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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CALDERA, JR. et al.,

Defendants and Appellants.

D058782

(Super. Ct. No. FWV801728)

APPEALS from judgments of the Superior Court of San Bernardino County, Jon D. Ferguson, Judge. Affirmed.

Codefendants Michael Caldera, Jr. and Elizabeth Lizette Lugo were tried jointly in the San Bernardino County Superior Court. The jury convicted Caldera of second degree robbery (Pen. Code,¹ § 211; counts 1-3, 5-8, 9, 10, 13, 14), resisting an executive officer (§ 69; count 12), and simple assault (§ 240; count 11) as a lesser included offense of the charged offense of assault on a peace officer. The jury convicted Lugo of seven counts

¹ All statutory references are to the Penal Code unless otherwise indicated.

of second degree robbery (§ 211; counts 1-3, 5-7, 9). With the exception of count 9 as to Caldera, the jury found true allegations that both Caldera and Lugo personally used a firearm (§ 12022.53, subds. (b) and (e)(1)) in the robbery offenses.

The trial court sentenced Caldera to a total prison term of 71 years four months, and ordered various fines and fees as well as victim restitution. It sentenced Lugo to a total prison term of 37 years eight months.

On appeal, Caldera challenges the sufficiency of the evidence of his count 12 conviction for resisting an executive officer. He also joins in Lugo's arguments to the extent they apply to him. Lugo contends her count 9 conviction must be reversed because there is no substantial evidence she was involved in the robbery alleged in that count. She further contends the court abused its discretion by imposing consecutive terms on counts 2, 3, 6 and 7. On that latter ground, she asks that we remand the matter for resentencing. We reject the contentions, and affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND²

In April, May and June 2008, Caldera and other individuals committed a series of armed robberies of Wachovia banks and other stores in Upland, Fontana and Montclair. Lugo was one of Caldera's accomplices in a Wachovia North Mountain Branch robbery

² We limit our recitation of the specific facts to counts 9 and 12 as to which Lugo and Caldera respectively challenge the sufficiency of the evidence. To the extent evidence of Caldera and Lugo's other robberies is relevant to the sufficiency of the evidence analysis or Lugo's claim of sentencing error, we summarize that evidence in addressing those arguments below.

committed on April 24, 2008, and a Wachovia North Campus Branch robbery that occurred on June 4, 2008.

Count 9 Robbery

On April 15, 2008, Michelle Benitez was working as a manager of a Check & Go store in Rialto and talking on the phone when a man and woman entered the store together. Benitez described the woman as very thin and wearing an oversized shirt and jeans and a hat with a small bill worn low on her face. The woman's hair was in a ponytail or bun. The man, who Benitez identified as Caldera, came to the counter and asked Benitez how to get a payday loan. The woman stayed on Caldera's right hand side. Benitez began to answer Caldera's question when he pulled out a note, put it in front of him, and asked Benitez where the money was. When she responded the money was in the drawer, Caldera asked for the location of the panic button. Benitez pointed to the button's location. Caldera asked Benitez if anyone else was in the store, and when she said no, he walked around the partition to the back, where he disappeared out of her view for a few seconds. The woman also came around the partition into the employee area. She was holding something under her shirt that appeared to be a gun. Caldera came back and asked Benitez for the money, and she gave him the approximately \$424 in the drawer while the woman pointed the gun at her. Caldera asked for more money, and after Benitez told him it was in a safe with a time delay, he told her to close her eyes and he and the woman left. When the woman got to the door, she told Benitez if she came back and saw police, she would come back and kill her.

Benitez later told police that the woman looked to be about five feet eight inches tall, with a light complexion, and 130 pounds, of "thin build." She also told the officer the woman was of mixed race and about 21 years old. Benitez was unable to provide a more specific description of the woman because she wore her hat low and held her head down. At the time, Lugo was 20 years old, was five feet five inches tall, and weighed 115 pounds.

Count 12

On June 18, 2008, San Diego Police Officer Michael Sylvester and others received a briefing from the Upland Police Department about a vehicle suspected in a robbery. The vehicle had a LoJack tracking device. Less than an hour after the officer went into the field, the tracking signal activated. Officer Sylvester met with other officers already at the scene, and they conducted a felony "hot stop" on Caldera and Lugo in a silver Toyota Camry on the I-5 freeway. Officer Sylvester handcuffed Caldera and put him in the back seat of his patrol car to eventually transport him to the Northwestern Division Police Station. When they arrived, the officer exited the car and opened the driver's side passenger door to let Caldera out, but unbeknownst to him, Caldera had slipped out of one of the handcuffs. Caldera kicked Officer Sylvester in the left thigh and then punched him in the lip. Officer Sylvester called out for another officer, who helped him take Caldera on the ground to re-handcuff him. While Officer Sylvester tried to re-handcuff him, Caldera resisted and was thrashing around, so the officer opened the handcuff and retightened it. The officers had difficulty walking Caldera into the station, and had to

forcibly push him into the holding cell. Officer Sylvester sustained a small cut to the inside of his mouth and large bruise to his thigh.

DISCUSSION

I. *Sufficiency of the Evidence*

A. *Standard of Review*

Well settled standards apply to defendants' sufficiency of the evidence challenges. We determine " ' "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] This standard applies whether direct or circumstantial evidence is involved. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' ' ' "

(*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) Reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. *Count 9 Robbery*

Lugo contends there is insufficient evidence that she was involved in the count 9 robbery of the Rialto Check & Go store. Pointing out Benitez was unable to identify her either to police or at trial as one of the assailants, Lugo argues "no evidence establish[es she] was the female who entered the Check & Go with Caldera" and thus the conviction must be reversed.

The contention is meritless. Lugo's identification as Caldera's assailant in the Rialto robbery was a question of fact for the jury. (*People v. Sanders* (1963) 217 Cal.App.2d 606, 610; *People v. Daly* (1959) 168 Cal.App.2d 169, 172.) The identification need not be positive (*Daly*, at p. 172), and unless the identification evidence on which the jury relies can be characterized as inherently improbable or incredible as a matter of law, its finding cannot be disturbed and we cannot substitute our judgment for that of the finder of fact. (*Sanders*, at p. 610.) On our review for substantial evidence, we " 'must accept logical inferences that the jury might have drawn from the circumstantial evidence.' " (*People v. Panah* (2005) 35 Cal.4th 395, 488.) "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it

is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Here, the jury was entitled to rely on circumstantial evidence from which it could reasonably infer Lugo was Caldera's accomplice in the Rialto Check & Go robbery. First, Benitez's description of the female accomplice as 21 years old, of mixed race, with a light complexion and thin build was consistent with Lugo's appearance and age at the time. Benitez testified the female robber's hat was "very similar" to that worn by Lugo in a "wanted" poster of Lugo shown to Benitez at trial. The jury saw photographs and videotape from the Rialto robbery picturing the assailants. It additionally heard testimony regarding other robberies Caldera and Lugo had committed, including from witnesses describing Lugo as wearing a small baseball-type hat worn low on her head with her hair up, in the same manner as Caldera's female companion from the Rialto robbery. Manuel Padua, for example, the teller manager at the Wachovia Mountain branch, testified that Lugo wore a cap lowered on her face, so that the teller could only see down from the bridge of her nose. According to Padua, Lugo also wore her hair in a bun. The female in the Rialto robbery pointed a gun hidden under her shirt, and Lugo used a gun in both Wachovia Bank robberies. The robberies were relatively proximate in time: the Rialto robbery occurred nine days before the Wachovia Bank robbery that Caldera and Lugo committed on April 24, 2008, and about a month and a half before the June 4, 2008 robbery.

The question is whether all of this evidence justifies the jury's finding that Lugo was Caldera's accomplice in the Rialto Check & Go robbery. We answer in the

affirmative. The similar stature, appearance and clothing of Lugo and the female described by Benitez, as well as the time frame and characteristics of the robberies, permits a logical inference that Lugo was the assailant in the Rialto robbery.

Accordingly, we accept that finding of the jury because it is based on evidence that is neither inherently improbable nor incredible as a matter of law. The absence of a direct identification does not render the evidence of guilt insufficient to support the verdict.

C. Count 12 Charge of Resisting an Executive Officer

Caldera contends insufficient evidence supports his count 12 conviction of resisting an executive officer. Specifically, he argues there is no evidence Officer Sylvester was lawfully performing his duties when the officer restrained and transported him to the division station, because the People did not establish police had probable cause to arrest him. Caldera maintains the People did not present evidence or specifics as to the circumstances preceding his arrest, other than the fact a 2007 Toyota Camry was sought because of a robbery investigation. Though Caldera acknowledges the evidence established he was the registered owner of the vehicle, he argues the fact officers were told his vehicle was related to a robbery investigation, or that they were dispatched to conduct a felony traffic stop of the vehicle based on the LoJack tracker, is not enough to constitute probable cause for his arrest.

The People respond that there is ample evidence of both reasonable suspicion to detain Caldera and Lugo, as well as probable cause for their arrest, in testimony concerning the fact police agencies worked together to solve the robberies, and evidence from eyewitnesses and surveillance video of Caldera's and Lugo's commission of

robberies at the banks and businesses in Rialto, Upland and Fontana. They point to various police officers' testimony concerning encounters with Lugo and Caldera, an admitted member of the Black Angels criminal street gang, including the fact he was previously known by officers to drive a silver Toyota Camry.

1. *Legal Principles*

Section 69 makes it a crime to "attempt[], by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law," or to "knowingly resist[], by the use of force or violence, such officer, in the performance of his duty." (§ 69.) "Police officers are 'executive officers' under section 69." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984, fn. 2.)

"The long-standing rule in California and other jurisdictions is that a defendant cannot be convicted of an offense against a peace officer ' "*engaged in . . . the performance of . . . [his or her] duties*" ' unless the officer was acting lawfully at the time the offense against the officer was committed. [Citations.] "The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in "duties," for purposes of an offense defined in such terms, if the officer's conduct is unlawful. . . . [¶] . . . [T]he lawfulness of the victim's conduct forms part of the corpus delicti of the offense.' " (*In re Manuel G.* (1997) 16 Cal.4th 805, 815 (*Manuel G.*); see *People v. Cruz* (2008) 44 Cal.4th 636, 673 ["it is also a 'well-established rule that when a statute makes it a crime to commit any act against a peace officer engaged in the performance of his or her duties, part of the corpus delicti of the offense is that the officer was acting lawfully at the time the offense was committed' "].) Thus, "for purposes of the

offense set forth in the second part of section 69, the officers must have been acting lawfully when the defendant resisted arrest." (*Manuel G.*, at p. 816.)

A police officer is not lawfully performing his duties when he " 'detains an individual without reasonable suspicion or arrests an individual without probable cause.' " (*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 819, quoting *Nuno v. County of San Bernardino* (C.D.Cal. 1999) 58 F.Supp.2d 1127, 1134.) " ' "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity," ' " even if the officer lacks probable cause to arrest. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145; *People v. Souza* (1994) 9 Cal.4th 224, 231.) The reasonable suspicion standard "is not a particularly demanding one." (*People v. Letner and Tobin*, at p. 146.) The analytical touchstone is reasonableness under the totality of the circumstances. (*People v. Dolly* (2007) 40 Cal.4th 458, 463.)

Caldera's contentions implicate the "*Harvey-Madden*" rule,³ which " 'govern[s] the manner in which the prosecution may prove the underlying grounds for arrest when the authority to arrest has been transmitted to the arresting officer through police channels.' " (*People v. Gomez* (2004) 117 Cal.App.4th 531, 540.) In *Gomez*, the court explained "[i]t is well settled under California law that an officer may arrest an individual on the basis of information and probable cause supplied by another officer.

³ *People v. Harvey* (1958) 156 Cal.App.2d 516 and *People v. Madden* (1970) 2 Cal.3d 1017.

[Citation.] '[H]owever, . . . when the first officer passes off information through "official channels" that leads to arrest, the officer must also show basis for his probable cause. In other words, the so-called "*Harvey-Madden*" rule requires the basis for the first officer's probable cause must be "something other than the imagination of an officer who does not become a witness." [Citation.] [Citation.] [¶] Probable cause for a search or an arrest without a warrant may be proven by information passed from one officer to another if it is shown the information was "'factual rather than conclusionary,' related 'specific and articulable facts,' was the product of personal observations by the informing officer, and was reliable." [Citations.] [Citation.] Ultimately, the issue boils down to whether the latter officer's reliance on the information was reasonable." (*People v. Gomez*, 117 Cal.App.4th at p. 540.)

" [W]hen police officers work together to build "collective knowledge" of probable cause, the important question is not what each officer knew about probable cause, but how valid and reasonable the probable cause was that developed in the officers' collective knowledge.' [Citation.] There is no requirement that the officer whose personal observations were relied upon for purposes of the probable cause determination actually testify to his or her observations. To the contrary, the *Harvey/Madden* rule merely precludes the prosecution from relying on hearsay information communicated to the arresting officer that is not sufficiently specific and fact based to be considered reliable." (*People v. Gomez, supra*, 117 Cal.App.4th at p. 541; see also *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1555 ["the important question is

not what each officer knew about probable cause, but how valid and reasonable the probable cause was that developed in the officers' collective knowledge"].)

In *In re Richard G.* (2009) 173 Cal.App.4th 1252 (*Richard G.*), two police officers on a routine patrol around midnight received a radio dispatch that two males were causing a disturbance outside a residence. (*Id.* at p. 1256.) The dispatcher described the clothing the two men were wearing and the direction in which they were headed. The officers went to the location and saw two men and two women walking toward a park across the street from the residence; the men "were wearing clothing that identically matched the description given in the radio dispatch." (*Ibid.*) After an altercation, the two males were detained and the defendant arrested. The defendant moved to suppress evidence of his statements and conduct during the detention and made a *Harvey-Madden* objection, arguing the prosecution could not establish a lawful detention without the source of the original report or testimony from the dispatcher. The trial court permitted the prosecution to overcome this objection by allowing the arresting officers to "describe the radio dispatch they heard and responded to." (*Richard G.*, 173 Cal.App.4th at p. 1256.) It then denied the defendant's motion. (*Ibid.*)

The appellate court rejected the defendant's challenge to that ruling on appeal. It noted that the California Supreme Court's point was to discourage the manufacture of reasonable grounds for arrest within a police department: "[W]hen it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness." (*Richard G.*, *supra*, 177 Cal.App.4th at p. 1259, quoting *Remers v. Superior*

Court (1970) 2 Cal.3d 659, 666-667.) In *Richard G.*, no evidence of such conduct existed. The court stated: "Here there was no 'manufacture' of information. The information received by the police dispatcher was radioed to multiple officers in multiple patrol cars and it provided detailed descriptions of the two suspects. Absent (1) the officer himself calling in the report to the dispatcher or, (2) clairvoyance on the part of the dispatcher, there is no way that the dispatcher could have manufactured these detailed descriptions at or near the place and time the officers saw appellant and his companion matching the detailed descriptions. [¶] Where, as here, the evidence and the reasonable inferences flowing from it show that the police dispatcher actually received a telephone report creating a reasonable suspicion of criminal wrongdoing, it is not necessary to require strict compliance with the '*Harvey-Madden*' rule. . . . [¶] . . . When the judiciary can reasonably determine that no evidence has been manufactured, there is no reason for strict compliance with the letter of the '*Harvey-Madden*' rule." (*Richard G.*, 177 Cal.App.4th at pp. 1259-1260, in part citing *People v. Orozco* (1981) 114 Cal.App.3d 435, 444.)

2. *Analysis*

As a threshold matter, we conclude Caldera arguably forfeited this issue by failing to make a Fourth Amendment challenge to the legality of his detention below. Caldera states there was no motion to suppress under section 1538.5, and as a result, there was "no testimony establishing any probable cause to arrest [him] and his passenger." But the *Harvey-Madden* issue raises questions under the Fourth Amendment, and such claims have been "barred from consideration[]" because of failure to point out the defect in the

trial court." (*People v. Moore* (1970) 13 Cal.App.3d 424, 434, fn. 8; see also *People v. Williams* (1999) 20 Cal.4th 119, 130-131.) "The bar against raising a *Harvey/Madden* issue for the first time on appeal is but an application of the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 547-548.) The accepted practice is to raise the issue as part of a Fourth Amendment challenge in the trial court. (See, e.g., *Richard G.*, *supra*, 173 Cal.App.4th at p. 1260 [requirements of *Harvey-Madden* rule "can plainly and easily be met by simply calling the police dispatcher as a witness at the suppression hearing"]; *Ojeda v. Superior Court* (1970) 12 Cal.App.3d 909, 914, 916 [defendant moved to suppress on grounds uncorroborated police broadcast concerning a vehicle wanted in connection with a robbery was insufficient to establish reasonable cause for his arrest and search and "persistently insisted" that the prosecution produce the officer who received the original information and initiated the broadcast]; *In re Eskiel S.* (1993) 15 Cal.App.4th 1638, 1642 (*Eskiel S.*) [defendant moved to suppress and also interposed *Harvey-Madden* objection to officers' testimony regarding contents of police dispatch].)

Nevertheless, we conclude the totality of evidence presented at trial was sufficient. Because there is no question Officer Sylvester detained and arrested Caldera, the question is simply whether the evidence shows he did so with reasonable suspicion or probable cause, thus establishing the element that he was engaged in the performance of his duties at the time Caldera resisted arrest.

As stated, the *Harvey-Madden* requirement may be satisfied with circumstantial evidence providing a strong inference officers did not manufacture the information. (*People v. Orozco, supra*, 114 Cal.App.3d at pp. 444-445.) In *Orozco*, an anonymous call to police about people shooting out of a car was not proved with dispatcher testimony or other evidence, but evidence of spent cartridges found on the ground near the car in question supported "a very strong inference that the police did not make up the information from the informant" and circumstantially proved the veracity of the dispatch to police. (*Id.* at pp. 444-445.) This evidence negated any sort of " 'do it yourself probable cause. . . . ' " (*Ibid.*)

Here, Officer Sylvester testified without objection that he and other officers had been briefed on a vehicle having a particular brand of tracking device that the Upland Police Department was looking for, along with information about a robbery suspect. Officer Sylvester corroborated the information given to him by other law enforcement sources when he testified that within the hour after that briefing, "*that LoJack [tracking] signal started going off.*" (Italics added.) Another officer who participated in the felony stop, San Diego Police Officer Michael Vendixen, also testified he had received a dispatch concerning a 2007 model year silver Toyota Camry, and spotted the vehicle on the Interstate 5 freeway. He tracked the vehicle with the LoJack device. Upland Police Department Detective Marcelo Blanco testified that on June 18, 2008, he was involved in the search for a 2007 Toyota Camry with a particular license plate in connection with a robbery, and was sent to San Diego after the LoJack tracking device detected the car.

The fact Officer Sylvester was able to locate and track Caldera and Lugo's vehicle with the LoJack signal supports an inference that the police did not make up or manufacture information concerning the vehicle that was the subject of the robbery investigation. As in *Richard G.*, the information had been provided to multiple police officers in multiple patrol cars, and gave specific information concerning the make and model of the vehicle involved in the robberies. It corroborated the veracity of the dispatcher's statement and the information provided in the briefing by unknown officers. This was coupled with other evidence that Caldera associated with Lugo and drove a silver Toyota Camry, as well as evidence that robbery victims had identified Caldera and Lugo as some of the robbery suspects in prior robberies. A silver Camry was pictured in the wanted bulletin for Caldera and Lugo in connection with the April 24, 2008 Wachovia Mountain branch robbery. In sum, the evidence, in totality, including the collective knowledge of the law enforcement officers, shows Officer Sylvester's detention and arrest was based on " 'something other than the imagination of an officer who [did] not become a witness.' " (*Remers v. Superior Court, supra*, 2 Cal.3d at p. 666; *Richard G., supra*, 173 Cal.App.4th at p. 1259; *People v. Johnson* (1987) 189 Cal.App.3d 1315, 1319 ["The whole point of the *Remers* rule is to negate the possibility that the facts which validate the conduct of the officers in the field are made up inside of the police department by somebody who is trying to frame a person whom he wants investigated"].)

Caldera compares the circumstances here to those in *Eskiel S., supra*, 15 Cal.App.4th 1638, in which the appellate court reversed the trial court's denial of a suppression motion by a defendant detained and arrested by a patrol officer who had

relied on a radio broadcast of a possible gang fight. (*Id.* at p. 1641.) The appellate court held defendant's suppression motion should have been granted, observing the record lacked evidence of the origin of the information in the broadcast and likening it to an uncorroborated anonymous tip. (*Id.* at pp. 1641-1643.) The *Eskiel* court stated, "Justifying an arrest or detention based on information received by an officer through 'official channels' requires the prosecution to trace the information received by the arresting officer back to its source and prove that the originating or transmitting officer had the requisite probable cause or reasonable suspicion to justify the arrest or detention." (*Id.* at p. 1643.)

As the People point out, the *Richard G.* court declined to follow *Eskiel S.* to the extent it required strict compliance with the *Harvey-Madden* rule, because the *Eskiel S.* court in doing so did not address the "crucial role of independent corroboration." (*Richard G.*, *supra*, 173 Cal.App.4th at p. 1260.) The court in *Richard G.* believed "a plausible argument could be made that the crime report at issue in *Eskiel S.* was sufficiently corroborated, negating the possibility that probable cause was 'manufactured' at the police station and providing substantial evidence to support the detention." (*Ibid.*) As we have explained, in this case, unlike *Eskiel*, the record establishes sufficient circumstantial evidence police did not make up the transmitted information; rather, as stated, Officer Sylvester and the other officers who detained and arrested Caldera relied on corroborated information.

II. *Claim of Sentencing Error*

A. *Background*

Lugo's total 37-year eight-month prison term consists of five years on the count 1 second degree robbery plus 10 years for firearm use under section 12022.53, subdivisions (b) and (e)(1); consecutive terms of four years four months each on the counts 2, 3, 5, 6 and 7 second degree robberies (one-third the midterm plus one-third the enhancement); and a consecutive one-third the midterm on the second degree robbery of count 9. At the sentencing hearing, the trial court found Lugo not eligible for probation due to her firearm use, and explained it would find her unsuitable even if she were eligible given her "repeated acts of violence carried out over a period of time and different dates involving a number of victims." It continued: "With respect to circumstances in aggravation, I think quite honestly this is the issue that has the most merit as to Ms. Lugo whether to impose middle or aggravated term[s] on the base term or the principal term; however, in aggravation, I do find that she—factors related to the crime, [California Rules of Court, rule] 4.421[(a)(8)], 'The manner in which the crime was carried out indicates planning, sophistication, or professionalism.'

"Most crimes, . . . Lugo wore a disguise. She wore sunglasses and a hat. She worked with another individual. Sometimes two individuals. She had a gun hidden in a central compartment of a car at the time of her arrest. Again, these were bank robberies committed over a period of time. Large sums of money were taken.

"So compared to other instances of the same offense, I do find this to be an aggravated instance of robbery in each of those occasions. There were gratuitous threats made during the course of the robberies, and particularly Ms. Lugo participated in gratuitous acts of violence in having several of the victims get down on the floor. That

added an additional element of terror. Those individuals probably were believing that they were about to be shot execution style in light of the circumstances."

The court found those aggravating factors "far outweigh[ed]" the fact Lugo had no prior criminal history, which was the sole mitigating factor. The court concluded: "For the same reasons indicated, I do not believe concurrent sentences are appropriate. Through no fault of the victims, they were subjected to the terror and violence of Ms. Lugo. They happened to be together on some of those occasions, and concurrent sentences would be totally inappropriate under the circumstances."

B. *Contentions*

Lugo contends the trial court abused its discretion when it imposed consecutive terms on counts 2, 3, 6 and 7. Though she concedes she was properly convicted of six counts of robbery, one for each robbery victim, in counts 1 through 3 (the Wachovia Mountain Branch robberies) and 5 through 7 (the Wachovia North Campus Branch robberies) (see *People v. Scott* (2009) 45 Cal.4th 743), she argues the robberies of counts 1 through 3 were not committed with independent objectives or at different times or places, she did not engage in separate acts of violence or threats of violence toward the victims, and they were committed so closely in time and place as to indicate a single period of aberrant behavior. Lugo maintains the same arguments apply to the robberies of counts 5 through 7.

C. *Legal Principles*

"It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively." (*People v. Bradford* (1976) 17

Cal.3d 8, 20, called into question on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1065 as stated in *People v. Thomas* (2012) 53 Cal.4th 1276, 1288; *People v. Giminez* (1975) 14 Cal.3d 68, 71.) Appellate courts do not have the power to modify or reduce a sentence absent error and, unless a clear abuse of discretion is shown, error cannot be predicated on a trial court's determination that several sentences are to run consecutively. (*Giminez*, at p. 72.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.] However, in the absence of a clear showing that its sentencing decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate sentencing objectives and, accordingly, its discretionary determination to impose consecutive sentences ought not be set aside on review." (*Ibid.*)

To assist the trial court in the exercise of its discretion, rule 4.425 of the California Rules of Court sets out "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences," which include that the "crimes and their objectives were predominantly independent of each other," they "involved separate acts of violence or threats of violence" and the "crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(1)-(3).) But these criteria are not exclusive. (*People v. Caesar* (2008) 167 Cal.App.4th 1050, 1060, disapproved on another ground in *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 18.) Rule 4.408(a) of the California Rules of Court states: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the

application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge." (See also *Caesar*, 167 Cal.App.4th at p. 1060.)

D. *Analysis*

In the counts at issue, Lugo was convicted of robberies against separate victims, as the jury found in its verdicts. The "naming of separate victims in separate counts is a circumstance on which a trial court may properly rely to impose consecutive sentences." (*People v. Caesar, supra*, 167 Cal.App.4th at pp. 1060-1061.) Here, the presence of multiple victims in separate counts by itself justifies the trial court's decision. But the offenses involved more than just multiple victims, they also involved multiple threats of violence. Lugo argues she did not commit separate acts of violence against the victims. But as to the Wachovia Mountain Avenue branch robberies, the evidence demonstrated that Lugo pointed her gun at the bank manager and forced her to lie down on the ground facedown, while Caldera swung a gun back and forth in faces of a teller and manager. Lugo also pointed her gun at a customer who came upon the scene, and also forced him to get on the ground. Lugo does not provide authority for the proposition that the trial court's discretion in this case is limited to finding separate threats of violence *as to the victims*. The criteria requires only that the crimes involve separate acts or threats of violence in general, which was present in this case as to multiple individuals in the bank.

As to the Wachovia North Campus branch robberies, Lugo pointed a gun at teller Miriam Chatkoo and told her to "put [her] fucking hands up." The other assailants had a gun to another teller, who was also giving them money from her drawer. Another teller

manager, Jenny Nguyen, was forced to move behind the tellers at gunpoint. Lugo and the others forced the tellers to close their eyes and go into the break room and sit or kneel down. Chatkoo explained that Lugo's gun was pointed in the direction of her body, but "[i]t could have been [pointed at] someone next to me as well. So it was pointed at us essentially." The prosecutor asked whether Lugo's gun was pointed "in the general vicinity of the group" and Chatkoo responded, "After she had it towards me, yes." It is simply incorrect to say there was "no evidence . . . [Lugo] pointed the gun at everyone else" as Lugo asserts in her brief.

Finally, the multiple crimes Lugo committed with Caldera plainly required a great deal of preparation and planning so as to obtain and find weapons, disguises, and targets with cash on hand. This is an additional aggravating factor set forth in California Rules of Court, rule 4.421(a): that the manner in which the crime was carried out indicates planning, sophistication, or professionalism. (Cal. Rules of Court, rule 4.421(a)(8).) The trial court was authorized to consider such additional factors in deciding whether to impose consecutive sentences under California Rules of Court, rule 4.425(b).

In short, Lugo's claim fails on grounds she cannot show the trial court's decision was arbitrary or irrational, or that its sentence otherwise plainly exceeded the bounds of reason. On this record, the trial court did not abuse its wide discretion in sentencing Lugo consecutively for the robbery offenses, which involved multiple victims named in separate counts, separate threats of violence, and a substantial amount of planning.

DISPOSITION

The judgments are affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.