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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RONNIE JAY CLARK, et al. Defendants and Appellants.	B258237 (Los Angeles County Super. Ct. No. SA084531)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elden S. Fox, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Ronnie J. Clark.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant Tommie Lee Dotson.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant Richard L. Sims.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant Tony D. Theus.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant Davonte Jamal Grace.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

In June 2013, five men committed a "smash and grab" robbery at the jewelry counter in the Fox Discount Store (also known as the Fox swap meet); three other men acted as getaway drivers. Following a joint jury trial, appellants and defendants Davonte Jamal Grace, Richard Lamar Sims, Tony Diamante Theus, Tommie Lee Dotson, and Ronnie Jay Clark (collectively defendants) were convicted of two counts of second degree robbery arising out of the incident. On appeal, they contend: (1) admitting evidence of the defendants' home addresses and the relationship of those addresses to one another was prejudicial error (Clark, Dotson, Grace, Theus); (2) admitting "composite exhibits" was prejudicial error (Grace, Theus); (3) refusing to take judicial notice that the prosecutor obtained but did not introduce into evidence defendants' cell phone records was prejudicial error (Dotson, Clark, Grace, Theus); (4) the robbery convictions were not supported by sufficient evidence (Clark, Theus, Sims); (5) there was prosecutorial misconduct (Dotson, Grace, Sims, Theus); (6) there was instructional error (Sims); and (7) there were sentencing errors (Dotson, also the People). In addition to these specific contentions, each defendant also purports to join in all of the contentions of each codefendant.[1] Each also contends the errors were cumulatively prejudicial, even if individually harmless. We affirm the judgments.

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[1] A party may join the contentions of another party (Cal. Rules of Court, rule 8.200(a)(5)), but cursory joinder is not enough. The joining party still has the burden of demonstrating error and prejudice as to him. (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.) We analyze each defendant's contentions only as they relate to that defendant unless a codefendant explains how the contention relates to him.

PROCEDURAL BACKGROUND

Defendants were jointly charged by second amended information with the second degree robberies of Song Kuk Cho (count 1) and Hae Ja Cho (count 2), the husband and wife owners of the Fox Jewelry Store; various prior conviction enhancements were also alleged. In May 2014, following a joint jury trial, all five defendants were convicted on both counts.[2] Each defendant subsequently admitted the alleged priors. Clark was sentenced to 8 years in prison; Dotson to 16 years, Grace to 21 years, Sims to 10 years, and Theus to 17 years. Each timely appealed.

FACTS

A. Summary

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that surveillance cameras at the Fox Discount Store recorded five African-American men wearing ski masks or hoods pulled up around their faces enter the building at about 4:22 p.m. on June 26, 2013, smash glass jewelry display counters, grab merchandise and run out of the store. In addition to the five men who entered the store, the perpetrators included the drivers of three different getaway vehicles (a blue Chevy Astro van, a white Dodge Charger and a black Honda). Within a short time, all three vehicles had been located at three different locations and seven suspects were in custody. The suspects in custody included the five defendants and two other men – John Hughes and William James Nichols. When the Charger was stopped by police, defendant Sims was the driver, Hughes and defendants Grace and Dotson were passengers. Nichols was the driver of the Honda and defendants Clark and Theus were passengers.

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[2] This was the second jury trial for Clark, Dotson, Grace and Theus, whose first trial ended in a mistrial on December 24, 2013. Sims was added as a codefendant in the operative second amended information, filed after the first trial ended.

B. The Robbery

1. Mr. Song Kuk Cho (Count 1)

Mr. and Mrs. Cho, owners of the Fox Jewelry Store, were both working on the afternoon of June 26, and the display cases were full. At about 4:20 p.m., Mr. Cho was behind the counter concentrating on repairing a piece of jewelry when he heard breaking glass and someone scream. Looking toward the sound, Mr. Cho saw at least four masked men; two broke the glass on the front of his display cases, one used a hammer. Mr. Cho grabbed a golf club he kept behind the counter with the intention of swinging it at the robbers to defend himself and his property. But when he stepped forward, one of the men sprayed something in Mr. Cho's face and eyes; it felt like he was "hit by fire"; his eyes burned and he had difficulty keeping his eyes open. Notwithstanding his impaired vision, Mr. Cho swung the golf club, but it hit a post and broke.

The robbers ran out of the store with merchandise they had taken from the broken display case. On their way out, they dropped some of the stolen goods on the ground. Mrs. Cho ran after the robbers. When she did not return after several minutes, Mr. Cho became concerned for her safety and ran after her. By the time Mr. Cho reached the security gate leading to the parking lot, his wife was there but the robbers were gone.

Because of the masks and disabling spray, Mr. Cho could not identify anyone as a perpetrator. Police showed Mr. Cho a can of bear spray and a hammer found among the debris at the store.

2. Mrs. Hae Ja Cho (Count 2)

Mrs. Cho was behind the counter, helping a customer, when she heard a lady scream, "Robber. Robber." Mrs. Cho saw four or five men wearing ski masks enter the store and run towards her counter. Mrs. Cho screamed, "No. No." She tried to stop the men from breaking the display cases by putting her hands over the counter. When Mrs. Cho climbed onto the display case in her efforts to stop them, she heard one of the men say, "No. No. No. No spray." Mrs. Cho was able to grab the clothing of one of the men, but lost her grasp when she was sprayed. Mrs. Cho believed her reaction to the spray was less severe than her husband's because her eyes were protected by eyeglasses.

Mrs. Cho ran after the robbers as they fled the store. When she reached the security gate, Mrs. Cho saw that all but one of the robbers was already in a parked van, which she described as having a blue bottom, light top and no rear license plate; the van's motor was running and a man wearing blue jeans and a beige colored top was sitting in the driver's seat; both the sliding passenger door and the driver's door were open. Mrs. Cho saw the last robber to leave the store, the one Mrs. Cho struggled with at the end, get into the front passenger seat of the van; as soon as he did, the van drove away.

3. Ivana Paniagua

That afternoon, Ivana Paniagua and her friend, Keny Clavel, were walking from a restaurant towards Paniagua's car in the parking lot of the Fox swap meet when a blue van drove by so quickly that Paniagua and Clavel had to step back to avoid being hit. Paniagua described the van as an old-fashioned "Scooby Doo" style van with sliding passenger doors, blue and light blue with patches of rust and an advertisement where the van's license plate should have been. The driver was an African-American man in his mid-20's, with a "fade" haircut and multiple tattoos on the right side of his face and neck, wearing a black T-shirt.[3] The African-American man in the front passenger seat seemed younger than the driver; he was wearing a hoodie pulled up over his head so that only his nose was visible; the words "Cali Life" were printed on the front of the hoodie.

After the van came to an abrupt stop in front of the gates to the swap meet, the sliding doors opened and several men emerged and went into the swap meet building. Moments later, while Paniagua was getting a drink at a food truck parked in the parking lot, an Asian man ran out of the building yelling, "Police. Police." Realizing something was wrong, Paniagua took cover behind a vehicle. From her hiding place about 10 feet away from the blue van, Paniagua saw four or five African-American men run through the gates and leap into the van; all were wearing dark colored shorts, black hoodies, black leather gloves and black or gray ski masks; three of them were wearing basketball shorts under their outer shorts (visible because the outer shorts were sagging); most were

[3] At the time of defendants' arrest within an hour of the robbery, only defendant Clark was wearing a black T-shirt – a black tank-top.

carrying something in their hands, possibly hammers. Paniagua estimated they were in their 20's. The first man out of the gate was very tall; he was wearing army shorts, Air Jordan shoes and a ski mask; he was carrying what looked like a gray silk pillow case. As the other men followed, this first man stood outside the van saying, "Let's go. Let's go. Let's go." It was Paniagua's impression that he was "guiding" the others. After the van's sliding door closed, the man who had been guiding the others jumped into the front passenger seat and the van drove away at a high speed; it turned right onto Sunset Avenue. Two Asian men and three Asian women ran into the parking lot; they were all crying and had "blood in their eyes." Clavel called 911 while Paniagua tried to help the victims wash their eyes with milk.

C. The Blue Van

On the day of the robbery, Sean Peoples lived about one-half mile from the Fox swap meet. At about 4:30 p.m. that day, Peoples alerted police to a blue Chevrolet Astro van abandoned on his street, which Peoples had observed acting suspiciously in connection with a white Dodge Charger and a black car. Peoples's observations suggested the occupants of the van may have transferred into those two cars.

Later, police found in or around the parked van two hammers, a pair of gloves, a blue knit ski mask and packaging for the same brand of bear spray used by the robbers. The hammer found in the van was similar to a hammer found at the scene of the robbery. There were no usable fingerprints on the van.

The parties stipulated that the registered owner of the abandoned blue van last saw it the night before the robbery, when she parked it on the street. The owner reported the car missing the morning of the robbery.

D. The White Dodge Charger

Reports of the robbery and a description of the suspected getaway vehicles, including a white Dodge Charger, were broadcast over the police radio. At about 4:35 p.m., officers saw a white Dodge Charger on the southbound 405 Freeway. They followed the Charger until it turned onto eastbound Slauson; when the Charger was on Slauson and Sherbourne, the officers initiated a stop; the Charger eventually stopped

between Chariton and Garth.[4] The driver (defendant Sims) and one passenger (Hughes) were taken into custody without incident, but two other passengers (later determined to be defendants Dotson and Grace) ran away. Motorcycle officer Patrick O'Dea gave chase.

A white canvas bag and a pair of gray sweatpants fell out of the car when the fleeing suspects took off. There was a mixture of broken glass and stolen jewelry in the pocket of the sweatpants and a gray ski mask, brown T-shirt and a pair of blue gloves in the canvas bag. Inside the Charger, there was broken glass, a gold Star of David stolen in the robbery, and two dark sweatshirts.

One of the two sweatshirts found in the Charger was a pull-over ("hoodie") on the front of which is printed the word "Cali" over the word "Life;" the "L" in life is in the shape of the state of California; the words are separated by a red horizontal strip in which is centered the block image of a bear. In the surveillance recording of the robbery, the man spraying Mr. and Mrs. Cho is wearing a sweatshirt with the same logo. Detective Warren Porche testified that, after seeing the Cali Life sweatshirt and viewing the surveillance recording of the robbery, he concluded it was the sweatshirt seen in the surveillance recording.

Fingerprints on the Charger belonged to defendants Sims (lifts 2 and 3), Dotson (lifts 8, 10-12, 23-29) and Grace (lifts 20, 21, 26 and 28).[5] Although defendant Clark was not a passenger in the Charger when it was stopped – as we explain in the next section, Clark was a passenger in the black Honda – his palm print was found on the passenger side rear quarter panel of the Charger.

E. The Black Honda

Unbeknownst to the police officers engaged in stopping the Charger on Slauson, the black Honda was parked just around the corner, on Chariton. It had been traveling

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4 All references to Slauson are to West Slauson Avenue, references to Chariton are to South Chariton Avenue and references to Garth are to South Garth Avenue.

5 Hughes's prints were also on the Charger.

southbound on Chariton when an overheated radiator forced it to stop. John Harrison, an electrical contractor working on a house on that street, helped the driver, identified by Harrison as non-defendant Nichols, put water in the radiator. While Harrison and Nichols were filling up the radiator, the two passengers in the Honda, identified by Harrison as defendant Theus and defendant Clark, stood off to the side. Harrison and Nichols had made several trips from a hose bib to the Honda when first Grace and then a second man came running around the corner, followed by an armed motorcycle officer (O'Dea).

When O'Dea came around the corner with his gun drawn, he saw six men: the two men O'Dea was chasing (defendants Grace and Dotson), the three occupants of the Honda (Nichols and defendants Clark and Theus) and witness Harrison. O'Dea ordered everyone onto the ground. O'Dea observed defendant Clark's eyes "got real big" and he gestured with his head to the other men, who were wearing white T-shirts (Clark was wearing a sleeveless black shirt). Everyone except Dotson complied with O'Dea's order to get on the ground; Dotson ran south on Chariton. When questioned later, witness Harrison identified defendant Grace as the first of the two men he saw run around the corner ahead of O'Dea; Harrison could not identify the second man (later determined to be Dotson) and Harrison did not know where he had gone.

F. Dotson is Taken into Custody

After the three occupants of the Honda (Nichols and defendants Theus and Clark) and three of the four occupants of the Charger (Hughes and defendants Sims and Grace) were in custody, only Dotson remained at large. Police Officer Cesar Corrales was patrolling the general area where the Charger was stopped while he followed police radio broadcasts of the unfolding events. Corrales saw defendant Dotson standing on a porch, talking to a postman. Because Dotson matched the description of the fleeing suspect, Corrales detained Dotson; but while Corrales's attention was diverted, Dotson ran away. Corrales chased Dotson into a backyard, but Dotson evaded capture by jumping over a wall.

Police Officer Michael Flannery was monitoring the progress of the foot pursuit on the police radio. Following directions given by the police helicopter, Flannery parked and waited for Dotson to come over a fence. Dotson came over that fence and Flannery took him into custody.

G. The Field Show-up

To sum up, the suspects associated with the Charger (Hughes and defendants Sims, Dotson and Grace) were detained at one location and those associated with the Honda (Nichols and defendants Clark and Theus) were detained at a different location. Mrs. Cho and witnesses Paniagua and Peoples were brought separately to each location. Peoples identified the white Dodge Charger and black Honda as the cars he saw on the street in front of his home earlier that day, behaving suspiciously in connection with the blue van. But Peoples could not identify any of the suspects as the drivers of those vehicles, or the men he saw getting into the Charger.

Mrs. Cho and Paniagua were unable to identify any of the men because the robbers had worn masks. But Paniagua testified that the sleeveless black shirt Clark was wearing looked like the shirt worn under a hoodie by one of the men she saw fleeing from the Fox swap meet.

Paniagua and Mrs. Cho also recognized items found in the Charger and Honda. Mrs. Cho identified the "Cali Life" hoodie as the hoodie worn by one of the robbers; the brown T-shirt looked like the T-shirt worn by the driver of the blue van; the gray ski mask and blue gloves looked like clothing worn by the robbers; and the gold jewelry found in the pocket of the sweatpants was some of the stolen merchandise. Paniagua identified the black sweatshirts, black pants and black gloves found in the Honda as clothing worn by the men she saw getting into the van; the "Cali Life" hoodie found in the Charger looked like the hoodie worn by the person in the front passenger seat of the van; and the bag, ski mask and sweatpants found on the ground near the Charger looked like clothing worn or items held by men she saw getting into the van.

H. The Defense Case

Keny Clavel was the person with Paniagua in the parking lot that day. Because Clavel was unavailable for trial, a portion of her preliminary hearing testimony was read into evidence. At the preliminary hearing, Clavel testified she and Paniagua had just finished eating and were still sitting inside the restaurant when Paniagua said, "Did you see that van almost hit that old lady?" Clavel looked out the window, but the van had already passed by. Clavel did not see the van until a few minutes later, when she and Paniagua were at a lunch truck.

DISCUSSION

We address defendants' various contentions in the following order: (A) challenges to the admission and exclusion of evidence, including judicial notice rulings; (B) sufficiency of the evidence; (C) instructional error; (D) prosecutorial misconduct; and (E) sentencing errors.

A. Evidentiary Challenges

Defendants contend the trial court abused its discretion in making the following evidentiary rulings: (1) admitting "composite exhibits" (Grace, Theus); (2) admitting evidence of defendants' home addresses (Dotson, Theus, Grace, Clark); and (3) failing to take judicial notice of the fact that the prosecution obtained defendants' cell phone records but did not introduce them into evidence (Dotson, Theus, Grace, Clark). As we shall explain, the trial court did not abuse its discretion in making any of these rulings.

We begin with general principles. Only relevant evidence is presumptively admissible and all relevant evidence is admissible. (Evid. Code, §§ 350, 351.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Even relevant evidence may be excluded if its "probative value is substantially outweighed by . . . substantial danger of undue prejudice." (Evid. Code, § 352) or is subject to other exclusionary rules.

Whether the challenge is to the admission or the exclusion of evidence, the standard of review is the same. We review trial court rulings, including balancing

probative value against undue prejudice, for abuse of discretion. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805 (*Jablonski*).) Neither the erroneous admission of evidence, nor the erroneous exclusion of evidence, can be the basis of a reversal unless the error resulted in a miscarriage of justice. (Evid. Code, § 353 [erroneous admission]; § 354 [erroneous exclusion]; *Jablonski,* at p. 805; *People v. Champion* (1995) 9 Cal.4th 879, 919.)

The abuse of discretion standard also applies to appellate review of a ruling denying a request for judicial notice. (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520.) A trial court's decision "not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter. [Citation.]" (*Willis v. State of California* (1994) 22 Cal.App.4th 287, 291.) With this standard in mind, we turn to the challenged evidentiary rulings.

1. Admission of "Composite Exhibits"

Grace contends it was prejudicial error for the trial court to admit People's Exhibits Nos. 98 through 101, which Grace characterizes as "composite exhibits." Grace also complains about Detective Porche's testimony relating to those exhibits.[6] He argues: (1) the challenged evidence constitutes inadmissible lay opinion of defendants' guilt; and (2) the exhibits were unduly suggestive. In his reply brief, Theus explains how he believes the contention also applies to him. As we shall explain, Porche's testimony was admissible lay opinion of identity and the composite exhibits were admissible as demonstrative evidence to aid the jury in understanding Porche's substantive evidence.

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[6] The People contend defendants' failure to object to the challenged exhibits in the trial court on the same grounds they argue on appeal constitutes a forfeiture of the issue. (See Evid. Code, § 353.) Grace argues the issue was preserved by defense objections on Confrontation Clause grounds (Clark), lack of foundation (Dotson) and speculation (Grace). We find the objections made in the trial court sufficient to preserve the issues for appeal.

a. Governing Legal Principals

i. Lay opinion of identity

Opinion testimony is admissible to "assist the jury to understand the evidence or a concept beyond common experience." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) A witness's opinion on guilt or innocence is inadmissible because the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion. (*Id*. at p. 47.) But the province of the trier of fact is not invaded by lay opinion evidence of the identity of a person depicted in a still or moving picture, including a police officer's opinion as to the identity of a person depicted in surveillance recordings of the crime. (*Ibid*; *People v. Leon* (2015) 61 Cal.4th 569, 601 [" '[T]he identity of a person is a proper subject of nonexpert opinion. . . .' [Citations.]"].)

Although identity lay opinion must be founded on the witness's "personal perception" (*People v. Perry* (1976) 60 Cal.App.3d 608, 613), our Supreme Court recently held the witness need not have had any actual contact with the defendant *before* the crime was committed. (*Leon, supra*, 61 Cal.4th at p. 601 [characterizing the pre-crime versus post-crime familiarity of the witness with the defendant as "a distinction without a difference"].)[7] *People v. Leon, supra*, upheld the admissibility of a detective's lay opinion that the person depicted in surveillance videos was the defendant. The Supreme Court held that the detective could so testify even though the detective had had no contact with the defendant before the commission of the crimes in question. The court reasoned the detective was "familiar with defendant's appearance around the time of the crimes" since "[t]heir contact began when defendant was arrested. . . ." (*Ibid*.) "Questions about the extent of [the detective's] familiarity with defendant's appearance went to the weight, not the admissibility, of his testimony. [Citation.] . . . Moreover, because the surveillance video was played for the jury, jurors could make up their own

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[7] *Leon* was published on June 29, 2015, after Grace's and Theus's Appellants' Opening Briefs were filed on June 8 (Theus) and June 22 (Grace), but before Respondent's Brief was filed on December 10, 2015. We asked for supplemental briefing on the applicability of *Leon* to the facts of this case. We have reviewed those supplemental briefs.

minds about whether the person shown was defendant. Because [the detective's] testimony was based on his relevant personal knowledge and aided the jury, the court did not abuse its discretion by admitting it." (*Ibid*.)

ii. Demonstrative evidence

"Demonstrative evidence is evidence that is shown to the jury 'as a tool to aid the jury in understanding the substantive evidence.' [Citation.]" (*People v. Diaz* (2014) 227 Cal.App.4th 362, fn. 19, citing *People v. Duenas* (2012) 55 Cal.4th 1, 25; see 2 Witkin, Cal. Evidence (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence, § 2.) Charts and diagrams are "classic forms of demonstrative evidence." (*Duenas,* at p. 20.) Demonstrative evidence that tends to clarify the circumstances of the crime is admissible. (*People v. Cavanaugh* (1955) 44 Cal.2d 252, 267.) Trial courts have broad discretion to admit demonstrative evidence to illustrate a witness's testimony. (*People v. Mills* (2010) 48 Cal.4th 158, 207.) In *Duenas*, our Supreme Court held a computer animation is admissible "if ' "it is a fair and accurate representation of the evidence to which it relates . . . ." ' [Citations.]" (*Id*. at p. 20 [distinguishing between a computer *animation* and a computer *simulation*].) And in *People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 316, the court found no abuse of discretion in allowing the pathologist to use a life-sized mannequin made in the likeness of the victim to illustrate his testimony.

b. The Challenged Evidence

Shortly after the robbery, Detective Porche saw all seven suspects at the locations where they were being detained for field show-ups; he directed they be photographed. Later that same day, Porche visited the jewelry store to view the surveillance recording. Based on his personal observations of the suspects and multiple viewings of the surveillance recording, Porche came to the conclusion that defendants Clark, Dotson, Grace and Theus were included among the men in the surveillance recording. Based on those conclusions, Porche caused People's Exhibit Nos. 98 (Grace), 99 (Dotson), 100 (Clark), and 101 (Theus) – the so-called "composite exhibits" – to be created.

Each of the "composite exhibits" is a single 8½ x 11 sheet of paper on which is reproduced several photographs that were individually introduced into evidence: (1) photographs of one defendant from different angles (e.g. front and side and/or back); (2) photographs of items found in the car in which that defendant was an occupant prior to his detention; and (3) still photographs obtained from the surveillance recording that is People's Exhibit No. 6. Because only Grace and Theus challenge the evidence, we describe in detail only the two exhibits that pertain to them.

People's Exhibit No. 98 includes front and side-view photographs of Grace, a close-up photograph of the "Cali Life" sweatshirt found in the Charger, a close-up photograph of the jewelry and glass mixture found in the pocket of the gray sweatpants found in the Charger, and four still photographs obtained from the surveillance recording showing the robber wearing the "Cali Life" hoodie and holding a spray can.

People's Exhibit No. 101 includes front, side and rear-view photographs of Theus, a photograph of the black jeans and black belt found in the Honda, and two still photographs obtained from the surveillance recording showing the robber wearing black jeans and black tennis shoes with the distinctive "Puma" stripe.

Neither Grace nor Theus challenges the admissibility of the individual photographs that are reproduced on the so-called "composite exhibits," only the introduction into evidence of a collection of those photographs on a single piece of paper.

c. Analysis

i. Porche's Lay Opinion testimony

Under *Leon*, Porche's testimony was an admissible lay opinion of the identity of the people depicted in the surveillance recording. Porche testified his opinion was based on his personal observations of the suspects shortly after the robbery. As in *Leon*, the weight to be given to Porche's opinion was for the jury to decide. Because the video was played for the jury, and jurors also had photographs of the defendants taken the same day, they could make up their own minds about whether they agreed with Porche's opinion.

ii. The "Composite Exhibits"

The gist of Porche's testimony was that he caused the composite exhibits to be created to illustrate his opinion that a specific suspect was a particular person in the surveillance recording. Given that the individual components of the composite were admitted and not challenged on appeal and there was nothing unduly suggestive about the composites, we find no abuse of discretion in admitting the composite exhibits as demonstrative evidence to illustrate Porche's identification evidence.

2. Admission of Defendant's Home Addresses (Dotson, Grace, Theus)

Dotson, Grace and Theus contend it was prejudicial error to admit evidence of their home addresses and People's Exhibit No. 102, a map created by Porche on which are marked their addresses and the location from which the blue van was taken. They argue their home addresses, which came from defendants' booking sheets, were inadmissible hearsay and irrelevant since they were not charged with stealing the van. The People counter that evidence of the addresses fell under the public records exception to the hearsay rule (Evid. Code, § 1280) and was relevant: (1) to "explain why they would have stolen the Astro van from that area rather than the area where it was ultimately abandoned;" and (2) to "connect them to each other, which helped to refute any claim that they were just coincidentally together near the black Honda . . . ." We find no error.

a. Governing legal principals

Subject to statutory exceptions, evidence of an out of court statement offered to prove the truth of the matter stated is inadmissible hearsay. (Evid. Code, § 1200.) Exceptions "commonly involve considerations of necessity, or at least efficiency, i.e., in the absence of the exception there might be no practical substitute for the proffered evidence, which would therefore be withheld from the trier of fact despite its posited trustworthiness. [Citation.]" (*People v. Franzen* (2012) 210 Cal.App.4th 1193, 1208.) "When evidence is offered under one of the hearsay exceptions, the trial court must determine as preliminary facts both that the out-of-court declarant made the statement as

represented, and that the statement meets certain standards of trustworthiness." (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.)

The exception presented here is records made by a public employee (the "public records" exception) (Evid. Code, § 1280). The records in question are the booking records. For a writing to fall within this exception, it must be shown that: "(a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.) Determining whether these foundational requirements have been established is within the trial court's discretion and we will overturn the exercise of that discretion only upon a clear showing of abuse. (*People v. Martinez* (2000) 22 Cal.4th 106, 120.)

Penal Code section 7, subdivision (21) states: "To 'book' signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest." In *People v. Rucker* (1980) 26 Cal.3d 368, our Supreme Court explained that booking is " 'essentially a clerical process.' [Citation.]" (*Id*. at p. 387.)

We analogize booking records to rap sheets, which courts have found admissible under Evidence Code section 1280 to prove prior convictions. (*People v. Martinez* (2000) 22 Cal.4th 106, 113, 119; *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477-1478; see also *People v. Morris* (2008) 166 Cal.App.4th 363 [admission of rap sheet does not violate *Crawford v. Washington* (2004) 541 U.S. 36, because it is not testimonial].) The *Dunlap* court explained that a rap sheet satisfies Evidence Code section 1280 because it is made by and within the scope of duty of public employees, it is reasonable to presume these public employees complied with their statutory obligation to provide the Department of Justice with the information, and the sources of the information as to convictions (the superior courts) and release dates (the Department of Justice) are trustworthy. (Evid. Code, § 664 [presumption that official duty has been performed]; Pen. Code, § 13151 [duty to report disposition of cases to the Department of Justice].)

b. The Challenged Evidence

Porche testified that each time a person is booked into custody, the relevant public agency (e.g. Los Angeles Police Department or the Los Angeles County Sheriff's Department) is responsible for obtaining basic information from the person such as their birthday, address and telephone number; the employee is responsible for putting the information into the booking records, which are maintained by the booking agency. Based on the defendants' booking records in this case, Porche determined their home addresses. Defendants all lived within one-and-one-half miles from one another, and about three miles from the location where the blue van was taken. People's Exhibit No. 102 is the printout of a map Porche created using Mapquest. Each defendant's address is noted on the map, as well as the initial location of the blue van.

c. Analysis

We find no abuse of discretion in admitting Porche's testimony and People's Exhibit No. 102. First, evidence the defendants lived close to one another was relevant to counter the argument that there was a reasonable doubt defendants knew one another, much less planned the robbery together. For example, defendants argued there was no evidence of calls between any of the cell phones recovered in the cars or from the suspects. Dotson argued there was no evidence linking him to defendants; his fingerprints might have been placed on the Charger while he was detained.

Second, the trial court did not abuse its discretion in ruling the evidence fell within the public records exception to the hearsay rule. It was undisputed that the booking records were made by employees of Los Angeles Police Department and the Los Angeles County Sheriff's Department, employees of those agencies are "public employees," it is the duty of those public employees to obtain basic information from the person being booked at the time of booking, to record the information in the booking records of that person, and the source of the information – the defendants themselves – is trustworthy.

Third, a map created by a witness to illustrate his testimony may be admissible as demonstrative evidence. (See *People v. Sassounian* (1986) 182 Cal.App.3d 361, 401 [no abuse of discretion in admitting "a 'semi-map' of the area where the killing took place,"

made by a jail inmate based on what the defendant told him].) Like the composite exhibits discussed in the prior section, People's Exhibit No. 102 was admissible as demonstrative evidence to illustrate Porche's testimony that the defendants lived in close proximity to one another, and near the location from which the van was stolen.

3. Judicial notice that the prosecutor subpoenaed cell phone records (Clark, Dotson, Grace, Theus)

Clark, Dotson, Grace and Theus contend it was error to deny defendants' request for judicial notice that the prosecutor had subpoenaed defendants' cell phone records from the cell phone providers, those providers produced data in response to the subpoenas, and the prosecutor did not show the data to Porche (the lead investigator) or introduce it into evidence at trial. Defendants do not dispute the prosecution complied with its obligations to disclose the data obtained from the cell phone providers. (Pen. Code, § 1054.1; *Brady v. Maryland* (1963) 373 U.S. 83.) The gist of their argument is that denial of the request for judicial notice prevented them from putting on a defense and receiving a fair trial because the fact the prosecutor did not show the data to Porche or introduce it into evidence shows the incompleteness of the investigation. We find no error.

a. Governing Legal Principals

Judicial notice may be taken of facts and propositions that "are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 453, subd. (h).) Judicial notice is also appropriate of official acts of the executive department of the state. (Evid. Code, § 453, subd. (c).) The prosecutor is a representative of the executive branch. (*People v. Simpson* (2014) 223 Cal.App.4th Supp. 6, 11.) "Even if a matter is a proper subject of judicial notice, it must still be relevant. [Citations.]" (*People v. Payton* (1992) 3 Cal.4th 1050, 1073.)

Neither party in a criminal case is under a duty to produce all possible evidence, but the defendant may comment on the prosecution's failure to produce relevant evidence. (*People v. Grant* (1968) 268 Cal.App.2d 470, 475.)

b. The Excluded Evidence

Police found two cell phones in the Charger, one in the Honda, one on Dotson and two on Nichols. During closing arguments in the first trial, defendants had argued that the prosecutor could have, but did not, obtain cell phone records for those cell phones connecting the defendants together. After the first trial ended in a mistrial, the prosecutor subpoenaed the records from the cell phone providers. The prosecutor disclosed to defendants the cell phone providers' emailed responses and attached data, consisting of: (1) three Excel spreadsheets which contained cellular data and SMS text logs (but not cell phone tower locations) for several cell phone numbers; (2) records for two other cell phone numbers but not the cellular data information.

When counsel for Dotson showed Detective Porche the Excel spread sheets at the second trial, Porche said he had never seen them and had no idea what they were. Outside the presence of the jury, defense counsel expressed surprise that the lead detective had not seen the cell phone records. Defendants argued the fact that the cell phone providers produced data in response to the prosecution's subpoena, but the prosecutor did not show that data to Porche or introduce it into evidence, was relevant to show there was no correlation between the phones and they had "a right to the jury knowing that a return of information was given and the I.O. testified to have never seen it." There was this colloquy:

> "THE COURT: That's all fine. Are you going to bring somebody in to testify to all of that?
> [THEUS'S COUNSEL]: The point of all this is that the company did return the subpoena. The information was made available to defense counsel. The lead investigator never looked at it. [¶] . . . I don't believe I have a legal basis to introduce the data information that was in the return; however I do have a right to the jury knowing that a return of information was given and the [investigating officer] testified to have never seen it.
> THE COURT: Okay.
> [THEUS'S COUNSEL]: Goes to his credibility. Goes to his ability to be able to investigate the case fully, to give the opinions that he gave based on the totality of the evidence that he collected. This is evidence that was available to him that he did not look at. I think it goes to the defense. You know, if I had time I would call them, but –

> THE COURT: We haven't had enough time between August of last year and today?
> [THEUS'S COUNSEL]: Well, frankly I'm taken aback that the investigator hasn't looked at these at all.
> THE COURT: Okay.
> [THEUS'S COUNSEL]: I mean, that's where I'm at with it. It's shocking. [¶] So all I'm asking for is for the court to take judicial notice of the file that a subpoena was issued and a return came back."

The prosecutor objected to the request for judicial notice, arguing a "phone expert" was necessary. Defense counsel suggested the prosecutor could testify that she issued the subpoena and defense counsel could testify that he received the forwarded email containing the information from T-Mobile. The trial court denied the request for judicial notice and to allow defense counsel to testify, but said it would "put [the prosecutor] on the stand if you want me to." Defendants did not call the prosecutor as a witness.

Analysis: Assuming for the sake of argument that the fact the prosecutor subpoenaed data from defendants' cell phone providers, the providers produced data in response to the subpoena, and the prosecutor did not show the data to the lead detective or introduce it into evidence are proper matters for judicial notice under Evidence Code section 452, subdivisions (c) or (h), defendants have not made the require showing of relevance. (See *Payton, supra*, 3 Cal.4th at p. 1073.)

Clark argues the evidence "would have bolstered the defense's argument that [Clark] was not linked to the other defendants and that Detective Porche's investigation was incomplete." Dotson argues the evidence "would have allowed the defense credibility in making its argument that Detective Porche's investigation was incomplete and that the jury should be circumspect in considering his opinions." Grace argues the evidence "would have cast more doubt on the efficacy of the police investigation." Theus argues the jury could have inferred that the phone records did not connect Theus to the robberies from evidence that "the prosecution had determined not to introduce subpoenaed call and text records . . . ."

The flaw in each of these arguments is that they conflate the relevancy of the data with the relevancy of the prosecutor's trial strategy. While the former is relevant (and

was not excluded), the prosecution's trial strategy was not relevant. Under *Grant, supra*, 268 Cal.App.2d at page 475, the prosecutor was under no duty to introduce the data. As they did in the first trial, defendants were entitled to and did comment on the evidence that cell phones were recovered but the prosecution presented no evidence that defendants were using those cell phones to communicate with one another during the relevant time period. They were not entitled to judicial notice of the prosecutor's trial strategy (issuing a subpoena, not showing the records to the investigating officer or introducing them into evidence), which was not relevant to whether they committed the charged offenses.

Finally, even if we were to find the matters were relevant, the trial court stated that defendants could call the prosecutor as a witness, an offer defendants declined.

B. Sufficiency of the Evidence of Robbery (Clark, Sims, Theus)

Defendants Theus and Clark contend there was insufficient evidence that they were involved in the robbery. Clark argues "no jewelry, glass shards, hammers or ski masks were found in [Clark's] possession or in the black Honda he was found near." Theus argues the People proved only that Theus wore the same brand of shoes as one of the robbers and that he might have been in a car with a man who might be connected to the robbery. Sims argues none of the incriminating evidence found in the Charger was found in the front seat, where he was seated. We find sufficient evidence.

1. Governing Legal Principals

The standard of review for a challenge to the sufficiency of the evidence to support a criminal conviction is well settled. We review the whole record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the jury could reasonably have deduced, to determine whether there is evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Zamudio*, *supra*, 43 Cal.4th at p. 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*Ibid*.) The standard is the same where the prosecution relies

primarily on circumstantial evidence. "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation.] 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]" (*Id*. at pp. 357–358.)

2. The Evidence

The color surveillance recording (People's Exhibit No. 6) shows five men arrive at the jewelry store counter at about 4:22 p.m. on June 26. While one man sprays Mr. and Mrs. Cho, the others smash the glass display cases, grab merchandise and run out of the store. Although their faces are concealed, some of the perpetrators are wearing distinctive clothing. For example, the surveillance recording clearly shows that one of the robbers is wearing black pants and black tennis shoes with a distinctive light Puma logo on the side. A second is wearing dark gray basketball shorts with a distinctive light gray stripe. A third is carrying a hammer with a yellow handle and wearing a gray ski mask, blue jeans with a distinctive red tag and tennis shoes with red laces. A fourth, the man wielding the bear spray can, is wearing gray sweatpants, white tennis shoes and a dark hoodie with the "Cali Life" logo previously described.

A short time later, police were alerted to a van that matched the description of the getaway van, abandoned about one-half mile away from the Fox swap meet. Witness Peoples had noticed the van engaging in suspicious activity with a white Dodge Charger and a black car on the street in front of his house not long after the robbery had occurred. From what Peoples observed, it appeared the occupants of the van had entered into those two cars. Inside the abandoned van, police found a yellow-handled hammer that looked like the hammer seen in the surveillance recording of the robbery; and packaging for the same brand of bear spray as an empty canister found at the scene. Later that day, Peoples

identified the Charger stopped by police on Slauson and the Honda forced to stop on Chariton by an overheating radiator, as the cars he saw acting in concert with the blue van.

The Honda is missing a front passenger seat (People's Exhibit No. 79), which Detective Porche explained is a common modification criminals make to a vehicle intended to be used as a getaway car. In the Honda, police found a pair of black leather gloves (People's Exhibit Nos. 26, 80), a pair of black jeans and a black belt (People's Exhibit No. 82A), two black sweat shirts (People's Exhibit Nos. 82B & C) and a black T-shirt (People's Exhibit No. 82D). Paniagua recognized these items (depicted together in People's Exhibit No. 28) as clothing worn by men she saw getting into the blue van after the robbery.

In or near the Charger, police found the "Cali Life" hoodie, a mixture of broken glass and stolen jewelry, ski masks and gloves. (People's Exhibit Nos. 16, 19, 91, 92).

a. Clark

Defendants Clark and Theus were both passengers in the Honda when it stopped on Chariton Avenue that afternoon. Clark was wearing a black sleeveless shirt, blue jeans with a distinctive red tag and tennis shoes with red laces (People's Exhibit Nos. 14E, 64, 65, 96A (side view) & 96B (rear view)). People's Exhibit No. 100, the composite exhibit relating to Clark, includes front and side-view photographs of Clark and two still photographs of one of the masked robbers obtained from the surveillance recording. In the stills, the robber is carrying a hammer with a yellow handle and is wearing a gray ski mask, gray gloves, a black hoodie, blue jeans and tennis shoes with red shoe laces. Although not obvious in the still photos, Porche pointed out in the surveillance recording where a red tag can be seen on the robber's blue jeans. At the field show-up Paniagua recognized the sleeveless shirt Clark was wearing as similar to the shirt she saw under the hoodie of one of the men fleeing from the Fox swap meet.

Clark falsely told the police that witness Harrison was his uncle, even after Harrison refused Clark's request that Harrison lie to the police. Although he had been a passenger in the Honda, Clark's palm prints were found on the Charger.

b. Theus

Theus, also a passenger in the Honda, was wearing "black Puma tennis shoes with a distinctive gray Puma logo on the side" and a pair of large gray basketball style shorts. (People's Exhibit Nos. 14A, 63, 95A (side view), 95B (rear view).) People's Exhibit No. 101, the composite exhibit, included side and rear-view photographs of Theus, a photograph of the black jeans and black belt found in the Honda and two still photographs of one of the robbers obtained from the surveillance recording. The robber in the surveillance stills is wearing black pants, a black hoodie and tennis shoes. The tennis shoes worn by the robber have the same distinctive Puma logo as the shoes Theus is wearing in his photographs.

c. Sims

Sims was driving the Charger when it was stopped on Slauson.

2. Analysis

Although Peoples did not see any of the occupants of the blue van get into the Charger or the Honda, from Peoples's account of the maneuverings of those two cars before and after the van arrived, a reasonable trier of fact could conclude that the Charger and Honda were there for a prearranged meeting with the van, so that the perpetrators could transfer from the easily recognizable van into getaway cars that were less conspicuous. The discovery of stolen merchandise and the "Cali Life" sweatshirt in or near the Charger and of masks, gloves and clothing that looked like those worn by the robbers in the Honda, supports the conclusion that the Charger and the Honda were secondary getaway cars.

That Clark and Theus were participants in the robbery, not just passengers in the Honda by happenstance, can reasonably be inferred from the evidence that they were wearing the same distinctive clothing as the robbers. Clark's association with the robbery is further supported by his palm print on the Charger and the evidence that he asked Harrison to lie for him. Taken together, this evidence is sufficient to support the robbery convictions of Clark and Theus.

That none of the incriminating evidence associated with the Charger was found in the front seat, where Sims as the driver was seated does not detract from the jury's implied finding that Sims aided and abetted the robbery as a getaway driver. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165 [getaway driver is aiding and abetting crime].)

Although Grace and Dotson join generally in all contentions of their codefendants, neither explains how the sufficiency of the evidence argument relates to them. Accordingly, we treat the issue as waived as to those defendants.

C. Instructional Error

Sims, the driver of the white Charger, contends it was error to give CALJIC No. 3.00, which defines principals to a crime. Sims concedes the instruction is generally a correct statement of the law, but argues that under the circumstances of this case, the phrase "equally guilty" may have prevented the jury from finding that Sims had a lesser mental state than his codefendants.[8] We find no error.

1. Governing Legal Principals

In determining whether there has been instructional error, we consider the instructions as a whole and assume that the jurors are "intelligent persons and capable of understanding and correlating" the jury instructions they are given. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We interpret the instructions, if possible, so as to support the judgment. (*Ibid*.)

The relevant instructions are CALJIC Nos. 3.00 and 3.01. As given, those instructions read:

> "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is *equally guilty*. Principals include: [¶] 1. Those who

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8 The People contend Sims forfeited the issue by failing to object on the stated grounds in the trial court. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 624 (*Meija*).) Sims acknowledges trial counsel did not expressly object to CALJIC No. 3.00, but argues review is appropriate because the alleged error affected his substantial rights by preventing the jury from considering his mental state. We need not decide the forfeiture/ineffective assistance of counsel issues inasmuch as we find no error.

> directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime." (CALJIC No. 3.00, italics added.)
>
> "A person aids and abets the commission of a crime when he or she: [¶] (1) *With knowledge of the unlawful purpose of the perpetrator, and* [¶] (2) *With the intent or purpose of committing or encouraging or facilitating the commission of the crime,* and [¶] (3) By act or advice, aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed or the failure to prevent it does not amount to aiding and abetting." (CALJIC No. 3.01, italics added.)

Also germane to our analysis are CALJIC Nos. 3.31, 9.40 and 9.40.1, which read:

> "[In Robbery] there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the crime to which it relates is not committed. [¶] The specific intent required is included in the definition of the crime set forth elsewhere in these instructions." (CALJIC No. 3.31.)
>
> "Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with *the specific intent to permanently deprive that person of the property,* is guilty of the crime of robbery in violation of Penal Code section 211." (CALJIC No. 9.40, italics added.)
>
> "For the purpose of determining whether a person is guilty as an aider and abettor to robbery, the commission of the crime of robbery is not confined to a fixed place of a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety." (CALJIC No. 9.40.1.)

In *People v. Nero* (2010) 181 Cal.App.4th 504, 513, the court held CALJIC No. 3.00, by its use of the phrase "equally guilty," can be misleading in some circumstances. This court had occasion to discuss *Nero* in *People v. Mejia* (2013) 211 Cal.App.4th 586. The defendant in *Mejia* was convicted of provocative act first

degree murder on an aider and abettor theory of liability; he challenged CALJIC No. 3.00 on the same grounds as does Sims in this case. We explained that *Nero* and other cases stand for "the unremarkable proposition that the extent of an aider and abettor's liability is dependent upon his particular mental state, which may, under the specific facts of any given case, be the same as, or greater or lesser than, that of the direct perpetrator." (*Id*. at p. 624.) Although recognizing the concern identified in *Nero*, we held that absent evidence that the principals had different states of mind, "CALJIC No. 3.01 adequately clarified any ambiguity created by the 'equally guilty' language of CALJIC No. 3.00." (*Ibid*.) We found no evidence in *Mejia* that the defendant-accomplices had a different state of mind than did the perpetrator. We come to the same conclusion here.

2. Analysis

The jury was correctly instructed that aiding and abetting liability for robbery required proof that the defendant committed an act with "knowledge of the unlawful purpose of the perpetrator" and with the "intent or purpose of committing or encouraging or facilitating the commission of the crime." (CALJIC No. 3.01.) There was substantial evidence that Sims had knowledge of the perpetrator's unlawful purpose and intended to facilitate the commission of the crime by acting as a getaway driver. There was no evidence Sims had a different state of mind than the principals. Sims argues his absence from the events inside the jewelry store is evidence "that he did not become involved until 15 or 20 minutes after the robbery occurred, there was no evidence he had prior knowledge that a robbery was planned, and no evidence he communicated with the other participants before they got into his car on Indiana Street." But the only reasonable inference from Peoples's description of the maneuvering of the Charger and Honda before and after the blue van arrived, is that the two cars were there as part of a prearranged plan for the perpetrators to evade capture by transferring from the recognizable van into two more nondescript cars that could not have been seen by witnesses to the robbery. Sims was the driver of one of those cars. On this record, there was no evidence Sims had a lesser or different state of mind than the principals, and no likelihood the jury was confused by the "equally guilty" language in the instructions.

D. Prosecutorial Misconduct

Dotson, Grace, Sims and Theus contend the prosecutor committed prejudicial misconduct. We disagree.

1. Governing Legal Principals

The state and federal standards for prosecutorial misconduct are well established. "Intemperate behavior" by a prosecutor violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Redd* (2010) 48 Cal.4th 691, 733, internal quotations omitted.) If the challenged conduct does not violate the federal constitution, it may still be prosecutorial misconduct under state law, but "only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*Id.* at p. 734, internal quotations omitted.)

"Vigorous argument" is not misconduct so long as it is fair comment on the evidence, including reasonable inferences, or deductions to be drawn from the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 819, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) During argument, the prosecutor may state his opinion of a witness's credibility. (*People v. Padilla* (1995) 11 Cal.4th 891, 946, overruled on another point in *Hill, supra*, [showing of bad faith not required to establish reversible error from prosecutorial misconduct].) The prosecutor also "has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) This includes commenting on the defendant's failure to introduce material evidence or call logical witnesses. (*People v. Brown* (2003) 31 Cal.4th 518, 554 (*Brown*).)

But it is misconduct for a prosecutor to attack the integrity of, or cast aspersions on defense counsel. (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1268 (*Caldwell*).) And in arguing the veracity of a witness, it is misconduct for the prosecutor to suggest to the jury that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. (*Padilla, supra*, 11 Cal.4th at p. 946.) Although it is misconduct to vouch for a witness, it is not improper vouching for the prosecutor to

argue a police officer has no reason to lie in response to a defense argument that the officer was not telling the truth. (*Caldwell, supra,* at pp. 1268, 1270.)

2. Factual Background

Dotson argues that in its final argument the prosecutor improperly suggested Dotson could have called an alibi witness (the postman), and "undermined the presumption of innocence and confused the state's burden" to prove guilt beyond a reasonable doubt. Theus argues the prosecutor misled the jury, vouched for a witness and disparaged defense counsel. Sims argues these arguments apply to him. Grace made similar arguments. We set forth the challenged prosecutor's arguments by the defense, and then the earlier defense argument to which the prosecution was responding.

a. **The Prosecutor:** "Defense threw out there the mailman, why didn't I bring in the mailman? He has the same subpoena power. When he told you he didn't, [that was] untrue. That's called failure to call a logical witness." "If you think that's an alibi which he's stating to you, call him."

Dotson: "Was the postman interviewed to see, hey, was Mr. Dotson out of breath from running? Was he sweaty? What happened to the postman? Now, either he went the direction where everybody else was being detained on Chariton, or he went the other way where Corrales drove by him. Either way the police had access to him to stop and interview him. Corrales saw him talking to my client. What were they talking about? Nothing. Zero evidence. Zero investigation."

b. **The Prosecutor**: "Defense counsel also touched on the phone records. Now, one counsel in particular got up here and had a pack of papers and waved them in front of you. We don't know what those papers are. They're not in evidence. He's suggesting they're something. Nothing's in evidence. He didn't enter them into evidence. [¶] My detective told you, 'I don't know what those

papers are.' I can tell you the detective didn't give them to him. He's suggesting they're some type of phone records. [¶] Again, if this is an important piece of evidence, defense counsel has the same subpoena power, he can subpoena phone records. He told you he can't, but absolutely he can." "He can subpoena those phone records, and he didn't. He can bring somebody from Sprint, Verizon, T-Mobile, whoever he wants if there's some evidence that you need to hear that was not provided to you."

Dotson: "The best evidence to link the defendants together would have been cell phone data records, but Porche testified: 'You haven't seen the cell phone data records, Detective? No.' Use your common sense. Where the hell did I get them from? I'll bet you one thing is for damn sure. If there was a call or a text message from one of these phones to another of these phones, you would be dammed sure you'd hear about it, but you haven't. [¶] And then he talks about, oh, well, all the cell phones were locked. How many murder investigations do you think have been unsolved because the cops weren't able to unlock the phone? Come on. Come on."

Sims: The police recovered seven cell phones, but there was no evidence that Sims talked to any of the codefendants: "Who had the ability to do that and the only ability to do that is LAPD and specifically Detective Porche. He chose not to do that."

Clark: "So we're to believe that they had this grand conspiracy they all put together and they had this rendezvous point and nobody contacted somebody with a cell phone; that the guys in the Dodge Charger didn't say, we're being followed by the cops."

c. **The Prosecutor:** "[Motorcycle Officer O'Dea] told you the truth. He told you he saw Grace" fleeing from the Charger.

Grace: "Now, Officer O'Dea testified that Grace ran from the white Charger. But nobody wrote it down in 28 pages of handwritten paper. He asked Mr. Harrison at gunpoint who ran around the corner, okay? Well, that's kind of a strange question to ask somebody at gunpoint if you know the person right over there is the one that ran around the corner. [¶] So if you know the one right at the edge of the sidewalk is the one that ran around the corner, why is he putting the gun on this guy's head saying, 'Who's the one, you know, who ran around the corner?' [¶] Officer O'Dea testified that he was about one car back to the driver's side of that car and that the passenger alighted from the white Charger and ran towards the front of the car and then directly on through the hedges in a southeasterly direction. What's the problem with that? [¶] . . . [¶] . . . Officer O'Dea from where he was positioned . . . would have had perhaps a view of their rear ends."

d. **The Prosecutor:** "[The officer who stopped the Charger] made a mistake at one point and said a different street. She was a rookie cop for four months. You think she's going to jeopardize her career by coming in and trying to switch her testimony to please the D.A.? For what reason? [¶] Everything that she testified to is substantiated and backed up by the other officers."

Sims: The officer who stopped the Charger on Slauson "was not – what's the word I want to use? Certain as to the exact point she put on the overlights, but it was somewhere between Sherbourne and Corning."

3. Analysis

None of the statements identified by defendants constitute prosecutorial misconduct. Under *Caldwell*, *supra*, each statement was an appropriate response to an argument made by defendants. For example, in response to Sims's suggestion that the

officer who stopped the Charger was being untruthful, the prosecutor asked the jurors to consider why she would jeopardize her career by lying. This type of statement was expressly approved in *Caldwell, supra*, 212 Cal.App.4th at page 1270.

Dotson argued the prosecution had "zero evidence" because it did not call the postman as a witness to testify whether Dotson was out of breath or sweaty. The gist of the prosecutor's response was that, if Dotson thought the mailman had favorable evidence, Dotson could have called the postman as a witness. Again, the response was well within the limits of describing the deficiencies in "opposing counsel's tactics and factual account" (*Bemore, supra*, 22 Cal.4th at p. 846) and was a comment on "defendant's failure to introduce material evidence or call logical witnesses." (*Brown, supra*, 31 Cal.4th at p. 554.) So too was the prosecutor's statement that defendants had the ability to subpoena cell phone records. Also without merit is the argument that it was misconduct for the prosecutor to state that Motorcycle Officer O'Dea "told you the truth." It was not misconduct for the prosecutor to state her opinion of the witness's credibility; she did not suggest that her opinion was based on information undisclosed to the jury. (*Padilla, supra*, 17 Cal.4th at pp. 945-946.)

E. Dotson's 16-Year Sentence

Dotson contends he was denied due process by imposition of a 16-year prison term rather than the 10-year term he agreed to as part of a "package-deal plea bargain" to which his codefendants would not agree. He argues the rule that a defendant may not be punished for electing to go to trial was particularly violated here because Dotson did *not* elect to go to trial, but was forced to do so by the refusal of his codefendants to accept the global deal. We find no error.

1. Governing Legal Principals

Plea offers contingent on all defendants accepting the plea (a "package-deal" plea bargain) are an accepted practice. (*In re Ibarra* (1983) 34 Cal.3d 277, 287-288, disapproved on another ground in *People v. Howard* (1992) 1 Cal.4th 1132, 1175–1178.) Courts must assure each defendant's acceptance is, in fact, voluntary. (*Ibid*.) But the issue here is not whether Dotson voluntarily entered into a package-deal plea bargain

because no such bargain was made. Rather, the issue is whether the sentence imposed following a trial is limited by the terms of the pre-trial package-deal offer. We conclude it is not.

It is a violation of due process to punish a defendant for exercising his or her jury trial right. (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 761.) The court may not " ' "treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right." ' [Citations.]" (*Ibid*.) On appeal, it is the defendant's burden to show that the higher sentence was imposed as punishment for exercising the right to trial. (*Ibid*.) But the "mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights." (*People v. Szeto* (1981) 29 Cal.3d 20, 35; accord *Ghebretensae,* at p. 762.) " 'Legitimate facts may come to the court's attention either through the personal observations of the judge during trial [citation], or through the presentence report by the probation department, to induce the court to impose a sentence in excess of any recommended by the prosecution.' [Citation.]" (*Ghebretensae,* at p. 762.)

The burden was met in *In re Lewallen* (1979) 23 Cal.3d 274, in which the trial court responded to the defendant's request for informal probation as follows: " 'I think I want to emphasize there's no reason in having the District Attorney attempt to negotiate matters if after the defendant refuses a negotiation he gets the same sentence as if he had accepted the negotiation. It is just a waste of everybody's time, and what's he got to lose. And as far as I'm concerned, if a defendant wants a jury trial and he's convicted, he's not going to be penalized with that, but on the other hand he's not going to have the consideration he would have had if there was a plea.' " (*Id*. at p. 277.) Our Supreme Court found Lewalllen had shown "that the trial court's exercise of its sentencing function was improperly influenced by his refusal of the proffered plea bargain and insistence on his right to trial." (*Ibid*.) Dotson has not met the burden in this case.

2. Factual Background

When Dotson committed the robberies in June 2013, he was on probation in two prior cases: (1) case No. MA054733, a March 2012, conviction for participation in a criminal street gang; and (2) case No. TA122516, a November 2012, conviction for assault with a firearm. Based on these two prior convictions, the August 2013, information alleged Dotson had suffered two Three Strikes law prior convictions (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(e)). An amended information filed on December 5, 2013, added two five-year section 667, subdivision (a)(1) enhancements based on the same two prior convictions.

The first trial ended in a mistrial in December 2013. On February 28, 2014, Judge Elden Fox, presiding, offered a package-deal plea bargain to all five defendants. Theus and Dotson were offered 10 years. The trial court stated:

> "THE COURT: As to Mr. Dotson, court calculates his exposure as 60 years to life. In this matter, the court has also made an offer of ten years. The court is advised that the People had agreed if the case resolves as to all defendants that they would dismiss one of the 667(a) priors. The calculation for Mr. Dotson being a plea to count 1 with the strike, low term doubled. That is 24 [months] times two. Count 2 without the strike, one-third the midterm which is one year and one 667(a) prior for a total of 10 years."

Although Theus rejected the 10-year offer, Dotson wanted to accept it. In response to Dotson's argument that he should be allowed to accept the deal notwithstanding Theus's rejection because Dotson's absence from the trial would not "impede the prosecution," the trial court said:

> "THE COURT: Here's what I'll indicate to counsel. You've made the representation to the court. I've been doing this about 23, 24 years. I certainly take that into consideration when it's indicated to the court that the disposition offered is one that would have been accepted, so, therefore, any result in this matter I think as to those defendant that did not want to resolve this matter is one that is likely to occur if they are convicted in this case."

The operative second amended information, filed two months later in April 2014, alleged the same two prior convictions under the Three Strikes law and section 667, subdivision (a)(1). Judge Fox presided over the second trial, as well as the sentencing hearing on July 31, 2014.

At the hearing, the trial court noted it was "cognizant of the fact that Mr. Dotson had been prepared at an earlier stage to accept the disposition as proposed by the district attorney in his case which the court was advised was 10 years." Dotson then asked to be sentenced to that same 10-year term, arguing he had been willing to accept a six-year offer even before the first trial. The prosecution sought a 35-year-to-life sentence, based on the two strikes and the two section 667, subdivision (a)(1) enhancements. This colloquy ensued:

> "THE COURT: Okay. . . . there is one question I would like the district attorney to address . . . how Mr. Dotson's offer which you concur was ten years? [*sic*]
> [THE PROSECUTOR]: I don't. I don't recall ever offering ten years. I think that was an open offer?
> THE COURT: Okay. Was that something –
> [THE PROSECUTOR]: We discussed in chambers. I didn't.
> THE COURT: Okay. Was that in this court?
> [THE PROSECUTOR]: You know, I have a lot of notes. I'm not sure which court it was in. [¶] . . . The five-year priors weren't taken into account. [¶] So originally a long time ago there was a lower offer, but Judge Dabney caught it, and so everything was revoked and we started over. So I was offering Dotson a ten-year offer when I'm offering the rest of them higher . . . .
> THE COURT: I just wanted to know if that was an offer that had been communicated.
> [THE PROSECUTOR]: No. . . . [¶] So, no, that offer – I never offered a ten-year offer to him.
> [DOTSON'S COUNSEL]: May I? I remember what happened and [the prosecutor] and the court [are] correct. He was offered six [in Judge Dabney's] court and, indeed, the information did not allege the two five-year priors, which is how we got out of there.
> THE COURT: Okay.
> . . .
> [DOTSON'S COUNSEL]: The way we got to ten here was that [the prosecutor] at the time was willing to set aside one of the five-year priors to

> make a global disposition happen. So that's how we got to the ten at pretrial here.
> THE COURT: Okay. Thank you."

The trial court expressly took into account that Dotson was on probation in two prior cases at the time he committed the robberies, had been willing to accept the 10-year package-deal plea bargain, was just 19 years old when these crimes were committed (20 years old at the time of sentencing), and deadly weapons were not used in these crimes. Based on these circumstances, the trial court granted Dotson's *Romero* motion as to one of the alleged Three Strikes law priors.[9] It sentenced Dotson to 16 years in prison, comprised of 4 years (the two-year low-term doubled pursuant to Three Strikes) on count 1; plus a consecutive 2 years (one-third the three-year mid-term (one year) doubled pursuant to Three Strikes) on count 2; plus a consecutive 10 years pursuant to section 667(a)(1). Although the trial court seemed to indicate it was applying one section 667, subdivision (a)(1) enhancement on each robbery count, the abstract of judgment correctly reflects 2 five-year section 667, subdivision (a)(1) enhancements, one for each of the two prior convictions that Dotson had admitted, applied to the aggregate term for a total of 10 years.

3. Analysis

The trial court's statements indicate it carefully considered the relevant factors in calculating Dotson's 16-year sentence. Dotson has not shown any evidence that the trial court imposed the 16-year sentence as punishment for Dotson's assertion of the right to jury trial.

F. The Section 667, subdivision (a)(1) Enhancements as to Grace and Theus

In its respondent's brief, the People have argued sentences imposed on Grace (16 years) and Theus (17 years) were unauthorized because, as to each defendant, the trial court imposed a five-year section 667, subdivision (a)(1) enhancement on one, but not both robbery counts. We requested and received supplemental briefing on the application of *People v. Sasser* (2015) 61 Cal.4th 1, which held that in the case of "two strikes," the

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9 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

enhancements for " 'prior convictions do not attach to particular counts but instead are added just once as the final step in computing the total sentence.' [Citation.]" (*Id*. at p. 15.) In their supplemental brief, the People concede that, under *Sasser*, the trial court properly added a single five-year enhancement as the final step in computing Grace's and Theus' sentences.

G. Grace's Sentence

The trial court originally sentenced Grace to 16 years in prison but the minute order and abstract of judgment did not calculate that term in the same way that the trial court stated in its oral pronouncement of judgment. We asked for and received supplemental briefing on the issue. On August 30, 2016, the trial court resentenced Grace to 13 years in prison, comprised of six years on count 1 (the three year mid-term doubled pursuant to the Three Strikes law), plus a consecutive two years on count 2 (one-third of the three year mid-term, doubled pursuant to the Three Strikes law), plus a consecutive five years on the aggregate pursuant to section 667(a)(1).[10] The new sentence does not suffer from the defects of the first sentence, and we find no error.

DISPOSITION

The judgments are affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.

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10 We grant Grace's motion to augment the appellate record only with the August 30, 2016, minute order. The motion to augment with other documents is denied.