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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WENDY MARTINEZ et al.,<br><br>Defendants and Appellants. | B277395<br><br>(Los Angeles County Super. Ct. No. YA091411) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed in part, reversed in part, and remanded.

Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant Wendy Martinez.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant Jerry Leone.

Lori A. Quick, under appointment by the Court of Appeal, for Defendant and Appellant Art Macias.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant Miguel Ochoa.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Daniel C. Chang, Deputy Attorney General, for Plaintiff and Respondent.

Defendants and appellants Wendy Martinez (Martinez), Art Macias (Macias), Jerry Leone (Leone), and Miguel Ochoa (Ochoa) were convicted of first degree robbery, home invasion robbery in concert, burglary, and two counts of assault with a deadly weapon—all stemming from an altercation between defendants and Michael Veneris (Veneris). As to defendants Ochoa and Leone, we consider whether they are entitled to reversal of their convictions due to alleged infringements on their right not to testify and their right to remain silent. As to defendant Ochoa, we consider whether substantial evidence supports his convictions for robbery and burglary. As to all defendants, we consider whether the robbery and assaults were part of a single course of conduct, such that the sentence imposed on the assault charges should have been stayed. We also decide a variety of sentencing-related issues that apply to some or all of the defendants.

## I. BACKGROUND

### *A. The Charges Against the Defendants*

The Los Angeles County District Attorney charged each defendant with five crimes:[1] (1) first degree residential robbery in violation of Penal Code section 211 (count 1);[2] (2) assault with a deadly weapon (a knife) in violation of section 245, subdivision

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[1] Ochoa and Leone were also charged with possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). They pled no contest to these charges prior to the commencement of voir dire at trial.

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

(a)(1) (count 2); (3) assault with a deadly weapon (a baseball bat) in violation of section 245, subdivision (a)(1) (count 3); (4) home invasion robbery in violation of section 211, committed by the defendants who voluntarily acted in concert under section 213, subdivision (a)(1)(A) (count 8); and (5) first degree burglary in violation of section 459 (count 9). The amended information further alleged Leone and Ochoa personally used dangerous or deadly weapons in the commission of the charged counts (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury on victim Veneris (§ 12022.7, subd. (a)).

*B. The Prosecution's Case*

The prosecution presented testimony from two witnesses during its case in chief: Veneris and Wendy Ho (Ho), the property manager for the apartment building in which Veneris lived at the time of the incident.

*1. Veneris's testimony*

Veneris owned an HTC smartphone. At some point, he lent that smartphone to a friend, who never returned it. Veneris met Martinez through a different friend sometime around the end of August 2014. He and Martinez were not close friends, but they had interacted a few times. Martinez came to Veneris's apartment a few days after they first met and brought four or five cellphones with her. Veneris and Martinez looked through the phones, and Martinez said one of them did not charge. Veneris suggested she try a charger he had and connected the charger to the phone. The phone powered up and, after looking through a few pages, Veneris realized it was his HTC phone. He informed Martinez the phone was his, but Martinez refused to give it back,

instead offering to sell it to him for $40. Veneris offered her $20. Martinez refused the offer and eventually left Veneris's apartment, leaving his HTC phone behind.

Veneris was preparing to go out of town when he began receiving phone calls from Martinez telling him he needed to return the HTC phone to her. After several additional calls between the two, Veneris ultimately told her it was his phone, it was "not going anywhere," and he would give her a call when he got back into town so they could work something out.

The next time Martinez contacted Veneris was the date of the alleged crimes, September 19, 2014. Veneris, who had two cameras monitoring certain parts of the apartment complex in which he lived (one above the gate to the parking lot and one at his own door),[3] saw Martinez standing outside with an umbrella. She remained outside for a couple of hours without attempting to speak with Veneris. At some point, Veneris went outside his apartment to the hallway and spoke to Martinez. By this time, Veneris had traded or sold the HTC phone to another friend. Martinez was very upset that Veneris did not have the phone, and she said she wanted $60 for it. Veneris offered to give her $20, or to get the phone and meet up with her later. Martinez, speaking partially in Spanish, said she was going to have Veneris beat up or make him pay for the phone one way or another. Veneris walked with Martinez to the front gate and then, because of Martinez's threat to have him beat up, went back to his apartment to hook up his cameras to record.

Veneris left the door open while he was hooking up the cameras, and while he was standing with one foot on the back of

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[3] Veneris did not have the cameras set up to record.

his couch and one foot on the counter, he was hit on the left side of his face and the back of his head. He did not see who initially hit him, but could tell he was hit with a solid object. Veneris jumped down to the floor and saw Ochoa and Leone, the latter of whom was holding a bat. Shortly thereafter, he noticed Macias. All three men said "where's my girlfriend's cell phone." The men began attacking Veneris, and at some point during the altercation, Veneris saw Ochoa coming toward him with a pocket knife. Ochoa stabbed and slashed at Veneris, and came in contact with his body "a couple of times," including "right on [Veneris's] kidneys." Veneris also believed the knife came into contact with his head, shoulders, back, hands, and arms. Veneris estimated the knife hit him somewhere around fifteen or twenty times.

Once Ochoa entered the fray, Ochoa and Leone were attacking Veneris at the same time. Veneris eventually slapped Ochoa's arm, causing the knife to fall. Veneris reached for the knife but could not grab it because Leone was still hitting him with the bat. Leone hit Veneris in the back, and Veneris stumbled forward and was bent over the arm of the couch. Ochoa then began kicking at Veneris's face with the bottom of his shoe, and not long thereafter, Ochoa turned and walked out of Veneris's home (meaning at least to the doorway of his apartment) with "some stuff." Veneris also saw Macias leave the apartment with some of his belongings. (A subsequent inspection revealed a television, a laptop computer, external disk drives, a couple of iPod touches, and an "old school" iPod had been taken.)

Leone and Ochoa then attacked Veneris again. Macias pointed a "chrome pistol" (which turned out to be a BB gun) at Veneris and told him to get on his knees. Veneris responded,

"'F' that,'" and slapped the pistol down. The pistol fired, and Veneris felt something hit his knee. Veneris then started asking the men to leave him alone, saying it was enough. The men stopped attacking him and left shortly thereafter. After the men left, Veneris's stepfather came over and took him to Torrance Memorial Hospital.

The police came to the hospital, spoke to Veneris about the incident, and took pictures of his injuries. Veneris had a cut on his left eyebrow which required stitches, numerous small cuts and bruises on the top of his head, areas of swelling on his left arm, a gash on his left side which the hospital closed with glue, swelling on his back, and a reddish welt or bruise on his right knee. The hospital put a brace or splint on Veneris's right leg.

*2. Ho's testimony and the video evidence*

Ho authenticated surveillance footage recorded by the apartment complex's cameras showing the defendants at the complex on September 19, 2014. Though the surveillance footage did not cover the entire apartment complex, and thus did not depict all of defendants' actions, it did show Martinez on the property, the male defendants driving up and exiting the car, Leone with a baseball bat, Ochoa with an object in his hand, Macias with something resembling a gun in his waistband, and the defendants returning to the car with property, including a television and a laptop computer. The video footage established defendants were only away from the car for a few minutes at most.

*C. The Defendants' Case*

Two of the four defendants, Martinez and Macias, testified at trial. There were no other witnesses during the defense case.

*1. Martinez's testimony*

Martinez met Veneris around March of 2014 at a friend's house. Between their first meeting and the September 19, 2014, incident, Martinez had been to Veneris's apartment about seven times and she had smoked methamphetamine with him six or seven times. Veneris previously tried to be sexually intimate with Martinez, but she had just laughed off his overtures. Martinez considered Veneris a friend.

At some point between March and September, Martinez left certain possessions with Veneris so he could try to fix them for her. For example, in late June or July, Martinez left her television with Veneris. Martinez called Veneris the day before the charged in-home attack to get her belongings back, including an iPhone, the HTC phone, a television, and a laptop computer;[4] Martinez went to Veneris's apartment on September 19 to pick the items up. Some of Martinez's possessions were outside of the front door of Veneris's apartment. Veneris appeared high when Martinez arrived, and the two of them proceeded to smoke methamphetamine from a bong in his apartment. Martinez was in the apartment for about an hour or two. During that time, Veneris told her the HTC phone belonged to him.

While Martinez and Veneris were sitting on his couch together, Veneris started rubbing her leg and other portions of

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[4] Martinez grabbed her iPhone while she was in Veneris's apartment, but she did not get the HTC phone back.

her body. Martinez told him to stop and stood up. Veneris continued to proposition her verbally. Martinez initially laughed at his efforts and told him to stop. Veneris grabbed her butt and pushed himself close enough to Martinez that she could feel his erection.[5] When Veneris persisted, Martinez said she wanted to leave, needed her stuff back, and was going to call someone for help.[6]

Martinez called Leone while still in Veneris's apartment. She told him she was trying to get her property back from Veneris and Veneris was trying to touch her. Veneris told Martinez to go ahead and call for help, and he had "something waiting for them." Martinez saw Veneris grab "something sharp." She left the apartment and continued calling her friends while pacing in an alley in the apartment complex. Veneris then came out of his apartment to look for a cat and he suggested Martinez come back inside to smoke some more methamphetamine. Martinez did not feel she was in immediate danger from Veneris at that point.

Martinez did not know Ochoa and Macias were with Leone until they arrived at the apartment complex. Martinez saw the three men get out of the car, and Martinez told Macias that Veneris had her TV. Macias grabbed the TV, and he and Martinez headed back to the car. Martinez did not see any of the men enter Veneris's apartment, and did not witness the

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[5] This physical behavior differentiated this incident from previous times Veneris had asked Martinez to have sex with him.

[6] Martinez did not call the police because she believed they would not believe her and she would get in trouble for using drugs.

altercation between Leone, Ochoa, and Veneris. Once all of the defendants were in the car, Martinez drove the car away.

At some point after the incident, Torrance Police Department Detective Ryan Galassi spoke to Martinez by phone. Martinez told Detective Galassi she had gone to Veneris's apartment to retrieve a cell phone and an umbrella. She also told Detective Galassi that Veneris had tried to rape her, but Martinez said the detective refused to take a report. It was unclear from the recording of the phone interview (which was played at trial) whether Martinez told Detective Galassi what items of her property other than her phone and umbrella, if any, were in Veneris's apartment.

*2. Macias's testimony*

Macias was eating lunch with Ochoa and Leone on September 19 when Leone got a call from Martinez. Leone asked Ochoa and Macias if they would go with him to pick up Martinez and her property. Leone said he was worried about Martinez and didn't know what he was getting himself into. When they arrived at the apartment complex, Macias saw Martinez crying in the parking lot. Macias grabbed a BB gun from the glove compartment because he wanted something to protect himself. He had seen Veneris by his door with a screwdriver in his hand.

While together with Macias, Ochoa told Martinez they should leave, but Martinez did not want to leave without her property. Macias saw some items outside Veneris's apartment in the hallway next to his door, including a TV and a laptop. Leone started walking toward Veneris, who was standing outside of his apartment.

Veneris swung the screwdriver at Leone twice, though he did not hit him. Leone backed up and swung the bat at Veneris, but Leone did not hit Veneris either. Ochoa then went to help Leone, and the fight moved from the walkway into the parking lot. Martinez asked Macias to help put her property inside the car, and Macias grabbed the TV.

Meanwhile, the fight was still going on between Ochoa, Leone, and Veneris. Macias did not pull out, drop, or display the BB gun. Instead, he put the BB gun in the car before putting the TV in the back seat, and he then went to check on Ochoa and Leone. Macias saw Ochoa grab the laptop, while Leone watched Veneris, who was on the floor. Though Macias saw a bat in Leone's hands, he did not see Leone hit Veneris with anything. Martinez also saw Leone and Ochoa knock Veneris down, but he testified he did not see Leone or Ochoa strike, kick, punch, or throw anything at Veneris after he was on the ground.

All four defendants left the apartment complex in the same car. Martinez seemed high, upset, and depressed, and she said she had a fight with Veneris because he was trying to have sex with her.

*D. The Prosecution's Rebuttal Evidence*

The People called Detective Galassi as a rebuttal witness. He testified he spoke to Martinez over the phone for about forty-five minutes in October 2014. Martinez told Detective Galassi she had gone to Veneris's house to get a cell phone that belonged to her and to collect some money from an antique she had sold to Veneris, which he had never paid for. She did not say anything about trying to retrieve any other property from Veneris.

On cross-examination, counsel for defendants Leone and Martinez asked Detective Galassi a number of questions regarding what he did in response to Martinez's allegation that Veneris had sexually assaulted her. The detective was specifically asked, "Who did you have go and talk to her when a citizen had made a complaint to you that a crime had been committed against her?" Detective Galassi responded, "Well, I had spoke to her prior, about 45, 46 minutes worth of her telling me that the victim had sexually assault[ed] her— [¶] . . . [¶] And then I followed up with . . . Veneris and spoke with him about it, and prior to that, I attempted to speak with the other defendants in this case about it, but they would not speak to me." At that point, counsel for Ochoa and Leone objected. The trial court sustained the objection, struck Detective Galassi's answer, ordered the jury to disregard the answer, and reminded the jury that "a defendant has a constitutional right to remain silent and not speak to the police. So the jury's ordered to disregard it and not consider that for any purpose."

*E. The Prosecution's Rebuttal Argument*

At one point during rebuttal, the prosecutor made the following remarks: "It's interesting. You had two defendants that testified, and that's Martinez and Macias. You had two defendants that didn't testify, and there's a jury instruction that says specifically you cannot use that fact if the defendant doesn't testify against them, can't consider that." Counsel for Leone, Ochoa, and Macias objected. The court then told the jury, "I did read a jury instruction to the jury. A defendant has an absolute constitutional right to remain silent, and in this case, the defendants Leone and Ochoa have exercised their right to remain

silent. The jury's instructed they're not to consider that silence for any purpose whatsoever." The prosecutor then continued, stating, "But defense counsel for both Leone and Ochoa, they used facts that were presented to argue their case. Okay?" Defense counsel renewed their objection, and the court overruled it. The court also reminded the jury, "The jury has the law. I've read the instructions to the jury. You must follow the law as I give it to you. If an attorney's comments conflict[ ] with the law, you must follow my instructions. That's what I've read to you. Okay?" The prosecutor proceeded to finish his rebuttal argument.

*F. Motion for Mistrial*

Defense counsel moved for a mistrial based on (1) Detective Galassi's reference to certain of the defendants' silence in answering a cross-examination question, and (2) the above-quoted excerpt of the prosecution's rebuttal argument. The defense position was that the challenged comments were *Doyle*[7] and *Griffin*[8] error, respectively. The trial court found the prosecutor's comments did not constitute *Griffin* error because the prosecutor's statement that the defendants' silence could not be used against them was an accurate statement of law. It also found the detective's testimony did not really implicate *Doyle* because there was no indication in the trial testimony regarding whether the detective attempted to speak to the other defendants pre-arrest or post-arrest, or before or after giving warnings

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[7] *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

[8] *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. The court also reasoned it had taken swift action in response to the detective's testimony by admonishing the jury and striking the testimony, the reference to the refusal to talk was "brief and mild," and the jury was presumed to follow the court's instructions and orders. Accordingly, the court denied the mistrial motion.

*G. Verdicts and Sentencing*

The jury found the defendants guilty on all counts charged. Specifically, the jury found each defendant guilty of: (1) robbery under section 211, with the further finding the robbery was of the first degree; (2) assault with a deadly weapon (knife); (3) assault with a deadly weapon (baseball bat); (4) home invasion robbery under section 211, with the further finding that the home invasion robbery was committed in concert under section 213, subdivision (a)(1)(A); and (5) first degree burglary. The jury also found Ochoa and Leone had inflicted great bodily injury on Veneris, and had personally used a knife and baseball bat, respectively, during the commission of the substantive offenses.

The trial court held three separate sentencing hearings. The court sentenced Martinez and Macias during the first hearing, Leone during the second hearing, and Ochoa during the third hearing.

The trial court discussed a potential section 654 issue with the assault charges at the first and second sentencing hearings. During the first hearing, the prosecutor acknowledged one could argue the two assault charges merged with the robbery charge under section 654 and stated he was not sure how the court viewed the issue. The court replied, "I will tell you how I

interpret them right now. I don't think that they merge under 654 of the Penal Code. I do think that counts 1 and 9 are 654 to count 8." There was no other substantive discussion regarding whether the assault charges merged under section 654. At Leone's sentencing hearing, the court acknowledged "there's an argument whether or not [the assault charges] are 654" but did not further address the issue.

The trial court ultimately sentenced Macias and Martinez to 11 years in state prison, Leone to 15 years, and Ochoa to 20 years.

The court ordered the defendants to pay restitution and specified liability for the amount due would be joint and several among the defendants. The court also ordered each defendant to pay various fines, including a "$40 court security fee, $30 criminal court assessment fine, [and] $10 crime prevention fine."

## II. DISCUSSION

The bulk of defendants' asserted grounds for reversal of their convictions lack merit. Defendants Ochoa and Leone reprise the argument made below that their convictions should be reversed due to *Griffin* and *Doyle* error. We conclude (1) there was no *Griffin* error because the comments at issue neither implied nor stated the jury should understand defendants' silence as an indication of guilt, and (2) there was no *Doyle* error both because the prosecution did not "use" the challenged testimony and because the trial court took prompt ameliorative action. Defendant Ochoa argues there was no substantial evidence at trial that he had the specific intent necessary to commit robbery or burglary because he believed the property he took from Veneris's apartment belonged to Martinez. We hold Veneris's

testimony, along with other evidence, provided substantial circumstantial evidence of Ochoa's specific intent. All four defendants argue the trial court erred by imposing separate sentences for their robbery and assault convictions because the assault was merely the means by which they committed the robbery. Substantial evidence, however, supports the trial court's determination that the robbery and assaults were divisible crimes committed with separate intent because defendants renewed their assault on Veneris after they were in possession of the fruits of the robbery and could have escaped unimpeded.

On the other hand, we do conclude—as the Attorney General concedes on the merits—that all defendants' convictions for first degree residential robbery must be reversed because it is a lesser included offense of home invasion robbery. We also conclude, again as the Attorney General concedes, that the personal use of a weapon enhancement imposed as part of Leone's count 3 assault with a deadly weapon conviction must be stricken because use of a deadly weapon is a necessary element of the charged crime. Further, we order Ochoa's abstract of judgment amended to reflect the midterm sentence on count 2, as ordered by the trial court, and all defendants' abstracts of judgment revised to (1) indicate their liability for restitution is joint and several, (2) correct the amount of their crime prevention fines, and (3) reduce the amount of their court operations and conviction assessments.

### *A. Ochoa and Leone Are Not Entitled to Reversal Under Griffin and Doyle*

Defendants Ochoa and Leone argue the trial court erred by denying their motion for mistrial arguing *Griffin* and *Doyle* error

based on the prosecution's rebuttal argument and Detective Galassi's testimony. We address these contentions in turn and conclude the trial court did not err.

*1. The prosecution did not commit* Griffin *error and, in any event, any error would be harmless*

In *Griffin*, the United States Supreme Court held a prosecutor may not comment on a defendant's failure to testify. "'*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand.'" (*People v. Hovey* (1988) 44 Cal.3d 543, 572 (*Hovey*).) *Griffin* "'does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses.'" (*People v. Thomas* (2012) 54 Cal.4th 908, 945.) Courts have declined to find *Griffin* error where the challenged statements indicate "counsel was not suggesting that the jury draw any sort of adverse inference from defendant's silence." (*People v. Carter* (2005) 36 Cal.4th 1114, 1190, 1192 [no *Griffin* error where defense counsel, in closing argument, acknowledged the defendant had not testified and admonished the jurors they could not "'hold it against him'" or "'consider any of it'"].)

A prosecutor's act of paraphrasing a jury instruction on a defendant's right to silence has also been held not to constitute *Griffin* error. (*People v. Bradley* (2012) 208 Cal.App.4th 64 (*Bradley*).) In *Bradley*, the prosecutor told the jury the defendant had a constitutional right not to testify and "the jury could not draw an inference from the fact that [he] did not testify because he was 'entitled to just sit in that chair on his constitutional right and not say anything.'" (*Id.* at p. 85.) Defense counsel moved for

a mistrial and the trial court denied the motion, "finding the prosecutor's comments did no more than paraphrase instructions the court had already given the jury." (*Id.* at p. 86.)

The Court of Appeal held there was no *Griffin* error. (*Bradley, supra,* 208 Cal.App.4th at p. 86.) The Court of Appeal explained "[t]he prosecutor merely paraphrased the language of CALJIC Nos. 2.60 and 2.61, which had already been read to the jury, and explained he did not mean to suggest the jury should draw any adverse inference from [the defendant's] failure to testify. [¶] Even if the prosecutor's references to [the defendant's] constitutional right not to testify can be regarded as error, "'indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error. [Citations.]'" (*Ibid.*) We find *Bradley's* reasoning persuasive.

Here, the prosecutor directly referenced two defendants' decisions not to testify when he stated: "It's interesting. You had two defendants that testified, and that's Martinez and Macias. You had two defendants that didn't testify, and there's a jury instruction that says specifically you cannot use that fact if the defendant doesn't testify against them, can't consider that."[9] However, in the same sentence, the prosecutor also paraphrased the relevant jury instruction and stated the jury could not use the

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[9] To the extent defendants argue *Griffin* applies to Detective Galassi's comments regarding defendants' unwillingness to talk to him, we are unpersuaded. *Griffin*'s focus is on comments regarding a witness's failure to testify during trial, not a witness's refusal to speak to police.

decision not to testify against the non-testifying defendants. The trial court then reminded the jury that the court had read them an instruction regarding a defendant's "absolute constitutional right to remain silent" and noted defendants Leone and Ochoa had exercised that right. The prosecutor continued, stating, "But defense counsel for both Leone and Ochoa, they used facts that were presented to argue their case. Okay?" After overruling a renewed objection from defense counsel, the trial court reminded the jury again that they had to follow the jury instructions, not counsel's argument.

These statements by the prosecutor do not constitute *Griffin* error. In reviewing potentially improper prosecutorial remarks, we "review the comment to determine whether there is a reasonable likelihood that the jury would be misled about the inference to be drawn from defendant's silence." (*People v. Mayfield* (1993) 5 Cal.4th 142, 178.) There is no such reasonable likelihood here. The prosecutor's first statement did not cast aspersions on defendants Leone and Ochoa due to their silence or suggest their silence was indicative of guilt. To the contrary, the prosecutor expressly told the jury they could not use the two defendants' decision not to testify against them. Additionally, when viewed in context, the prosecutor's remark that Leone and Ochoa were relying on facts presented at trial to argue their case merely attempted to describe for the jury the state of the evidence, and the sources from which that evidence came, in what might have otherwise been a potentially confusing multi-defendant case.[10]

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[10] For essentially the same reasons, we also reject the argument that the prosecutor improperly shifted the burden of

We also conclude that even if the prosecutor's references to the defendant's right not to testify were error, they were "'brief and mild references . . . without any suggestion that an inference of guilt be drawn therefrom,'" and are thus of the type generally "'held to constitute harmless error.'" (*People v. Turner* (2004) 34 Cal.4th 406, 419-420; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1118 (*Thompson*); *Hovey*, *supra*, 44 Cal.3d at p. 572; *People v. Vargas* (1973) 9 Cal.3d 470, 478-479; *Bradley, supra,* 208 Cal.App.4th at p. 86.)

Our Supreme Court recently held any *Griffin* error was harmless where the comment at issue was "a single short query," the comment "did not directly suggest the jury should draw an inference of guilt from defendant's decision not to testify," and the jury was reminded both that a defendant has the right not to testify and that it "'must not draw any inference from the fact a defendant does not testify.'" (*Thompson*, *supra*, 1 Cal.5th at p. 1118.) Each of these three observations similarly applies here. The prosecutor made a brief statement that defendants Ochoa and Leone had not testified. Not only did he not suggest the jury should draw an inference of guilt from that fact, he did the opposite: reminding the jurors that they were prohibited from considering a defendant's decision not to testify. In addition, the trial court itself emphasized that the jury could not consider defendants' invocation of their right to remain silent as an indication of guilt. Thus, independent of our holding that there

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proof to the defense. In our view, the prosecutor did not shift the burden of proof, but merely argued the testimony of the defendants had not undermined the prosecution's case. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1408.)

was no error, there is also no possibility the challenged comments contributed to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

*2. No violation of* Doyle *occurred*

Ochoa and Leone also argue for reversal due to *Doyle* error stemming from Detective Galassi's statement that the defendants other than Martinez would not speak to him.

As our Supreme Court has stated, "*Doyle* holds that the prosecution violates due process if it uses the postarrest silence of a suspect who was given *Miranda* warnings to impeach an exculpatory explanation subsequently offered at trial." (*People v. Evans* (1994) 25 Cal.App.4th 358, 367 (*Evans*).) "Whether *Doyle* error occurred must be considered in light of *Greer v. Miller* (1987) 483 U.S. 756, 763 [ ] (*Greer*)." (*Evans*, *supra*, at p. 367.) In *Greer*, the United States Supreme Court explained there are two necessary components to a *Doyle* violation: (1) the prosecution makes use of a defendant's postarrest silence for impeachment purposes, either by questioning or by reference in closing argument; and (2) the trial court permits the use. (*Greer*, *supra*, at pp. 761-764; see also *Evans*, *supra*, at p. 368.) "The type of permission specified in *Greer* will usually take the form of overruling a defense objection, thus conveying to the jury the unmistakable impression that what the prosecution is doing is legitimate." (*Evans*, *supra*, at p. 368.) Neither component of a *Doyle* violation is present here.

First, we do not read the record to indicate the prosecution made use of Leone and Ochoa's postarrest silence for impeachment purposes. While it does appear from the record that Detective Galassi tried to speak to defendants Ochoa and

Leone about Martinez's sexual assault allegations after they were arrested, and while we assume for argument's sake that their refusal to speak to Detective Galassi constituted *post*arrest silence under *Doyle*, neither Detective Galassi nor the prosecutor attempted to make use of that silence for impeachment purposes. Detective Galassi did not affirmatively insinuate Ochoa and Leone's silence into his testimony, nor did he attempt to use it to impeach either defendant. Rather, he mentioned it in response to a question from defense counsel regarding the steps he had taken to investigate Martinez's sexual assault allegations. The fact that defendants (other than Martinez) refused to speak to Detective Galassi was directly responsive to the question he was asked; it provided information about the steps he had, or had not, taken. This is not *Doyle* error.

Second, even if we were to consider the statement a "use" by the prosecution of defendants' (assumed) postarrest silence, the trial court unquestionably did not permit the use. Counsel for Ochoa and Leone immediately objected to the detective's testimony and the trial court sustained the objection, struck the testimony from the record, ordered the jury to disregard the testimony, and reminded the jury a defendant has a constitutional right to remain silent and not speak to the police.[11] Accordingly, no *Doyle* violation occurred.

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[11] Defendants appear to argue the prosecutor's comment that two of the defendants did not testify constituted a "use" of Detective Galassi's testimony. The record does not support their argument. The prosecutor's rebuttal argument did not mention Detective Galassi's statement, which the trial court had previously stricken.

### *B. Substantial Evidence Supports Ochoa's Convictions for Robbery and Burglary*

When considering a challenge to the sufficiency of the evidence to support a conviction, "'"we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) When undertaking a substantial evidence inquiry, "the testimony of a single witness that satisfies the standard is sufficient to uphold the finding" even if there is a significant amount of countervailing evidence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; see also Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Robertson* (1989) 48 Cal.3d 18, 44.) And "[i]t is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility." (*People v. Richardson* (2008) 43 Cal.4th 959, 1030.)

*1. Substantial evidence supported the robbery conviction*

"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." (§ 211.) Robbery is a specific intent offense which requires the prosecution to prove the defendant intended to permanently deprive the victim of the property taken. (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Because there is rarely direct evidence of specific intent, it must usually be proven circumstantially. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

Ochoa argues there was insufficient evidence of his specific intent to commit robbery. Specifically, Ochoa contends the prosecution failed to prove he had the specific intent to permanently deprive Veneris of property belonging to Veneris rather than the intent to assist Martinez in retrieving her own property. Ochoa argues the evidence presented at trial is consistent with his position and Veneris's testimony was inherently improbable. Under the applicable standard of review, however, the contention that the evidence could be viewed as inconsistent with the requisite intent does not necessitate reversal. (See, e.g., *People v. Houston* (2012) 54 Cal.4th 1186, 1215 ["[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding"].) Though there may be some inconsistencies in Veneris's testimony (notably his testimony regarding the number of times he was stabbed or slashed with Ochoa's knife, when compared with his injuries), the inconsistencies are not so great

as to convince us to second guess the jury's implicit decision to find Veneris's testimony credible.

Rather, in our view, substantial evidence supports a finding defendant Ochoa had the specific intent to permanently deprive Veneris of his property. Veneris testified he and Martinez had a dispute over an HTC phone that belonged to Veneris. When Martinez spoke to Detective Galassi, the only items she mentioned she had been trying to retrieve were the HTC phone and an umbrella. Veneris further testified Martinez had told him he would pay for the HTC phone "one way or another." The apartment complex's surveillance footage showed defendants Ochoa, Leone, and Macias getting out of their car at the complex, each with a weapon or object in his possession. When the men entered Veneris's apartment, they asked, "Where's my girlfriend's phone?" They did not mention any other property, but far more than a phone was taken. As explained previously, defendants participated in taking a television, a computer, and various other items.[12]

The method of defendants' attack on Veneris also supports a finding that defendants' intent was to permanently deprive Veneris of his property. Defendant Leone hit Veneris with a

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[12] Ochoa argues Macias's testimony that Martinez asked Leone to pick both her and "her property" up demonstrates he believed all the items taken from Veneris's property belonged to Martinez. However, there is no evidence in the record indicating Martinez told Ochoa and Leone any specific property in Veneris's apartment belonged to her. The jury was entitled to infer from the evidence in the record that all of the property belonged to Veneris and that Martinez had not told the other defendants she owned any property other than the HTC phone.

baseball bat while Veneris was facing away from him, and defendants Leone and Ochoa thereafter continued to attack Veneris with the bat and knife. When speaking to Veneris, Leone and Ochoa demanded only a phone, and the mention of just this one item, plus their violent attack of some extended duration support a finding that this was not simply an effort to retrieve only that property belonging to Martinez. Substantial evidence therefore supports the jury's finding that Ochoa had the specific intent to permanently deprive Veneris of his property.

*2. Substantial evidence supports Ochoa's burglary conviction*

Section 459 states, in relevant part: "Every person who enters any . . . apartment . . . with intent to commit . . . any felony is guilty of burglary." Although burglary is a specific intent crime, the intent necessary for conviction is the intent to commit *any felony*. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) The intent to commit the felony must exist at the time of entry. (*People v. Holt* (1997) 15 Cal.4th 619, 669.) """While the existence of the specific intent charged at the time of entering a building is necessary to constitute burglary in order to sustain a conviction, this element is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence."" (*Ibid*.) """When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal."""" (*Id*. at p. 670.)

We conclude there is substantial evidence to support the jury's finding that Ochoa entered the apartment with the intent to commit a felony. For the same reasons there is substantial evidence supporting Ochoa's robbery conviction, there is

substantial evidence Ochoa entered Veneris's apartment with the intent to commit a robbery.

In addition, substantial evidence demonstrates Ochoa entered the apartment with the intent to commit another felony, namely, assault with a deadly weapon. While Martinez was on the phone calling for help, she told Veneris she would make him pay for the phone somehow or have him beaten up. Leone asked Ochoa and Macias to go with him to pick Martinez up because he wasn't sure what he was getting into. Leone attacked Veneris with a bat upon entering his apartment and with basically no forewarning, and Ochoa joined in, attacking him with a knife. Based on this evidence, the jury could have concluded Ochoa entered Veneris's apartment with the intent to commit felony assault.

### *C. Substantial Evidence Supports the Trial Court's Conclusion That Section 654 Did Not Prevent Separate Sentences for Robbery and Assault With a Deadly Weapon*

Section 654 prohibits punishment for multiple crimes arising from a single indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208.) The application of section 654 "turns on the *defendant's* objective in violating" multiple statutory provisions rather than temporal proximity. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952 (*Britt*).) If all of the crimes for which the defendant was convicted were merely incidental to or were the means of accomplishing or facilitating one objective, he may be punished only once. (*Ibid.*) Multiple punishment, by contrast, is proper if the defendant entertained multiple independent criminal objectives. (*People v. Harrison*

(1989) 48 Cal.3d 321, 335.) As our Supreme Court explained in *Britt*, "cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*Britt*, *supra*, at p. 952.)

The question of whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad discretion to resolve the question; its findings will not be reversed on appeal if there is substantial evidence to support them. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).) This review for substantial evidence applies to implied and express findings alike. (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338; *Jones*, *supra*, at p. 1143.) On appeal, "[w]e review the trial court's determination in the light most favorable to the [People] and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*Jones*, *supra*, at p. 1143.)

Here, the trial court concluded the assault charges did not merge with the robbery charge under section 654 but did not elaborate on the reasons for its conclusion. The trial court's conclusion, however, is supported by the implicit finding that defendants had separate objectives in committing the robbery and assault with deadly weapon offenses.

"[W]here a burglary or a murder is committed to facilitate a robbery, section 654 prevents multiple separate terms under separate statutes for each such 'indivisible' offense." (*People v. Melton* (1988) 44 Cal.3d 713, 767; see also *People v. Lowe* (1975) 45 Cal.App.3d 792, 795 [robbery and murder or attempted murder].) However, acts of "'gratuitous violence against a helpless and unresisting victim . . . [have] traditionally been viewed as not 'incidental' to robbery for purposes of . . . section 654.' [Citations.]" (*People v. Bui*, 192 Cal.App.4th 1002, 1016;

see also *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272 [sufficient evidence supported finding defendant had separate intents for robbery and attempted murder where amount of force used in robbery was far more than necessary to achieve objective, and where there was evidence of a history of negative interaction between defendant and victim].) Additionally, "[w]hen there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable." (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 171; see also *People v. Harrison* (1989) 48 Cal.3d 321, 338 [defendant should "not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior"]; *In re Chapman* (1954) 43 Cal.2d 385, 388-389 [assault and robbery were two separate and divisible acts, where the defendant accomplished the robbery by showing the victim a gun; the victim surrendered his wallet and loose change and attempted to run; and defendant tackled the victim, hit him over the head with his gun, and said he should blow his guts out].)

This circumstance, an assault that began or persisted after fruits of the robbery were obtained, is the circumstance presented here. Before the assault on Veneris ended, defendants were in possession of Veneris's property, he was not resisting, and their ability to escape was unimpeded. Veneris was bent over his couch, he had seen Macias and Ochoa take some property out of his apartment, and defendants had stopped attacking him. Then, instead of leaving, Ochoa returned, and he and Leone "came at"

Veneris again.[13] Macias also returned and threatened Veneris with what Veneris called a "pistol"; the gun discharged and Veneris felt something hit his knee.[14] This gratuitous violence supports the trial court's finding that punishment on both the robbery and assault crimes of conviction was justified notwithstanding section 654.

*D. First Degree Robbery Is a Lesser Included Offense of Home Invasion Robbery*

Defendants were tried for and convicted of two counts of robbery: first degree robbery and home invasion robbery in concert. As specified in both the information and the jury verdict forms, both robbery counts constituted violations of section 211. Defendants argue, and the Attorney General concedes,[15] that first

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[13] That Ochoa did not immediately place the property he removed from Veneris's apartment in defendants' car does not mean the robbery was not completed when the attack on Veneris first ceased. From the evidence presented, the trial court could have reasonably deduced that Ochoa exited Veneris's apartment with the laptop (but did not yet return to the car), and had the opportunity to escape without further attacking Veneris. Instead of doing so, Ochoa returned, joined Leone in further assaulting Veneris, and only returned to the car at the final conclusion of the assault.

[14] Contrary to Ochoa's argument, the logical inference based on the discrepancy between Veneris's testimony that Macias had a pistol and the absence of evidence of a bullet or shell is that the "pistol" was the BB gun Macias admitted to removing from the car, not that Veneris's testimony is inherently improbable.

[15] We decline to accept the Attorney General's argument that defendants forfeited their claim they could not be convicted for

degree robbery was a lesser included offense of home invasion robbery while acting in concert, and thus defendants could not validly be convicted of both counts. Count 8 charged defendants with home invasion robbery in concert, which is robbery (§ 211) committed in an "inhabited dwelling house" while acting in concert with others (§ 213, subd. (a)(1)). Count 1 charged defendants with first degree residential robbery, which is robbery (§ 211) committed in an "inhabited dwelling house" (§ 212.5). Count 8 thus included all of the elements of count 1. "'[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) The defendants' count 1 first degree robbery convictions must be reversed.[16]

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both home invasion robbery and first degree residential robbery by failing to press an objection during their sentencing hearings. (*People v. Moran* (1970) 1 Cal.3d 755, 763 ["When the jury expressly finds defendant guilty of both the greater and lesser offense, however, there is no implied acquittal of the greater offense. If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed"]; but see *People v. Magana* (1991) 230 Cal.App.3d 1117, 1122 (conc. & dis. opn. of Turner, J.).) The trial court itself noted the potential problem at sentencing but stated it would be an "issue [that] will be addressed in the Court of Appeal . . . ."

[16] Despite the Attorney General's concession, certain defendants initially contended the conviction for home invasion robbery, not the first degree robbery conviction, should be reversed because home invasion robbery in concert is not a separate offense from first degree robbery but is, instead, a

*E. The Section 12022 Deadly Weapon Enhancement Imposed in Connection with Leone's Count 3 Conviction Must Be Stricken*

Leone argues the trial court erred by imposing the section 12022, subdivision (b) enhancement in connection with his conviction on count 3, assault with a deadly weapon. Section 12022, subdivision (b)(1) provides: "A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense." Section 245, subdivision (a)(1) provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

Leone argues the enhancement was improperly imposed because the use of a deadly or dangerous weapon is an element of the underlying offense, a point the Attorney General concedes. We agree and order the enhancement stricken. (*People v. Memory* (2010) 182 Cal.App.4th 835, 838, fn. 1 [striking section 12022, subdivision (b), enhancement as improperly imposed because use of a deadly weapon is element of section 245, subdivision (a)]; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [same].)

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sentence enhancement. This contention was withdrawn at oral argument.

*F. Ochoa's Abstract of Judgment Should Be Amended to Reflect the Midterm Sentence on Count 2*

During Ochoa's sentencing hearing, the trial court stated, "As to count 2, a violation of 245(a)(1) of the Penal Code, assault with a deadly weapon, the court will select one-third of that mid-term. That's one year. And that's doubled because of the strike. That's two years. [¶] That's ordered to run consecutive." The minute order for the hearing also reflects the mid-term sentence for count 2. The abstract of judgment, however, states the upper term was imposed on count 2, though the abstract properly reflects a two-year sentence term. Ochoa argues, and the Attorney General agrees, the abstract of judgment should be amended to reflect the middle term. We will order the trial court to correct the abstract of judgment to reflect its oral ruling imposing one-third of the midterm sentence for count 2.

*G. All Defendants' Abstracts Of Judgment Should Be Amended To Correct Certain Other Errors*

*1. The abstracts of judgment should be amended to reflect joint and several liability for restitution orders*

Defendants contend the abstract of judgment should be corrected to provide their liability to pay the restitution order should be a "joint and several liability." The Attorney General agrees the correction should be made, as do we.

The trial court has the authority to make the restitution obligation of multiple codefendants joint and several. (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.) Here, the trial court ordered joint and several liability among all four of the

codefendants, but the abstracts of judgment do not reflect the joint and several nature of the liability. We will order modification of the judgments to expressly state the restitution order is joint and several as to all defendants.

*2. The abstracts of judgment should be amended to reflect the appropriate crime prevention fine*

During the sentencing hearings, the trial court imposed a $10 crime prevention fine on each defendant pursuant to section 1202.5, subdivision (a). Section 1202.5, subdivision (a) provides, "[i]n any case in which a defendant is convicted of any of the offenses enumerated in Section 211[ or] 459 . . . , the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." (§ 1202.5, subd. (a).) Accordingly, "the crime prevention fine can be imposed only once '[i]n any case.'" (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) The abstracts of judgment (except for Ochoa's) and minute orders for the defendants, however, reflect a $30 crime prevention fee. The People concede, and we agree, the $30 crime prevention fee should be reduced to $10 for each defendant.

The parties do not agree, however, on the propriety of all of the additional penalty assessments the trial court added to the crime prevention fee. They agree on the following assessments, surcharges, and penalties: (1) a $10 penalty assessment pursuant to section 1464, subdivision (a)(1); (2) a $2 penalty assessment pursuant to Government Code section 76000.5, subdivision (a)(1); (3) a $2 state surcharge pursuant to section 1465.7, subdivision (a); (4) a $1 DNA Identification Fund penalty pursuant to Government Code section 76104.6, subdivision (a); (5) a $4 DNA Identification Fund penalty pursuant to Government Code

section 76104.7, subdivision (a); and (6) a $5 court facilities construction fund penalty pursuant to Government Code section 70372, subdivision (a)(1). Their disagreements thus boil down to a dispute over $2: the difference between defendants' reading of Government Code section 76000's penalty assessment and the Attorney General's.

Government Code section 76000, subdivision (a)(1), the sole provision upon which the People rely, provides as follows: "Except as otherwise provided elsewhere in this section, in each county there shall be levied an additional penalty in the amount of seven dollars ($7) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ." (Gov. Code, § 76000, subd. (a)(1).)

Defendants rely on subdivision (e), which provides, "[t]he seven-dollar ($7) additional penalty authorized by subdivision (a) shall be reduced in each county by the additional penalty amount assessed by the county for the local courthouse construction fund established by Section 76100 as of January 1, 1998, when the money in that fund is transferred to the state under Section 70402. The amount each county shall charge as an additional penalty under this section shall be as follows" and lists the Los Angeles County fee as $5. (Gov. Code, § 76000, subd. (e).) Pursuant to this, defendants argue the fee is $5.

However, there is no indication in the record, or on the list of agreed upon assessments, surcharges, and penalties, that indicates Los Angeles County has, in fact, assessed any money for a local courthouse construction fund. The only construction fund penalty levied is under Government Code section 70372, which levies a state, not county, construction penalty and which

expressly provides it is in addition to the other penalties, including that imposed by Government Code section 76000. Because the reduction contemplated by Government Code section 76000 subdivision (e) indicates its purpose is to counterbalance a fee imposed by the county and no such county fee appears to have been imposed, we conclude the penalty is $7. The minute orders and abstracts of judgment should be corrected to reflect a crime prevention fine of $10, plus a $31 penalty assessment, for a total of $41.

*3. Defendants' abstracts of judgment should be modified to reduce court operations assessments and conviction assessments*

Defendant Macias argues the reversal of count 1 also requires a reversal of the $40 court operations assessment (§ 1465.8) and the $30 conviction assessment (Gov. Code, § 70373) attached to that count. The Attorney General concedes this point as to defendant Macias but does not address the fees assessed on the other defendants. Though not all of the other defendants raised this issue in their opening briefs, our decision to reverse the conviction on count 1 requires the reduction of each defendant's assessments on that count. (Gov. Code, § 70373 ["an assessment shall be imposed on every conviction"]; § 1465.8; see also *People v. Watts* (2016) 2 Cal.App.5th 223, 227, fn. 4 [imposition of incorrect assessments is an unauthorized sentence].) The amount of each defendant's court security fee should be reduced by $40, and each conviction assessment should be reduced by $30.

## DISPOSITION

All defendants' convictions for first degree residential robbery are reversed and dismissed. Leone's section 12022 deadly weapon enhancement on count 3 is stricken. All defendants' convictions are otherwise affirmed, and the matter is remanded to the trial court for preparation of revised abstracts of judgment that reflect (1) our decision to reverse the convictions for first degree robbery as charged in count 1, which includes the elimination of court operations and conviction assessments on that count; (2) our decision to strike Leone's deadly weapon enhancement on count 3; (3) Ochoa's mid-term sentence (not an upper-term sentence) on count 2; (4) defendants' joint and several liability for restitution orders; and (5) defendants' liability for a crime prevention fine in the corrected amount of $41.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J. DUNNING, J.*

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