Filed 3/29/12 P. v. Valencia CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FLOR VALENCIA et al., Defendants and Appellants.	B231329 (Los Angeles County Super. Ct. No. VA113106)

APPEALS from judgments of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Affirmed as modified.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Flor Valencia.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant Juan Oscar Flores.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Rodney Allen Oakley.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant Adrian Rochin.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Flor Valencia, Juan Oscar Flores,[1] Rodney Allen Oakley and Adrian Rochin, appeal from judgments of conviction following a jury trial. Mr. Oakley was convicted of: kidnapping to commit robbery (Pen. Code,[2] § 209, subd. (b)(1)); three counts of firearm assault (§ 245, subd. (a)(2)); and attempted robbery. (§§ 664, 211.) With respect to the firearm assault counts, Mr. Oakley was found to have acted for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) And with respect to two of the three firearm assault counts, Mr. Oakley was also found to have personally used a firearm. (§ 12022.5, subd. (a).) He was sentenced to an indeterminate life term consecutive to a determinate term of 12 years. Mr. Rochin was convicted of: kidnapping to commit robbery (§ 209, subd. (b)(1)); three counts of firearm assault (§ 245, subd. (a)(2)); and attempted robbery. (§§ 664, 211.) He was sentenced to an indeterminate term of life in prison with the possibility of parole consecutive to a determinate 3 years term.

Juan was convicted of: attempted kidnapping to commit robbery (§§ 664, 209, subd. (b)(1)); three counts of firearm assault (§ 245, subd. (a)(2)); and attempted robbery (§§ 664, 211). He admitted serving a prior separate prison term. (§ 667.5, subd. (b).) Juan was sentenced to 9 years in state prison. Ms. Valencia was convicted of three

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[1] Mr. Flores has the same surname as a defense witness. For clarity purposes, we will refer to him as Juan.

[2] All further statutory references are to the Penal Code unless otherwise noted.

counts of firearm assault. (§ 245, subd. (a)(2).) She was sentenced to 3 years in state prison.

II. THE EVIDENCE

A. The Prosecution Case

1. The firearm assault

In November 2009, Rafael Mendoza lived in a garage near the intersection of South Central Avenue and 83rd Street in Los Angeles. One to two weeks prior to the present attack, Mr. Mendoza was unloading guns from his car upon his return from a shooting range. Mr. Mendoza saw Juan and Ms. Valencia. Juan and Ms. Valencia were looking at Mr. Mendoza. They were in an old Chevrolet parked across 83rd Street. There were six or seven people in the car. This was the first time Mr. Mendoza had ever seen Juan and Ms. Valencia. Mr. Mendoza unloaded two .9 millimeter handguns and six rifles. One of the rifles was a Russian-made AK-47 assault rifle with a "knife" on the end. Mr. Mendoza later told Detective Alicia Saldana the two .9 millimeter handguns were registered to him; the other weapons he was unloading from his car belonged to his uncles and cousins.

On Saturday, November 21, at 2 a.m., Ms. Valencia knocked on Mr. Mendoza's door. Juan and another man were with her. Mr. Mendoza saw them through a hole in his door. Ms. Valencia was wearing makeup and a dress. She said they were coming from a dance. They wanted to buy drugs. Mr. Mendoza told Ms. Valencia where she could purchase drugs. Ms. Valencia called Mr. Mendoza "Guero," which referred to the color of his skin. Juan told Mr. Mendoza to come outside. Juan said the other man had "business" to do with Mr. Mendoza. Mr. Mendoza did not open the door.

Four hours later, at 6 a.m., Mr. Mendoza was leaving for work. Mr. Mendoza saw Juan and Ms. Valencia in a Volvo with several other individuals, including Mr. Rochin. Juan was in the driver's seat. The Volvo was parked in the alley blocking Mr. Mendoza's exit. Juan and the unidentified man got out of the car. Both men told Mr. Mendoza to get in the car and they would take him wherever he needed to go. Mr. Mendoza said: "How can I get in the car? The car is full." Mr. Mendoza ran away.

The charged offenses occurred on November 22, 2009. At 8 p.m., Ms. Valencia knocked at Mr. Mendoza's door. Mr. Mendoza heard his dog growling. He went outside to bring the dog back inside the house from the alley. When he opened the door, Ms. Valencia said, "Guero." Mr. Mendoza told Ms. Valencia to leave or he would call the police. Ms. Valencia asked Mr. Mendoza to accompany her because she was afraid to be in the alley. As Mr. Mendoza walked with Ms. Valencia in the alley toward the street, she began to dial a number on her cellular telephone.

Mr. Mendoza and Ms. Valencia reached the sidewalk on 83rd Street. They stood there for two to three minutes while Ms. Valencia attempted to reach someone on her cellular telephone. Eventually she said something. When Mr. Mendoza turned in her direction, he felt something hit him on the head from behind. The male assailant grabbed Mr. Mendoza's arm. The assailant told Mr. Mendoza not to turn and look back. Mr. Mendoza was hit on the head with a semiautomatic weapon. Mr. Mendoza turned to try to defend himself. The assailant hit Mr. Mendoza. Mr. Mendoza was struck in the area of his left cheek. Mr. Mendoza sustained an injury to his face. The attacker was a short, dark-skinned Latino. Mr. Mendoza's arm was held behind his back and the gun was pointed at his head. The assailant hit Mr. Mendoza on the face and back with the gun. Mr. Mendoza was told to walk back toward his home. Mr. Mendoza tried to escape and run. But at that moment according to Mr. Mendoza, a "Black fellow," Mr. Oakley, arrived. Mr. Oakley started to hit Mr. Mendoza with a dark bag. Mr. Oakley had his other hand on something in his pocket.

Mr. Mendoza "got loose" and tried to run, but Juan and Mr. Rochin appeared. Mr. Mendoza described what happened when Juan arrived, "He arrived hitting me, and said he was going to kill me." Juan demanded the keys to Mr. Mendoza's door. At the same time, Mr. Rochin grabbed Mr. Mendoza from behind. Mr. Rochin hit Mr. Mendoza on the shoulder. Mr. Mendoza heard Ms. Valencia saying she knew he had a key because she saw him lock the door.

Mr. Rochin, Juan, Mr. Oakley and an unidentified fourth individual carried Mr. Mendoza to a back door. Mr. Mendoza was ordered to open the rear door. They were carrying him and hitting him. Mr. Mendoza hid his door key in an old fence post as he passed by it. Mr. Oakley was hitting Mr. Mendoza. Mr. Oakley hit Mr. Mendoza in the back of the head with something hard. Mr. Mendoza tried to run. Mr. Mendoza saw that Mr. Oakley had a semiautomatic weapon. Mr. Oakley fired three to four shots at Mr. Mendoza. The last shots were fired as Mr. Mendoza ran down the alley. Rivas heard 5 shots, or "many" shots, Juan, Mr. Rochin and Mr. Oakley lifted Mr. Mendoza. They pushed and hit at Mr. Mendoza, and swore at him as they moved him into a courtyard at the back of the house. Ms. Valencia repeatedly asked Mr. Mendoza for the key. Mr. Oakley ordered Mr. Mendoza in English and Spanish, "[T]ake out the . . . fucking keys." The distance from where Mr. Mendoza was initially attacked to the courtyard was about 75 feet.

Juan hit Mr. Mendoza in the neck. Juan made Mr. Mendoza kneel down. He yelled at Mr. Mendoza, "Get down on your knees, you fucking idiot." Juan pushed Mr. Mendoza. Juan held Mr. Mendoza down. The unidentified assailant grabbed Mr. Mendoza by the arm. Juan had an automatic weapon in his hand; a 9 millimeter or a .350. Juan started kicking the door, trying to force it open. On the other side of the door were members of Mr. Mendoza's family: Mirza Rivas; her boyfriend, Jesus Torres; their two young children; and Mr. Torres's mother and her two sons. Mr. Torres was Mr. Mendoza's nephew. The children ranged in age from 1 to 14 years of age. The children were afraid; they were yelling and crying. Juan told the family members to open the door

or he would shoot. Mr. Mendoza told them to lock the door with a key and not to open it. Mr. Mendoza told his family members the assailants had guns. Juan told Mr. Mendoza, "You're going to die, you fucking are going to die." Mr. Rochin and Mr. Oakley were beating Mr. Mendoza as Ms. Valencia searched his pockets for the key.

Mr. Rochin and Mr. Oakley held Mr. Mendoza on the ground. They were stepping on his face. Juan and the unidentified man asked Mr. Mendoza for weapons. Juan also demanded money. Juan told the unidentified co-perpetrator to go to the car and get something to open the door. The unidentified man ran back shortly thereafter shouting, "[T]he fucking police [are] coming." Everyone started to run, including Mr. Mendoza. Juan, Mr. Oakley and the third individual began firing shots. Mr. Oakley had a small gun. Mr. Mendoza testified: "It was like a .22. It was not a very big gun. It was a revolver." The assailants had been passing guns between them. Mr. Mendoza heard three or four shots. The shots came from two weapons; they sounded like they came from a .9 millimeter semi-automatic handgun and a .22 revolver. Mr. Mendoza tried to hide behind Mr. Rochin. Mr. Rochin shouted as if he had been hit by gunfire. Mr. Mendoza saw Mr. Rochin lying on his belly on the ground. Mr. Rochin suffered a graze wound to his lower back. The entire incident lasted about 20 minutes.

Ms. Rivas testified that initially she heard five shots. Ms. Rivas telephoned the emergency operator. She looked out a window and saw people pushing Mr. Mendoza down the pathway into the courtyard. Mr. Mendoza had his hands on his head; he did not want to fight. Ms. Rivas heard people arguing and Mr. Mendoza struggling with his assailants. She heard him say that they wanted to break into the house. The assailants kept pulling on her door and kicking it. Mr. Mendoza told his relatives not to open the door. Ms. Rivas heard someone say, "Open the door or I'll shoot him." Ms. Rivas called the emergency operator a second time.

2. The investigation

Mr. Mendoza spoke to Deputy Robert Lavoie. Mr. Mendoza said he had been pistol-whipped and then shot at. Deputy Lavoie testified Mr. Mendoza appeared scared and was bleeding. Mr. Mendoza also spoke to Deputy Ricardo Munoz. Mr. Mendoza said that five assailants had tried to rob him and take his firearms. He said he had been shot at two or three times at two separate times. The two shootings occurred approximately 50 feet apart. Mr. Mendoza said Mr. Oakley used a black revolver. The second person to fire a gun was a fifth assailant who was never identified. Mr. Oakley and Mr. Rochin both tested positive for gunshot residue. A scientist with the sheriff's scientific services bureau, Joseph Cavaleri, testified concerning gunshot residue tests. Mr. Cavaleri said the positive results meant defendants: could have fired a gun; handled a gun; stood next to someone who fired a gun; or touched a surface with gunshot residue on it. Mr. Cavaleri said a positive gun residue test could never confirm that a person had actually shot a gun.

Ms. Valencia and Mr. Rochin were detained at the scene. Mr. Rochin told Deputy Lavoie, "I think I've been shot." Mr. Rochin's right hand was lacerated. Mr. Oakley was located by a sheriff's dog hiding in a storage shed in a nearby yard. A bag containing numerous live 7.62 rounds was also found in the shed. This ammunition was commonly used in AK-47 rifles and in American-made M-60 machine guns. Mr. Oakley suffered dog bite wounds and was treated at a hospital. Deputy Veronica Torrez accompanied Mr. Oakley to the hospital. Deputy Torrez recovered a bullet fragment from the hospital gurney occupied by Mr. Oakley. Two live .9 millimeter bullets and a bullet fragment were found at the scene of the assault as well as a set of Volvo car keys. An expended .9 millimeter bullet casing was found in the alley. Deputy Munoz found an unlocked gray or silver Volvo parked on 83rd Street approximately 100 feet from Mr. Mendoza's home. A wallet in the center console area contained a California identification card belonging to Juan. At the scene of the crimes, the victim, Mr. Mendoza, identified Ms. Valencia, Mr. Rochin and Mr. Oakley as among the perpetrators. Mr. Mendoza identified all four defendants as his assailants at the preliminary hearing and again at trial.

There was some evidence of a surveillance camera on the property. Mr. Mendoza testified one of the apartments on the property where the assault occurred had a surveillance camera. The surveillance camera faced the north-south alley and was monitored by one of Mr. Mendoza's nephews and another unidentified man. And, as described below, Ms. Valencia testified she did not have to knock on Mr. Mendoza's door because he would see her coming on the surveillance camera. But Ms. Rivas denied there was any such camera on the property.

3. The prosecution's gang evidence

In January 2008, Deputy Alex Kim stopped a car in gang territory for excessive speed. Ms. Valencia was a passenger. Ms. Valencia admitted to Deputy Kim that she was a gang member. Other occupants of the vehicle were self-admitted gang members.

In June 2008, Deputy David Diot encountered Juan in gang territory. Juan admitted that he was a gang member who used a gang moniker. Deputy Diot observed that Juan had gang tattoos.

In May 2009, Deputy Raquel Gonzales detained Mr. Oakley for spray-painting gang graffiti on a wall. Mr. Oakley told Deputy Gonzales he wanted the gang name and his own name up on the wall. Mr. Oakley had gang tattoos on his chest and back. Mr. Oakley used two gang monikers. Deputy Justin Smith spoke to Mr. Oakley on September 29, 2009. Mr. Oakley had gang tattoos and was wearing clothing typically worn by gang members. Mr. Oakley admitted his gang membership and that he used a gang moniker.

Deputy Arnulfo Sanchez talked to Mr. Rochin in April 2010. Mr. Rochin was in custody. Mr. Rochin admitted he was a gang member who used an alias. Mr. Rochin had a gang tattoo on his arm. Detective Dean Camarillo arrived at the scene of the November 22, 2009 assault on Mr. Mendoza. Detective Camarillo found a cellular

telephone on Mr. Rochin's person. The telephone contained many photographs of Mr. Oakley and Mr. Rochin making gang signs.

Detective Camarillo testified he had personally investigated over 100 crimes involving members of defendants' gang. He described the gang's primary activities as including assaults; firearm assaults; illegal firearms possession; street robberies; home invasion robberies; narcotics transportation and distribution; vandalism; and witness and victim intimidation. The crimes against Mr. Mendoza had occurred in gang territory. Detective Camarillo concluded Mr. Oakley, Juan and Mr. Rochin were all members of the same gang based on their: interactions with law enforcement as described above; their admissions; their tattoos; and their gang monikers. The detective described Ms. Valencia as an associate of the gang. Detective Camarillo testified that to leave a gang an individual would have to move away from the area and not return, get a job, and have gang tattoos removed.

In response to hypothetical questions closely tracking the facts of the present case, Detective Camarillo testified the crimes were committed in association with and for the benefit of a gang. He based his conclusion on the facts that: the perpetrators were three documented gang members and one associate (Ms. Valencia); the crimes were committed in gang territory; discharging firearms sent a strong message the gang members were not afraid to use weapons, thereby enhancing their reputation; their possession and use of firearms was designed to instill fear in the victim; fear facilitated their control of gang territory; and the perpetrators were attempting to obtain money and guns, which could be used for protection and to commit other crimes. Detective Camarillo noted that firearms obtained in this manner could not be traced back to any individual gang member or to the gang generally. He also testified that gangs establish their reputations through such violent acts so they can commit crimes at will and sell drugs without fear of retaliation.

B. The Defense Case

1. Mr. Rochin

Mr. Rochin's wife, Lizeet Bresea Ybarra Osuna, and mother-in-law, Manuela Osuna Triado, testified he lived with his family in Tijuana. Mr. Rochin was at home in Tijuana on Saturday, November 21, 2009. On Sunday, November 22, at about 1 p.m., Mr. Rochin boarded a bus to Southern California. He was headed to his mother's house in Los Angeles to pick up his unemployment check. On Monday, November 23, Ms. Osuna learned Mr. Rochin had been arrested. Ms. Osuna knew Mr. Oakley to be a friend of her husband. Mr. Rochin had known Mr. Oakley since they were both young. She had also seen Juan with Mr. Rochin near her mother-in-law's house. Ms. Osuna had never seen Ms. Valencia before. Ms. Osuna once heard Mr. Rochin's friends call him by a nickname. Mr. Oakley was referred to by a nickname. Mr. Rochin was undergoing treatments to remove his gang tattoos.

Mr. Rochin's mother, Maria Lourdes Lizarraga, testified he took a bus from Tijuana and arrived at her home in Los Angeles on Sunday, November 22, 2009. He arrived in the afternoon, when it was starting to get dark. Mr. Rochin came to pick up his unemployment check. He stayed for 10 to 15 minutes. Ms. Lizarraga confirmed that she knew both Juan and Mr. Oakley. Ms. Lizarraga did not know Ms. Valencia.

Mr. Rochin testified in his own defense. He admitted he had been a gang member from the age of 13. But Mr. Rochin testified he had left the gang by the time he was 20. He had committed a crime when he was 16 or 17 and spent time in a camp placement. Mr. Rochin had known Mr. Oakley since they were kids. Mr. Rochin met Juan in junior high school. He had never met Ms. Valencia. He had undergone four treatments to remove his gang tattoos at a San Diego clinic. He had lived in Tijuana for the past eight years, but did not work there. He had worked in San Diego. Now he traveled to Los Angeles every two weeks to pick up his unemployment check. Mr. Rochin had not seen Mr. Oakley or Juan for some time. Mr. Rochin saw Mr. Oakley from a distance in the Summer of 2009. Mr. Rochin's mother's home was in the heart of the gang's territory.

On Sunday, November 22, 2009, Mr. Rochin took the bus from Mexico to Huntington Park, California. Mr. Rochin then went to a local bus stop. As Mr. Rochin waited, Juan appeared. Juan offered Mr. Rochin a ride. They got something to eat and then went to Mr. Rochin's mother's house. Ten minutes later they went to Juan's house. Mr. Rochin borrowed Juan's car. When Mr. Rochin left Juan's house it was already dark. Mr. Rochin went to Mr. Mendoza's home to buy marijuana. Mr. Rochin had done so six or seven times before. Mr. Rochin knew Mr. Mendoza by two nicknames. Mr. Mendoza called Mr. Rochin by a nickname. Upon arriving, Mr. Rochin saw Mr. Oakley walking in the street. They walked together down the alley to Mr. Mendoza's door and knocked. When no one answered, they knocked next door. According to Mr. Rochin, a lady came to the door with a baby. They asked for Mr. Mendoza, but never saw him. Walking away, Mr. Rochin saw three people running in the alley. Everything happened fast. Mr. Rochin turned into the alley. Mr. Rochin saw a man with a gun. Mr. Rochin was shot in the back. He ran back towards the courtyard outside Mr. Mendoza's door. Mr. Rochin tried to jump a fence and injured his hand. He fell on his back and could not move. Mr. Rochin was arrested, placed in an ambulance and taken to St. Francis Hospital. He was subsequently booked and released. At some point he had dropped his car keys and a $50 bill. Mr. Rochin did not remember where he dropped his car keys or what happened to the money. As noted, Mr. Rochin had borrowed Juan's car earlier in the evening. Mr. Rochin did not realize Juan's wallet was still in the car. Mr. Rochin never saw Juan at Mr. Mendoza's house that night. Mr. Rochin never saw Ms. Valencia there either.

2. Juan

Juan had worked for Joe Louis Guerra, Jr., for more than two years, from 2006 to 2009. Mr. Guerra was aware that Juan had been a gang member. But Juan was working

and had attended technical school to become a certified electrical technician. Juan had discussed removing his gang tattoos, but the cost was prohibitive.

Juan's girlfriend, Aurora Canela, testified he supported her and their 4-year-old daughter. Ms. Canela had known Mr. Rochin for three years and Mr. Oakley for two or three years. On November 22, 2009, Mr. Rochin came to a barbeque at Juan's home. He left alone in the Volvo. Juan and Ms. Canela spent that night together. Juan never left. Juan had been a gang member but was not anymore. He wanted to have his gang tattoos removed, but it was too expensive. Juan's sister, Marbella Flores, confirmed that her brother had taken steps to disassociate from the gang. Ms. Flores was not at the barbeque on November 22, 2009.

3. Ms. Valencia

Ms. Valencia also testified in her own defense. She said Mr. Mendoza used to be her "meth connect", viz. drug supplier. She had procured drugs from him about 20 times prior to November 22, 2009. On Friday, November 20, 2009, Ms. Valencia went to a bar and then to Mr. Mendoza's house. She walked down the alley and through the pathway to Mr. Mendoza's door. Ms. Valencia did not have to knock because he would see her coming on the surveillance camera. Mr. Mendoza opened the window. Ms. Valencia got her drugs and left. She did the same thing on Saturday, November 21 and Sunday, November 22, 2009. On November 22 however, as she was purchasing drugs from Mr. Mendoza, three men appeared—one Black and two Latino. She had never seen them before. They were engaged in a confrontation. She saw a gun. One of the men had a gun to the back of Mr. Mendoza's head. Ms. Valencia panicked and ran into the restroom. While in the restroom, she heard one or two gunshots. Then the police arrived. And Detective Alicia Saldana looked for but did not find any surveillance equipment.

4. Martin Flores

Martin Flores described himself as a gang "expert" appointed by the Los Angeles County Superior Court. He described defendants' gang as one of the original gangs in Los Angeles. Mr. Flores described how young people in gang neighborhoods can grow up in the gang lifestyle.

Mr. Flores discussed Mr. Oakley's long-time connection with the gang. Mr. Oakley's ties to the neighborhood went back to when he was six or seven. Mr. Flores said Mr. Oakley, now in his 30s, was still an "inactive" gang member. According to Mr. Flores, Mr. Oakley's tattoos were old. In Mr. Flores's view: Mr. Oakley had taken steps to disassociate from the gang; Mr. Oakley had maintained a consistent work history since 1996 or 1998; with the exception of the one vandalism incident, Mr. Oakley had minimal to no contact with law enforcement; and the gang photographs were old. Mr. Flores concluded there was no current showing Mr. Oakley was still actively involved in the gang. Mr. Flores admitted Mr. Oakley was caught six months prior to the attack on Mr. Mendoza tagging a wall with gang graffiti. But in Mr. Flores' view, this did not mean Mr. Oakley was "down for the gang" in terms of committing violent crimes.

Also, Mr. Oakley was not currently living in gang territory. Ms. Flores described the location of the present crimes as outside the gang's area; not a gang stronghold. Mr. Flores noted it was uncommon to have an African-American like Mr. Oakley in defendants' Latino gang. But Mr. Oakley had grown up with stronger ties to Latinos.

In response to hypothetical questions, Mr. Flores concluded that the current crimes were not committed for the gang's benefit. Mr. Mendoza was not a rival gang member. There was no evidence the assailants had claimed their gang by throwing out signs or yelling out the name. There was no evidence gang graffiti had been crossed out. There was no evidence the gang wanted Mr. Mendoza's weapons as opposed to individuals seeking them for personal use. Mr. Flores described Detective Camarillo's opinion that the weapons would inure to the gang's benefit as speculative. In Mr. Flores view, there was no evidence: of similar conduct with respect to firearms; the assailants had weapons

in their homes or in their cars; the individuals were planning to use drugs or guns for the gang; and of any future plan.

When cross-examined, Mr. Flores admitted a person who was not an active gang member could still fall within the gang enhancement. He agreed that: defendants' gang was historically a very violent gang; they engaged in carjackings, robberies, drive-by shootings, murders and vandalism; it was very unusual for a person Mr. Oakley's age to be tagging a wall; to leave a gang requires that the individual leave the area and not return, get a job and remove gang tattoos; and Mr. Rochin's mother's home was in the heart of the gang's neighborhood. But Mr. Rochin did not reactivate his gang member status by visiting his mother.

C. Rebuttal

In rebuttal, Detective Camarillo testified concerning the conversation with Mr. Rochin. Mr. Rochin said he thought he had been shot. Mr. Rochin said he had started fighting with some males. During the fracas a "Black guy" started shooting. Later, Detective Camarillo spoke again to Mr. Rochin. This was after Mr. Rochin received medical treatment. Mr. Rochin said he had gone to the area to visit friends and decided to take a walk down the alley. As he was walking, someone started shooting. Mr. Rochin ran to Mr. Mendoza's rear yard and tried to climb over a fence but failed. He said he was there alone. Mr. Rochin never mentioned anything about being present to buy drugs from Mr. Mendoza. Mr. Rochin never mentioned Mr. Oakley.

Detective Saldana interviewed Ms. Valencia following the incident. Ms. Valencia said she had gone to Mr. Mendoza's to "hook up" with him. Ms. Valencia said she had met Mr. Mendoza on Friday, November 20, 2009, and started to like him. On November 22, she was walking in the alley with Mr. Mendoza. They were going to buy methamphetamine at another location. While in the alley, Ms. Valencia saw several Latinos approaching. The men assaulted Mr. Mendoza. They all ended up in Mr.

Mendoza's courtyard. Ms. Valencia said she became frightened and ran into the communal bathroom.

Detective Saldana spoke again to Ms. Valencia two days later. Ms. Valencia told the detective that one of the Latinos had fired a weapon. The bullet hit a garage door in the alley next to where Ms. Valencia was standing. The men dragged Mr. Mendoza from the alley to the courtyard, about 15 yards. Detective Saldana did not see Ms. Valencia with any cash in the aftermath of the incident.

Deputy Majalia Booth also interviewed Ms. Valencia. Ms. Valencia said: she had met Mr. Mendoza earlier and wanted to "hook up" with him; on November 22, 2009, she went to Mr. Mendoza's house; the two of them started walking in the alley toward Mr. Mendoza's uncle's house on Manchester Avenue; but several men forced them back into the courtyard of Mr. Mendoza's home. Deputy Booth also testified no money was recovered from Ms. Valencia.

D. Surrebuttal

In surrebuttal, Mr. Rochin denied speaking to Detective Camarillo on November 22, 2009. Mr. Rochin did not see the detective at the location of the incident involving Mr. Mendoza. Mr. Rochin never saw Detective Camarillo until the preliminary hearing in February 2010.

III. DISCUSSION.

A. Kidnapping Or Attempted Kidnapping To Commit Robbery: Asportation

Mr. Rochin, Mr. Oakley and Juan argue there was insufficient evidence of the asportation element of kidnapping or attempted kidnapping to commit robbery. Ms. Valencia was acquitted of this charge. Defendants reason: moving Mr. Mendoza from

the street, down an alley and into a courtyard was merely incidental to the intended robbery; it did not substantially increase the risk of harm to the victim over and above that necessarily present in the intended robbery. We find substantial evidence of asportation. Further, we note that asportation is not an element of *attempted* kidnapping, the crime for which Juan was convicted. (*People v. Cole* (1985) 165 Cal.App.3d 41, 50; *People v. Fields* (1976) 56 Cal.App.3d 954, 957.) Under section 21a, "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." However, Juan asserts that the absence of asportation evidence also demonstrates insufficient evidence he specifically intended to commit a kidnapping. In other words, Juan contends, "[N]o circumstances indicated [he] had the intent to kidnap, as the defendants moved [Mr.] Mendoza solely to accomplish their goal of robbery." We find substantial evidence of asportation and therefore of Juan's intent.

Section 209, subdivision (b) states: "(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 apply only 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 offense." Section 209, subdivision (b) does not require that the movement "substantially" increase the risk of harm to the victim. (*People v. Vines* (2011) 51 Cal.4th 830, 869, fn. 20; *People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4.) Our Supreme Court has held that the aspects of movement not merely incidental to the underlying crime and the increased risk of harm are not mutually exclusive, but interrelated. (*People v. Vines, supra,* 51 Cal.4th at pp. 869-870; *People v. Martinez, supra,* 20 Cal.4th at pp. 232-233.) In *Vines,* our Supreme Court explained: "With regard to the first prong, 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 the first prong. [Citations.] [¶] '"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."' [Citation.]" (*People v. Vines, supra,* 51 Cal.4th at p. 870; accord, *People v. Martinez, supra,* 20 Cal.4th at p. 233.)

We view the evidence in the light most favorable to the judgment. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Mincey* (1992) 2 Cal.4th 408, 432.) Our Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin, supra,* 18 Cal.4th at p. 331; *People v. Manriquez* (2005) 37 Cal.4th 547, 577.) Here, Mr. Mendoza was first assaulted where the alley intersected with a public street. Instead of simply taking the key to his home from him, defendants beat and dragged Mr. Mendoza away from the public street, down an alley, and into a courtyard outside his home, a distance of 75 feet. This forcible movement: decreased the likelihood of detection from passersby; increased the danger inherent in Mr. Mendoza's foreseeable attempt to escape—indeed, he was shot at when he tried to run; and increased the risk of harm to Mr. Mendoza's family and other residents of the property. Defendants forcibly and with threats attempted to gain entry to a home occupied by five children. This was sufficient evidence of asportation. (*People v. Rayford* (1994) 9 Cal.4th 1, 12; see *People v. Vines, supra,* 51 Cal.4th at pp. 870-871.)

B. Failure To Instruct On False Imprisonment As A Lesser Included Offense

Mr. Rochin, Mr. Oakley and Juan argue it was error not to sua sponte instruct the jury it could find them guilty of false imprisonment as a lesser included offense of

aggravated kidnapping. Our Supreme Court has held: "[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] . . . That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present [citations], but not when there is no evidence that the offense was less than that charged.' [Citation.]" (*People v. Kelly* (1990) 51 Cal.3d 931, 958-959; accord, *People v. Valdez* (2004) 32 Cal.4th 73, 115.) Our review is de novo. (*People v. Booker* (2011) 51 Cal.4th 141, 181; *People v. Avila* (2009) 46 Cal.4th 680, 705.) We find no error.

False imprisonment is a lesser included offense of aggravated kidnapping. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 367; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233; see *People v. Cooks* (1983) 141 Cal.App.3d 224, 333; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547; *People v. Morrison* (1964) 228 Cal.App.2d 707, 713). But false imprisonment does not require the involuntary movement of the victim from one place to another. (§ 236; *People v. Gibbs, supra,* 12 Cal.App.3d at p. 547.) Further, as the Court of Appeal held in *Ordonez,* "[A] lesser included offense instruction on false imprisonment is not required where the evidence establishes that defendant was either guilty of kidnapping or was not guilty at all. [Citations.]" (*People v. Ordonez, supra,* 226 Cal.App.3d at p. 1233; accord, *People v. Morrison, supra,* 228 Cal.App.2d at p. 713.) Here, defendants do not claim they merely detained Mr. Mendoza. They assert they were guilty, if at all, of intending to rob Mr. Mendoza. And when they *forcibly moved* him, it was solely to commit the intended robbery. Mr. Mendoza testified defendants forcibly moved him a 75-foot distance from the street to the courtyard. They wanted him to unlock his door. They were looking for weapons and cash. Both Mr. Rochin and Ms. Valencia admitted being present at Mr. Mendoza's house at the time, but denied they played any part in the assault. Defendants were either guilty of aggravated kidnapping or deserved to be acquitted. The trial court did not err in failing to sua sponte instruct on false imprisonment. (*People v. Kelly, supra,* 51 Cal.3d at p. 959; *People v.*

Ordonez, supra, 226 Cal.App.3d at p. 1233; *People v. Morrison, supra,* 228 Cal.App.2d at p. 713; *People v. Cooks, supra,* 141 Cal.App.3d at p. 333.)

Defendants argue the failure to request a false imprisonment instruction constitutes ineffective assistance of counsel. We need not consider whether counsels' performance was deficient. Defendants have failed to establish, as a demonstrable reality, there is a reasonable probability of a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Horton* (1995) 11 Cal.4th 1068,1122.) As discussed above, on the evidence before it, the jury could either believe defendants had attempted to kidnap Mr. Mendoza or they had not. It is not reasonably probable the jury would have found defendants guilty of merely violating Mr. Mendoza's personal liberty. Any error was harmless beyond a reasonable doubt. Because the evidence did not support the instruction and having found no prejudice in the omission of the instruction, the ineffective assistance of counsel claim is without merit. (See *People v. Cowan* (2010) 50 Cal.4th 401, 493, fn. 31; *People v. Carter* (2003) 30 Cal.4th 1166, 1222; *People v. Lewis* (2001) 26 Cal.4th 334, 363-364.)

C. Attempted Robbery As A Necessarily Included Offense Of Attempted Kidnapping To Commit Robbery

Defendants, except for Ms. Valencia, contend their attempted robbery convictions (count 5) must be reversed. They assert attempted robbery is a necessarily included offense of attempted kidnapping (count 1). In other words, they assert they could not commit an attempted kidnapping for robbery without also necessarily committing an attempted robbery. (See *People v. Montoya* (2004) 33 Cal.4th 1031, 1034; *People v. Lopez* (1998) 19 Cal.4th 282, 288.)

We apply the "elements test" to decide whether Juan, Mr. Rochin and Mr. Oakley may be convicted of both charged offenses. (*People v. Ramirez* (2009) 45 Cal.4th 980, 984-985; *People v. Reed* (2006) 38 Cal.4th 1224, 1229-1231; see *People v. Izaguirre*

(2007) 42 Cal.4th 126, 128.) As our Supreme Court explained in *Ramirez*: "Under the 'elements' test, we look strictly to the statutory elements, not to the specific facts of a given case. (See, e.g., *People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984.) We inquire whether all the statutory elements of the lesser offense are included within those of the greater offense. In other words, if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense. ([*People v.*] *Montoya, supra,* 33 Cal.4th at p. 1034; [*People v.*] *Lopez*, *supra*, 19 Cal.4th at p. 288.)" (*People v. Ramirez, supra,* 45 Cal.4th at p. 985.)

Section 211 defines robbery: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Section 21a sets forth the elements of an attempted crime, "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." Attempted robbery has two elements. The first element is a specific intent to rob. The second element is a direct but ineffectual act towards the commission of the intended robbery. (§ 21a; *People v. Dillon* (1983) 34 Cal.3d 441, 455-456.) As set forth in CALCRIM No. 1203, kidnapping to commit robbery has six elements: "1. The defendant intended to commit [robbery]; [¶] 2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; [¶] 3. Using that force or fear, the defendant moved the other person [or made the other person move] a substantial distance; [¶] 4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a [robbery]; [¶] 5. When that movement began, the defendant already intended to commit [robbery]; [and] [¶] 6. The other person did not consent to the movement." An attempted kidnapping to commit robbery has two elements. First, the accused must possess a specific intent to commit kidnapping for robbery. The second element is a direct, but ineffectual act towards the commission of the intended kidnapping for robbery. (§ 21a.)

Our Supreme Court has held that robbery is not a lesser included offense of kidnapping for robbery. This is because a person can commit a kidnapping for robbery without also committing a robbery. (*People v. Lewis* (2008) 43 Cal.4th 415, 518-519; *People v. Davis* (2005) 36 Cal.4th 510, 565.) By the same reasoning, a person can perpetrate an attempted kidnapping to commit robbery without also committing an attempted robbery. This is because a direct but ineffectual act towards the commission of the intended robbery is not an element of attempted kidnapping for robbery. A perpetrator could: possess specific intent to commit a kidnapping for robbery and to rob; take a direct but ineffectual step towards committing the kidnapping for robbery; but without taking a direct but ineffectual step towards committing the robbery. Therefore, attempted robbery is not a necessarily included offense of attempted kidnapping for robbery.

People v. Medina (2007) 41 Cal.4th 685, 700-701, does not compel a different result. There, our Supreme Court held attempted kidnapping was a lesser included offense of attempted kidnapping during the commission of a carjacking (§ 209.5, subd. (a)). This is different from our case. The crime of attempted kidnapping for robbery, does not require an attempted robbery. By contrast, *Medina* held attempted kidnapping during the commission of a carjacking cannot be committed without also committing an attempted kidnapping.

D. Gang Evidence

1. Sufficiency of the evidence supporting the gang enhancement

The jury found Mr. Oakley committed three counts of assault with a firearm for the benefit of a criminal street gang. The jury found the gang allegations true only as to Mr. Oakley and only as to the three assault with a firearm counts. Mr. Oakley argues the evidence was insufficient to support those findings. Mr. Oakley points to the fact there

was no evidence he had engaged in any prior violence, particularly on the gang's behalf. He notes that in September 2009, he admitted his gang membership. This occurred during a consensual contact with Deputy Smith. Mr. Oakley emphasizes that prior to and during the consensual encounter he was not involved in any criminal activity and he was cooperative. We view the evidence in the light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) Our review for substantial evidence is independent of the jury's determination the evidence was insufficient as to other defendants and other counts. (See *United States v. Powell* (1984) 469 U.S. 57, 67; *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 5, *People v. Avila* (2006) 38 Cal.4th 491, 600-601; *People v. Lewis* (2001) 25 Cal.4th 610, 654-656 [inconsistent verdicts may stand].)

Mr. Oakley was an active gang member willing to engage in violent crime and to fire a weapon at Mr. Mendoza. Mr. Oakley had ties to the gang neighborhood from a young age, six or seven. On two occasions within six months prior to committing the present offenses, Mr. Oakley admitted his gang membership and his monikers. On both occasions he was dressed in gang attire. He had gang tattoos that covered his chest and his back. On one occasion, Mr. Oakley was detained for tagging a wall with gang graffiti. It was unusual for a gang member of Mr. Oakley's age to be engaging in such conduct. It was something younger gang members were much more likely to do. Mr. Oakley said he did it because he wanted his and the gang's names displayed. Multiple photographs of Mr. Oakley making gang signs were found in Mr. Rochin's cellular telephone. During the present aggravated assault, which occurred in gang territory, Mr. Oakley fired a weapon at Mr. Mendoza. There was also evidence from which the jury could reasonably infer Mr. Oakley wanted Mr. Mendoza's AK-47 rifle. Mr. Oakley's fellow gang members had observed Mr. Mendoza unloading an AK-47. Mr. Oakley assaulted Mr. Mendoza with a bag containing multiple rounds of ammunition used in AK-47 rifles. Possession of such a weapon, particularly an untraceable one, would be much desired by the gang. By his conduct, including discharging his weapon at the

victim, Mr. Oakley accomplished multiple goals consistent with a finding he acted to benefit a street gang. He sent a strong message that he was a gang member who was not afraid to use his weapon. Mr. Oakley instilled fear in Mr. Mendoza. Mr. Oakley spread fear in the community. He enhanced his gang reputation. He promoted his gang's reputation. This was substantial evidence from which the jury could reasonably find Mr. Oakley had gang-promoting purposes with respect to the firearm assault charges. No rational argument can be made there was no substantial evidence Mr. Oakley was not a gang member.

2. Trial court questioning of Mr. Flores

Mr. Oakley argues the trial court abandoned its neutral role in questioning Mr. Flores. He points to sections of Mr. Flores's lengthy testimony during which the trial court asked pointed questions of the witness.[3] The trial court could properly examine Mr.

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[3] Mr. Oakley cites the following testimony: "[Victor Salerno, counsel for Mr. Oakley]: Do you believe that there's evidence, based on what you've heard, to substantiate that these weapons were in fact on their way to the [gang]? [¶] Mr. Cernok: I'm going to object, Your Honor. That's a question that the jury is to answer, not this expert. [¶] The Court: I'll overrule the objection. [¶] The witness: No, I don't believe that. [¶] The Court: You don't believe what? [¶] The witness: That there's evidence that the weapons that would be gotten from this individual would be used for the benefit of the gang. [¶] The court: Or for alleged gang members or three alleged gang members and an associate gang member, go and attempt to steal firearms, you don't think that is for the benefit of a criminal street gang? [¶] The witness: No, not in this case, I don't. [¶] The court: For their personal use only? [¶] The witness: It could be for their personal use, and there's no evidence that I saw that even these individuals are currently actively involved with this type of criminal activity that leads me to that belief. [¶] The Court: Are you telling me that a gang member has to be actively involved time and time again in trying to steal weapons to qualify as an active or criminal street gang? [¶] The witness: I think it shows a track record of an individual when they are actively involved. In this case, there is minimal to no contact. [¶] . . . [¶] Q By Mr. Salerno: Do you believe that there needs to be evidence related to the actual commission of the alleged offense, if found to be true, to show that the activity was gang-related? [¶] A. No. The evidence that the alleged crime took place, that's one incident. Okay? In particular to the

Flores in an attempt to clarify the testimony and elicit facts pertinent to a just determination of the case. (Evid. Code, § 775; *People v. Cook* (2006) 39 Cal.4th 566, 597; *People v. Harris* (2005) 37 Cal.4th 310, 350; *People v. Hawkins* (1995) 10 Cal.4th 920, 948, abrogated on another point in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) Moreover, we find no prejudice to Mr. Oakley. (*People v. Harris, supra*, 37 Cal.4th at pp. 350-351; *People v. Monterroso* (2004) 34 Cal.4th 743, 783.) The questions were

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gang enhancement, I think it's important to look at the proof that there's sufficient evidence to show that these individuals are planning to use whatever they're getting, whether it's the drugs or the guns, for the gang. Gang members don't just function with the mindset for the gang. They also do things for themselves, and so there needs to be sufficient evidence that demonstrates that these individuals were doing this to benefit the gang and not just themselves. [¶] The court: I didn't quite understand your answer. In addition to what Mr. Salerno has posed as the hypothetical factors in arriving at your opinion, you believe, in addition to that, there must be evidence of what they planned to do with the items that they were going to take? There must be some evidence of a future plan to do something, is that right? [¶] The witness: That's a part of it, yes. [¶] The Court: Okay. [¶] Q By Mr. Salerno: Well, another way of looking at it, based on what I've said hypothetically, are you saying that you would want to see more evidence connecting the actual gang with this criminal activity complained about by Mr. Mendoza? [¶] A Yes. [¶] Q Or by the individual. Okay. [¶] And one incident would be evidence of what was the intended purpose of these items, how they were going to be used, and whether they were going to be used individually or for a gang purpose? [¶] A That is a part of it. In addition to that -- [¶] The Court: How would that be shown, that a crime has been committed allegedly by members that belong to a particular street gang/ Let's assume that in that weapons were taken. So you indicate that, for you to render an opinion that that act by those alleged gang members to take these weapons or attempt to steal weapons, you would still have to have some evidence of how they planned to use those items that were taken; is that right? [¶] The witness: Yes. Let me elaborate on that. [¶] The Court: What kind of evidence are we talking about? [¶] The witness: I think what matters here -- [¶] The Court: Somebody admitting that we're going to take these weapons to do something with them? [¶] The witness: That's not the only evidence, no. [¶] The Court: Is that what you're talking about? [¶] The witness: I think what we're looking at here is documentation that these individuals are still actively involved with the gang. [¶] The Court: That's different than what Mr. Salerno said. He indicated that there had to be a plan with these people as to how they were going to use these items. Now you are telling us something a little differently. [¶] The witness: No. I'm expanding on what I was saying. [¶] The Court: Okay. The witness: If you want me to expand? [¶] The Court: Sure."

directed at Mr. Flores's opinion concerning the evidence defendants acted for the benefit of the gang in attempting to steal Mr. Mendoza's weapons. The jury was instructed it should form its own conclusions about the credibility of witnesses and should not decide the facts based on anything the trial court did. (*People v. Cook, supra,* 39 Cal.4th at p. 598; *People v. Harris, supra,* 37 Cal.4th at p. 350.) Moreover, the jury returned not true findings on the gang enhancement allegations with respect to the kidnapping, attempted kidnapping and attempted robbery convictions as to all defendants, including Mr. Oakley. Evidence of Mr. Oakley's guilt was strong. It is not reasonably probable the jury's verdict would have been more favorable to him had the trial court not questioned Mr. Flores.

3. Disclosure delay

Defendants assert prosecutorial misconduct in turning gang evidence including field identification cards over to the defense seven days prior to trial. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Mr. Rochin's counsel, Mr. Edward Mizrahi, objected to testimony based on a field identification cards. Mr. Mizrahi acknowledged that he had received a copy of a field identification card documenting an encounter between his client and a law enforcement officer, albeit only seven days prior to the start of trial. Ms. Valencia's lawyer, Albert Deblanc, Jr., joined in Mr. Mizrahi's objections. The motion to strike the testimony was denied on grounds the trial had been in progress and Mr. Mizrahi had not previously objected to the late disclosure nor sought a continuance. Further, the trial court noted there was no evidence as to when the prosecution came into the possession of the field interview cards. Neither Mr. Mizrahi nor any other defense attorney requested a continuance or moved to suppress the evidence. None of the defense attorneys requested a jury instruction on the delayed disclosure of evidence. (§ 1054.7; *People v. Riggs* (2008) 44 Cal.4th 248, 303-306.) Moreover, reversal is required only where it is

reasonably probable that absent the disclosure violation the verdict would have been more favorable to the defendant. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; Cal. Const., art. VI, § 13.) Defendants assert that the prosecution case was close. But Ms. Valencia, Juan and Mr. Oakley failed to demonstrate how the evidence of Mr. Rochin's statements affected the case against them. Any error was harmless.

4. Bifurcation or curtailment

The trial court denied defendants' motion to bifurcate the gang issue. On appeal, defendants argue the gang evidence should have been bifurcated. Defendants also contend the trial court abused its discretion under Evidence Code section 352 by admitting cumulative and excessive gang evidence. We find no abuse of discretion. (*People v. McKinnon* (2011) 52 Cal.4th 610, 655; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048; *People v. Calderon* (1994) 9 Cal.4th 69, 72.) The jury found the gang enhancement allegation not true as to all defendants except Mr. Oakley. However, there was evidence the attempted robbery in gang territory was a coordinated effort among three gang members and an associate, Ms. Valencia, to acquire weapons and funds for its benefit. The gang evidence was relevant to the issue of motive. The evidence was admitted to show defendants were gang members or associates and that the crimes were committed to benefit the gang. The gang evidence was not unduly cumulative or inflammatory. Given this conclusion, defendants' constitutional claim is also meritless. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 656, fn. 28; *People v. Hartsch* (2010) 49 Cal.4th 472, 493 & fn. 19.)

E. Sentencing Issues

1. Attempted robbery

The trial court sentenced Mr. Oakley to a mid-term of *four years* (stayed) for attempted second degree robbery. This was error. Pursuant to sections 213, subdivision (b) and 18, the sentencing range was 16 months, 2 years or 3 years. The trial court imposed a two-year mid-term sentence for attempted robbery on Juan and Mr. Rochin. Therefore, it appears the trial court simply misspoke when it orally sentenced Mr. Oakley. The judgment as to Mr. Oakley will be modified to reflect a mid-term two-year sentence for attempted robbery.

2. Fees and assessments

The trial court orally imposed a single $40 court security fee (§ 1465.8, subd. (a)(1)) and a single $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) as to Mr. Rochin. The trial court erred in failing to orally impose a court facilities assessment and a court security fee as to *each of the five counts* of which Mr. Rochin was convicted. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3 [Gov. Code, § 70373, subd. (a)(1)]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 [§ 1465.8, subd. (a)(1)].) The judgment as to Mr. Rochin must be modified to impose $150 in court facilities assessments and $200 in court security fees.

3. Presentence custody credits

a. Ms. Valencia

Ms. Valencia was in presentence custody for 446 days, from November 22, 2009, to February 10, 2011. The trial court initially awarded her credit for 415 days in presentence custody plus 62 days of conduct credit. Subsequent to sentencing, Ms. Valencia filed an ex parte motion in the trial court seeking to correct her presentence

custody credit award. Ms. Valencia relied on the enhanced "one for one" credit provisions of section 4019 as amended in 2009 effective January 25, 2010 (Stats. 2009, ch. 28, § 50). This is the version of section 4019 that was in effect as to Ms. Valencia when she was sentenced, on February 10, 2011. The trial court granted Ms. Valencia's motion and awarded her credit for 446 days in presentence custody plus 446 days of conduct credit for a total of 892 days. Section 4019 as subsequently amended in 2010 (Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010) applies only to defendants in custody for a crime committed on or after September 28, 2010. (§ 4019, subd. (g), as amended eff. Sept. 28, 2010.) The present crimes were committed on November 22, 2009. Therefore, the amendment effective September 28, 2010 is inapplicable to Ms. Valencia.

Ms. Valencia is not entitled to one-for-one credit. Section 4019 subdivisions (b)(2) and (c)(2) as amended effective January 25, 2010, expressly exclude from the enhanced credit provisions defendants who are sentenced on a serious felony as defined in section 1192.7. The Legislature expressly stated that, "[A] term of four days will be deemed to have been served for every two days spent in actual custody, *except that* a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c)." (§ 4019, subd. (f), as amended in 2009, italics added.) Ms. Valencia was sentenced on three counts of firearm assault (§ 245, subd. (a)(2)), a serious felony (§ 1192.7, subd. (c)(31)). Therefore, the "one for one" credit provisions of section 4019 as amended in 2009 effective January 25, 2010 were not available to her. Pursuant to section 4019 subdivisions (b)(2) and (c)(2) as amended effective January 25, 2010, Ms. Valencia should have received credit for 446 days in actual presentence custody plus 222 days of conduct credit for a total presentence custody credit of 668 days. (See *People v. Madison* (1993) 17 Cal.App.4th 783, 786-787; *People v. Gutierrez* (1991) 232 Cal.App.3d 1571, 1573.)

Ms. Valencia argues she has been released from custody and it would be "fundamentally unfair and cruel and unusual punishment" to recommit her. We disagree.

Due to the miscalculation of her presentence custody credit, Ms. Valencia received an unauthorized early release from prison. (*People v. Statum* (2002) 28 Cal.4th 682, 692; *In re Borlik* (2011) 194 Cal.App.4th 30, 42.) She has no legitimate expectation that she will not be not be returned to custody. No unusual circumstances have been shown. (*People v. Statum, supra*, 28 Cal.4th at p. 692; *In re Borlik, supra*, 194 Cal.App.4th at pp. 42-44.) Ms. Valencia has engaged in extraordinarily dangerous conduct. It is entirely fair she serve her full term of imprisonment.

b. Juan

Juan received credit for 456 days in actual presentence custody and 68 days of conduct credit for a total presentence custody credit of 524 days. However, he was in presentence custody from November 24, 2009, to February 24, 2011, a 458-day period. Additionally, Juan contends and the Attorney General concedes that Juan was not subject to the 15 percent limitation on conduct credits for a person convicted of a violent felony. (§ 2933.1, subd. (a).) We agree that Juan's offenses do not qualify as violent felonies for purposes of the section 2933.1 conduct credit limitation. However, Juan *was* convicted of serious felonies. (§ 1192.7, subd. (c)(31) [firearm assault] and (c)(2) and (39) [attempted kidnapping].) Therefore, he was not entitled to one-for-one credit under section 4019, subdivision (f), as amended effective January 25, 2010 (Stats. 2009, ch. 28, § 50) or section 2933, subdivision (e), as amended effective September 28, 2010 (Stats. 2010, ch. 426, § 1). Under the version of section 4019, subdivision (f), in effect as to Juan when he was sentenced (Stats. 209, ch. 28, § 50), Juan was entitled to 228 days of conduct credit. His total presentence custody credit was 686 days (458 plus 228).

Juan contends that to deny him one-for-one credit because he was convicted of a serious felony violates the equal protection guarantees of the state and federal Constitutions. Juan asserts he will serve a longer period of state prison confinement than a defendant in his exact position but who did not serve time in presentence custody. Juan

reasons the hypothetical defendant will earn one-for-one credit against a full state prison sentence. (§ 2933 as amended by Stats. 2009, ch. 28, § 38, eff. Jan. 25, 2010.) But Juan argues he will earn less than one-for-one credit against his full state prison sentence because he received less than one-for-one credit against his presentence county jail time. The Attorney General has not addressed this argument.

Juan's argument is without merit. Even if, as Juan asserts, state prison work credit may be passively earned so long as the prisoner is willing to work, conduct credit must still be earned and can be forfeited. (§ 2933, subd. (c).) It cannot be said that defendant will necessarily serve more time in prison than the hypothetical prisoner described above. Moreover, pretrial detainees are not similarly situated to prison inmates with respect to conduct credit schemes. Therefore, Juan has not demonstrated any equal protection violation. (See *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1141-1142; *People v. Ramos* (1996) 50 Cal.App.4th 810, 821-824; *People v. Devore* (1990) 218 Cal.App.3d 1316, 1319; *People v. Poole* (1986) 187 Cal.App.3d 552, 524-527; *People v. Caruso* (1984) 161 Cal.App.3d 13, 15-21; *People v. Caddick* (1984) 160 Cal.App.3d 46, 47-54; *In re Cleaver* (1984) 158 Cal.App.3d 770, 773-774; *People v. Rosaia* (1984) 157 Cal.App.3d 832, 841-848.)

IV. DISPOSITION

The judgment as to defendant, Rodney Allen Oakley, is modified to impose a stayed mid-term two-year sentence for attempted second degree robbery. The judgment as to defendant, Adrian Rochin, is amended to impose $150 in court facilities assessments (Gov. Code, § 70373, subd. (a)(1)) and $200 in court security fees (Pen. Code, § 1465.8, subd. (a)(1)). The judgment as to defendant, Juan Oscar Flores, is modified to award him credit for 458 days in presentence custody and 228 days of conduct credit for a total presentence custody credit of 686 days. The judgment as to defendant, Flor Valencia, is modified to award her credit for 446 days in actual

presentence custody plus 222 days of conduct credit for a total presentence custody credit of 668 days. The judgments are affirmed in all other respects. Upon remittutur issuance, the clerk of the Superior Court shall amend the abstracts of judgment to reflect the modified judgments and deliver copies to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.