per. rules. The court then told defendant "[y]ou can continue to represent yourself if you like. The problem is, as you probably have already figured out is you will not be able to go to the law library. I am not able to give you any pro[.] per[.] funds, so you have no money. I can, if you have an expert that needs to be appointed, I pay the expert, but I don't pay for your phone. . . . I can give you paper and pencils. But no law library, no legal runner. And you will have to just, you know, visit with your people without having access to the pro[.] per[.] library. And [so] you can do that sir. You do have back-up counsel. If they can be ready for trial . . . . [¶] As you know, I was already pushing this thing to trial. You have had over a year representing yourself, it is plenty of time. So you are going to be more frustrated now in trying to prepare your case because you don't have access to these things. So that is certainly your choice. You can decide to do it the hard way, that's up to you. . . . [¶] I am not giving you more time because you chose a more difficult route."

Defendant initially decided to remain pro. per., but later in the hearing, relinquished his status and requested counsel. The matter proceeded to trial with defendant represented by Charles Frisco.

#### **b. Analysis**

A criminal defendant's right to self-representation has been firmly established since *Faretta v. California* (1975) 422 U.S. 806, 821, 834 (*Faretta*). A necessary corollary to this right is that a defendant must be provided access to sufficient resources to prepare an adequate defense. (*People v. Moore* (2011) 51 Cal.4th 1104, 1124

(*Moore*.) These resources may include access to “ ‘a telephone, law library, runner, investigator, [and] advisory counsel.’ ” (*Ibid.*) However, neither the right to self-representation nor its accompanying privileges are absolute. The right can be revoked and the privileges can be restricted if abused. (*Faretta*, at p. 834, fn. 46; *Moore, supra*, at p. 1125.)

An administrative hearing to restrict or revoke a defendant’s pro. per. privileges must provide a defendant with: “(1) an opportunity to appear before the decision-making body, (2) written notice of the charge against him at least 24 hours in advance of the hearing, (3) an opportunity to present witnesses and documentary evidence if doing so will not be unduly hazardous to institutional safety, (4) an impartial hearing body, and (5) a written statement of the evidence relied on and of the reasons for the disciplinary action taken.” (*Wilson, supra*, 21 Cal.3d at pp. 825-826.)

Due process also requires judicial review of the jail’s administrative hearing. (*Wilson, supra*, 21 Cal.3d at p. 827.) On appeal, the trial court’s findings are reviewed for substantial evidence. (See *Moore, supra*, 51 Cal.4th at p. 1126.) We examine the record in the light most favorable to the trial court’s decision to determine whether it discloses “credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 711.)

Defendant does not meaningfully dispute that the hearing he received in jail complied with the due process requirements of



*Wilson*.<sup>4</sup> Rather, he contends there was no substantial evidence of good cause for termination of his privileges.

Good cause for restriction or termination of pro. per. jail privileges includes violation of jail rules, or the need to place the defendant in administrative segregation due his threat to jail security. (*Wilson, supra*, 21 Cal.3d at pp. 821-822.) Here, there was ample evidence that defendant abused his in-custody privileges, and violated jail rules. Defendant refused to comply with a deputy's orders in the attorney room, used profanity, and interfered with the operations of the attorney room. He also assaulted another inmate in the pro. per. housing module. Defendant also, on several occasions, used his status as a pro. per. to wander into restricted areas of the jail, and was recalcitrant with jail staff when confronted. On this record, good cause supported the revocation of his privileges. (*Id.* at pp. 821-822.)

Defendant also argues that revoking his pro. per. privileges "eliminated [his] ability to meaningfully represent himself at trial" and therefore denied him his right of self-representation. We are not persuaded. Defendant relinquished his right to represent

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<sup>4</sup> Defendant's opening brief states that he was "arbitrarily . . . denied the right to call the gang expert as a witness" at the revocation hearing. He contends, without analysis, that his hearing was "perfunctory." Defendant attempts to fully develop this argument for the first time in his reply brief. Unfortunately, this is too late. (*People v. Mitchell* (1995) 36 Cal.App.4th 672, 674, fn. 1.) And, in any event, the claim lacks merit. Defendant's right to call witnesses is committed to the discretion of the Sheriff's Department, because of "the hazards to institutional interests." (*Wilson, supra*, 21 Cal.3d at p. 826.) Moreover, defendant has failed to show prejudice, and likely could not do so. The trial court found the declarations submitted by his proposed witnesses were not helpful. In fact, defendant admitted he engaged in much of the conduct on which the revocation of his privileges was based.

himself, after the trial court made clear that although he would no longer receive any privileges, he could continue to represent himself. The court noted that the case was nearly ready for trial, and that defendant had had ample time to prepare. Limitations on defendant's privileges did not prevent him "from making an intelligent and voluntary decision to continue to represent himself provided that he had been warned of the dangers and difficulties that such a choice might entail." (*Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 892.) Here, defendant chose to proceed with counsel, after being advised of the pitfalls of continued self-representation.

**c. Denial of Davis's renewed request for self-representation**

Davis contends the trial court erroneously denied his postverdict request to represent himself.

On February 18, 2016, following the jury's verdict, defendant made a *Faretta* request to represent himself for trial on his prior offenses and sentencing. The trial court explained that its tentative decision was to deny the request, based on defendant's disruptions during trial, including an assault on codefendant Lemon, and defendant's threat to break the bailiff's jaw. The court took the matter under submission so that it could review the record to ensure the accuracy of its recollection.

At the April 6, 2016 hearing, the court recounted Davis's disruptive behavior. The court noted that Davis had multiple "abusive outbursts" toward the court and the deputy who was handling security; repeatedly used expletives in court; was generally unruly; had a violent outburst during his attorney's closing argument, and refused to sit in the courtroom while counsel completed his argument; banged Lemon's head against a wall while exiting the courtroom; threatened to break a deputy's jaw; and had

numerous disciplinary problems in jail while he previously represented himself.

Defendant did not deny any of the behavior attributed to him by the court (and does not do so on appeal). Instead, defendant explained that his disruptions were caused by “PTSD” and that he “flip[s].” Defendant apologized for “telling Officer Poulos that I’ll break his jaw.”

The court denied defendant’s request to represent himself.

On September 16, 2016, defendant again renewed his request to represent himself. The court noted that the issue had been litigated multiple times and denied the request.

“[A] motion for self-representation made after the jury returns its verdict on a primary offense but prior to commencement of a bifurcated trial on prior convictions is untimely and subject to the trial court’s discretion . . . .” (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1023.)

On the record before us, we can discern no abuse of discretion. Defendant does not deny his repeated outbursts and violent behavior, and his abuse of pro. per. privileges in jail, on which the trial court relied when denying his request. This conduct was severe enough to warrant revocation of his pro. per. privileges, and was also sufficient to warrant denial of defendant’s belated request to represent himself. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 735.)

**d. Sufficiency of the gang evidence**

Davis contends the gang enhancements were unsupported by substantial evidence, reasoning that the People failed to present “any competent evidence that [defendant] committed the underlying crimes with the specific intent to benefit, promote or further [the gang], or that [defendant’s] offenses were committed for the benefit of, at the direction of, or in association with [the gang].”

A finding on a gang enhancement is reviewed under the same substantial evidence standard as any other conviction. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).) A finding under Penal Code section 186.22, subdivision (b)(1) has two elements: (1) the crime was committed for the benefit of a criminal street gang, or in the alternative, at the direction of or in association with a criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in criminal conduct by gang members. (*Albillar*, at pp. 64-65, 67-68.) Evidence that a defendant intended to commit a crime with known gang associates satisfies the “in association with” element of the offense. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198; *Albillar*, at pp. 61, 67-68.) “[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Albillar*, at p. 68.)

Davis does not contend there was insufficient evidence that he, Lemon, and Mitchell were members of the Southside Compton Crips. Instead, he argues there was “no evidence that [he] possessed the requisite specific intent to benefit, promote or assist [the gang]” because the hallmarks of a gang crime were not present. There was no evidence that defendants announced their gang affiliation, wore gang clothing, or used gang symbols when perpetrating the robberies. Davis posits that he could have been “freelancing.”

However, there was overwhelming evidence that each defendant was a member of the Southside Compton Crips, and they each knew of one another’s gang membership. Gang expert, Detective Ibarra, testified that Davis, Lemon, and Mitchell were members of the Southside Compton Crips, and that Davis had gang

tattoos. Lemon had been a member of the Southside Compton Crips since he was 12 or 13, and had met Mitchell through another gang associate. According to Lemon, the crimes were committed so that Lemon could repay a drug debt owed to Mitchell, and both Mitchell and Davis pressured him to commit the crime.

Detective Ibarra opined that the robberies were committed in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. He testified that the fact that two gang members came together with the same goal of committing a robbery demonstrated an association. The gang also benefitted because the reputation of the individual gang members and gang as a whole was enhanced.

“It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. [Citation.]” (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) And, expert opinion may be sufficient to prove that a crime was gang related and committed with the intent to benefit a gang. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048-1049; *Albillar, supra*, 51 Cal.4th at p. 63.)

The jury could reasonably infer from this evidence that Davis committed his crimes in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. Substantial evidence supports the jury’s true findings.

**e. Ineffective assistance of counsel**

**i. Procedural history**

On September 16, 2016, Davis’s trial counsel, Charles Frisco, filed a *Romero* motion to strike his prior strike conviction, a 2006 conviction for first degree burglary. The motion argued that the

conviction was more than 10 years old and was “in no way similar to that of which he is being charged in this case.” The motion did not discuss the details of the 2006 conviction.

At a court appearance on that same day, while the court considered a motion for a new trial, Davis alleged that Mr. Frisco provided ineffective assistance of counsel. The court stated that it would appoint a separate attorney to determine whether there was any merit to defendant’s claim. The court postponed ruling on the new trial motion until after the appointed attorney reviewed the file. The court and Mr. Frisco agreed to continue the *Romero* motion as well.

On January 12, 2017, at Davis’s next court appearance, Mojgan Aghai appeared on his behalf. She told the court she did not believe Mr. Frisco had rendered ineffective assistance. The trial court clarified that Ms. Aghai was now Davis’s appointed attorney, “although in [the court’s] estimation, [Mr. Frisco] competently represented Mr. Davis throughout the proceedings.”

The trial court denied the motion for a new trial and reminded counsel that there was a true finding on the prior strike. Counsel said she was ready to move forward with sentencing, and the court proceeded to sentence defendant. Prior to announcing its sentence, the court noted that defendant “was the chief planner of these various incidents. [¶] He was the individual that the others were taking orders from. [¶] He directed . . . their conduct on each of the occasions. [¶] On one such occasion, he took a specially vulnerable victim, pointed a weapon at her head while the co-defendant tried to assure her that she wasn’t going to be hurt. [¶] Mr. Davis did no such thing. [¶] His prior conduct on probation or parole has been poor. [¶] He’s had a long history of violent conduct which include[s] a prior strike.” The probation report revealed that defendant had convictions for possession of a controlled substance,

possession of a controlled substance for sale, discharging a firearm in public, and receiving stolen property, in addition to his prior strike conviction of burglary.

In sentencing defendant, the court imposed the maximum sentence for each of the crimes. The court selected the robbery count as the base count, doubled the high term of five years because of defendant's prior strike, and imposed consecutive sentences of one-third the midterm on each of the remaining counts, also doubled because of his prior strike (except for those which were stayed under Penal Code section 654, for which the court imposed the midterm).

To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051-1052.) However, unless there can be no conceivable reason for counsel's acts or omissions, ineffective assistance of counsel will not be found if the record does not establish counsel's strategic reasons for the challenged decision. (*Id.* at p. 1051.) Moreover, an attorney is not deemed incompetent when he or she fails to make a meritless motion or objection. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.)

Here, defendant cannot demonstrate that Ms. Aghai was ineffective for failing to argue his earlier filed *Romero* motion, and in any event, defendant cannot demonstrate prejudice. Counsel could reasonably conclude such a motion would have been futile given Davis's extensive criminal history, and the violent nature of the robberies. Only extraordinary circumstances justify a finding that a career criminal is outside the Three Strikes law. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) When considering whether to strike prior convictions, the relevant factors a court must consider are "whether, in light of the nature and circumstances of his present

felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) On this record, there is no chance whatsoever the trial court would have granted a *Romero* motion.

### **Lemon’s Appeal**

#### **1. Sufficiency of the Aggravated Kidnapping Evidence**

Lemon contends there was insufficient evidence to support his convictions for kidnapping to commit robbery related to the RadioShack robbery. He contends the movement of victims D.M. and L.G. was minimal, and was incidental to the robbery.

Penal Code section 209, subdivision (b) provides that:

“(1) Any person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole. [¶] (2) This subdivision shall only apply if 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 intended underlying offense.”

To determine whether a victim’s movement is incidental to the underlying crime, we consider the scope and nature of the movement, including the actual distance the victim is moved. (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) There is no minimum number of feet a victim must be moved. (*Ibid.*) When deciding whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in robbery, we consider “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." (*Id.* at p. 13.) "[E]ach case must be considered in the context of the totality of its circumstances." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.)

Here, defendant contends that the movement of D.M. and L.G. to the back of the store, a distance of approximately 30 feet, was merely incidental to the robbery because the merchandise was kept in the back of the store. He contends that moving the victims made the robbery easier, as it enabled defendants to avoid detection, and allowed the robbery to be completed without having to watch the victims in the front of the store while the merchandise was taken from the back of the store.

Defendant relies on *People v. Washington* (2005) 127 Cal.App.4th 290 (*Washington*), *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), and *People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*). In *Washington*, two defendants were convicted of aggravated kidnapping after they robbed a bank during business hours. (*Washington*, at pp. 295-296.) During the robbery, one of the defendants made two bank employees walk at gunpoint to the bank's vault. (*Id.* at p. 296.) He moved the bank's manager approximately 25 feet from her office to the vault, and moved a teller 15 feet from the teller area to the vault. (*Ibid.*) He forced the manager to open the vault with the teller's assistance. (*Ibid.*) In reversing the convictions for kidnapping to commit robbery, the court reasoned that such movement was insufficient to support an aggravated kidnapping conviction because a "robbery of a business owner or employee includes the risk of movement of the victim to the location of the valuables . . . held on the business premises." (*Id.* at p. 300.)

In *Hoard*, the defendant was convicted of aggravated kidnapping after he robbed a jewelry store. (*Hoard, supra*, 103

Cal.App.4th at p. 602.) After entering the store, the defendant displayed a gun and made the two employees walk 50 feet to the store's back room, where he bound their wrists, ankles, and mouths with duct tape. (*Id.* at pp. 602, 607.) He left the employees in the back and returned to the front room to gather jewelry from the display cases. (*Id.* at p. 602.) The Court of Appeal reversed the defendant's conviction for aggravated kidnapping, reasoning that the defendant's forced movement of the employees provided him free access to the jewelry and helped conceal the robbery from members of the public. (*Id.* at p. 607.) The court further found that the employees "may have been at less risk tied up in the back office where they could not try to thwart the robbery than had they remained at gunpoint in the front of the store." (*Ibid.*)

In *Daniels*, the court found that the defendants' conduct of forcing three women to move about rooms in their homes for distances of 5 or 6 feet, 18 feet, and 30 feet, while robbing and raping them did not amount to kidnapping. (*Daniels, supra*, 71 Cal.2d at pp. 1126-1140.) With each victim, the defendants gained entry to the victims' home by knocking on the front door, and then moved the victim to a different room in the house, looking for valuables, or looking to see whether there were other occupants in the home. (*Ibid.*)

This case is distinguishable from those relied upon by defendant. Lemon's forced movement of D.M. and L.G. was not necessary to commit the robbery. Although the valuable merchandise was kept in the rear of the store in a locked cage, neither D.M. nor L.G. was moved to help procure the merchandise, as they were simply a customer and delivery driver who happened to be at the store at the time of the crimes, and not employees of the store. Securing the victims in the back of the store did not segregate them from the crime, or otherwise ensure that they did

not intervene with defendants' plan to take the goods. The victims here were not simply moved about their own homes. D.M. and L.G. were moved from a public area of a store to a remote part of the store, minimizing the possibility of detection, and giving defendant the opportunity to commit additional crimes.

*People v. James* (2007) 148 Cal.App.4th 446 (*James*) is instructive. Defendant James and several associates robbed a bingo club before it opened for business. (*Id.* at p. 449.) The robbers held a gun to the back of a maintenance employee, Jesus Gonzalez, who was outside hosing down the parking lot, and made him knock on the door of the club to gain entry. (*Ibid.*) When another employee opened the door, James and one of his associates entered, throwing Gonzalez to the floor. (*Id.* at pp. 449-450.) All of the employees present were ordered to the floor except for a female who was made to open a safe. (*Id.* at p. 450.) The employees and the robbers waited for the arrival of the supervisor, who was forced to open the remaining safes, which were then emptied. (*Id.* at pp. 450-451.) Defendant James challenged his conviction for aggravated kidnapping of Gonzalez. He argued that his movement of Gonzalez from outside the club to inside was merely incidental to the robbery of the club, and the movement did not increase the risk of harm to Gonzalez. (*Id.* at p. 452.)

The court disagreed. "This is not a case where Gonzalez was himself robbed, and defendant is charged with kidnapping Gonzalez due to some trivial, criminologically insignificant movements of Gonzalez that were incidental to that robbery. Instead, the underlying offense was the robbery of the managers of the Bingo Club. That defendant and his associates chose to commit this robbery by the means of bringing Gonzalez, at gunpoint, to the door of the Bingo Club does not make the movement of Gonzalez merely incidental to the robbery; it means that defendant committed the

robbery by means of a kidnapping, and was therefore properly convicted of aggravated kidnapping.” (*James, supra*, 148 Cal.App.4th at p. 458.) Moreover, “[t]he movement of Gonzalez substantially increased the risk of harm to Gonzalez. He was brought from the outside of the Bingo Club to the enclosed inside, reducing the prospects of detection or escape. By being held inside the Bingo Club during the robbery, there was an increased risk that Gonzalez himself would have been robbed . . . or physically assaulted.” (*Id.* at pp. 457-458.)

Here, the victims were not store employees, and were not the target of the robbery. Their possessions were not taken. Defendant moved the victims beyond the distance required merely to conceal them from public view. He moved them to a remote corner of the back of the store, away from the merchandise cage which was the target of the robbery, and bound their hands. On this record, the jury could reasonably conclude that defendant’s movement of the victims was not essential to the robbery itself, and increased the risk of harm to the victims. Substantial evidence supports Lemon’s convictions for aggravated kidnapping.

### **Common Claims of Error**

Defendants contend that remand is necessary for the trial court to exercise its new discretion under Senate Bill No. 620 to strike their firearm enhancements.

On January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) took effect, which amends Penal Code section 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

The discretion to strike a firearm enhancement under Penal Code section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; see also *People v. Brown* (2012) 54 Cal.4th 314, 323.) In this case, defendants' appeals were pending at the time the amendment went into effect, and therefore their convictions are not yet final. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305-306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

#### **1. Defendant Davis**

The jury found true that Davis personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b), on six separate counts, for which the court added 26 years 8 months to his sentence.

The Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 to argue remand is unwarranted because there is no reasonable possibility the court would exercise its new discretion to strike any of Davis's firearm enhancements. In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence, which included an enhancement for a prior strike conviction and two other discretionary enhancements. (*Id.* at p. 1896.) While the defendant's appeal was pending, the Supreme Court held that trial courts have discretion to strike prior convictions under the Three Strikes law in the furtherance of

justice. The Court of Appeal, however, declined to remand for resentencing. The court reasoned it was obvious the trial court would not exercise its newfound discretion given it increased the defendant's sentence beyond what it believed was required by the Three Strikes law and stated the maximum sentence was appropriate. (*Gutierrez*, at p. 1896.)

Here, as discussed *ante*, when sentencing defendant, the trial court imposed the maximum sentence on all counts, finding numerous factors in aggravation, and no factors in mitigation. The court concluded that the crimes involved great violence, Davis was the "chief planner" who directed the other defendants, and he pointed a gun at D.M., a RadioShack customer who presented no threat, and who was particularly vulnerable, given her age. Defendant had a long history of violent conduct, including a prior strike conviction.

We interpret these discretionary sentencing choices as a clear message the court would not exercise its discretion to resentence defendant with leniency on remand.

## **2. Defendant Lemon**

As for Lemon, the jury found true that a principal personally used a firearm within the meaning of Penal Code section 12022.53, subdivisions (b) and (e)(1) for six counts. The enhancements added 40 years to defendant's sentence.

At the sentencing hearing, the court noted that Lemon never personally used a firearm, he cooperated with law enforcement in the case, and he reassured some of the victims they would not be hurt. According to the court, Lemon was "far less culpable than his codefendants . . . ." The court exercised its discretion, under Penal Code section 1385, to strike defendant's prior strike conviction for some of the counts. Consequently, defendant's sentence was not enhanced by his strike prior for counts 2, 3, 4, 8, and 9. The court

also elected to impose midterm and low-term sentences on all of the counts.

We interpret these discretionary sentencing choices to suggest the court may be inclined to resentence defendant on the firearm enhancements on remand, and the Attorney General concedes that remand is appropriate. Accordingly, we remand to allow the trial court the opportunity to exercise its newly granted discretion under subdivision (h) of Penal Code section 12022.53. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

On remand, the court may exercise its discretion under Penal Code section 12022.53, subdivision (h), to strike all of the firearm enhancements or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subds. (f) & (h).) Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (Pen. Code, § 1385, subd. (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443-1446.) “In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant’s criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration.” (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant’s criminal record, and may affect the award of custody credits. Specifically, subdivision (c)(22) of section 667.5

provides that a violent felony is “[a]ny violation of Section 12022.53.” Because a section 12022.53 violation is a violent felony, the defendant would be entitled to a maximum of 15 percent conduct credits. (§ 2933.1, subd. (a).)

### **DISPOSITION**

The judgments are affirmed; the case is remanded only as to defendant Lemon for the court to exercise its discretion under Senate Bill No. 620.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

GOODMAN, J.\*

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