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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WAYNE LEFON BRIGGS, Defendant and Appellant.	B272003 (Los Angeles County Super. Ct. No. BA434343)

APPEAL from a judgment of the Superior Court of Los Angeles County, Douglas Sortino, Judge. Affirmed and remanded with directions.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Wayne Lefon Briggs appeals the judgment of conviction after a jury found him guilty of aggravated kidnapping (Pen. Code, § 209, subd. (b)(1))[1] and nine counts of second degree robbery (§ 211) arising from two bank robberies, one in December 2014 of a Wells Fargo and a second in January 2015 of a Citibank. The jury also found true that Briggs personally used a firearm in the commission of the kidnapping and two of the robberies (§ 12022.53, subd. (b)) and that a principal was armed in the commission of the kidnapping and all the robberies (§ 12022, subd. (a)(1)).

On appeal Briggs contends there was no substantial evidence to support a finding that he was one of the masked perpetrators of the kidnapping and robberies. With respect to the kidnapping, Briggs contends there was insufficient evidence of asportation because the forced movement of the victim was incidental to the commission of the robbery and did not increase her risk of harm. Briggs also asserts with respect to the robbery of a bank employee on break during the Wells Fargo robbery that there was insufficient evidence Briggs used force or fear to take the bank's property from him.

We affirm. However, we remand for resentencing for the trial court to decide whether to strike the firearm enhancements pursuant to section 12022.53, subdivision (h).

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[1] All further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The second amended information charged Briggs with respect to the Citibank robbery with kidnapping to commit robbery (aggravated kidnapping) (§ 209, subd. (b)(1); count 1) and five counts of robbery (§ 211; counts 2-4, 6, & 7).[2] The information further alleged Briggs personally used a firearm during the commission of the Citibank kidnapping and robberies (§ 12022.53, subd. (b); counts 1-4, 6, & 7). The information also charged Briggs with six counts of robbery with respect to the Wells Fargo robbery (counts 8-12, 14).[3] The information alleged as to all counts that a principal was armed with a firearm in the commission of the offenses (§ 12022, subd. (a)(1)). Briggs pleaded not guilty to all charges and denied the allegations.

B. *The Prosecution Case*

1. *Wells Fargo Robbery (Counts 8, 10-12, 14)*

On the afternoon of December 12, 2014 two men robbed a Wells Fargo bank in Rancho Palos Verdes. Wells Fargo employees Jennilyn Redondo (count 8), Alex Ruiz (count 10), Brenda Tena (count 11), Kyle Miller (count 12), David Gressett (count 14), Julia Chernova, and Matthew Fetui were working at the bank at the time of the robbery, along with other tellers. Ruiz, Tena, Miller, Gressett, and Fetui testified at trial to the

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[2] Justin Davis was originally named as a codefendant, but the court granted Briggs's motion to sever their trials.

[3] There are no counts 5 or 13 in the second amended information.

events that day. None of the witnesses could identify Briggs as one of the robbers.

Tena supervised the tellers, and at the time of the robbery was standing behind the line of tellers. She observed a man wearing a hat and a mask enter the bank. Two men with their faces covered followed and announced it was a robbery. The first robber held up a gun and ordered everyone to drop to the floor. Everyone complied.

The second robber jumped onto the "bandit barrier," a glass partition that separated the customers from the tellers. He climbed over the bandit barrier and jumped onto the counter on the teller side. The second robber did not appear to have a gun. Tena was scared and froze.

Redondo and Chernova ran out the back door, and the second robber chased them into the employee break room. When he returned, he asked the tellers something to the effect of, "[W]here's the money[?]" Tena pointed to the "buses," which are black boxes on wheels next to each teller where they store the money. The second robber began emptying the cash from two buses into a plastic trash bag. As the second robber was doing this, one of the other robbers started counting down the seconds and said, "[L]et's go." The second robber moved down the teller line, attempting to empty other buses, but they were locked. He returned to the lobby area, having taken approximately $23,000. Tena could not see the faces of the robbers. The robbery lasted about 90 seconds.

Miller was directing customers to the teller lines when he saw three people enter the bank. One robber was holding a gun, while another counted down the seconds. One of the three

jumped over the bandit barrier. Miller could not see the robbers' faces because they were wearing ski masks.

Gressett, a home mortgage consultant, was near his desk in the back of the bank when he heard a commotion. He saw someone standing on the floor of the bank counting down. Gressett heard a command to "get on the ground and nobody gets hurt," and he got down. Gressett could not see what the robber was wearing or whether he had a gun.

At the time of the robbery Ruiz was in the employee break room taking a break, when he heard a loud "thud" coming from the bank. He looked at the security camera monitor and saw a handicapped customer on the floor. The monitor showed men run into the bank who did not work there. Ruiz did not see any weapons. When Ruiz stood up to assist the customer, he saw through the open door to the break room a man in a black or dark gray sweatshirt chasing Redondo and Chernova into the break room. Redondo and Chernova told Ruiz the bank was being robbed.

The robber chased Ruiz, Redondo, and Chernova until they reached the emergency exit door in the break room. Ruiz could not make out the robber's facial features because he had something over his face that appeared to be a ski mask, nylon stocking, or beanie. Ruiz was scared and believed his life was in danger.

Ruiz, Redondo, and Chernova ran out the emergency exit, along with two other bank employees. They ran to a pizza restaurant in the same shopping plaza. Ruiz and his coworkers called 911 from the restaurant. Ruiz saw three men run toward a white car. One took off a sweatshirt, then they opened the trunk and threw the sweatshirt and "other things" inside the trunk.

They jumped in the car and sped off. Ruiz believed it was a four-door Kia Optima.

Joannie Ybarra, who worked at the pizza restaurant, saw the five bank employees run from the bank on the day of the robbery. They looked frantic and scared, and said they had just been robbed at gunpoint.

Fetui, a Wells Fargo private banker, was working at a desk in the back of the bank when he realized a robbery was in progress. He left through a side door to the parking lot. Fetui saw three men leaving the bank wearing hoodies, "skipping and jumping and kind of laughing." The men were carrying cloth drawstring bags. They got into a white Kia Optima, and fled. Fetui memorized the license plate number on the vehicle, and conveyed it to a 911 operator.

Michael Ponce owned a white Kia Optima that was stolen from the parking lot at his daughter's high school on December 9, 2014, three days before the robbery. Ponce reported the theft to the police. Five days after the robbery Los Angeles County Sheriff's Detective Marcello Curko found Ponce's stolen Kia three to five miles away from the Wells Fargo bank. Detective Curko recovered a red and black Miami Heat hat stuffed under the front passenger seat. Ponce had not previously seen the hat, nor had he ever seen his daughter with a Miami Heat hat.

Senior criminalist John Bockrath took a swab from the interior lining of the Miami Heat hat for testing. He testified the hat contained DNA from at least three donors, with two predominant contributors. Bockrath concluded Briggs was a possible donor, meaning he possibly wore it or came into contact with the hat. He excluded Ponce's daughter as a donor.

FBI special agent Rosario Escajeda obtained through search warrants records associated with the Facebook accounts for Briggs and his girlfriend, Ashlee Perkins. Photographs uploaded to Briggs's Facebook account two days after the robbery included one showing "a sink full of money," another with Briggs "holding money," and a third with Briggs sitting "with a large amount of money on his lap."

On March 5, 2015 Los Angeles Police Detective Tracey Benjamin interviewed Briggs after advising him of his *Miranda* rights.[4] When Detective Benjamin showed Briggs a photograph of Perkins uploaded to Briggs's Facebook account, Briggs identified the hooded sweatshirt worn by Perkins as his own. Detective Benjamin offered her lay opinion at trial that the hooded sweatshirt with a "Chicago" logo worn by one of the robbers in the Wells Fargo surveillance video appeared to be the same sweatshirt worn by Perkins in the Facebook photograph.

After Briggs identified Perkins as the individual wearing Briggs's hooded sweatshirt, Detective Benjamin said, "you see where this is going? You want to talk to me? I just need to know why and how come." Briggs responded, "I'm never gonna see my family again? Am I never gonna see my family again?" Briggs added as to Perkins, "She didn't have nothing [to] do with nothing."

2. *Citibank Robbery (Counts 1-4, 6)*

On the afternoon of January 31, 2015 Hugo Romero was waiting in the parking lot outside of a Citibank in Eagle Rock. His wife was banking inside. He saw two men doing a "shoulder

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436, 471.

bump" in the parking lot. They then pulled stockings over their faces before entering the bank. Romero described the men as African-American.

At the time of the robbery, Georgina Mis (count 2), Karen Hamasaka (count 3), Brittany Bonilla (count 4), and Maria Bernal (count 6) were working inside the bank as tellers. Mis, Hamasaka, and Bonilla testified as to the events that day. They were not able to identify Briggs as one of the robbers. Head teller Hamasaka described the layout of the bank. The tellers worked in a row with a glass barrier dividing them from the customers. The bank had a front entrance on Eagle Rock Boulevard and a back door leading to the parking lot. The back door opened to a hallway leading to the parking lot.

Lida Cruz (count 1) was a customer at the bank on the day of the robbery. She completed her transaction with the teller, then exited the bank through the back door, and walked through the hallway toward the parking lot. After Cruz stepped out of the back door into the hallway, she saw two African-American men enter the hallway from the parking lot. Cruz was three to four steps away from the back door (inside the hallway) as the men walked toward her—the taller man was on her right; the shorter one was on her left. When Cruz was in the center of the hallway, she tried to walk past the men, but the taller man suddenly grabbed her, covered her mouth with his gloved hand, and "put [her] back inside the bank."

Cruz described that she "was trying to . . . go away from the back door" when she was grabbed and brought back into the bank. Cruz demonstrated to the jury how the taller man grabbed her, placed his right arm across her neck up to her chest, and

covered her mouth. He then turned Cruz around to face back toward the bank. However, he "was gentle" as he grabbed her.

The taller robber brought Cruz into the bank, about five or six feet from the back door. He ordered everyone to get down, and everyone complied. The taller man cursed and called someone a "bitch." Cruz testified, "Maybe I was the one." The taller man told the shorter one to pistol-whip someone "[i]f it's needed." Cruz never saw a weapon. The perpetrators were not wearing masks, but Cruz was too scared to look at their faces.

Mis was helping a customer when she saw two young African-American men enter the bank. The first robber pointed a gun at everyone in the bank while ordering people to get down. This robber stayed on the public side of the glass barrier. Mis pressed the alarm button to alert the police. The second robber came to Mis's side of the glass barrier and stood in front of her as she was on the floor. She thought she was going to die. The second robber had a tan nylon stocking over his face. The robber told her to open her cash drawer, and he took about $18,000 from the drawer. He was wearing gloves and put the money in a cloth bag. The robber demanded the teller next to Mis open his money drawer, and the robber took out about $30,000.

At the time of the robbery, Bernal was on break in the lunch room at the back of the bank. When Bernal opened the door from the lunch room, the second robber said to Mis something like, "don't try to be smart." The first robber told the second one to grab Bernal. While the second robber was taking cash from the drawers, the first robber kept saying, "hurry up, hurry up. We only have like seven minutes . . . ." Once the second robber took the money from the two drawers, the two robbers ran out through the back door to the parking lot.

Bonilla was standing at her station when she heard a commotion and saw the robbers enter the bank. The robbers were wearing nylon stockings over their face. Bonilla hid underneath her station and tried to grab her cell phone when one of the robbers landed in front of her. He told all the tellers to open their drawers. She opened her drawer, but the robber took the cash from the two tellers to her left. At the same time, the robber with the gun was counting down. During the robbery, she was terrified.

Hamasaka, who was the head bank teller, was helping customers at the time of the robbery. She saw a man with a gun. She got down on the floor and pressed the alarm. One of the robbers on her side of the teller line was wearing dark clothing with a two-toned red and black shirt with a different color on the shirt sleeves. She could only see one robber, who was wearing a mask, so she could not see his face.

Romero saw the two men return to the parking lot "yelling" and "celebrating." One of the men was holding a handgun, while the second held a bag. They drove off in an older model burgundy Toyota Corolla with a red license plate with yellow lettering. Romero wrote down the license plate number and later provided it to the police. The men quickly drove away.

Los Angeles Police Officer Jonathan Pacheco and his partner responded to a radio call of a robbery at the Citibank. They searched the area for an older model burgundy Toyota with a New Mexico license plate. Officer Pacheco located the car within approximately 10 minutes. The key was still in the ignition, the engine was running, and the windows were open. The steering column was broken. Officer Pacheco observed a nylon "ski mask" in the center console.

Los Angeles Police Detective Victor Marin also responded to the robbery, and searched the vehicle. It appeared somebody had been living inside. He found an envelope on the back seat with Briggs's name on it, in care of Perkins.[5] Other items in the trunk had the name of Briggs or Perkins on them. Detective Marin found a second nylon stocking on the front right passenger seat. On the driver's side floorboard he found a receipt from a Carl's Jr., dated January 26, 2015. The vehicle was registered to Perkins.

Detective Benjamin went to the Carl's Jr. restaurant identified on the receipt and obtained the surveillance video from the date on the receipt. The surveillance footage showed Briggs wearing a jacket with red and yellow trim. The jacket matched a jacket Briggs wore in a music video posted on YouTube. Video footage from the robbery showed one of the robbers wearing a jacket with the same distinctive coloring. Briggs later told Detective Benjamin during his March 5, 2015 interview as he watched the surveillance video of the robbery, "The person who robbed the bank is in that jacket that's in my video that you see me with right there," referring to his music video posted online. Detective Benjamin opined at trial that the jacket worn by Briggs in the video posted online was the same jacket worn by one of the robbers.

Randy Zepeda, a criminalist with the Los Angeles Police Department, conducted DNA testing of the two nylon stockings and knit cap recovered from the abandoned Toyota, as well as a

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[5] The officer testified that the envelope was in care of "Ashlee Briggs." However, it appears he intended to refer to Ashlee Perkins.

reference sample taken from Briggs.[6] The DNA profile from Briggs's reference sample matched the DNA profile taken from the nylon stocking. Zepeda estimated the probability that two unrelated people would share the same DNA profile was one in 700 quintillion (7 followed by 20 zeros).

During Briggs's March 5, 2015 interview, Briggs initially claimed Perkins's Toyota had been stolen approximately one week after Christmas. When Detective Benjamin showed Briggs the January 26, 2015 Carl's Jr. video in which Briggs was driving Perkins's car through the drive-through window, Briggs admitted he was the one driving the vehicle, more than a month after he said the vehicle was stolen.

C. *The Defense Case*

Briggs testified in his own defense. In late 2014 and early 2015, Briggs did not have money for housing, and lived in short-term hotels, with people he knew, and in his car. He denied participating in either the Wells Fargo or Citibank robberies.

As to the Wells Fargo robbery, Briggs acknowledged that in November 2014 he posted a photograph of himself wearing a Miami Heat hat. As to the photograph of him with large amounts of cash, Briggs explained that some of the money was his, but around December 14 (two days after the robbery), Davis gave him approximately $1,500 in cash as a Christmas present.

As to the Citibank robbery, Briggs admitted the nylon stocking found in the car was his, but explained that he wore

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[6] Zepeda also compared DNA found on the nylon stocking to a DNA profile taken from a cigarette butt Briggs had discarded during a period in which he was under surveillance. The DNA profile from the cigarette butt was "consistent" with the DNA profile extracted from the nylon stocking.

nylon stockings at night to prevent his braids from becoming "frizzy." When Briggs told the police in his interview that Perkins's vehicle was stolen around Christmas in 2014, he was confused. The vehicle was actually stolen a couple weeks after Perkins went to Tucson on January 6, 2015. Briggs admitted the surveillance footage from Carl's Jr. showed him going through the drive-through on January 26. Briggs explained that his answers to the detective during his interview about the timeline of the car being stolen were inaccurate because he was confused and intimidated.

When asked why he told the detectives that Perkins had "nothing to do with nothing," Briggs explained that he said this because she "doesn't do that" (presumably bank robberies), and she was in Tucson on the dates of the robberies. The prosecutor asked Briggs on cross-examination whether he bought a Ford Expedition for Perkins the day after the Citibank robbery. Briggs denied this, explaining that Perkins's pastor Jesus gave her the car as a gift.

D. *Rebuttal*

Jesus Puente testified that on February 1, 2015 he sold his Ford Expedition to Briggs.[7] Puente was not a pastor or preacher. Briggs handed Puente's son $4,000 for the vehicle in $100 bills. Briggs requested that the transfer paperwork list Perkins as the owner.

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[7] Puente did not recall the date of the sale, but a certified record from the Department of Motor Vehicles showed that the vehicle was transferred to Perkins on February 1, 2015.

E. *Jury Verdict and Sentencing*

At the close of the prosecution's case, Briggs moved for acquittal under section 1118.1. The court granted the motion as to counts 7 and 9.[8]

As to the Citibank robbery, the jury found Briggs guilty of aggravated kidnapping and four counts of robbery. The jury also found true the allegation that Briggs personally used a firearm during the commission of counts 1 through 3 (§ 12022.53, subd. (b)) and, as to counts 1 through 4 and 6, that a principal was armed with a firearm (§ 12022, subd. (a)(1)).

As to the Wells Fargo robbery, the jury found Briggs guilty of the remaining five counts of robbery (counts 8, 10-12, & 14), as well as the allegation that in the commission of each offense a principal was armed with a firearm (§ 12022, subd. (a)(1)).

On count 1, for the aggravated kidnapping of Cruz, the trial court sentenced Briggs to life with the possibility of parole, plus 10 years for the firearm-use enhancement. The court imposed a consecutive determinate term of 24 years eight months on the remaining robbery counts. The court designated count 2 for the second degree robbery of Mis as the principal term. The court imposed on this count the upper term of five years, plus 10 years for the personal use of a firearm. The court imposed consecutive

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[8] Briggs was charged in count 7 with the robbery of Susan Lee. Lee was allegedly a bystander in the Citibank robbery, but no testimony was presented about her. Briggs was charged in count 9 with the robbery of Daniel Gramp, who was a financial advisor who sat at a desk near the back door of the Wells Fargo bank. There likewise was no testimony about whether Gramp was at work the day of the robbery or, if he was, "what he did or how he reacted."

terms of one year (one-third the middle term of three years) for the Citibank robberies of Hamasaki, Bonilla, and Bernal (counts 3, 4, & 6) and the Wells Fargo robberies of Tena and Miller (counts 11 & 12). The court imposed on count 3 an additional three years four months for the firearm-use enhancement (one-third the 10-year enhancement). On counts 4, 6, 11, and 12, the court imposed an additional four months (one-third the one-year term) for the principal armed enhancements. The court stayed the one-year principal armed enhancements on counts 1, 2, and 3 under section 654.

The court imposed concurrent sentences of four years (the middle term of three years plus one year for the principal armed enhancement) for the Wells Fargo robbery counts as to Redondo, Ruiz, and Gressett (counts 8, 10, & 14).

DISCUSSION

A. *Standard of Review*

In evaluating the sufficiency of the evidence to support a conviction, "'we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.'"

(*People v. Penunuri* (2018) 5 Cal.5th 126, 142; accord, *People v. Casares* (2016) 62 Cal.4th 808, 823.)

"'"We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] 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.'" (*Penunuri*, *supra*, 5 Cal.5th at p. 142, quoting *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The same standard of review applies in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278; accord, *People v. Casares, supra*, 62 Cal.4th at p. 823.) '"'"'"'"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'"'"'"'" (*Ghobrial*, at p. 278; accord, *Casares*, at pp. 823-824.)

The identity of the perpetrator may be proved by circumstantial evidence. (See *People v. Zaragoza* (2016) 1 Cal.5th 21, 45 ["The evidence that defendant was the shooter was entirely circumstantial—but it was sufficiently substantial to uphold his convictions."]; see also *People v. Mohamed* (2011) 201 Cal.App.4th 515, 521-522 [substantial evidence established

identity, including that defendant was wearing same clothing as robber].)

B. *Substantial Evidence Established Briggs's Identity as the Perpetrator*

Briggs contends the evidence at most raises only a suspicion that he participated in the crimes. We disagree. Reviewing the record as a whole, substantial evidence supports the jury's implied finding that Briggs participated in both robberies. (See *People v. Penunuri*, *supra*, 5 Cal.5th at p. 142.)

1. *Wells Fargo robbery*

Tena described the first robber holding the gun as wearing a hat. Briggs's DNA was found on the Miami Heat hat recovered from the stolen Kia, which was used as the getaway vehicle. The car was found three to five miles from the Wells Fargo bank. Briggs offered no explanation for why his DNA would have been on the hat in the stolen car.

In addition, the photograph of Briggs's girlfriend Perkins downloaded from Briggs's Facebook account showed her wearing a hooded sweatshirt that Briggs later admitted was his. In the surveillance video from the robbery, one of the robbers wore a sweatshirt with a "Chicago" logo on it. Detective Benjamin opined that Briggs's sweatshirt "appear[ed] to be the same jacket" worn by the robber in the video. After Briggs identified the hooded sweatshirt Perkins was wearing as his, he said to Detective Benjamin, "I'm never gonna see my family again?" He added as to Perkins, "She didn't have nothing [to] do with nothing."

Significantly, two days after the robbery, Briggs posted two photographs on his Facebook profile showing him with a large

amount of cash and a third photograph with "a sink full of money." Yet Briggs testified that at the time he did not have enough money to pay for housing. The jury reasonably could have found Briggs's explanation that some of the money was his and that Davis gave him $1,500 as a Christmas gift was not credible, especially given the timing of the photographs.

2. *Citibank robbery*

The getaway car used in the Citibank robbery belonged to Perkins. Mail addressed to Briggs was found in the vehicle. A nylon stocking found in the vehicle was similar to the stockings worn by the robbers. Briggs admitted the stocking was his and it contained his DNA profile. The jury could reasonably reject Briggs's implausible explanation that he wore the stocking to prevent his braids from becoming frizzy.

In addition, surveillance footage from the date on the Carl's Jr. receipt found in Perkins's vehicle showed Briggs driving the vehicle through the drive-through window. Briggs was wearing a distinctive jacket with red and yellow trim, which matched the jacket he admitted he wore in a music video posted on YouTube. The surveillance video from the robbery showed that one of the robbers wore a jacket with the same distinctive colors. Detective Benjamin opined that the jacket Briggs wore in the music video was the same jacket worn by one of the robbers. Briggs similarly told the detective, "The person who robbed the bank is in that jacket that's in my video that you see me with right there."

Briggs also made multiple false statements during his interview with Detective Benjamin and at trial. False statements by a defendant to conceal a crime are "'highly probative of whether defendant committed the crime.'" (*People v.*

Thompson (2010) 49 Cal.4th 79, 113; accord, *People v. Mohamed*, *supra*, 201 Cal.App.4th at p. 522 [false alibi suggested consciousness of guilt].) Briggs initially said Perkins's vehicle had been stolen approximately one week after Christmas. After he was shown the January 26, 2015 surveillance video from Carl's Jr. showing him driving the vehicle, he admitted his earlier statement was not true.

Briggs also was confronted during cross-examination with the fact he purchased a Ford Expedition for Perkins the day after the robbery. He responded that Perkins received the vehicle as a gift from her pastor named Jesus. However, Jesus Puente testified he was not a pastor and that he sold the vehicle to Briggs the day after the robbery for $4,000 in cash, which amount Briggs paid in $100 bills.

C. *Substantial Evidence Supports the Conviction for Aggravated Kidnapping*

Briggs contends the evidence is insufficient to support his conviction for kidnapping to commit robbery because the asportation of Cruz was merely incidental to the commission of the robbery and did not increase her risk of danger. We disagree.

A person who kidnaps or carries away another person to commit robbery is guilty of aggravated kidnapping. (§ 209, subd. (b).) "Kidnapping for robbery requires asportation, i.e., movement of the victim that is not merely incidental to the commission of the robbery and that increases the risk of harm over that necessarily present in the crime of robbery itself." (*People v. Delgado* (2013) 56 Cal.4th 480, 487; accord, § 209, subd. (b)(2) [aggravated kidnapping occurs only "if the movement of the victim is beyond that merely incidental to the commission of, and

increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense"]; see *People v. Vines* (2011) 51 Cal.4th 830, 870 (*Vines*) [describing two-prong test for asportation], overruled on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 104.)[9] "The essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*); accord, *People v. Corcoran* (2006) 143 Cal.App.4th 272, 279.)

1. *Cruz's movement was not merely incidental to the robbery.*

In analyzing the first prong—whether movement of the victim was merely incidental to commission of the underlying crime—the jury must consider "the 'scope and nature' of the movement, which includes the actual distance a victim is moved." (*Vines*, *supra*, 51 Cal.4th at p. 870; accord, *Dominguez*, *supra*, 39 Cal.4th at p. 1151 ["the jury must 'consider[] the "*scope and nature*" of the movement,' as well as '*the context of the environment in which the movement occurred*""].) "There is, however, no minimum distance a defendant must move a victim to satisfy the first prong." (*Vines*, at p. 870.)

"'Incidental' means 'that the asportation play[ed] no significant or substantial part in the planned [offense], or that it be a more or less "'trivial change[] of location having no bearing on the evil at hand.'"'" (*People v. James* (2007) 148 Cal.App.4th 446, 454 (*James*).) "[T]he fact that the movement of a robbery

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[9] In 1997 the Legislature amended section 209, subdivision (b), to "eliminat[e] the requirement that the movement of the victim 'substantially' increase the risk of harm to the victim." (*Vines*, *supra*, 51 Cal.4th at p. 869, fn. 20.)

victim *facilitates* a robbery does not imply that the movement was merely incidental to it." (*Ibid*.)

Here, the evidence established that Cruz had exited the bank at the time the robber grabbed her. At that time she was inside the hallway, three to four steps away from the back door to the bank. When Cruz tried to walk past the men, the taller man suddenly grabbed her, covered her mouth with his gloved hand, and moved her five or six feet inside the bank.

The facts here are similar to those in *James*, relied on by the People. In *James*, a maintenance worker was working outside a bingo club when gunmen forced him to knock on the door and identify himself. (*James*, *supra*, 148 Cal.App.4th at p. 449.) Recognizing his voice, another employee opened the door, enabling the robbers to enter the club. (*Ibid*.) The robbers threw the maintenance worker to the floor and stole cash from the club's safe. (*Id*. at p. 450.)

The Court of Appeal affirmed the defendant's aggravated kidnapping conviction, explaining, "It is significant here that the underlying crime was *not* the robbery of [the maintenance worker], but the robbery of the Bingo Club. In other words, defendant did not seek to rob [the maintenance worker] of property kept inside the Bingo Club and simply moved him from the outside of the Bingo Club to the location of the property inside. Instead, defendant and his companions intended to rob the *manager* of the Bingo Club, and moved [the worker] from the outside of the Bingo Club to the door, in order to gain entry." (*James*, *supra*, 148 Cal.App.4th at p. 457.)

Like the maintenance worker in *James*, Cruz was not a target of the robbery. Forcibly moving Cruz from the relative safety of the hallway back into the bank exceeded the amount of

movement necessary to accomplish the robbery. Had the robbers allowed Cruz to exit the building, it is unlikely she would have obstructed the robbery. Rather, the only risk to the robbers was that she would call for help. "Lack of necessity is a sufficient basis to conclude a movement is not merely incidental . . . ." (*James*, *supra*, 148 Cal.App.4th at p. 455; accord, *People v. Corcoran*, *supra*, 143 Cal.App.4th at pp. 279-280 [upholding defendant's aggravated kidnapping conviction where the victims were moved 10 feet to a back office in a bingo hall after the robbery was aborted].)

Briggs relies on *People v. Washington* (2005) 127 Cal.App.4th 290 (*Washington*), in which the Court of Appeal reversed the defendant's conviction for aggravated kidnapping, concluding the movement of two bank tellers to a vault room was incidental to the bank robbery. (*Id*. at p. 299.) In *Washington*, the robbers entered the bank manager's office and demanded she get the bank's money for them. (*Id*. at pp. 295-296.) Because the bank manager needed a second set of keys to open the vault, a teller walked with her and the robber to the vault room. (*Id*. at p. 296.) The manager and teller travelled about 35 and 45 feet, respectively. (*Id*. at p. 299.) Once they opened the vault, the robbers took the cash and fled. (*Id*. at p. 296.)

In concluding this movement was incidental to the robbery, the court observed, "[T]here was no excess or gratuitous movement of the victims over and above that necessary to obtain the money in the vault." (*Washington, supra*, 127 Cal.App.4th at p. 299.) The court explained, "The rule to be derived from these cases is that robbery of a business owner or employee includes the risk of movement of the victim to the location of the valuables

owned by the business that are held on the business premises." (*Id*. at p. 300.)

Here, unlike the movement of the bank employees in *Washington* toward the vault so they could open it for the robbers, moving Cruz from the hallway back inside the bank lobby did not facilitate the robbery. A jury could reasonably conclude movement of Cruz back inside the bank was beyond that necessary to accomplish the robbery and "not merely incidental to the commission of the robbery." (*People v. Delgado*, *supra*, 56 Cal.4th at p. 487.)

2. *The movement of Cruz increased her risk of harm.*

As to the second prong—whether the movement substantially increased the risk of harm to the victim above that present in the underlying crime—the jury should consider "'"such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased."'" (*Vines*, *supra*, 51 Cal.4th at p. 870; accord, *Dominguez*, *supra*, 39 Cal.4th at p. 1152.)

Similar to the maintenance worker in *James*, the robber moved Cruz from a safe location in the hallway to a more dangerous location inside the bank where the robbery took place. By moving Cruz back into the bank, her chances of detection, calling the police, or escaping decreased, increasing her risk of harm. (See *Dominguez*, *supra*, 39 Cal.4th at p. 1153 [defendant substantially increased victim's risk of harm by moving her from an open area on the side of the road to a secluded location where

he raped her, decreasing possibility of detection]; *People v. Simmons* (2015) 233 Cal.App.4th 1458, 1472 [movement of victims "a significant distance up the front stairs" into their home decreased the likelihood defendants would be detected and increased risk to victims by hiding them from public view]; *James*, *supra*, 148 Cal.App.4th at pp. 458-459 [movement of worker from parking lot into club substantially reduced prospects of detection or escape and increased risk of harm]; *People v. Corcoran*, *supra*, 143 Cal.App.4th at p. 280 [moving victims to small back office substantially increased their risk of danger and decreased odds of detection].)

Moreover, movement of Cruz back into the bank increased her risk of psychological harm. (See *People v. Nguyen* (2000) 22 Cal.4th 872, 885-886 [increased risk of harm includes psychological harm]; see also *People v. Power* (2008) 159 Cal.App.4th 126, 138 [increased risk of harm includes risk of psychological, emotional, or physical harm].) Once inside the bank, the robbers held the employees and customers at gunpoint and threatened to pistol-whip them if they did not cooperate, increasing Cruz's risk of psychological harm. Indeed, Cruz was scared during the robbery and fearful for several days.

Viewing the evidence in the light most favorable to the prosecution, substantial evidence supports Briggs's aggravated kidnapping conviction. (See *People v. Penunuri, supra*, 5 Cal.5th at p. 142; *Vines*, *supra*, 51 Cal.4th at pp. 870-871.)

D. *Substantial Evidence Supports Briggs's Conviction of the Robbery of Ruiz*

Briggs contends the evidence is not sufficient to support his conviction on count 10 for the robbery of Ruiz because no

property was taken from Ruiz's immediate presence by force or fear. We disagree.

Robbery is defined as "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.) "To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his presence." (*People v. Gomez* (2008) 43 Cal.4th 249, 254; accord, *People v. Scott* (2009) 45 Cal.4th 743, 749 (*Scott*).)

"'"'[A] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.'" [Citations.]' [Citation.] Thus, 'immediate presence' is 'an area over which the victim, at the time force or fear was employed, could be said to exercise some physical control' over his property. [Citation.] 'Under this definition, property may be found to be in the victim's immediate presence "even though it is located in another room of the house, or in another building on [the] premises."'" (*People v. Gomez*, *supra*, 43 Cal.4th at p. 257, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 626-627.)

"[B]ased upon a theory of constructive possession, '"a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property."'" (*Scott*, *supra*, 45 Cal.4th at p. 751.) "Although not every employee has the authority to exercise control over the employer's funds or other property during everyday operations of the business, any employee has, by virtue of his or her employment relationship with the employer, some implied

authority, when on duty, to act on the employer's behalf to protect the employer's property when it is threatened during a robbery. . . . [Citations.] They are 'therefore in "possession" of the property as against anyone who might attempt to steal it.'" (*Id*. at p. 754.)

Under *Scott*, there was substantial evidence that Ruiz constructively possessed the bank's money at the time of the robbery. Although Ruiz was on break in the employee break room during the robbery,[10] the break room was adjacent to the teller line and, after hearing a loud thud, Ruiz jumped up to assist with what he believed was a fallen customer in the bank lobby. But for the intervention of the robber, Ruiz would have returned to the bank lobby where his employer's money was located.

The prosecution also needed to prove the robber applied force or fear to Ruiz to take the bank's money. "'[T]he central element of the crime of robbery [is] the force or fear applied to the individual victim in order to deprive him of his property.'" (*People v. Gomez*, *supra*, 43 Cal.4th at p. 265.) "'The element of fear for purposes of robbery is satisfied when there is sufficient

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[10] Neither party addressed whether Ruiz was "on duty" during the robbery for the purpose of establishing constructive possession pursuant to *Scott*. Briggs forfeited this contention by failing to raise it in his opening brief. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9; *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."].) In any event, it would have been reasonable for the jury to conclude Ruiz had the authority to protect the bank's money while he remained on the premises. (*Scott*, *supra*, 45 Cal.4th at pp. 752-755.)

fear to cause the victim to comply with the unlawful demand for his property.'" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774 (*Morehead*); accord, *People v. Mullins* (2018) 19 Cal.App.5th 594, 604 ["[t]he fear is sufficient if it facilitated the defendant's taking of the property"]; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1319 [element of fear satisfied when there is sufficient fear to cause the victim to comply with an unlawful demand for property].)

In *Morehead*, the defendant entered three banks wearing a partial disguise (dark sunglasses and a beanie cap) and slipped the tellers notes demanding money. (*Morehead, supra*, 191 Cal.App.4th at pp. 777-778.) Each teller promptly complied. (*Id.* at p. 778.) The Court of Appeal affirmed the convictions for robbery of the three tellers, concluding, "The testimony of each victim regarding her reaction to Morehead's demand for money reflected a perception that she had no choice but to comply with his demand. Any reasonable jury would conclude the tellers had no way of knowing what Morehead might do if they failed to comply, and their prompt compliance showed they viewed Morehead's demands as carrying an implicit threat he might harm them if they did not immediately hand money over to him. The evidence strongly supports a conclusion that Morehead's demands engendered both actual and reasonable fear in the employees." (*Ibid.*; see *People v. Bordelon, supra*, 162 Cal.App.4th at pp. 1316, 1320 [robber's statements to teller that "[t]his is a robbery. Put your money in the plastic bag" supported robbery conviction where the teller was "shocked" and "traumatized"].)

Here, the robber jumped over the bandit barrier, then chased Redondo and Chernova to the employee break room. This

occurred before the robber returned and took the money from the tellers—thus, at the time he chased the coworkers, the robbery was still in progress. Ruiz saw the robber, wearing a ski mask, nylon stocking, or beanie over his face, chase Redondo and Chernova into the break room. Ruiz's coworkers told him the bank was being robbed. As of that point, the robber had not used force or fear on Ruiz. However, the robber then chased Ruiz, along with Redondo and Chernova, to the exit door and out of the bank. But for the robber chasing Ruiz out of the bank, Ruiz was about to leave the break room to go to the bank lobby to assist a customer he thought had fallen. Thus, the robber thwarted any possibility that Ruiz could have prevented the robbery. Ruiz was scared and believed his life was in danger.

As in *Morehead*, there was substantial evidence to support the jury's implicit finding that Ruiz left the bank out of fear of the robber, who was wearing a nylon stocking, mask, or beanie obscuring his face, as he chased Ruiz and his coworkers out the exit door to the bank. The jury could therefore reasonably have found the robbers used force or fear against Ruiz to accomplish the robbery. (See *Morehead, supra*, 191 Cal.App.4th at pp. 774-775.)

E. *Section 654 Does Not Bar Punishment for Briggs's Robberies of Multiple Victims*

Briggs contends the trial court was required to stay his sentence on all but one of the Wells Fargo robbery counts because the robberies were not violent crimes, and therefore the exception from section 654 for acts of violence on multiple victims does not apply. We disagree.

Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." However, "section 654 does not apply to crimes of violence against multiple victims. [Citation.] The reason is that "'[a] defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.'"" (*People v. Correa* (2012) 54 Cal.4th 331, 341, fn. omitted; accord, *People v. Newman* (2015) 238 Cal.App.4th 103, 112 (*Newman*); *People v. Calles* (2012) 209 Cal.App.4th 1200, 1216 [§ 654 did not bar punishment for vehicular manslaughter with gross negligence as to two victims because offense was crime of violence].)

At Briggs's sentencing, the trial court noted, "Both of these incidents in my opinion involve great violence, threat of violence, cruelty and callousness and even though that's always inherent in a robbery, a robbery always involves force and violence." Although the trial court did not expressly find section 654 did not apply, the fact the court did not stay the sentence is deemed to reflect an implicit determination that each crime was separately punishable. (See *People v. Islas* (2012) 210 Cal.App.4th 116, 129 ["When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective."]; see also *People v. Tarris* (2009) 180 Cal.App.4th 612, 626 ["In the absence of any reference to . . . section 654 during sentencing, the fact

that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective."].)

When the underlying facts are undisputed, as they are here, "the application of section 654 raises a question of law we review de novo." (*People v. Corpening* (2016) 2 Cal.5th 307, 312; accord, *People v. Ochoa* (2016) 248 Cal.App.4th 15, 29 ["We review de novo the legal question of whether Section 654 applies."].)

The Supreme Court has concluded that "[r]obbery is violent conduct warranting separate punishment for the injury inflicted on each robbery victim." (*People v. Champion* (1995) 9 Cal.4th 879, 935 (*Champion*), overruled on another ground by *People v. Combs* (2004) 34 Cal.4th 821, 860; accord, *People v. Deloza* (1998) 18 Cal.4th 585, 592 (*Deloza*); see *People v. Miller* (1977) 18 Cal.3d 873, 886 (*Miller*) ["robbery of a victim at gunpoint has been held to be an act of violence such as to preclude application of section 654 in the case of multiple convictions involving multiple victims"].)

The holding in *Newman*, relied on by Briggs, is not to the contrary. In *Newman*, the defendant was convicted of robbery and two counts of felony false imprisonment arising out of a single incident. (*Newman, supra*, 238 Cal.App.4th at p. 106.) Because false imprisonment is not inherently a violent crime, the court considered whether the facts of the case supported characterization of the crime as a violent offense for purposes of section 654. (*Newman*, at pp. 120-121.) The court distinguished false imprisonment from crimes that "unquestionably involve acts of violence," including robbery. (*Id.* at p. 117.) As the

Newman court observed, "Robbery at gunpoint is an act of violence under section 654." (*Id.* at p. 121.)

Briggs argues there was no evidence he used a firearm in the commission of the robberies, and therefore the crimes were not violent offenses. While Briggs is correct that the Supreme Court in *Miller* concluded that "robbery of a victim at gunpoint has been held to be an act of violence" (*Miller*, *supra*, 18 Cal.3d at p. 886), the Supreme Court in *Champion* stated more generally that "[r]obbery is violent conduct warranting separate punishment for the injury inflicted on each robbery victim." (*Champion*, *supra*, 9 Cal.4th at p. 935; accord, *Deloza*, *supra*, 18 Cal.4th at p. 592.) However, both *Champion* and *Deloza* involved armed robberies.

We need not decide whether a nonarmed robbery is a violent crime because "'[a] person who aids and abets the commission of a crime is a "principal" in the crime, and thus shares the guilt of the actual perpetrator.'" (*People v. Smith* (2014) 60 Cal.4th 603, 611; see § 31 ["All persons concerned in the commission of a crime, . . . and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed."]

Because one of the robbers was armed, Briggs is criminally liable for armed robbery. Accordingly, he was properly punished for the robberies committed against multiple victims.

F. *Remand for Resentencing Is Necessary Pursuant to Section 12022.53, Subdivision (h)*

With respect to the Citibank robberies, the court imposed consecutive 10-year terms for Briggs's personal use of a firearm on counts 1 and 2, along with a three-year four-month

consecutive term on count 3 pursuant to section 12022.53, subdivision (b). At the time of sentencing, these enhancements were mandatory and could not be stricken in the interest of justice. (Former § 12022.53, subd. (h); *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

In 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018. Senate Bill No. 620 amended section 12022.53, subdivision (h), to give trial courts discretion to strike a firearm enhancement in the interest of justice. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Section 12022.53, subdivision (h), provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

As the People concede,[11] "Senate Bill No. 620's (2017-2018 Reg. Sess.) grant of discretion to strike firearm enhancements under section 12022.53 applies retroactively to all nonfinal convictions." (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425.)

Briggs contends he is entitled to a new sentencing hearing to give the trial court an opportunity to exercise its discretion to strike the firearm-use enhancements. We agree. "[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it

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11 We granted Briggs's request for leave to file a supplemental brief regarding the application of Senate Bill No. 620. (See Cal. Rules of Court, rule 8.200(a)(4).) Both parties filed supplemental briefs.

would not in any event have stricken a firearm enhancement." (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425; accord, *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [remand is required when "the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion"].)

The People contend remand is not warranted because it is clear the trial court would not have stricken the firearm enhancements even if it had the discretion to do so in light of the trial court's finding that the aggravating factors outweighed any mitigating factors and that it sentenced Briggs to the maximum sentence for the Citibank robberies. However, at the sentencing hearing the trial court acknowledged that Briggs lacked a serious criminal record and expressed remorse for his role in the robberies. The trial court also credited Briggs for admitting he lied on the stand during his presentence statement. Further, it expressed sympathy for Briggs's family and indicated the court took "no great pleasure" in handing out such a lengthy sentence.

Although the only leniency the court showed Briggs related to counts involving the Wells Fargo robberies, the record does not "clearly indicate[]" that the trial court would not have stricken the firearm enhancements for the Citibank robberies under any circumstances. (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425; accord, *People v. Billingsley*, *supra*, 22 Cal.App.5th at p. 1081.) As the Supreme Court held in *People v. Gutierrez* (2014) 58 Cal.4th 1354, in the context of sentencing juveniles for special circumstance murder: "'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that

"informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.'" (*Id.* at p. 1391.)

Remand for resentencing is appropriate to provide the trial court an opportunity to consider whether to exercise its discretion to strike the firearm-use enhancements in the interest of justice. (§ 12022.53, subd. (h).)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for the limited purpose of allowing the trial court to exercise its resentencing discretion under section 12022.53, subdivision (h).

FEUER, J.

We concur:

ZELON, Acting P. J.

SEGAL, J.