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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DANIEL BRODIE,

Defendant and Appellant.

D0058053

(Super. Ct. No. SWF022721)

APPEAL from a judgment of the Superior Court of Riverside County, Mark E. Petersen, Judge. Affirmed as modified, with directions.

This case arose out of the August 2007 kidnapping and robbery of John West, who worked as a carrier in the back of a Loomis Armored Transport (Loomis) truck in Hemet, California. Michael Daniel Brodie initially was charged with his codefendants, Antoinette Heggins (the armored truck driver), Delia Chris Davies (Heggins's girlfriend and the getaway car driver), and Leon Kevin Wagner (who allegedly perpetrated the robbery and kidnapping of West with Brodie). Davies pleaded guilty to one count of kidnapping and two counts of robbery, and was sentenced to a 12-year prison term.

Heggins was found guilty of kidnapping for robbery and was sentenced to a prison term of 10 years to life. The charges against Wagner were dismissed under Penal Code section 1118.1. (Further statutory references will also be to the Penal Code.) The jury was unable to reach a verdict as to Brodie and the court declared a mistrial.

In a retrial, the jury convicted Brodie of simple kidnapping (count 1: § 207) as a lesser included offense of kidnapping for robbery (§ 209, subd. (a)), two counts of robbery (counts 2 (taking the money) & 3 (taking West's gun): § 211), and one count of grand theft (count 4 (taking West's eyeglasses): § 487, subd. (a)) as a lesser included offense of robbery.

As pertinent here, regarding counts 1 and 2 as charged in the second amended complaint, the jury found not true the allegation in each count that Brodie personally used a firearm during the commission of the crime (former § 12022.53, subd. (b) (hereafter § 12022.53(b)) & § 1192.7, subd. (c)(8) (hereafter § 1192.7(c)(8)); but found true as to each count the allegation that he participated as a principal in the crime knowing that another principal in the crime was armed with a firearm (former § 12022, subd. (a)(1) (hereafter § 12022(a)(1))). In addition, as to count 2, the jury found Brodie took property valued in excess of \$150,000 (former § 12022.6, subd. (a)(2), hereafter § 12022.6(a)(2)).

As to count 3, the jury found not true the allegation that he personally used a firearm during the commission of the crime and also found not true the allegation that he participated as a principal in the crime knowing that another principal in the crime was armed with a firearm. In addition, as to count 3, the jury found Brodie took property valued in excess of \$150,000.

As to count 4, the jury found true the allegation that he participated as a principal in the crime knowing that another principal in the crime was armed with a firearm.

Sentence

The court imposed the upper term of eight years for Brodie's count 1 kidnapping conviction, plus a consecutive one-year term for the section 12022(a)(1) firearm enhancement. For the count 2 robbery conviction, the court imposed a consecutive one-year term (one-third the middle term of three years), imposed but stayed a one-year term for the section 12022(a)(1) firearm enhancement, and imposed an additional eight-month consecutive term (one-third the middle term of two years) for the true finding on the section 12022.6(a)(2) enhancement allegation that Brodie took property valued in excess of \$150,000. For the count 3 robbery conviction, the court imposed but stayed the middle term of three years. For the count 4 grand theft conviction, the court imposed but stayed the middle term of two years and imposed but stayed a one-year term for the section 12022(a)(1) firearm enhancement. Thus, the court sentenced Brodie to an aggregate prison term of 10 years eight months.

Contentions

Brodie asserts five principal claims on appeal: (1) There is insufficient evidence to support his kidnapping and robbery convictions because Davies's accomplice testimony was not sufficiently corroborated; (2) the court should have stayed under section 654 the sentence it imposed for his count 2 robbery conviction; (3) the court committed prejudicial instructional error by failing to properly instruct the jury under CALCRIM Nos. 301, 335, and 373; (4) the prosecutor committed misconduct during his

closing arguments by (a) misstating the evidence and arguing facts not in evidence, (b) presenting false testimony, (c) disparaging defense counsel, (d) misstating the law and attempting to shift the burden of proof to the defense, and (e) appealing to the passions and prejudices of the jury; and (5) the court committed sentencing error by imposing the upper prison term of eight years for his kidnapping conviction.

The Attorney General concedes the prosecutor misstated the law regarding the count 1 and count 2 firearm enhancement allegation that the jury found true when the prosecutor argued the jury could find that allegation to be true even if the weapon "shoots BBs." The Attorney General argues, however, that the misconduct was harmless.

We conclude the judgment must be modified because the court should have stayed under section 654 the execution of both the consecutive one-year sentence it imposed for Brodie's count 2 robbery conviction and the consecutive eight-month sentence it imposed under section 12022.6(a)(2) for the count 2 excessive taking enhancement. As modified, the judgment is affirmed.

FACTUAL BACKGROUND

A. The People's Case

West, a former deputy sheriff, worked as a carrier with Heggins at Loomis. As a carrier, he dropped off and picked up money, and got in and out of the truck as quickly as possible. Heggins, who worked for Loomis as an armored car driver, was responsible for driving set routes and providing security for the carrier.

Heggins lived with her girlfriend, Davies, who was a friend of Brodie and worked with him at the California Department of Corrections and Rehabilitation in Rancho Cucamonga. Wagner was a friend of Brodie.

Davies's accomplice testimony

Davies, testifying as a convicted accomplice, stated that in August of 2007,¹ she, Heggins, Brodie, and Wagner committed the armored truck robbery in this case. They planned the robbery at a park in Ontario and decided that Davies would provide a distraction and be the getaway driver. She would park in front of the armored truck in Hemet and then lead it to a designated place around the corner and behind a Long's Drugs Store. Two guns—a real gun and a BB gun—would be used, and Brodie and Wagner would have those guns. They discussed the fact that Heggins's coworker, West, would be armed, and decided Brodie or Wagner would have to take West's gun by force. They would use the guns to scare West. Brodie's role was to go inside the truck and take the money.

According to Davies, she and Brodie did not go to work on Monday, August 13. Davies rented a car, picked up Brodie and Wagner in Rancho Cucamonga, and drove to Hemet. Davies gave Loomis shirts to Brodie and Wagner that she had obtained from Heggins. Davies gave a BB gun to either Brodie or Wagner. She saw another weapon that was black, made of metal, and similar to the BB gun. Brodie and Wagner were both wearing gloves, but they were not wearing masks or anything covering their faces.

¹ All dates are to calendar year 2007 unless otherwise specified.

After they arrived in Hemet, Davies, Brodie, and Wagner waited across the street from the Long's Drug Store for about an hour or an hour and a half, and then drove to the Long's parking lot and waited there another 15 minutes. Brodie and Wagner got out of the car and waited in front of the Long's Drug Store while Davies parked the car in front of the entry doors of the store where the Loomis armored truck usually parked.

Davies testified she turned on her emergency lights and waited two to three minutes until Heggins pulled up behind her in the armored truck. Davies slowly drove away and Heggins followed her in the armored truck to the street behind the Long's Drug Store. She testified that when Heggins's armored truck arrived, she saw Brodie and Wagner jump out with a black bag. They put the bag in the trunk of the rental car and then got inside.

After the robbery, Davies drove Brodie and Wagner back to Brodie's house in Ontario. As they were driving, they discussed how Brodie and Wagner took West's glasses and hit him. When they arrived at Brodie's house, Brodie said he took West's glasses and hit him once in the head with the butt of his gun. They counted the money and divided it four ways. Davies took the shares belonging to Heggins and her and left the house with about \$160,000 or \$170,000.

Davies had intended to remove the license plate from the rental car. When she returned home, she told Heggins she forgot to do so.

Davies testified she became worried when Heggins was questioned by the Riverside County Sheriff's Department two days after the robbery. She sent Brodie a text

message saying she was worried because she had not heard from "our boy," meaning Heggins, all day.

On Friday, August 17, Davies texted Brodie she was worried they were going to be caught. That night, Davies was arrested at her home. Davies's share of the money stolen from the armored truck was in the trunk of her car, and police officers told her they had found the money. Davies was placed in a police vehicle with Heggins.

Davies testified she was charged with kidnapping and robbery, she entered into an agreement with the district attorney without any promises, and she is serving a 12-year sentence as a result of her plea of guilty to the kidnapping and robbery charges.

Recording of Davies's conversation with Heggins in the police vehicle

Davies's conversation with Heggins in the police vehicle was recorded. The recording was played for the jury, and the jurors received copies of the transcript. During her testimony, Davies acknowledged the voices in the recording were hers and Heggins's.

Heggins informed Davies she told the police Davies knew "of them," Davies "didn't have nothing to do with it"; and they "forced her arm saying that, you know, you gonna have to be down with this or we gonna tell your parents that you're gay." Heggins told Davies she told the police she did not know "their names," she met "them" through Davies, she and Davies were not the masterminds, and "they came to us."

Heggins also told Davies, "We're not going down for these dudes, you hear me?" and, "[I]f we give these dudes up, we aint doing time. We aint doing time. . . . If you have to change your story, you can do it. They'll let you change your story to give them dudes up."

Other evidence

West, who was in the back of the armored truck, testified there was a window separating him from the driver (Heggins) and, when he looked through that window and the truck windshield, he saw a dark blue car stopped in front of the truck with its flashers on. West asked Heggins whether it was clear for him to go, and she indicated it was. Carrying a bag of money and wearing his gun, West then exited the truck through the back passenger's door.

West testified he was robbed by two African-Americans as he opened the door and stepped down to the ground. The robbers were wearing Loomis shirts, baseball caps, and sunglasses. The first one was taller than West, whose height is five feet eight and a half inches. West estimated that the taller one was five feet nine inches to six feet one inch tall. The other was shorter than West.

According to West, the taller robber,² Brodie, pushed him and said, "Get back in the truck." West fell flat on his back, scraping his elbow. As his head hit the floor of the truck, West closed his eyes because he "thought [he] was dead," and he hoped he would be saved if he did not make eye contact with the robbers. He did look at the robbers before they left the truck.

As he was straddling West, Brodie told him, "Don't fucking move." West said, "Please don't shoot me. Take what you want." One gun was placed at his left eye socket, and a second gun on his right temple.

² Brodie, who is six feet two inches tall, is taller than Wagner. We shall refer to the taller robber as Brodie.

West felt a tug on his pants at his right waist and knew his gun had been taken. He indicated he had been carrying a personal weapon he had bought for \$460 and used for his Loomis employment. One of the robbers also took West's eyeglasses, which had cost \$365, from his face. Brodie, who was still straddling West, instructed Heggins, "Drive bitch." West heard the truck drive away from the Long's Drug Store.

Brodie still held a gun to West's head as Wagner put money into a bag. Eventually, Brodie commanded Heggins to stop and, after the truck stopped, the shorter robber, Wagner, shook a can of pepper spray as Brodie continued to hold the gun to West's head. When West asked Wagner not to spray him with the pepper spray, he was told to "get the fuck down" and not move. Brodie and Wagner then left the truck. When he heard the door close, West knew he was safe and would not be shot. He looked out the window and saw the robbers put a duffel bag into the trunk of the rental car and then climb into the car. As he was calling 911, West asked Heggins to get the license plate number of the car.

Gregory Rourke, the operations supervisor for Loomis, tried to call West at 12:00 p.m. on his two-way radio. West did not answer, which was unusual. West contacted Rourke at 12:05 p.m. and informed him about the robbery.

Amador Hernandez, Loomis's Ontario branch manager, testified that the Loomis truck left that morning with "cargo for financial institutions" in an amount exceeding \$300,000. The robbers left about \$21,000 in the truck. Hernandez testified that over \$219,000 is unaccounted for as a result of the robbery.

Brodie's cell phone records, identifying which cell phone towers were used, indicated Brodie's cell phone was used on August 13, starting at 12:19 p.m. near Hemet and ending near Ontario, where Brodie lived.

Brodie worked as an office assistant at the California Department of Corrections and Rehabilitation in Rancho Cucamonga. Office assistants there earned between \$1,800 and \$2,200 per month and were paid on the first day of every month.

On August 15, Brodie paid \$2,500 in cash for a new car audio system. Over the next few days, Brodie inquired about other items for his car, including after-market doors that were replicas of Lamborghini doors, an after-market alarm system, and a GPS navigation system.

Between August 13 and August 16, Brodie made numerous contacts with a realtor about obtaining a home loan and buying a house. On August 17, Brodie bought his former girlfriend a diamond necklace.

Trevor Montgomery, an investigator with the Riverside County Sheriff's Department, testified he interviewed Brodie on August 17. Brodie initially was evasive about his whereabouts on August 13, the day of the robbery. Then he said he did not work that day because his six-year-old daughter was not feeling well and he did not have anyone to take care of her. When Montgomery told Brodie that Davies implicated him in the robbery, Brodie "acted very incredulous." Brodie told Montgomery that Davies came to his house in the afternoon on August 13 with an envelope containing \$2,500 in cash and a backpack filled with cash. Brodie said Davies paid him the \$2,500 to hide the backpack, which contained about \$57,000. Brodie told Montgomery he spent virtually

all of the \$2,500 shopping at Ontario Mill mall, where he bought clothing, jewelry, and other personal items, and he spent some of the money fixing up his Dodge Charger with an oil change and new tires. Brodie also said he hid the backpack in a baseball bat bag in his mother's garage.

Later in the day on August 17, Brodie showed Gregory Gowe, a Riverside County sheriff's detective, where the money was hidden. Detective Gowe found \$57,740 in U.S. currency.

B. The Defense Case

Brodie did not testify and the defense presented no evidence.

DISCUSSION

I

*SUFFICIENCY OF THE EVIDENCE
(CORROBORATION OF DAVIES'S ACCOMPLICE TESTIMONY)*

Brodie first contends there is insufficient evidence to support his kidnapping and robbery convictions because Davies's accomplice testimony was not sufficiently corroborated. We reject this contention.

A. Applicable Legal Principles

A conviction cannot be based on an accomplice's testimony unless "other evidence tending to connect the defendant with the commission of the offense corroborates that testimony." (*People v. McDermott* (2002) 28 Cal.4th 946, 985-986; see § 1111.)

"The corroboration required of accomplice testimony . . . need only connect the defendant to the crime sufficiently that we may conclude the jury reasonably could have

been satisfied that the accomplice was telling the truth." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 185-186.) Such corroborative evidence may be slight or entirely circumstantial and entitled to little consideration when standing alone and need not by itself establish every element of the crime. (*People v. Abilez* (2007) 41 Cal.4th 472, 505.) "[T]he corroborating evidence may be circumstantial, of little weight by itself, and related merely to one part of the accomplice's testimony." (*People v. Letner*, at p. 186.)

The trier of fact's finding on the issue of corroboration may not be disturbed on appeal unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Szeto* (1981) 29 Cal.3d 20, 25.)

B. *Analysis*

We conclude the record contains evidence that corroborates Davies's accomplice testimony by tending to connect Brodie with the commission of the charged crimes in a way that reasonably may satisfy a jury that Davies was telling the truth.

1. *The \$57,500 in stolen cash Brodie hid in his garage*

The evidence regarding the discovery of approximately \$57,500 in cash that was hidden in a bag in Brodie's garage after the commission of the offenses, including Brodie's own statements to the police regarding his possession of this cash, tends to connect him to the commission of the crimes of which he was convicted. This evidence, alone, is sufficient to corroborate Davies's accomplice testimony. "It is established that '[t]he possession of recently stolen property is sufficient to support corroboration for an accomplice's testimony.'" (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1304,

quoting *People v. Jenkins* (1973) 34 Cal.App.3d 893, 900; see also *People v. Gilbert* (1964) 231 Cal.App.2d 364, 369 ["It is settled law that the possession of stolen goods alone, shortly after the commission of a crime, is sufficient corroboration of an accomplice's testimony."], citing *People v. Robinson* (1960) 184 Cal.App.2d 69, 77 & *People v. Miller* (1942) 54 Cal.App.2d 384.)

Here, Davies gave accomplice testimony that, after Brodie and Wagner jumped out of the armored truck with a black bag, they put the bag in the trunk of the rental car and got inside, and she drove them back to Brodie's house in Ontario. Davies also testified that, after they arrived at Brodie's house, they counted the money and divided it four ways. Davies took her and Heggins's shares, and she left the house with about \$160,000 or \$170,000.

The prosecution presented the testimony of Investigator Montgomery that Brodie told the investigator Davies came to his house on August 13 and paid him \$2,500 to hide a cash-filled backpack, which he hid in a baseball bag in the garage.

The prosecution also presented the testimony of Detective Gowey, who testified that he and Brodie went to Brodie's home on August 17, and Brodie showed him where the money was hidden. Detective Gowey stated that \$57,740 in U.S. currency was found inside a bag that was inside a duffle bag in the garage.

The foregoing testimony by Investigator Montgomery and Detective Gowey tends to connect Brodie to the robbery offenses of which he was convicted and also tends to connect him to the kidnapping and grand theft offenses of which he was also convicted. Specifically, the evidence showing Brodie possessed and hid the stolen money

corroborates Davies's accomplice testimony that Brodie participated in the planning and perpetration of the crimes, that she drove him and Wagner to Brodie's home with the stolen cash after he and Wagner jumped out of the armored truck and got into Davies's getaway car, that they divided up the cash four ways, and that she took her and Heggins's shares and left the remaining balance of the cash at Brodie's home.

Claiming the evidence of his possession of the money found in his garage is insufficient to corroborate Davies's accomplice testimony, Brodie asserts "[t]he money in [his] garage merely shows a crime was committed." Citing *People v. Najera* (2008) 43 Cal.4th 1132, 1138, for the proposition that possession of recently stolen property, without more, is insufficient evidence of a theft crime, Brodie asserts the evidence of his "mere possession of cash" is "weak evidence," and suggests—after performing an accounting, which the Attorney General challenges, of money Davies spent—that the \$57,740 found hidden in his garage belonged to Davies and she placed the money in his innocent hands.

These contentions are unavailing. As noted, the corroboration required of accomplice testimony need only connect the defendant to the crime sufficiently that a reviewing court may conclude the jury reasonably could have been satisfied that the accomplice was telling the truth, and the corroborating evidence "may be circumstantial, *of little weight by itself*, and related merely to one part of the accomplice's testimony." (*People v. Letner, supra*, 50 Cal.4th at pp. 185-186, italics added.) Here, the independent evidence regarding Brodie's possession of the stolen money he hid is sufficient by itself to corroborate Davies's accomplice testimony. (See *People v. Narvaez, supra*, 104

Cal.App.4th at p. 1304; *People v. Jenkins, supra*, 34 Cal.App.3d at p. 900; *People v. Gilbert, supra*, 231 Cal.App.2d at p. 369; *People v. Robinson, supra*, 184 Cal.App.2d at p. 77; *People v. Miller, supra*, 54 Cal.App.2d at p. 386.) It is of no moment that this corroborating evidence is weak or of little weight by itself. (*People v. Letner, supra*, at pp. 185-186.)

Brodie's reliance on *People v. Najera, supra*, 43 Cal.4th 1132, is misplaced. In that case, the defendant was convicted of the unlawful taking of a vehicle and possession of burglary tools after driving a stolen car using a shaved key that bypassed the pins in the ignition cylinder. (*Id.* at p. 1134.) The issue on appeal was whether the trial court had a duty to instruct the jury on its own motion that possession of recently stolen property was insufficient by itself to establish guilt of the charged offenses. (*Ibid.*) Holding that trial courts do not have such a duty (*id.* at p. 1135), the *Najera* court stated, "[W]e do not agree with defendant that the corroboration requirement for accomplices is sufficiently analogous to the corroboration requirement for the possession of recently stolen property for purposes of defining the scope of a trial court's duty to instruct on its own motion in this case." (*Id.* at p. 1136.)

Furthermore, Brodie's suggestions that the \$57,740 in cash he hid in his garage belonged to Davies and that she placed the stolen money in what he implies are his innocent hands, are unavailing. In cases involving accomplice testimony, whether the corroborating evidence is as compatible with innocence as it is with guilt is a question of weight for the trier of fact. (*People v. Robinson* (1964) 61 Cal.2d 373, 414; *People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012.)

Relying on the rule that an out-of-court statement by an accomplice cannot be used to corroborate the accomplice's testimony (see *People v. Tuggles* (2009) 179 Cal.App.4th 339, 365) and citing *Citizens United v. Federal Election Comm.* (2010) ___ U.S. ___ [130 S.Ct. 876] for the proposition that, in some settings, money is the equivalent of speech, Brodie states he is "ask[ing] this Court to hold that in the unique circumstances of this case, [Davies's] act of bringing money to [his] house was the equivalent of an out of court statement." We reject this meritless request. There is no legal or factual support for Brodie's claim that the stolen money Brodie hid in his garage cannot serve as evidence that corroborates Davies's accomplice testimony because (as he contends) the money is the equivalent of speech and, thus, is a statement made by Davies.

2. *Other corroborative evidence*

The Attorney General argues that Davies's accomplice testimony is also corroborated by (1) Brodie's cell phone and text records, (2) Brodie's "spending spree" in the days that followed his crimes, (3) his employment records showing he did not go to work on August 13, and (4) his false statements to the police and others. In light of our conclusion that the independent evidence regarding the discovery of the large amount of cash Brodie possessed and hid in his garage tends to connect him to the commission of the crimes of which he was convicted and is sufficient to corroborate Davies's accomplice testimony, we need not, and do not, determine whether this additional body of evidence corroborates Davies's testimony. Were it necessary for us to make such a determination, we would conclude this additional evidence also corroborates her accomplice testimony.

II

SECTION 654 (COUNT 2: ROBBERY)

Brodie also contends the court should have stayed under section 654 the execution of the sentence it imposed for his count 2 robbery conviction. We conclude the judgment must be modified because the court should have stayed the execution of that sentence under section 654.

A. Background

The jury found Brodie not guilty of the greater offense of kidnapping for robbery, but convicted him of the lesser included offense of simple kidnapping for kidnapping West. As pertinent here, the jury also convicted him of robbery for taking the money in the armored truck as charged in count 2.

At sentencing, over defense counsel's objection that the proposed sentence for Brodie's count 2 robbery conviction should be stayed under section 654, the court ruled that Brodie could be punished separately for the kidnapping and the robbery because the two offenses had separate objectives. Specifically, the court explained its reason for not staying the sentence it imposed for the count 2 robbery conviction (and the related § 12022.6(a)(2) excessive taking enhancement):

"First of all, as to [section] 654 that was brought up and addressed by the defense, as mentioned by the probation officer on page 24 and 25 [of the probation officer's report], the court agrees with probation that Count 2 had a separate goal and objective from that of Count 1.

"The purpose of the kidnapping in Count 1, as mentioned in the probation officer's report, was to avoid detection by having the driver transport the victim to a more secluded area, to the location of an awaiting getaway vehicle; whereas the purpose of the robbery in

Count 2, again citing the probation officer's report, was to financially benefit by taking large amounts of cash from the armored truck.

"So I believe that they are, again, separate goals and objectives from the kidnapping in Count 1 from the robbery in Count 2."

B. *Section 654*

Section 654, subdivision (a) provides in part: "An 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."

Section 654 "precludes multiple punishment for a single act or omission, or an indivisible course of conduct" (*People v. Deloza* (1998) 18 Cal.4th 585, 591) and ensures the defendant's punishment will be commensurate with his or her criminal culpability (*People v. Kramer* (2002) 29 Cal.4th 720, 723). If a defendant suffers two convictions and punishment for one is barred by section 654, that section requires that the sentence for one conviction be imposed and the other be imposed and then stayed. (*People v. Deloza*, at pp. 591-592.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant, not the temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the criminal acts are incident to one objective, then punishment may be imposed only as to one of the offenses committed. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

The question of whether a defendant harbored multiple criminal objectives is generally a question of fact for the trial court to decide. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

C. *Analysis*

In challenging the court's determination that he lawfully could be punished separately for both the kidnapping and the count 2 robbery, Brodie argues the court erred under section 654 by finding he harbored separate criminal objectives when he committed those crimes. Relying on *People v. Eddahbi* (1988) 199 Cal.App.3d 1135 and other case authorities, Brodie argues the sole objective of the kidnapping was the completion of the robbery. Specifically, he asserts "the robbery . . . was still in progress when the kidnapping took place, i.e. had not been completed, and could not be completed until the perpetrators reached a place of temporary safety that was not the robbery scene." He also asserts that "[s]ince, as the trial court found, the only intent behind the kidnapping was the completion of the robbery and the escape, there could have been only one indivisible transaction with only one object—the completion of the robbery."

The California Supreme Court has explained that " '[a] robbery is not complete until the perpetrator reaches a place of temporary safety . . . ,' which is not the scene of the robbery." (*People v. Wilson* (2008) 43 Cal.4th 1, 17, quoting *People v. Young* (2005) 34 Cal.4th 1149, 1177; see also *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1375 ["[t]he scene of a robbery is not a place of temporary safety".]) " In cases involving a kidnapping and robbery, courts have held . . . that the evidence supported the conclusion the robber had not reached a place of temporary safety so long as the victim [remained]

under the robber's control.' " (*People v. Ramirez, supra*, 39 Cal.App.4th at p. 1375, quoting *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251.)

Applying these principles, we conclude the court erred under section 654 by finding Brodie harbored separate criminal objectives when he committed the kidnapping and count 2 robbery. The trial record shows Brodie committed both offenses when he and the other perpetrator pushed West back inside the armored truck, put guns to West's head, took the money, and ordered Heggins to drive the truck to a designated place where Davies was waiting with the getaway car. The robbery was not complete when Brodie kidnapped West because Brodie and the other perpetrator had not yet reached a place of temporary safety as the scene of the robbery was not a place of temporary safety and West was still under their control. (*People v. Wilson, supra*, 43 Cal.4th at p. 17; *People v. Young, supra*, 34 Cal.4th at p. 1177; *People v. Ramirez, supra*, 39 Cal.App.4th at p. 1375.) Thus, as the objective of the kidnapping was (as the court found) "to avoid detection by having the driver transport the victim to a more secluded area, to the location of an awaiting getaway vehicle," it logically follows that Brodie acted with one intent and objective when he committed the two crimes: the completion of the robbery. As Brodie committed both offenses during an indivisible course of conduct, the court should have stayed under section 654 the execution of both the consecutive one-year sentence it imposed for Brodie's count 2 robbery conviction and the consecutive eight-month sentence it imposed under section 12022.6(a)(2) for the related count 2 excessive taking enhancement. (§ 654; *People v. Deloza, supra*, 18 Cal.4th at pp. 591-592.) The judgment must be modified accordingly.

The decision in *People v. Eddahbi, supra*, 199 Cal.App.3d 1135, on which Brodie relies, supports our conclusion. There, the defendant robbed two women wearing visible jewelry by luring them into his car on the pretext of going to another public place. (*Id.* at p. 1138.) Although the defendant was charged with two counts of kidnapping for the purpose of robbery, as to one of the counts the court granted a defense section 995 motion and reduced the charge to simple kidnapping. (*Eddahbi*, at p. 1138.) Agreeing with the People, the Court of Appeal held the trial court should have stayed under section 654 the sentences it imposed for the two kidnapping convictions. (*Eddahbi*, at p. 1143.)

In defending the court's decision to reject Brodie's objection under section 654, the Attorney General asserts "the jury found [Brodie] not guilty of kidnapping for the purpose of robbery, and instead found him guilty of simple kidnap[ping]." The Attorney General also asserts that, "as the jury found the kidnap[ping] was not for the purpose of robbery, it had an independent intent and objective." These assertions are unavailing. The People have cited no authority, and we are aware of none, to support their claim that, by acquitting Brodie of the greater offense of kidnapping for robbery, the jury "found the kidnap[ping] was not for the purpose of robbery."

III

INSTRUCTIONAL ERROR CLAIM (CALCRIM NOS. 301, 335 & 373)

Brodie next contends the court committed prejudicial instructional error by failing to properly instruct the jury under CALCRIM Nos. 301, 335, and 373. This contention is unavailing.

A. *Applicable Legal Principles*

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request." (*People v. Blair* (2005) 36 Cal.4th 686, 744.)

"The trial court's duty in a criminal case to instruct on the general principles of law relevant to the issues raised by the evidence [citations] includes a correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10, overruled on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 484.)

"The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259; see *People v. Satchell, supra*, 6 Cal.3d at p. 33, fn. 10.)

We review de novo a claim of instructional error. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

B. *Analysis*

We reach the merits of Brodie's instructional error claim notwithstanding his failure to object in the trial court. (§ 1259.) Brodie's claim consists of three contentions, all of which are unavailing.

1. *CALCRIM No. 301*

The court gave the jury the standard single witness testimony instruction, CALCRIM No. 301, as follows:

"The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Brodie contends the court erred by omitting the opening language in CALCRIM No. 301—" [Except for the testimony of _____ <insert witness's name>, which requires supporting evidence,] "—which, he asserts, should have listed Davies, the accomplice witness in this case, as the witness whose testimony required supporting (i.e., corroborating) evidence. Brodie suggests the jury may have concluded that corroboration of Davies's accomplice testimony was not required.

Brodie's contention is unavailing. As he acknowledges, the California Supreme Court has explained that, although the "better practice" is to modify the "single witness" instruction to expressly note the exception for testimony requiring corroboration, "when the detailed instructions on the requirement that an accomplice's testimony be corroborated have been given along with the 'single witness' instruction, a reasonable juror would understand that the corroboration requirement for accomplice testimony is an exception to the more general 'single witness' principle." (*People v. Price* (1991) 1 Cal.4th 324, 447 (*Price*)). The court properly instructed the jury under CALCRIM No. 335 that Davies was an accomplice in this case and that an accomplice's testimony must be independently "supported" (i.e., corroborated).

2. CALCRIM No. 335

The court gave the jury a modified version of the standard accomplice testimony instruction, CALCRIM No. 335, informing the jury that Davies was an accomplice in this case, an accomplice's testimony must be independently supported, and the supporting evidence must "tend to connect the defendant to the commission of the crime." As given, the instruction stated in part:

"If the crimes of kidnapping to commit robbery or robbery were committed, then *Delia Davies was an accomplice* to those crimes. [¶] *You may not convict the defendant of kidnapping to commit robbery or robbery based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if:* [¶] 1. *The accomplice's statement or testimony is supported by other evidence that you believe;* [¶] 2. *That supporting evidence is independent of the accomplice's statement or testimony;* [¶] AND [¶] 3. *That supporting evidence tends to connect the defendant to the commission of the crimes.* [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact mentioned by the accomplice in the statement or about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. *The supporting evidence must tend to connect the defendant to the commission of the crime.*" (Italics added.)

Brodie contends the court erred in giving this version of CALCRIM No. 335 because it "simply instructed 'the supporting evidence tends to connect the defendant to the commission of the crimes' without specifying that it must *relate to an act that is an element of the crime.*" In support of this contention, he relies on *People v. Abilez, supra*, 41 Cal.4th 472.

Brodie's reliance on *Abilez* is unavailing. In *Abilez*, the California Supreme Court recited the settled law on accomplice testimony. Quoting *People v. McDermott, supra*, 28 Cal.4th at p. 986, the *Abilez* court explained that "[t]he corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by *relating to an act that is an element of the crime*. *The corroborating evidence* need not by itself establish every element of the crime, but it *must*, without aid from the accomplice's testimony, *tend to connect the defendant with the crime*." (*People v. Abilez, supra*, 41 Cal.4th at p. 505, italics added; accord, *People v. Letner, supra*, 50 Cal.4th at pp. 185-186.)

In support of his claim of instructional error, Brodie relies on the statement in *Abilez* that the corroborating evidence must tend to implicate the defendant by relating to "an act that is an element of the crime." However, as noted, the *Abilez* court went on to explain that, although the corroborating evidence need not establish every element of the crime, it "must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." (*People v. Abilez, supra*, 41 Cal.4th at p. 505.) *Abilez* did not hold that an instruction on accomplice testimony is defective unless it includes a statement that the corroborating evidence must tend to implicate the defendant by relating to an act that is an element of the crime. In fact, the Supreme Court in *Abilez* upheld an accomplice testimony instruction that did *not* include such a statement. Specifically, the instruction at issue in *Abilez* informed that jury, "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other

evidence that tends to connect such defendant with the commission of the offense."

(*People v. Abilez*, *supra*, 41 Cal.4th at p. 504.) The instruction also informed the jury:

"To corroborate the testimony of an accomplice as to the guilt of a codefendant, there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged or that it corroborate every fact to which the accomplice testifies." (*People v. Abilez*, *supra*, 41 Cal.4th at pp. 504-505.)

The high court in *Abilez* held that the foregoing instructions—which did not include a statement that the corroborating evidence must tend to implicate the defendant by "relating to an act that is an element of the crime"—"accurately reflect the applicable law." (*People v. Abilez*, *supra*, 41 Cal.4th at p. 505.) Thus, the *Abilez* decision on which Brodie relies does not support Brodie's instructional error contention, which we conclude is unavailing and without legal support.

3. CALCRIM No. 373

Last, the court also gave the jury a modified version of the standard other perpetrator instruction, CALCRIM No. 373, as follows:

"The evidence shows that other persons may have been involved in the commission of the crimes charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether those other persons have been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged."

Asserting that Davies "was a participant in the crimes who was not being prosecuted in the instant trial because she had earlier entered into a plea bargain that included her cooperation in the prosecution of [Brodie] and others," Brodie contends the court prejudicially erred by omitting the bracketed closing language in CALCRIM No. 373—" [This instruction does not apply to the testimony of _____ <insert names of testifying coparticipants>.]"—which, he asserts, should have informed the jury that this "other perpetrator" instruction did not apply to Davies's testimony.

This contention is unavailing. Implicitly at issue here is the credibility of Davies, a prosecution witness who was a coparticipant or accomplice in the commission of the crimes charged against Brodie. The Bench Notes to CALCRIM No. 373 do instruct that "[i]f other alleged participants in the crime are testifying, this instruction should not be given or the bracketed portion should be given exempting the testimony of those witnesses." However, citing *People v. Fonseca* (2003) 105 Cal.App.4th 543, 549-550, the Bench Notes also instruct that "[i]t is not error to give the first paragraph³ of this instruction if a reasonable juror would understand from all the instructions that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility."

Assuming, without deciding, the court erred by failing to use the bracketed language to inform the jury that CALCRIM No. 373 did not apply to Davies's testimony, we conclude any such error was harmless. As Brodie appears to acknowledge, the

³ Here, the court gave the first paragraph of CALCRIM No. 373.

California Supreme Court has repeatedly held the erroneous giving of a substantially similar instruction—CALJIC No. 2.11.5—is not prejudicial error where the jury was also given a full set of instructions on witness credibility and accomplice testimony. In *People v. Brasure* (2008) 42 Cal.4th 1037 (*Brasure*), the trial court gave the jury CALJIC No. 2.11.5, which read:

"There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crimes for which the defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial." (*Brasure*, at p. 1055, fn. 12.)

The Supreme Court first concluded the trial court should not have given CALJIC No. 2.11.5 "in unmodified form" with regard to two prosecution witnesses who were accomplices or possible accomplices in that case. (*Brasure, supra*, 42 Cal.App.4th at p. 1055.) However, the high court held the instructional error was not prejudicial. (*Ibid.*) The *Brasure* court explained that "[t]he jury . . . was also given a full set of instructions on witness credibility and assessing the testimony of accomplices, including the direction to consider the existence of any 'bias, interest, or other motive' on a witness's part (CALJIC No. 2.20) and to view the testimony of an accomplice with caution (CALJIC No. 3.18). Where the jury has been so instructed, we have repeatedly held, giving CALJIC No. 2.11.5 is not prejudicial error." (*Brasure*, at p. 1055, citing *People v. Jones* (2003) 30 Cal.4th 1084, 1113–1114; *People v. Cain* (1995) 10 Cal.4th 1, 34–35; *People v. Price, supra*, 1 Cal.4th at pp. 445–446.)

Quoting *People v. Price, supra*, 1 Cal.4th at page 446, the *Brasure* court further explained that, "[w]hen the instruction is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses." (*Brasure, supra*, 42 Cal.App.4th at pp. 1055-1056.)

Here, in addition to giving CALCRIM No. 335, which instructed the jury with respect to assessing Davies's accomplice testimony and cautioned that such testimony should be viewed with caution, the court also instructed that, in assessing witness credibility, the jury could consider the existence of any bias or personal interest that might influence the witness's testimony and whether the witness was promised leniency in exchange for his or her testimony (CALCRIM No. 226), and the jury could also consider whether the witness had a felony conviction (CALCRIM No. 316). We conclude any error in giving CALCRIM No. 373 without the bracketed language was thus harmless. (*Brasure, supra*, 42 Cal.App.4th at p. 1055.)

IV

PROSECUTORIAL MISCONDUCT CLAIMS

Next, Brodie claims the prosecutor committed misconduct during his closing arguments by (1) misstating the evidence and arguing facts not in evidence, (2) presenting false testimony, (3) disparaging defense counsel, (4) misstating the law and

attempting to shift the burden of proof to the defense, and (5) appealing to the passions and prejudices of the jury. We conclude that, with the exception of his claim that the prosecutor disparaged defense counsel, Brodie forfeited appellate review of his misconduct claims. Nevertheless, in light of Brodie's claim the forfeiture resulted from ineffective assistance of his trial counsel, we review his claims on the merits and conclude reversal is not required.

A. Applicable Legal Principles

1. Prosecutorial misconduct

"To constitute a violation under the federal Constitution, prosecutorial misconduct must 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' " (*People v. Valdez* (2004) 32 Cal.4th 73, 122, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) "A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1202, quoting *People v. Strickland* (1974) 11 Cal.3d 946, 955.)

During argument, the prosecutor is given wide latitude to discuss and draw inferences from the evidence at trial, and whether the inferences the prosecutor draws are reasonable is for the jury to decide. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) The prosecutor's argument " "may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Williams* (1997) 16 Cal.4th 153, 221, quoting *People v. Wharton*

(1991) 53 Cal.3d 522, 567.) " 'While counsel is accorded "great latitude [during] argument . . . " argument, [he or she] may not assume or state facts not in evidence [citation] or mischaracterize the evidence.' " (*People v. Harrison* (2005) 35 Cal.4th 208, 249.)

In determining whether a prosecutor's allegedly improper remark constitutes misconduct, we must view the statement in the context of the argument as a whole. (*People v. Dennis, supra*, 17 Cal.4th at p. 522.)

When a misconduct claim focuses on comments the prosecutor made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the comments in an objectionable fashion. (*People v. Cole, supra*, 33 Cal.4th at pp. 1202-1203.) "A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

2. *Ineffective assistance of counsel*

"To establish ineffective assistance of counsel, [Brodie] bears the burden of showing [both] that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms[, and that] it is reasonably probable that the verdict would have been more favorable to him [absent counsel's error]." (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053.)

"We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15

Cal.4th 619, 703) We will reverse on the ground of ineffective assistance of counsel " 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Furthermore, in an appropriate case, we may dispose of an ineffectiveness claim on the ground of lack of prejudice without determining whether his counsel's performance was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

B. *Analysis*

1. *Forfeiture and Brodie's claim of ineffective assistance of counsel*

At the threshold, the Attorney General argues Brodie forfeited appellate review of all of his claims of prosecutorial misconduct, with the exception of his claim that the prosecutor disparaged defense counsel, by failing to object in the trial court to the statements he now contends constituted misconduct. We agree.

A defendant may not complain of prosecutorial misconduct on appeal unless he or she objected at trial on that ground, in a timely fashion, and also requested that the jury be admonished to disregard the perceived impropriety. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) The California Supreme Court has explained that "[t]he primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice. [Citation.] Obviously, that purpose can be served only if defendant is required to, and does, raise any objection before the jury retires." (*People v. Williams, supra*, 16 Cal.4th at p. 254.)

Here, defense counsel objected to only one of the prosecutor's numerous allegedly improper remarks on the ground of misconduct—his claimed disparagement of defense counsel—and in no instance did he request an admonition or curative instruction. A timely defense objection and request for admonition at the first sign of any purported prosecutorial misconduct might have tempered or curbed the vigor of the prosecutor's arguments. (See *People v. Dennis, supra*, 17 Cal.4th at p. 521.) We conclude that, although his claim that the prosecutor disparaged defense counsel was preserved for appeal, Brodie forfeited appellate review of his remaining prosecutorial misconduct claims because he failed to make timely objections and request admonitions when doing so might have cured any error. (See *People v. Williams, supra*, 16 Cal.4th at p. 254.)

Anticipating the Attorney General's forfeiture argument, Brodie contends that, if his right to complain of prosecutorial misconduct was forfeited, his trial counsel was constitutionally ineffective for failing to preserve it. "Keeping in mind that '[a]n attorney may choose not to object for many reasons and the failure to object rarely establishes ineffectiveness of counsel' (*People v. Williams, supra*, 16 Cal.4th at p. 221), we examine each instance of alleged misconduct" and conclude that, even if defense counsel had preserved Brodie's right to raise these claims on appeal, no reversal would be required.

2. *Specific claims of misconduct*

a. *Misstating the evidence and arguing facts not in evidence*

Brodie asserts four claims that the prosecutor, in his closing argument to the jury, misstated and "confused" the evidence and "gave his own unsworn 'testimony.' "

First, he claims the prosecutor misstated the evidence by arguing West was hit in the face with a gun. The record shows the prosecutor argued that West "was knocked down at gunpoint, *struck in the face with the gun*, hit another time, threatened with his life, didn't know if he was going to live or die that day" (Italics added.) Brodie asserts West "never testified that he was struck in the face with a gun."

We conclude the prosecutor did not overstep the boundary of fair comment on the evidence. The record shows the prosecutor asked West whether he was hit with the guns the robbers "placed to [his] head." West initially did reply, "I was not hit with them, no." However, the prosecutor then asked him, "Can you describe it for us?" West responded, "The first weapon that *hit me*, it was pushed into my face." (Italics added.) When asked to elaborate, West stated, "My left eye. That weapon was pushed into my face, left eye part." Thus, West *did* testify he was "hit" in the face with a gun, and Brodie's assertion on appeal that West "never testified that he was struck in the face with a gun" is not supported by the record. Brodie relies on, and has selectively quoted, one small portion of the transcript of West's testimony. The record also shows that Davies testified that after she Brodie and Wagner arrived back at Brodie's home, either Brodie or Wagner said they took West's glasses and "hit him with the butt of the gun." The prosecutor's remark that West was "struck in the face with the gun" is a fair and permissible comment on the evidence that is supported both by West's own testimony and Davies's testimony.

Second, Brodie claims the prosecutor committed misconduct by arguing that West was "threatened with his life." The record shows the prosecutor argued that West "was knocked down at gunpoint, struck in the face with the gun, hit another time, *threatened*

with his life, didn't know if he was going to live or die that day" (Italics added.)

Brodie asserts West "never testified that anyone threatened him."

We again conclude the prosecutor did not overstep the boundary of fair comment on the evidence. West testified that Brodie⁴ pushed him back into the armored truck while ordering him to "get back in the truck," and a gun "went to [his] head" as he fell back. He also testified that, as his head hit the floor of the truck, he closed his eyes because he "thought [he] was dead," and he hoped he would be saved if he did not make eye contact with the robbers. Straddling West, Brodie told him, "Don't fucking move." West testified he said, "Please don't shoot me. Take what you want." He also testified that one gun was placed at his left eye socket, and a second gun on his right temple. Based on this evidence showing that West feared for his life when the two guns were placed against his head in a threatening manner, the prosecutor permissibly drew and argued a reasonable inference that West was threatened with his life. West's testimony and the inferences that reasonably may be drawn therefrom refute Brodie's assertion that West "never testified that anyone threatened him."

Third, Brodie contends the prosecutor committed misconduct by arguing he (Brodie) "match[ed]" West's description of the taller of the two robbers. Asserting he had both facial hair and noticeable tattoos on his arms on August 13, Brodie states, "West was asked and testified repeatedly that the perpetrators were clean shaven and had no tattoos." The record shows the prosecutor made the following argument to the jury:

⁴ See footnote 2, *ante*.

"[Brodie] *does match*. . . . [L]et's be clear, [West] doesn't identify [Brodie] as his attacker. [West] didn't stand up here, point across the room and say that's the guy, that's the guy that did it to me. He can't. He never has. From the very beginning, he made it very clear throughout to the police officers, he gives a general description. Preliminary hearing, does the same thing. Former trial, does the same thing, but *his description does match [Brodie]*. . . . The fact of the matter is I'm not asking you to find the defendant guilty because he's an African-American male, I'm asking you find him guilty because the other evidence supports [Davies's] in-court identification of [Brodie] as well as her prior identification back long before there was ever a deal." (Italics added.)

We reject Brodie's contention that the prosecutor committed misconduct by arguing Brodie matched West's description of the taller of the two robbers. West testified he was unable to make out any facial features of the robbers, and he closed his eyes and avoided making eye contact in an effort to save his life. In his appellant's reply brief, Brodie acknowledges "the prosecutor was able to coax West into testifying that he was not sure if either of the robbers had facial hair and tattoos or not." The record shows West so testified. Specifically, the prosecutor asked him, "Did you get a good enough look at the person who entered the [armored truck] to know whether that person had facial hair?" West replied, "No." The prosecutor also asked him, "[D]id you get a good enough look at him in order to know whether that individual had tattoos?" West responded, "No."

Furthermore, in his closing argument, the prosecutor properly argued that although West could not, and never had, identified Brodie as his attacker, he did give a "general description" that matched Brodie. West testified he was robbed by two African-Americans; the robbers were wearing Loomis shirts, baseball caps, and sunglasses; and

the first one was taller than West, whose height is five feet eight and a half inches. West estimated that the taller of the two African-Americans was five feet nine inches to *six feet one inch tall*. Detective Govey testified that Brodie is six feet two inches tall, and he is taller than Wagner. Davies testified she gave Brodie and Wagner Loomis shirts, which she had obtained from Heggins, to wear during the robbery. For all of the foregoing reasons, we conclude this claim of prosecutorial misconduct lacks factual and legal support.

Last, Brodie contends the prosecutor committed misconduct when he argued during his rebuttal argument that the kidnapping involved moving West a substantial distance in the armored truck that was "more than merely incidental to the robbery," and also involved an increased risk of harm. Specifically, the prosecutor argued:

"Counsel is right. I have to prove to you that the movement here was *more than merely incidental to the robbery*. [¶] Okay. So movement inside the truck, that is if [West] was simply shoved back in, right then and there out in front of the Longs Drugs, that's clearly movement designed only to commit the robbery and that was it. And that movement in and of itself, while dangerous, while potentially deadly, . . . changes dramatically . . . when you start talking about a moving vehicle because look at what we're talking about with the definition of *substantial distance*. And that's another thing that counsel said to you in trying to intimate that the truck didn't go around to this abandoned cul-de-sac area, right, is that we don't have substantial distance. [¶] But what are the factors that you're allowed to consider in deciding whether or not substantial distance has occurred? *You look at the increase and the risk of harm both physical and psychological*, right? Meaning *increase in risk*, not actual harm, right?" (Italics added.)

The prosecutor then argued:

"And so let's think about it. *You have loaded firearms at your head in your face* and now a big ruckus, big rolling, right, safe on wheels

starts moving and *your finger is on the trigger*. These aren't toys. These are killing weapons. *It's a gun, can go off.*" (Italics added.)

In support of his misconduct contention, Brodie asserts, "There was no testimony that when the guns were pointed at [West,] the perpetrators had their fingers on the trigger. There was no evidence presented that the guns used by the perpetrators were loaded. . . . [¶] [T]here was no evidence either of the guns pointed at West could have 'gone off.'"

We conclude that the prosecutor did not overstep the boundary of fair comment on the evidence. Davies testified that when she, Brodie, and the others met in the park to plan the robbery, they discussed the fact that West would be armed, and they decided Brodie or Wagner would have to take West's gun by force. As noted, West testified two guns were placed against his head. A reasonable inference from this evidence, which the prosecutor properly drew and argued to the jury, was that West's assailants had a loaded weapon with a "finger on the trigger."

b. Presenting false testimony

Brodie also claims the prosecutor committed misconduct when he "presented a witness who gave false testimony." In support of this claim, Brodie asserts "the prosecutor admitted that [Davies] had lied under oath," and "her testimony affected the outcome of the trial" because she was "the only witness who implicated [him] in the kidnapping and robbery." Although Brodie does not identify in his opening brief the specific argument he is challenging, his claim appears to be based on the prosecutor's

following argument, in which he alluded to Davies and generally acknowledged she "lies about things":

"Ladies and gentlemen, when you look at the entire case and consider all the evidence in this case, I ask you to do what is right as I have from the very beginning. . . . There's no back room deals that you don't know about. It's flat out. Read the plea agreement. Read it. Look at the timing. Look at the timing of the evidence that was collected. ¶ [D]oes she get up and lie about things? Absolutely. Absolutely. There's no doubt she gets up and lies about things. The physical evidence proves it. But ask yourself the one thing, the one thing that you're asked to do with her testimony and that merely is to take the circumstantial evidence with regard to identification that the victim made and corroborate it with an accomplice who gives you the direct I.D. of who it is and there's no confusion anymore."
(Italics added.)

Brodie's misconduct claim is unavailing because he has not shown what "false" testimony by Davies the prosecutor purportedly presented, and his conclusory statement that the prosecutor presented unspecified "false testimony" is insufficient to state a claim. In this regard, the California Supreme Court has explained that, "[w]hen . . . the prosecution has doubts as to the truth of a statement it intends to present at trial, it must disclose to the defense any material evidence suggesting that the statement in question is false. But, notwithstanding those doubts, *the prosecutor may still present the statement to the jury.*" (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 167, quoting *People v. Harrison, supra*, 35 Cal.4th at p. 242.)

c. Disparaging defense counsel

Brodie next contends the prosecutor committed misconduct by twice disparaging defense counsel. This contention is unavailing.

While counsel have broad discretion in discussing the legal and factual merits of a case, and it is permissible to comment on apparent inconsistencies in argument or the failure to call a logical witness, it is improper to resort to personal attacks on the integrity of opposing counsel. (*People v. Bell* (1989) 49 Cal.3d 502, 537-539; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1333.) It is misconduct to suggest that opposing counsel fabricated a defense. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1077.)

Here, Brodie first contends the prosecutor disparaged defense counsel when he "accused defense counsel of having claimed [Brodie] had alibi witnesses and then produced none." This contention is based on the prosecutor's following rebuttal argument, as to which the court sustained a defense objection:

"Defense counsel got up in opening statement as well as closing argument and told you that her client [(Brodie)] was an easy target. What does that mean, easy target? Did [Davies] cause him to lie? Did [Davies] cause him to make up and fabricate where he was, when he was, at what time he was? [Davies], did she put that money in his garage? Did she cause him to claim he had alibi witnesses and then produce no alibi witnesses?"

Defense counsel objected, "[I]mproper argument. Misconduct." After the court sustained the objection, the prosecutor stated, "Ladies and gentlemen, you can consider . . . the lack of calling logical witnesses."

From the foregoing record it appears, and we are persuaded, a reasonable jury would have understood the prosecutor was not disparaging defense counsel; he was commenting on Brodie's defense that he was an easy target for the prosecution's accomplice witness, Davies. The prosecutor's argument appears to be an attempt to point out the flaw in that defense by commenting on the failure of the defense to produce a

witness. Sheriff's Investigator Montgomery testified that after he told Brodie that Davies had informed him (Montgomery) that Brodie was involved in the robbery, he asked Brodie about his whereabouts on August 13. Brodie told him his mother, sister, and brother could account for his whereabouts that day. They did not testify. As noted, it is permissible for a prosecutor to comment on the failure to call a logical witness. (*People v. Castaneda, supra*, 51 Cal.4th at p. 1333.)

Brodie also contends the prosecutor disparaged defense counsel by implying she was deceiving the jury. This contention is based on the prosecutor's following argument:

"Remember what the evidence is. It's not what the attorneys say it is. For example, when they make comments about, well, [Davies] heard [Brodie] talk about Lee Money before. Right? When that comment was made, did any of you hear evidence of that in the trial? No. It's not in evidence. Or, for example, when a question is asked to a witness, right, or a statement is made by counsel, oh, I'm approaching with the cell phone records of [Davies] and I'm going to have her review them. 'Does that refresh your recollection?' For all you know, ladies and gentlemen, she approached with a blank piece of paper or approached with a piece of paper with only one thing written on it. You didn't get to see it. It's not evidence. More importantly, you're left with the answer which is[, 'N]o[,] that doesn't refresh my recollection.['] Does that make her a liar? No. You guys know what her phone number is. It's a non issue." (Italics added.)

The court interrupted and stated it was going to sustain its own objection that it is was improper for the prosecutor to imply that defense counsel was deceiving the jury.

Defense counsel thanked the court and the prosecutor resumed his argument, telling the jury:

"You are not to speculate with regard to what evidence was or was not presented to you. You need to consider the evidence you have before you and what you have before you, defense is absolutely right. [Davies] is a liar. She is. You hear it throughout. [¶] But

what do you also hear throughout? The fact of the matter is throughout she says she is the getaway driver when she starts talking about everybody's role. Throughout [Brodie] is involved. . . ." (Italics added.)

"If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.)

Here, it is possible the jury might have understood the prosecutor's argument, taken alone, in this manner. However, in determining whether there is a reasonable likelihood the jury would understand the prosecutor's remarks as an assertion that defense counsel was seeking to deceive the jury, we must view the remarks in the context of the prosecutor's argument as a whole. (See *People v. Dennis, supra*, 17 Cal.4th at p. 522.) Viewing the prosecutor's remarks in context, we cannot conclude there is a reasonable likelihood the jury would understand the prosecutor's remarks as an assertion that defense counsel was seeking to deceive the jury. After the court sustained its own objection to his remarks, the prosecutor immediately sought to clarify his point by arguing the jury was "not to speculate with regard to what evidence was or was not presented"; rather, the jury should "consider the evidence you have before you" that, although Davies was a liar, she had consistently maintained "throughout" that she was the getaway driver and Brodie was "involved" in the crimes. We conclude the context was such that the jury would understand the remarks to be nothing more than the prosecutor urging the jury to keep in mind that the arguments of counsel were not evidence and that the evidence presented

showed Davies had consistently maintained that Brodie was involved in the kidnapping and robbery of West.

d. *Misstating the law*

Next, Brodie contends the prosecutor committed misconduct by misstating the law and attempting to shift the burden of proof to the defense, when, in discussing what was required to prove the firearm enhancement allegations, he argued to the jury:

"So now what's required? Displays a weapon in a menacing manner, right? . . . A *firearm*, whether it works or not, right? Whether it shoots bullets, *whether it shoots BBs*, whether it's working, whether it doesn't. If it has the ability to shoot a projectile by force of an explosion or combustion, it's a firearm for purposes of both [section] 12022(a)(1) as well as [section] 12022.53(b)." (Italics added.)

We conclude that, although the prosecutor misstated the law regarding the definition of a "firearm" for purposes of sections 12022.53(b) and 12022(a)(1) as the Attorney General concedes, the error was harmless.

i. Background

The jury found *not true* the section 12022.53(b) firearm enhancement allegation in counts 1 (simple kidnapping), 2 (robbery: taking the money), and 3 (robbery: taking West's gun) that Brodie personally used a firearm during the commission of the crime.⁵

The jury found *true* the section 12022(a)(1) firearm enhancement allegation in counts 1 (simple kidnapping), 2 (robbery: taking the money), and 4 (grand theft: taking

⁵ Section 12022.53(b) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a *firearm*, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." (Italics added.)

West's eyeglasses) that Brodie participated as a principal in the respective crime knowing that another principal in the crime was armed with a firearm. However, the jury found *not true* the section 12022(a)(1) firearm enhancement allegation in count 3 (robbery: taking West's gun).

The court imposed a consecutive one-year term for the count 1 section 12022(a)(1) firearm enhancement, imposed but stayed a one-year term for the count 2 section 12022(a)(1) firearm enhancement, and imposed but stayed a one-year term for the count 4 section 12022(a)(1) firearm enhancement.

ii. Applicable legal principles

"It is improper for the prosecutor to misstate the law generally, and in particular, to attempt to lower the burden of proof." (*People v. Williams* (2009) 170 Cal.App.4th 587, 635, citing *People v. Hill* (1998) 17 Cal.4th 800, 829.) "However, we do not reverse a defendant's conviction because of prosecutorial misconduct unless it is reasonably probable the result would have been more favorable to the defendant in the absence of the misconduct." (*People v. Williams*, at p. 635, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

iii. Analysis

As the Attorney General concedes, the prosecutor misstated the law regarding the definition of the term "firearm" as used in sections 12022(a)(1) and 12022.53(b) when he told the jury a weapon that "shoots BBs" is a firearm for purposes of those sections.

"[T]oy guns obviously do not qualify as a 'firearm,' nor do pellet guns or *BB guns* because, instead of explosion or other combustion, they use the force of air pressure, gas

pressure, or spring action to expel a projectile." (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435, italics added.) The *Monjaras* court explained that, as used in section 12022.53(b), ""firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion." (*People v. Monjaras, supra*, 164 Cal.App.4th at p. 1435, quoting former § 12001, subd. (b).) The same definition applies to the term "firearm" used in section 12022(a)(1). (See former § 12001, subd. (b).)⁶ Contrary to the prosecutor's statement to the jury, a BB gun is not a firearm within the meaning of sections 12022(a)(1) and 12022.53(b).

Although the prosecutor misstated the law, reversal is not required because Brodie has not shown, and cannot show, he would have obtained a more favorable outcome in the absence of the prosecutor's error, and, thus, his error was harmless. (See *People v. Williams, supra*, 170 Cal.App.4th at p. 635.) As noted, the jury found *not true* the section 12022.53(b) firearm enhancement allegations in counts 1 through 3. Thus, Brodie suffered no prejudice with respect to those section 12022.53(b) allegations as a result of the prosecutor's error because he (Brodie) was the prevailing party with respect to those allegations.

Brodie also suffered no prejudice with respect to the section 12022(a)(1) firearm enhancement allegations in counts 1 through 4. With respect to those allegations, the court gave the jury the following modified version of CALCRIM No. 3115, which

⁶ This definition of "firearm" is now codified in sections 12001 and 16520, subdivision (a).

correctly defined the term "firearm" and properly directed the jury to decide whether, for each crime, the People had proved "the additional allegation that *one of the principals was armed with a firearm* in the commission of that crime" (italics added). Specifically, that instruction read in part:

"If you find the defendant guilty of the crimes charged in Counts 1, 2, 3, or 4, or the lesser crimes of simple kidnapping, false imprisonment, or grand theft, *you must then decide whether, for each crime the People have proved the additional allegation that one of the principals was armed with a firearm in the commission of that crime.* You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] A person is a principal in a crime if he or she directly commits the crime if he or she aids and abets someone else who commits the crime. [¶] *A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.*" (Italics added.)

This instruction correctly informed the jury that, in order to find the section 12022(a)(1) allegation to be true, the prosecution was not required to prove that Brodie was armed with a firearm; rather, the People were required to prove that "one of the principals was armed with a firearm in the commission of that crime." This portion of the version of CALCRIM No. 3115 the court read to the jury comports with section 12022(a)(1), which specifically provides that the one-year prison term enhancement specified therein "shall apply to any person who is a principal in the commission of a felony or attempted felony if *one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.*" (§ 12022(a)(1), italics added, see fn.6, *ante.*) Thus, the jury could find the section 12022(a)(1) allegation to be true even if Brodie was not armed with a firearm at the time he committed the crime.

Here, both Brodie and Wagner were principals in the commission of the charged offenses. Davies testified that she and the others decided that a real gun and a BB gun would be used, and Brodie and Wagner would have those guns. She also testified she gave a BB gun to either Brodie or Wagner, and she saw another weapon that was black and made of metal. West's testimony shows that both Brodie and the other perpetrator were armed with a gun, one was placed at West's left eye socket, and the second gun was pressed against his right temple. Thus, the evidence establishes that one of the two guns was a firearm and the other was a BB gun.

As noted, the jury found *true* the section 12022(a)(1) allegation in counts 1, 2, and 4 that Brodie participated as a principal in the crime knowing that one of the principals was armed with a firearm.

The prosecutor's misstatement of the law regarding the meaning of the term "firearm" as used in section 12022(a)(1), which incorrectly informed the jury that a BB gun was a firearm, was harmless because it is immaterial whether Brodie wielded the firearm or the BB gun. The prosecution presented evidence from which any reasonable jury could find beyond a reasonable doubt that Brodie was one of the principals and he knew that either he or the other principal in question, Wagner, used a firearm in the commission of the crimes charged in counts 1, 2, and 4. Accordingly, the jury's true findings on the section 12022(a)(1) allegations in counts 1, 2, and 4 are affirmed.

Last, Brodie suffered no prejudice with respect to the section 12022(a)(1) firearm enhancement allegation in count 3 because the jury found that allegation to be *not true*, and, thus, he was the prevailing party as to that allegation.

e. *Appealing to the passions and prejudices of the jury*

Last, Brodie claims the prosecutor committed misconduct by appealing to the passions and prejudices of the jury. Specifically, he claims the prosecutor "injected" racism into the case "by accusing the defense attorney of calling an officer a racist." The record does not support his claim.

During her closing argument, defense counsel stated:

"You also heard from Deputy Edwards. He's the one that searched Mr. Brodie's car. He talked about the bags and the items of clothes that were found. *Then there was also a photo of an African-American man standing there.* Look at the photo. *The deputy tells us that's Mr. Brodie—you see the photo—and claims that man—you couldn't see it that well up there but make sure you take a look at it. It's clearly not Mr. Brodie. It's almost offensive that it was suggested that it was.* When you look at the picture, it will be quite clear. It's not only not the same body, but when you look at the face and you look at the lips and the chin and the nose, compare it with that photo up there. It's clearly not Mr. Brodie. *It's almost like saying, well, you know, I have blonde hair and madam clerk has blonde hair, so, you know, we're the same.* It's the same person." (Italics added.)

In his rebuttal argument, the prosecutor argued:

"And what accusation do you have by defense counsel about the police investigation in this case? Oh, that's right, *simply because an officer says that this photograph looks to be the defendant, well, apparently that makes him a racist.* [¶] *There's no issue.* There's no issue about the job done by the police in this case. Corporal Edwards searched the car. He documented what he found. That's it. *His belief that this is the defendant in the photograph makes no difference to the issues that you're here to decide today. This is not a black and white issue, this is an issue of justice.*" (Italics added.)

The foregoing record shows defense counsel raised the issue of whether the officer had engaged in racial stereotyping, and the prosecutor responded by attempting to explain that the officer had not engaged in such behavior and that the photograph in question, and

the officer's opinion about who was depicted in the photograph, had no bearing on the trial. We conclude the prosecutor did not commit misconduct.

V

IMPOSITION OF THE UPPER TERM (COUNT 1: KIDNAPPING)

Last, Brodie contends the court committed sentencing error by imposing the upper prison term of eight years for his kidnapping conviction. We reject this contention.

A. Background

Before it imposed the eight-year upper term (see § 208, subd. (a)) for Brodie's kidnapping conviction, the court noted that Brodie's sentence would be "based on all the factors in aggravation and mitigation." Commenting that the jurors' verdicts and findings "revealed that they believed [Brodie] was more responsible and culpable than [he] has indicated to probation," the court observed that "[his] remorse appears to be selective and limited to a minor role in the case." The court also stated it "recognized that the victim of the kidnapping [(West)] was forced back into an armored vehicle, had firearms pointed in his face, and had his own weapon taken from [him]. [¶] The court cannot think of a more terrifying situation for an employee and that [individual] to be in at that particular time. This was a brutal, callous, violent act that resulted in severe trauma to the victim that persists to this day."

In support of its decision to impose the eight-year upper term, the court found that "the aggravating factors far outweigh any mitigating factors." Specifically, the court found the following four circumstances in aggravation justified imposition of the upper term: (1) the kidnapping involved great violence and a threat of bodily harm (Cal. Rules

of Court,⁷ rule 4.421(a)(1)); (2) the victim, West, was particularly vulnerable (rule 4.421(a)(3)) in that he was enclosed in an armored vehicle, "firearms were used," and the crime was committed in "an extremely dangerous setting"; (3) the manner in which the kidnapping was carried out involved planning and sophistication (rule 4.421(a)(8)); and (4) Brodie engaged in violent conduct that indicates a serious danger to society (rule 4.421(b)(1)). The court found these circumstances in aggravation "far outweigh[ed]" the rule 4.421(b)(5) circumstance in mitigation that "[Brodie's] prior performance on probation was satisfactory, dating back to some misdemeanor cases in Los Angeles County in 1994 and 1995."

B. Applicable Legal Principles

A trial court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

"[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' " (*Sandoval, supra*, 41 Cal.4th at p. 847.) Thus, "a trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the [sentencing] decision or that otherwise constitute an improper basis for decision." (*Ibid.*)

⁷ All further rule references are to the California Rules of Court.

A single aggravating factor is sufficient to support the imposition of an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 813.)

C. *Analysis*

Brodie claims the court abused its sentencing discretion by "relying on aggravating factors that were not applicable and by failing to consider a mitigating factor." This claim is unavailing.

Brodie first contends the kidnapping did not involve great violence within the meaning of rule 4.421(a)(1). However, the circumstances in aggravation recognized in that rule apply when "[t]he crime involved great violence, great bodily harm, *threat of great bodily harm*, or other acts disclosing a high degree of cruelty, viciousness, or callousness." (Rule 4.421(a)(1), italics added.) Brodie distorts the court's finding under that rule. The court did not just find, as Brodie suggests, that the kidnapping involved "great violence." Rather, as noted, the court found the kidnapping "involved great violence and a *threat of bodily harm*." (Italics added.) The circumstance in aggravation recognized in rule 4.421(a)(1) is fully applicable in this case because substantial evidence establishes that Brodie's kidnapping offense involved a "threat of great bodily harm . . . disclosing a high degree of cruelty, viciousness, or callousness" within the meaning of rule 4.421(a)(1), as the court found. West's testimony shows that Brodie pushed him flat on his back into the armored truck, both Brodie and the other perpetrator were armed, and two guns were placed against his head. We conclude this evidence is sufficient to show Brodie's kidnapping offense involved a threat of great bodily

harm disclosing a high degree of cruelty, viciousness, or callousness within the meaning of rule 4.421(a)(1).

Brodie also contends that West was "not particularly vulnerable" for purposes of rule 4.421(a)(3), and the court's use of this circumstance in aggravation was "palpably erroneous." " 'Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act.' " (*People v. Webber* (1991) 228 Cal.App.3d 1146, 1170.) Here, substantial evidence supports the court's finding that West was particularly vulnerable within the meaning of rule 4.421(a)(3) in that he was "enclosed in an armored vehicle," weapons were used, and the kidnapping was committed in "an extremely dangerous setting." As noted, West testified that Brodie and the other perpetrator pushed him back inside the armored truck and placed two guns against his head. West also testified his own gun was taken from him, as were his eyeglasses. We conclude the evidence establishes Brodie's criminal actions rendered West defenseless, unprotected, assailable, and thus "particularly vulnerable" within the meaning of rule 4.421(a)(3).

Brodie also contends he personally did not engage in violent conduct for purposes of rule 4.421(b)(1), which recognizes as a circumstance in aggravation a defendant's "engage[ment] in violent conduct that indicates a serious danger to society." However, West's testimony shows that Brodie forcefully pushed him back into the armored truck, causing West to scrape his arm and hit his head on the floor of the vehicle. West's testimony also shows that he felt Brodie's gun against his head and that Brodie threatened

him. We conclude substantial evidence shows Brodie personally engaged in violent conduct that indicates a serious danger to society within the meaning of rule 4.421(b)(1).

Brodie also complains that the court failed to weigh his "insignificant" prior criminal record as a factor in mitigation. This claim lacks support in the record. As discussed, *ante*, the record shows the court did weigh the rule 4.421(b)(5) circumstance in mitigation that "[Brodie's] prior performance on probation was satisfactory, dating back to some misdemeanor cases in Los Angeles County in 1994 and 1995."

In any event, Brodie concedes, as he must, that his kidnapping offense involved planning and sophistication within the meaning of rule 4.421(a)(8), which recognizes the existence of a circumstance in aggravation when "[t]he manner in which the crime was carried out indicates planning, sophistication, or professionalism." This undisputed circumstance in aggravation alone warrants the imposition of the eight-year upper term for Brodie's kidnapping offense. (*People v. Black, supra*, 41 Cal.4th at p. 813 [a single aggravating factor is sufficient to support the imposition of an upper term].) We conclude the court did not abuse its discretion by imposing the upper term.

DISPOSITION

The judgment is modified to stay under Penal Code section 654 the execution of both the consecutive one-year prison term the court imposed for Brodie's count 2 robbery conviction and the consecutive eight-month sentence it imposed under former section 12022.6(a)(2) for the related count 2 excessive taking enhancement. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to

reflect this modification of the judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.