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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSE PEPE MITCHELL,<br><br>Defendant and Appellant. | B281476<br><br>(Los Angeles County Super. Ct. No. YA091753) |

APPEAL from the judgment of the Superior Court of Los Angeles County. LaRonda McCoy, Judge. Affirmed in part and remanded with directions.

Linda L. Gordon, 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, Idan Ivri and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Jose Pepe Mitchell was charged with criminal conspiracy, three counts of second degree robbery and three counts of attempted second degree robbery. The jury acquitted him on one of the robbery counts but otherwise convicted him as charged. Defendant appealed, arguing the trial court erred in denying his motion for mistrial based on juror misconduct. Defendant also contended that none of the six counts on which he was convicted was supported by substantial evidence.

In our original unpublished opinion filed October 11, 2018, we affirmed defendant's conviction in its entirety.

The Supreme Court granted review and transferred the case to us with directions to vacate our decision and reconsider the cause in light of the passage of Senate Bill No. 1393 (Reg. Sess. 2017-2018). Senate Bill No. 1393 became effective January 1, 2019, and granted trial courts the discretion to strike recidivist enhancements imposed under Penal Code section 667, subdivision (a)(1), based on prior serious felony convictions. (Stats. 2018, ch. 1013, § 1.) At the time defendant was sentenced, imposition of the enhancement was mandatory. The parties filed supplemental briefing addressing the new amendatory provision.

We agree with defendant that remand is warranted to allow the trial court the opportunity to exercise its newly granted discretion. We therefore remand for resentencing to allow the trial court to consider whether to strike defendant's recidivist enhancement pursuant to Penal Code section 1385 as amended by Senate Bill No. 1393. (Stats. 2018, ch. 1013, § 2.) Our reconsideration of this case did not affect the portions of our prior opinion affirming defendant's conviction. For clarity, in addition

to addressing Senate Bill No. 1393, we reissue our original opinion without change.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. The Charges and First Trial

Defendant was charged, along with two accomplices, in an amended information with one count of criminal conspiracy alleging two overt acts (Pen. Code, § 182, subd. (a)(1); count 1), three counts of second degree robbery (§ 211; counts 2-4), and three counts of attempted second degree robbery (§ 211, § 664; counts 5-7). It was alleged defendant had suffered a prior serious or violent felony within the meaning of section 667, subdivisions (a)(1) and (b) through (j), and section 1170.12. It was further alleged defendant had suffered four prior prison terms (§ 667.5, subd. (b)).

The charges against defendant's two accomplices were severed on defense motion. Neither of defendant's accomplices is a party to this appeal.

The case proceeded to a jury trial in May 2016 and ended in a mistrial after the jurors were unable to reach a verdict.

### 2. Retrial--Jury Selection

The second trial proceeded in November 2016. On November 15, 2016, during the fourth day of voir dire, an issue arose about the possibility that some prospective jurors had been exposed to outside information. During questioning, Prospective Juror No. 13, volunteered that he had "read the board out front" and "saw the defendant's name and [a] couple things about him." After questioning by the court, it was determined the juror was referring to the court's calendar posted on the door, which he read while the jurors were waiting to come into the courtroom.

He elaborated by saying the calendar identified the current trial "and then another charge" that had not been explained in court.

The court asked the panel if anyone else had looked at the calendar or formed any opinions about it. Prospective Juror No. 16 raised her hand and said "I don't have an opinion, but I did read it. I saw it." No other juror raised his or her hand or otherwise responded to the court's question.

The court spoke briefly with counsel at sidebar about the fact the calendar noted defendant's trailing probation violation case. The court expressed concern about bringing too much attention to something that could be a nonissue. The parties agreed the court should ask some additional questions of Prospective Juror No. 13 at sidebar and admonish the balance of the jurors.

When Prospective Juror No. 13 was asked, at sidebar, what specifically he recalled reading, he said the calendar mentioned the present trial, but also noted that defendant had been charged with a probation violation. The court asked whether he could disregard that information and not let it influence him. Prospective Juror No. 13 said he did not think that information should have been out there at all, but he would try to disregard it. The court reminded him that defendant was presumed innocent of all charges, including any probation violation. Prospective Juror No. 13 responded, "Oh, so he--so it wasn't a done deal on that. [¶] . . . [¶] . . . I just assumed that since it was up there that it was a—he'd already been you know violated." The court said it was simply a charging document and defendant was presumed innocent. The court asked again if he thought he could be fair. Prospective Juror No. 13 responded, "Just the fact that it says probation on it has affected my

judgment I think." The court asked if either side would like to ask additional questions and both sides declined. Prospective Juror No. 13 returned to his seat.

While still at sidebar, defense counsel asked for a mistrial, arguing that Prospective Juror No. 13 made the initial statement about outside information in open court, and it could have tainted the other jurors. The court said the phrase "probation violation" was not said in open court, only a reference to additional information. The court denied defendant's motion, finding insufficient grounds to warrant a mistrial, but reiterated that it would admonish the jurors, and speak with Prospective Juror No. 16 who had raised her hand indicating she had also read the calendar.

At sidebar, Prospective Juror No. 16 said she just looked at the calendar briefly but did not recall anything specific about what was printed on it. When asked if anything about it would cause her to be unfair to defendant, she said no. She said it would not influence her if she was chosen as a juror and that she could be fair to both sides. As she was being excused to return to her seat, she volunteered that other jurors were looking at the calendar even though they did not raise their hands when the court inquired about it.

Defense counsel renewed his motion for a mistrial, stating it appeared the possible taint was "a wide spread situation." The court agreed to speak with each prospective juror individually.

Prospective Juror Nos. 1 through 4 all stated at sidebar they had not read the calendar and had not been influenced by any of the comments made in open court by their fellow jurors. They all indicated they could be fair to both sides and follow the court's instructions.

Prospective Juror No. 5 said she had not read the calendar, but the discussion raised by the other jurors in court had made her curious. She asked "is there another case out?" The court admonished Prospective Juror No. 5 that she was not to speculate about such issues, and that she was to listen only to the evidence presented in court if she was seated as a juror. The court asked if she could do that. She said she would try, that she wanted to be fair, but it made her feel a little "weird."

After Prospective Juror No. 5 returned to her seat, the court, still at sidebar with counsel, expressed concern that calling up each juror individually was "drawing more attention to the issue at hand than need be." The court therefore decided it was better to give "a general admonition, and inquire of the jurors whether or not they can follow the court's order, and not consider anything outside of any evidence that will be presented during the trial in this matter." The court indicated it would allow counsel "an opportunity to voir dire on whatever issues they feel is [*sic*] relevant to the issue of potential jurors being unfair or biased."

When the proceedings resumed, the court told the panel it was going to proceed with a general admonition in lieu of continuing with the individual sidebar discussions. The court then admonished the prospective jurors as follows.

"I'm going to ask, one, that you not speak to each other about anything you may have heard, saw, read, or the calendar or otherwise. Not speculate as to any evidence that may be presented in this case. If you're selected as jurors, the evidence that you will consider for deliberations will be evidence that come[s] from either this seat, meaning a witness is testifying, which is called evidence, or will be presented to you as evidence,

or either side will present certain documentation, and you will be given instructions as to whether or not it is to be received for evidence. [¶] Anything other than that, I am ordering you not to consider, not to speculate, not to form any opinions. Remember, Mr. Mitchell is presumed to be innocent. There is no evidence that has been presented."

The court asked for a show of hands if anyone could not follow those instructions. Prospective Juror No. 5 raised her hand, and the court asked if that was based on the previous conversation at sidebar, and Prospective Juror No. 5 said yes.

Prospective Juror No. 7 said, "I didn't see it, or anything like that, but I overheard some things." The court asked if it was anything that would cause him/her to be unfair to defendant and Prospective Juror No. 7 said no.

The court re-read the charges, reiterating that they were just charges, that defendant was presumed innocent and that the prosecutor had the burden of proving each of those charges. "You are not to consider anything else presented unless it is presented for evidence. Any discussions, outside discussions that you have had, that is not to be considered in your deliberation, or your interpretation of the evidence as presented." The court then asked the panel, "Do you all agree to follow the court's order? Will you all be able to follow the court's order, and continue to give Mr. Mitchell a fair trial?"

The prospective jurors collectively responded, "Yes. Yes."

The court asked if there was anyone who believed they could not follow those instructions, then noted for the record, "[n]o hands being shown except for Juror No. 5." The court allowed counsel to ask additional questions of the panel on the subject.

Prospective Juror No. 7 said she heard other jurors discussing the calendar, and it might affect her deliberations. The court allowed a brief sidebar with Prospective Juror No. 7 who said she heard another juror say that whatever was on the calendar probably meant that defendant was "probably guilty." Prospective Juror No. 7 was not involved in the conversation but overheard it. She believed there may have been three or four prospective jurors within "earshot" of the comment. The court emphasized no evidence of a probation violation had been presented, it was not an issue for the jury to consider, and any speculation about there being such a violation must not be considered. Prospective Juror No. 7 said she could be fair and would abide by the court's instructions.

Prospective Juror No. 9 said it possibly could affect her deliberations. At sidebar, Prospective Juror No. 9 said she had not read the calendar but hearing what Prospective Juror Nos. 13 and 16 said made her wonder about the possibility of another case. She asked if there was another case pending and the court said, "[n]o. This is the only case that you're to consider." When asked whether she could keep an open mind and listen to the evidence fairly, Prospective Juror No. 9 said yes.

Prospective Juror No. 13 said it possibly could affect his deliberations. Neither party asked him any follow-up questions.

Prospective Juror No. 16 reiterated that she would adhere to the court's instructions and the speculation and comments about the calendar would not affect her.

Prospective Juror No. 19 said he believed he could follow the court's instructions, but he would "still want to know what was going on." The court interjected that jurors are not to speculate about outside issues, but are only to consider the

evidence presented, along with the court's instructions. The court asked if he could follow that instruction. Prospective Juror No. 19 said he was not sure because there was "no delete function in the human memory." The court explained there is no delete function for our "common life experiences" either, but as jurors everyone has to put that information aside and focus on the evidence presented and evaluate the case before them. "I'm not asking you to erase your memory. I'm asking you only if you're able to consider as evidence only what you hear, and see in court, and that which is presented as evidence." Prospective Juror No. 19 responded, "[i]f I understand you correctly, I can agree to that." He then said, "I would set that aside, listen to the evidence fairly."

One of the prospective jurors still seated in the audience (No. 3854) said that "everyone's just speculating" about what was on the calendar, but he did not hear anyone speculating about defendant's guilt or innocence. He said he could follow the court's instructions and be fair.

All of the remaining prospective jurors, including those in the audience who had not yet answered the basic background questions, responded that they had not read the calendar, had not heard any discussions about it, had not formed any opinions and would follow the court's instructions.

After both sides had completed their questioning, defense counsel again moved for a mistrial. The court denied the renewed motion for mistrial, explaining that except for Prospective Juror No. 5, all of the prospective jurors affirmatively stated they could put aside any outside influences. "I think the jurors were forthright in what they either overheard, saw, or even speculate to [*sic*] and each gave the court assurance[,] that

is they would not allow that to influence their judgment." On its own motion, the court excused Prospective Juror No. 5 for cause because of her statements that the information had impacted her ability to be fair.

The next day, jury selection resumed. Neither defense counsel nor the prosecutor moved to excuse any prospective jurors for cause. Since Juror No. 5 had been excused, the court instructed Juror No. 13 to take her seat. Defense counsel exercised only three of his remaining peremptory challenges, excusing Prospective Juror Nos. 1, 5 (formerly Juror No. 13) and 6. Both the prosecutor and defense counsel accepted the panel as then constituted. Prospective Juror No. 19 was excused, and Prospective Juror Nos. 17, 18 and 20 were sworn as alternates.

**3. Retrial--Evidence**

The evidence and testimony received at the second trial revealed the following material facts.

**a. The initial robberies in Torrance**

On the afternoon of June 27, 2014, Jeannie Kim went to a branch of BBCN Bank located on Sepulveda Boulevard in Torrance. After completing her business, she went out to her car and placed her purse behind the driver's seat. Ms. Kim then drove to her home in Torrance and pulled into her garage. When Ms. Kim got out of the car, a young African-American male whom she did not know was standing inside her garage very close to her car. He demanded her purse. Ms. Kim refused. The man demanded her purse again and, this time, pointed a gun at her and pushed her. She stepped backward and fell. Ms. Kim saw the man reach behind her front driver's seat, grab her purse and run to a white car in the street. The man got into the front passenger seat. Ms. Kim did not get a look at the driver. She got

back into her car and attempted to pursue the white car as it fled, but she was unable to keep up with it. Ms. Kim testified she was not sure if defendant was the man who took her purse.

A couple of weeks later, on July 11, 2014, Su Jin Lim left the BBCN Bank in Gardena, drove to her home in Torrance, and parked her white Toyota Camry in her driveway. Ms. Lim got out of the car carrying a small, pink backpack that contained several items, including her cell phone and bank cards, and went to get something out of her trunk. While she was standing at her open trunk, an African-American male, in his 20's or 30's, came up to her and told her not to make any noise. Ms. Lim screamed, and the man hit her in the side of her head with a hard object that felt metallic. She screamed again for help and tried to hold on to her backpack, but the man wrested it away from her. He then jumped into a brown-colored car that was waiting at the end of her driveway and fled. Ms. Lim was bleeding from the wound to her head and required medical attention. Ms. Lim was unable to identify defendant in court.

James Chen lived on the same street as Ms. Lim. He and his wife had just pulled out of their driveway on their way to dinner when Mrs. Chen said she heard a scream. Mr. Chen looked in the direction his wife pointed and saw Ms. Lim at the end of her driveway, struggling with a dark-skinned man, wearing a baseball cap. The man jumped into an older model, brown-colored Honda. The Honda drove off in the opposite direction, so Mr. Chen made a U-turn and tried to chase it. The Honda ran through several stop signs, so Mr. Chen was unable to catch up or get a license plate number.

Detective Jeff Livingston of the Torrance Police Department investigated the similar "follow home" robberies

involving Jeannie Kim and Ms. Lim. Detective Livingston learned that the Chen's home had security cameras. He obtained the video footage from those cameras which showed Ms. Lim's white Camry driving down the street just before the time of the robbery, followed by a brown-colored Honda and a red car with black rims. Shortly thereafter, the footage showed the red car and brown Honda driving back down the street in the opposite direction. Detective Livingston showed the footage to Detective Dariusz Wawryk, who agreed that it appeared the two cars may have been involved in the robbery.

Detective Livingston contacted Detective Michael Ross of the Gardena Police Department and inquired about the video footage from Gardena's traffic cameras located in the vicinity of the BBCN Bank for the afternoon of July 11, 2014. Detective Livingston asked Detective Ross to look for images of a white Camry, a brown Honda, and a red car with a black top and black rims. Detective Ross found footage showing a white Camry travelling south on Normandie Avenue not far from the BBCN Bank, with a brown car (or one with rusted or oxidized paint) and a red car with a black top following in fairly close proximity. Both Detective Livingston and Detective Wawryk believed the cars looked similar to those captured by the Chen's home security cameras.

In August, Ms. Lim emailed Detective Livingston the monthly statement for her cell phone. The statement showed that on July 11, a few hours after she was robbed, her phone was used to make a call to a phone number she did not recognize (ending -8143). After obtaining a search warrant, Detective Livingston determined that phone number belonged to an individual named Darian Baber.

Detective Livingston and Detective Wawryk also obtained access to Baber's Facebook account. On June 27, 2014, the date Jeannie Kim was robbed, Baber posted a selfie on his Facebook page. In the photograph, Baber is sitting in a car holding numerous $100 bills, and a Hispanic male is visible in the back seat. Baber's appearance in the photograph fit the general description of the suspect given by Ms. Kim, and the money stolen from her that day had been the same denomination ($100 bills).

In response to these leads, the Torrance Police Department initiated surveillance of Baber. While the detectives were watching Baber's house in Inglewood, they saw a red car (similar to the one captured on the Chen's security footage and the Gardena traffic cameras) arrive and park outside. The car was a red Infiniti sedan with a black top and black rims. After checking the license plate number, they determined defendant was the registered owner of the car. The police later saw defendant and Baber talking to each other on multiple occasions, and defendant was identified as a "friend" on Baber's Facebook page.

**b. The Culver City incidents**

On the afternoon of November 25, 2014, Lydia Kim left the Hamni Bank at 3737 West Olympic Boulevard and went to meet a client at a business called Master's Golf. She parked her car in the lot and headed toward the entrance of the building. When she got near the door, the manager of Master's Golf came out to meet her and asked why she had come with an African-American male. She was scared as she did not realize someone was walking near her, so she quickly went inside the building. The African-American man turned and walked away. Ms. Kim was

unable to identify defendant in court because she had never seen the man's face. During her testimony, Ms. Kim looked at video footage from a nearby security camera that captured the encounter. She identified herself as the person being followed by an African-American male wearing a construction vest, who then left in a black car after she entered Master's Golf.

Later that same day, Young Ok Hwang also conducted business at the same branch of Hamni Bank. She withdrew $7,000, placed the money in her purse, and then drove to her home on Whitburn Avenue in Culver City. By the time she arrived home, and parked in her driveway, it was dark outside. Ms. Hwang grabbed her purse, removed a piece of luggage from her trunk, and then walked to the end of her driveway to get her mail. Before she got to her mailbox, an African-American male suddenly appeared and ran toward her. He was wearing a construction worker's vest. He grabbed her purse, and Ms. Hwang struggled with him. She was too shocked and scared to scream. The man wrested the purse from her and ran to the street. Ms. Hwang then cried out for help. The man jumped into the passenger side of a black car and the car sped off.

Detective Ryan Thompson of the Culver City Police Department investigated the incidents involving Lydia Kim and Ms. Hwang. Detective Thompson obtained the video surveillance footage from the business located next to Master's Golf. The video showed the arrival of Ms. Kim, an African-American man following her, and a red car making a U-turn and pulling up near the driveway, followed by a black car that parked in the lot.

Detective Thompson also spoke with Anthony Canchari, a witness to the robbery of Ms. Hwang. Mr. Canchari said he was standing at a nearby corner when he saw an African-American

male get out of a maroon-colored car and head in the direction of Whitburn Avenue. Mr. Canchari then heard a woman scream. The African-American male ran back to the maroon car and got in. The driver of the car turned off the headlights and fled the area. A black car followed. When Detective Thompson showed Mr. Canchari some photographs, he identified defendant's red Infiniti and signed his name on the photograph, noting "This car looks familiar."

At trial, Ms. Hwang identified the construction vest recovered from defendant as the "same vest" she had seen on the man who robbed her. Ms. Hwang identified defendant in court as the person who took her purse. She admitted she had testified in the first trial that she was not sure if defendant was the one who robbed her. Ms. Hwang explained she had done so because she was scared defendant would seek revenge against her. Ms. Hwang said she wanted to just tell the truth even though she was still a little afraid to do so. When asked on redirect, Ms. Hwang reiterated she had previously equivocated about defendant's identification out of fear. The prosecutor asked again if she believed defendant was the person who stole her purse, and she said "yes, I think so." The prosecutor asked, "are you sure?" Ms. Hwang responded, "yes."

**c. The surveillance operation**

The Torrance Police Department began a surveillance operation, supervised by Detective Eric Williams, that involved several plain clothes detectives, including Detective Wawryk and Detectives Brent Clissold and Scott Nakayama. The undercover detectives, working in teams, drove unmarked cars and documented the activities of defendant (as well as Baber and Villanueva) on multiple days over a period of months.

According to Detective Clissold, the activities of defendant, Baber and Villanueva followed a regular pattern. Defendant was usually observed driving his red Infiniti, while Baber would be in a separate car with a third person (usually Villanueva). The two cars would follow each other to one of the branches of Hamni Bank or BBCN Bank ("like they're trailing each other"), park and then wait in an area where the bank's front doors and parking lot were visible. After a customer would leave the bank, the two cars, driving "in tandem," would follow the customer to their home or place of business. They always drove this way, travelling in proximity to each other, making the same turns and leaving locations at the same time. All of the known victims and potential victims were Asian females.

On the afternoon of December 8, 2014, defendant was observed by Detective Williams parking his car near the Hamni Bank at 3737 West Olympic Boulevard. Defendant got out of the car and put on a "caution" or construction vest. Detective Nakayama was also surveilling defendant and saw him walking near the bank talking on his cell phone. At some point, a female customer left the bank in a white Lexus sports utility vehicle, and defendant, in his car, immediately "shadow[ed]" her, along with Baber and a third person (possibly Villanueva) in a black Infiniti. Jieun Kim was the driver of the Lexus. The two cars followed Ms. Kim's Lexus "in tandem" until it pulled into her garage which was protected by two separate security gates. Both defendant and the black Infiniti pulled over and parked at the curb. After a few moments, they both drove off.

On December 17, 2014, Soon J. Le left the Hamni Bank on 3099 West Olympic Boulevard and headed back to work in her Honda Pilot. She pulled into the covered parking structure and

found a parking spot. She noticed a car behind her with two occupants. The driver appeared to be a Hispanic male. She gestured for them to move so she could back her car up a bit and straighten it in the parking space. Ms. Le then got out of her car, gave her key to the parking attendant and went inside.[1]

This encounter was observed by detectives Clissold, Williams, Nakayama and Wawryk who were working surveillance that day. Detective Clissold saw defendant in his red Infiniti at a gas station on Olympic Boulevard. Baber and Villanueva arrived in a white Honda shortly thereafter. The three men spoke together briefly. Baber and Villanueva got back into the Honda and left the gas station. Defendant followed. The detectives trailed the two cars to where they both parked across the street from the Hamni Bank on 3099 West Olympic Boulevard. Detective Williams noted the subjects had parked in areas with a "good visual" of the front of the bank and the parking lot.

After sitting outside the bank in their respective cars for awhile, defendant, Baber and Villanueva drove off, following a female customer in a blue Honda Pilot, who the detectives later learned was Ms. Le. Detective Williams saw Villanueva and Baber in the white Honda follow Ms. Le into a covered parking structure. Defendant, in his red Infiniti, parked at the curb a short distance from the driveway. Detective Williams double-parked several car lengths behind defendant. Defendant's driver

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[1] Ms. Le was unavailable to testify at the second trial, so her testimony from the first trial was read into the record. Ms. Le had been unable to identify defendant in court at the first trial.

side window was rolled down and Detective Williams could see defendant, somewhat slouched down, looking at him in his driver's side mirror. After a few minutes the white Honda came out of the parking structure and drove off, as did defendant.

Meanwhile, the detectives had determined that the white Honda, driven by Villanueva, had been reported stolen. A patrol car, not involved in the surveillance operation, drove past in the opposite direction and made a U-turn, apparently noting the stolen vehicle. Both defendant and the white Honda immediately made an evasive move, turning onto a side street. Baber and Villanueva abandoned the white Honda. The detectives called off the patrol car so as to not interfere with their surveillance operation. The detectives saw Baber and Villanueva being picked up by defendant in the red Infiniti.

That same day, the detectives also observed defendant, Baber and Villanueva make several other unsuccessful attempts to rob female victims, and several vehicle burglaries.

Detective Williams later interviewed Ms. Le who reported the two men who had pulled in behind made her nervous because they were staring at her and her car, and it was unusual to see anyone who was not Asian in the parking structure since everyone with whom she worked was Asian. Therefore, she said that when she got out of her car she immediately went over to the parking attendant and went inside.

**d. Defendant's pretrial statement**

Defendant was arrested on December 19, 2014. Defendant's cell phone was taken into evidence, as was a construction or safety vest located in the trunk of his car. While in custody, defendant waived his right to remain silent, did not ask to speak to an attorney and gave a statement to Detective

Wawryk. The statement was recorded and a redacted portion was played for the jury.

Defendant identified his cell phone and confirmed his phone number ending -2215. Defendant also confirmed he owned the red Infiniti with the black top and black rims.

Detective Wawryk asked defendant why he would be participating in these robberies when he had a job, particularly with a gun involved where someone would eventually get hurt. Defendant responded, "There's no gun (inaudible) I'm not bullshit [*sic*] you. Nobody has a gun." In response to being asked why there would be long periods in between some of the robberies, defendant said, "Didn't want to do it." Defendant asked several times if there was anything he could do to help himself, including asking if he could provide information. "No snitching in the world to get me out of this, huh, not even no wire informant?"

Detective Wawryk explained that he had to present the case to the district attorney, that he was not the person who could make any type of deal, but that he could tell the district attorney that defendant was remorseful or otherwise. He said, "you tell me . . . how did you feel?" Defendant said, "I was raised better than this."

Detective Wawryk told defendant he was on videotape. "[Y]ou were there. I got you—I got you on surveillance, neighbor's house, and I got you on surveillance . . . . Leaving the BBCN in Gardena, going down Normandie, you—you got to realize there's frickin [*sic*] surveillance video all over the streets; you know what I mean? So am I—am I bullshitting you?" Defendant responded, "not really."

Detective Wawryk again told defendant they had a lot of security camera footage and other evidence implicating him and

his "crew," enough to charge him on three completed robberies and four attempted robberies. Defendant responded, "Just give me a charge for attempted. Are . . . you charging me?"

Defendant continued to deny personally taking anything from anyone. "I never robbed." Detective Wawryk said, "but you were--you were part of the crew." Defendant interjected, "I'm saying I never robbed nobody." Detective Wawyrk explained, "You were part of the crew. You guys were working in concert together. You were identifying victims for them. You were following people from the bank. You were setting up on one side of the street; they set up on the other and yeah, they pop out of the car. They complete the robbery but you were part of the crew; you know what I mean? You can't deny that."

Defendant, responded: "Yeah, but you're—but I'm being charged with actual robbery." Detective Wawryk said, "well, the crew, the whole crew is charged with the robbery." To which defendant asked, "Is that how they (inaudible)." Detective Wawryk said, "Yeah, that's how it is, yeah."

Later on, near the end of the interview, defendant asked, "If I give you the rest of the information that you need, . . . what type of deal do I have to work out for me?" Defendant eventually said he did not think it was going to help his situation, but he could tell them where "some stuff" was in storage. He then asked if they took anything from his mother's house. It was near Christmas time and he asked, "[y]ou didn't take the presents, though, because some of that stuff I didn't steal, actually, but."

**e. Cell phone records**

Detective Thompson testified as an expert in cell phone technology and cell phone record analysis. In looking at the records for defendant's cell phone and Baber's cell phone, he

determined that on the dates of four of the incidents, there was regular communication between their two phones. There were 14 calls between them on June 27, the date of the robbery of Ms. Kim in Torrance. There were 22 calls on July 11, the date of the robbery of Ms. Lim in Torrance. And, on November 25, the date of the attempt on Ms. Kim at Master's Golf and the robbery of Ms. Hwang in Culver City, there were also 22 calls between them.

Detective Thompson further testified that the GPS tracking for the two cell phones showed the phones were used to make calls in the vicinity of the banks or the victims' homes during several of the incidents. He explained that when a cell phone is used to make a call, it will "ping" or be documented as within the coverage area of a particular cellular phone tower.

In analyzing the records for defendant's cell phone, Detective Thompson opined that defendant's cell "phone [was] pinging in the area of these banks where these victims [were] leaving from and [were] generally speaking, heading towards the areas where these victims lived. [¶] Right after they're robbed, the phone appears to move away from where the victims live[d] towards where [defendant] reside[d]."

**f. Defense evidence**

Defendant did not testify and did not call any witnesses.

**4. The Verdict and Sentencing**

The jury convicted defendant on all counts, except count 2.

Defendant waived his right to a jury on the trial of the prior allegations. The court found true the allegation that defendant had suffered a prior qualifying strike and denied defendant's motion to strike the prior conviction. The court

granted defendant's oral motion pursuant to Proposition 47 with respect to his one-year prison priors.

The court sentenced defendant to a term of 21 years in state prison. In defendant's trailing probation violation case (No. TA124565), defendant was found to have violated probation. The court lifted the suspension of the previously imposed term of 11 years four months, and ordered that sentence to run concurrent to the sentence imposed in this case.

## DISCUSSION

### 1. The Motion for Mistrial

Defendant contends his rights to a fair trial and an impartial jury were violated by the trial court's denial of his motion for mistrial based on juror taint. He argues it was error for the trial court to deny his request for a mistrial because during voir dire, several prospective jurors, who were ultimately seated on the jury, admitted to improper bias against defendant but were not excused. We disagree.

After defendant's oral requests for a mistrial were denied, voir dire continued and defendant did not move to excuse any juror for cause, including any juror he now contends expressed bias against him in answering the court's questions about the information on the calendar. Defendant also did not exhaust his remaining peremptory challenges. After exercising only three of his remaining peremptory challenges, defendant accepted the panel as constituted and did not restate any objection based on the alleged taint from the jurors' possible exposure to outside information from the posted calendar. " '[W]e adhere to the well-established rule that to preserve a claim a biased juror was improperly permitted to serve, the defense must exhaust its peremptory challenges and object to the jury as sworn.' " (*People*

*v. Souza* (2012) 54 Cal.4th 90, 130.) Defendant has not preserved for appellate review any contention that biased jurors were allowed to serve on the jury.

In any event, the record does not establish any abuse of discretion by the trial court in denying defendant's oral motions for mistrial. " ' " 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and *the trial court is vested with considerable discretion in ruling on mistrial motions. . . .*' [Citation.] A motion for a mistrial should be granted when ' " 'a [defendant's] chances of receiving a fair trial have been irreparably damaged.' " ' " [Citation.]' " (*People v. Harris* (2013) 57 Cal.4th 804, 848, italics added.)

The court excused for cause the only juror who admitted to being unable to judge defendant fairly, Prospective Juror No. 5. The court inquired of the jurors collectively and individually about whether they had seen or heard anything related to the court's calendar, and also allowed counsel to ask additional questions on the subject. A majority of the prospective jurors said they had not noticed the calendar, and gave no indication their impartiality had been impaired.

Prospective Juror Nos. 7, 9 and 16 said they had overheard some speculation about the possibility of another charge or case. However, after questioning and admonitions from the court, all three prospective jurors confirmed they could listen to the court's instructions and give defendant a fair trial. Prospective Juror Nos. 13 and 19 were the only other two jurors who said the information from the calendar might affect their judgment. Both were excused.

Moreover, the court thoroughly admonished the jury about the presumption of innocence, what constitutes evidence and their duty to disregard outside information. Defendant has not demonstrated any likelihood that a juror or jurors were actually biased against him. Indeed, the jury acquitted defendant of the robbery on count 2, indicating the jury engaged in measured and thoughtful deliberations.

**2. Substantial Evidence**

Defendant next contends that none of his convictions is supported by substantial evidence. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that 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." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*Rodriguez*, at p. 11.) Applying this standard, defendant's argument fails to persuade us reversal is warranted on any of his six convictions.

**a. Conspiracy (count 1)**

Defendant argues there was no evidence of his agreement to commit a robbery or any crime, nor evidence of any overt act in furtherance of a conspiracy to commit robbery.

As defendant concedes, an agreement to commit a crime may be proved by circumstantial evidence. The existence of a

conspiracy "may be proved by circumstantial evidence *without* the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy." (*People v. Zamora* (1976) 18 Cal.3d 538, 559, italics added; accord, *People v. Dewitt* (1983) 142 Cal.App.3d 146, 151 [presence of two felons, each in possession of stolen handguns and disguises, sitting in a stolen car outside the entrance of an expensive home in a remote area was sufficient evidence of a conspiracy to commit a robbery]; see also 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Elements, § 80, p. 375.)

Here, there was abundant circumstantial evidence of an agreement to commit robbery. Several different undercover detectives testified about observing defendant, on multiple days, acting in tandem with his two coconspirators, waiting outside of banks for female customers to leave, alone, and then trailing them home or to their place of business to be robbed. Their coordinated conduct reasonably implied a common purpose, a tacit agreement.

The testimony from the undercover detectives about the surveillance operation was bolstered and corroborated by the videotaped surveillance footage, the security camera footage, the cell phone records and Detective Thompson's testimony regarding the tracking of defendant's and Baber's cell phones on the dates of the offenses and their regular communication during those time periods. Defendant's pretrial statement to Detective Wawryk also contained admissions supporting his participation in the conspiracy. This evidence provided a sufficient basis upon which the jury could reasonably infer the existence of an agreement to commit robbery. Defendant cites no authority for the proposition that a record of the actual conversations between

the conspirators was necessary, and we know of no such authority.

There was also ample evidence of overt acts taken in furtherance of the conspiracy. " ' "[A]n overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." [Citations.]' [Citation.] One purpose of the overt act requirement 'is "to show that an indictable conspiracy exists" because "evil thoughts alone cannot constitute a criminal offense." [Citations.]' [Citation.] The overt act requirement also 'provide[s] a *locus penitentiae*—an opportunity for the conspirators to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy.' [Citations.] Once one of the conspirators has performed an overt act in furtherance of the agreement, 'the association becomes an active force, it is the agreement, not the overt act, which is punishable. Hence the overt act need not amount to a criminal attempt and it need not be criminal in itself.' " (*People v. Johnson* (2013) 57 Cal.4th 250, 259; see also 1 Witkin & Epstein, Cal. Criminal Law, *supra* Elements, § 96, p. 400 [commission of overt act done in pursuance of the conspiracy is a manifestation of the existence of the unlawful agreement, even if the overt act is itself lawful].)

Defendant argues the evidence showed only defendant and another car driving "in unison" without more. When viewed in its totality, the evidence showed a clear pattern of activity by defendant and his two coconspirators, engaged in over a period of months within the same geographic area, targeting Asian female bank customers who were by themselves. Defendant's conduct in driving to a particular bank location, waiting outside with his coconspirators nearby in another vehicle, and then following, for

several miles, a female customer home or to her place of business was more than sufficient to constitute an overt act taken in furtherance of the conspiracy. Any suggestion to the contrary is without merit.

**b. Second Degree Robbery (counts 3 & 4)**

Defendant argues there is no substantial, credible evidence he participated, either as a principal or aider and abettor, in the robbery of Ms. Lim on July 11 (count 3) or the robbery of Ms. Hwang on November 25 (count 4).

There was ample evidence supporting defendant's guilt as an aider and abettor of the robbery of Ms. Lim. "[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) " 'Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.' " (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*).)

It is well established that presence at the scene, companionship, and conduct before and after the offense are relevant factors in resolving the question of aiding and abetting liability. (*Campbell*, *supra*, 25 Cal.App.4th at p. 409 [presence near one who robs victims in order to intimidate, divert suspicion or watch out for others "is a textbook example of aiding and abetting"].)

There was strong evidence demonstrating defendant's presence at the scene and acting in concert with his coconspirators. Defendant admitted to his ownership of the red Infiniti with the black top and black rims. A car that looked nearly identical to defendant's car was captured by the traffic camera footage following Ms. Lim's car near the vicinity of the bank. A similar car was also captured by the security footage from the Chen's home near Ms. Lim's home at the time of the robbery. This evidence was bolstered by the cell phone records and testimony of Detective Thompson as to the usage of defendant's cell phone at the relevant times, both in the vicinity of the robbery and communicating with Baber.

Defendant argues that none of the security or surveillance footage showed the license plate number of the red car or the face of the driver of the car. The lack of these additional details does not lessen the strength and impact of the above evidence or the totality of evidence presented about the pattern of behavior engaged in by the three coconspirators with respect to all of their victims. Viewed collectively, along with the admissions made by defendant in his pretrial statement, the evidence was more than sufficient to support the jury's verdict.

As for count 4, the evidence presented as to the manner of how Ms. Hwang was robbed fit the pattern of behavior followed by defendant and his coconspirators with respect to all of the victims. Moreover, Ms. Hwang testified that defendant was the individual who robbed her.

Defendant argues that some of her testimony was inconsistent with the report by Mr. Canchari that the robber fled in a maroon car. (Ms. Hwang said her attacker fled in a black car). Defendant also argues Ms. Hwang's testimony was

inherently untrustworthy because she changed her testimony from the first trial at which she was unable to identify defendant in court.

However, Ms. Hwang explained that she did not identify defendant in the first trial out of fear of retaliation. And, other than the color of the car, the testimony of Ms. Hwang was consistent with Mr. Canchari. It was for the jury to decide the weight and credibility of her testimony. " ' "To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" . . . .' " (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) Nothing here indicates any basis for disregarding the jury's decision to believe Ms. Hwang's testimony.

**c. Attempted second degree robbery (counts 5, 6 & 7)**

Defendant argues the record lacks substantial evidence supporting his convictions for the attempted second degree robberies of Lydia Kim on November 25 (count 5), Ms. Le on December 17 (count 6), and Jieun Kim on December 8 (count 7). Defendant argues the evidence does not even show that any attempted robberies were committed.

The law of attempt is well settled. "An attempt to commit a crime consists of two elements, viz., the intent to commit it, and a

direct, ineffectual act done toward its commission. . . . There is, of course, a difference between the preparation antecedent to the commission of an offense and the actual attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after preparations are made and must be manifested by acts which would end in the consummation of the particular offense unless frustrated by extraneous circumstances. . . . *Whenever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt*." (*People v. Anderson* (1934) 1 Cal.2d 687, 689-690 (*Anderson*), italics added & citations omitted; accord, *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8-9.)

As we have already explained above, the prosecution presented solid evidence of a clear pattern of concerted action by defendant and his two conspirators in a series of follow-home robberies in which Asian female bank customers, driving alone, were targeted. Further, defendant made various admissions to Detective Wawryk in his pretrial statement, including a statement that is reasonably construed to be an admission by defendant of participating in the crimes, but denying any personal conduct in confronting any of the victims. Taken together, this was strong evidence demonstrating an intent to rob the victims.

There was also ample evidence showing direct acts, beyond mere preparation, taken by the three conspirators towards the accomplishment of the intended robberies. Each of the attempted robbery victims was followed by defendant and his conspirators for several miles to their homes or places of business. Each

victim was followed until she got out of her car, and then each of the attempted crimes was "frustrated by extraneous circumstances." (*Anderson*, *supra*, 1 Cal.2d at pp. 689-690.)

Lydia Kim was followed to Master's Golf, where the security camera footage showed a red vehicle similar to defendant's car arriving in tandem with the car from which a male exited and followed Lydia Kim until confronted by the manager of Master's Golf. With respect to both Ms. Le and Jieun Kim, defendant and his coconspirators parked outside the bank, waiting for them to leave, and then followed them for several miles. This conduct was observed and attested to by several undercover detectives. Ms. Le was followed all the way to her parking spot inside her workplace parking garage, at which point the attempt was frustrated by the presence of the parking attendant. The attempt on Jieun Kim was frustrated by her ability to drive safely through a double-set of security gates upon her arrival home.

We have no trouble concluding there was substantial evidence in the record to support the jury's verdicts. (See, e.g., *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862 [evidence showing the defendant approached a liquor store carrying a rifle, tried to hide on a pathway adjacent to the store when observed by a customer, and then fled without entering the store deemed sufficient acts to support attempted robbery].)

3. **Senate Bill No. 1393**

At the time of defendant's sentencing, the trial court lacked the authority to strike enhancements proven true under Penal Code former section 667, subdivision (a)(1). By statute, the imposition of the enhancement was mandatory. The former version of section 1385, subdivision (b), provided: "This section

does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."

But Senate Bill No. 1393, which became effective January 1, 2019, removed that prohibition and granted trial courts discretion to consider striking such enhancements. (Stats. 2018, ch. 1013, § 2.) Under the well-established rule of *In re Estrada* (1965) 63 Cal.2d 740, 742-748, this newly granted sentencing discretion may be exercised as to any defendant *whose conviction is not final as of the effective date of the amendment*. (*People v. Brown* (2012) 54 Cal.4th 314, 323-324; accord, *People v. Conley* (2016) 63 Cal.4th 646, 657 ["The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not."]; see also *People v. Vieira* (2005) 35 Cal.4th 264, 305 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"].)

Because Senate Bill No. 1393 has taken effect and defendant's judgment of conviction is not yet final, the new law applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [holding Sen. Bill No. 1393 applies retroactively upon effective date].) Defendant is entitled to a new sentencing hearing at which the trial court can consider whether to strike the recidivist enhancement pursuant Penal Code section 667, subdivision (a)(1).

## DISPOSITION

We remand for resentencing to allow the trial court to consider whether to strike defendant's prior recidivist enhancement in accordance with Senate Bill No. 1393.

We affirm the judgment of conviction in all other respects.

GRIMES, Acting P. J.

WE CONCUR:

WILEY, J.

RUBIN, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution