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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO MANUEL VILAR,

Defendant and Appellant.

D058926

(Super. Ct. No. SCN267540)

In re RICARDO MANUEL VILAR on
Habeas Corpus.

D060685

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge, and petition for writ of habeas corpus. Judgment affirmed; petition denied.

This appeal is taken from a judgment of the superior court based on Ricardo Manuel Vilar's conviction of attempted kidnapping and attempted kidnapping of a person under 14 years of age and the revocation of his probation on earlier charges against him for burglary and fraudulent use of an access card. On appeal, Vilar's appointed appellate

counsel filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), requesting that this court conduct an independent review of the record to determine whether there are any arguable appellate issues.

After we invited Vilar to file a brief on his own behalf, he filed a petition for a writ of habeas corpus, contending that (1) he suffered from ineffective assistance of his trial counsel; (2) the court improperly (a) dismissed three prospective jurors, (b) admitted eyewitness identification evidence, (c) failed to curb the prosecutor's inflammatory comments about him during closing argument, (d) failed to instruct the jury regarding actual/factual innocence, (e) failed to give a jury instruction on the lesser included offenses of attempted kidnapping, (f) failed to continue the sentencing hearing, (g) imposed consecutive sentences on the attempted kidnapping counts, and (h) calculated the custody credits to which he was entitled; and (3) he suffered from ineffective assistance of counsel on appeal.

After independently reviewing the record and the issues identified by appellate counsel under *Anders v. California* (1967) 386 U.S. 738 (*Anders*),¹ as well as those

¹ Counsel's brief identifies the following as possible, but not arguable, issues: (1) should Vilar's statements to Sheriff's Deputy Clifford Cutrell have been excluded because he never expressly waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436); (2) did the trial court err in denying Vilar's motion for an acquittal of the attempted kidnapping charges; (3) did the prosecutor commit prejudicial misconduct during closing argument in violation of Vilar's due process rights; and (4) was Vilar's Sixth Amendment right to a jury trial violated when he was sentenced to the upper term, and did the trial court abuse its discretion in imposing the upper term?

raised by Vilar, we asked the parties to submit letter briefs regarding his custody credits. Both appointed counsel and the Attorney General responded with letter briefs contending that the sentence imposed was unauthorized, in different respects. We affirm the judgment and deny the writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

In the evening of September 16, 2009, 19-year-old Brittany Simmons and her three-year-old stepsister, J.M., encountered Vilar at a market near their home and spoke to him about J.M.'s recently-skinned knee as they waited to pay for their purchases. Brittany did not know Vilar, but had a clear view of him during their brief conversation.

After Brittany and J.M. left the market and began to walk to their home nearby, Vilar followed them in his car and asked them if they wanted a ride. Brittany declined, but Vilar persisted, asking a second time a bit more forcefully, so she picked J.M. up and began to walk quickly away from the car. When Vilar demanded that Brittany get in the car, she started to run while still holding J.M.

Vilar continued to follow and, by the time the girls were passing a small stand of trees, he got out of the car, leaving the engine running and the car door open, and approached them from behind. He grabbed Brittany's shirt, yanking it very hard in the direction of the car and causing her to temporarily lose her balance. As Brittany caught herself, she turned and saw Vilar; she escaped by elbowing him in the stomach and pushing him away and then ran home with J.M.

Brittany reported the incident first to her mother, who was recently released from the hospital, and then to her father when he came home from football practice later in the

evening. Brittany's father called the market and arranged to meet Sheriff's Deputy Victor Perry there the next morning to look at the store's surveillance video. Brittany described her assailant as 35 years old, 5 feet 10 or 11 inches tall, weighing 190 to 195 pounds, with short black hair and stubbly facial hair and indicated that his car was a "beat up" silver two-door "Honda type." Although the quality of the surveillance tape was poor, Brittany was able to recognize Vilar in it.

Deputy Cutrell later watched the videotape with the market owner, who identified Vilar as a regular customer.² Deputy Cutrell asked him to call 911 if Vilar came to the market again. A few days later, Brittany identified Vilar as her assailant in a photo lineup.

About a week after the incident, Vilar returned to the market and, as the cashier made small talk with him, someone else went outside to surreptitiously take down the license plate number of his car.³ Vilar's girlfriend, who was in the car, noticed what was happening and alerted Vilar; although they left, deputies promptly stopped the car and arrested Vilar for attempted kidnapping.

Deputy Cutrell recited Vilar his *Miranda* rights and then questioned him regarding his whereabouts on the days surrounding the incident. Vilar initially claimed, with "100 and 10 percent" certainty that he was at the nearby Rincon reservation casino for the

² Unfortunately, as they were viewing the tape, it froze up and quit functioning. Deputy Cutrell later sent the tape to a service that specializes in retrieving and capturing images from videotapes; however, the lost portions of the tape could not be recovered.

³ The car, a silver 1994 Nissan Sentra, was registered in the name of Vilar's brother.

entire day when the incident occurred; however, he later told Deputy Cutrell that he had left the casino for a few hours to drive his girlfriend to her boss's home in Del Mar. After finding out that the cashier had identified him as having been at the market and that the market surveillance tape provided verification of that fact, Vilar changed his story yet again, admitting that he had been at the market and spoken to the girls about J.M.'s skinned knee, but adamantly maintaining that he had not followed them after leaving the market. He told Deputy Cutrell that, as he was driving away from the market, he saw Brittany having some sort of interaction with a Native American man.

Vilar was ultimately charged with one count each of attempted kidnapping (count 1), and attempted kidnapping of a victim under 14 years old (count 2) and two counts of false imprisonment by violence arising out of the incident. The court remanded Vilar to the custody of the sheriff, subject to bail of \$200,000. Vilar, however, remained incarcerated pending his trial.

While in jail, Vilar called his girlfriend and asked that she talk to Brittany's stepfather; specifically, he wanted her to explain that he had done some work at the stepfather's auto repair shop and that there had been a misunderstanding about the incident. He also attempted to contact the stepfather himself, by phone and by letter.

In the meantime, Vilar's counsel moved in limine to exclude Vilar's statements to Deputy Cutrell on the ground that Vilar never expressly waived his *Miranda* rights. The court denied the motion, finding that the law did not require an express waiver and that the dialog between Vilar and Deputy Cutrell made clear that Vilar understood his rights and intended to waive them.

The case proceeded to trial and during jury selection, three prospective jurors expressed concerns about their ability to be objective in light of recent publicity relating to two local teenagers, Chelsea King and Amber Dubois, who were believed to have been abducted, murdered and buried in shallow graves by a man named John Gardner. The court admonished the prospective jurors that the proceedings against Gardner had nothing to do with this case and that, to serve in the case, jurors would need to be able to compartmentalize their focus to the facts of this case and not allow external matters to influence their decision.

After further inquiry of the prospective jurors by defense counsel, the court ultimately excused two of them for cause and one on a defense peremptory challenge. The court empanelled the jury and informed the jurors that a girl's remains had just recently been found in the area where Chelsea King had disappeared, but again emphasized that that discovery had nothing to do with Vilar or the proceedings against him.

In support of the prosecution's case, Brittany, the market owner, the cashier, Deputies Perry and Cutrell and others testified as to the facts described above. After the prosecution rested, Vilar moved, unsuccessfully, for an acquittal of the attempted kidnapping charges, arguing that there was insufficient evidence that he (1) had had the specific intent to kidnap Brittany and J.M. or (2) had moved Brittany a substantial distance. Vilar thereafter testified as to his version of the facts, introduced expert testimony regarding the fallibility of eyewitness identifications and called his girlfriend and her mother as character witnesses.

In closing argument, the prosecutor described Brittany as very courageous, saying that "if it wasn't for her actions[,] we would be looking at another crime of the century gripping this county. We would be looking to find two girls." He went on to describe Vilar as a "monster" and a "predator" and argued that it was fortunate Vilar had not been "behind [the casino] digging up two shallow graves and burying some bodies." After the court sustained defense counsel's objection to the latter argument, the prosecutor commented that he was "pleased that we don't have DNA in this case . . . because if we did . . . these claims would have been completed . . . but because Brittany . . . fought, fought for her life[,] she avoided giving that DNA evidence to you." Defense counsel again objected and the court sustained the objection, telling the prosecutor to "move on."

Vilar moved for a mistrial based on the prosecutor's statements, a matter the court took under submission to permit briefing by the parties. Counsel proceeded with closing arguments, during which defense counsel reminded the jurors of their obligation to not let bias or prejudice influence their decision in the case.

While in deliberations, the jury requested a read-back of the testimony of Brittany and Deputy Perry as to when Brittany first described Vilar's car for the deputies. Shortly after the read-back was completed, the jury reached a verdict, convicting Vilar of the attempted kidnapping charges, but acquitting him of the false imprisonment counts.

At a subsequent hearing, the court denied Vilar's mistrial motion. It concluded that although the prosecutor's challenged arguments constituted misconduct, it had specifically admonished the jury not to consider the events underlying Gardner's trial. The jury had in fact acquitted Vilar of the forcible false imprisonment charges, thus

establishing that the misconduct had not infected the trial with such unfairness as to result in a denial of due process. Based on Vilar's convictions, the court revoked his probation on two counts of second degree burglary and two counts of fraudulent use of an access card for which he was convicted in 2009.

At the sentencing hearing, Vilar personally requested a mistrial, claiming that he had received ineffective assistance from his trial counsel, and the court appointed an attorney from the Office of Assigned Counsel (OAC) for the limited purpose of investigating whether to pursue a new trial on that basis. As part of her investigation, OAC counsel sought, and was granted, release of the surveillance videotape.

At the continued hearing, the court conducted a proceeding outside the presence of the prosecutor on Vilar's ineffective assistance claims. It found that there had been an irreconcilable breakdown in the attorney-client relationship and relieved trial counsel; after OAC counsel informed the court that she did not intend to further pursue a new trial motion, it appointed her to represent Vilar for purposes of sentencing, which proceeded forthwith.

In accordance with the probation officer's recommendation, the court sentenced Vilar to eight years four months in prison. The sentence was composed of six years four months on the attempted kidnapping charges (the upper term of 66 months on the attempted kidnapping count relating to J.M., and a consecutive 10 months [one-third the mid-term] on the attempted kidnapping count relating to Brittany), plus two years on the probation revocation offenses (one-third the mid-term [eight months]), consecutive, on the first fraudulent access count (one-third the mid-term [eight months]), concurrent, on

the second fraudulent access count (one-third the mid-term [another eight months]), consecutive, on the first burglary count and (one-third the mid-term [yet another eight months]), consecutive, on the second burglary count.

The court also imposed a \$3,000 restitution fine, a \$3,000 parole revocation fine, stayed unless parole was granted or revoked, a \$60 court security fee, a \$60 criminal conviction assessment and a \$154 booking fee and ordered Vilar to submit to DNA testing. It awarded Vilar custody credits of 692 days (462 actual days plus 230 days of conduct credits) on the sentence for the attempted kidnapping convictions and 842 days (562 actual days plus 280 days of conduct credits) on the probation revocation sentence. After later being notified that it had improperly awarded certain credits against both the current offenses and the probation revocation offenses, the court issued a corrected abstract of judgment reducing the credits against the probation revocation offenses to 156 days.

DISCUSSION

1. *Ineffective Assistance of Trial Counsel*

Vilar contends that he suffered from ineffective assistance of counsel in the proceedings below. To succeed on such a challenge, he bears the burden of showing that: (1) his counsel's performance was deficient when measured against "an objective standard of reasonableness [¶] . . . under prevailing professional norms"; and (2) prejudice, (i.e., a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). (*Strickland v. Washington* (1984))

466 U.S. 668, 687-688, 691-694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

In reviewing this challenge, we must presume that counsel's conduct "falls within the wide range of reasonable professional assistance" (*Strickland, supra*, 466 U.S. at p. 689) and "accord great deference to counsel's tactical decisions." (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) Otherwise, it would be "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and . . . too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Strickland*, at p. 689.)

Vilar asserts that his counsel was ineffective in two respects.⁴ First, he contends that counsel failed to properly investigate possible defenses of impossibility (based on his contention that it was physically impossible for him to have committed the crime because he was in the store for several minutes after Brittany and J.M. left), and Brittany testified that the attack occurred less than a minute after the girls' departure and evidence tampering (relating to the deterioration or destruction of the portion of the surveillance

⁴ Notably, he contends that, at the posttrial hearing on his request for a mistrial, the trial court found he had suffered ineffective assistance of his trial counsel. The record belies this assertion, showing that the court relieved trial counsel based on an irreconcilable breakdown in the attorney-client relationship, not a finding of ineffective assistance.

tape showing him in the market). However, the record does not affirmatively establish that defense counsel in fact failed to investigate these matters. Further, Vilar has neither explained what further investigations counsel should have had carried out, nor shown that the results of those investigations would have resulted in his acquittal of the attempted kidnapping charges.

Second, Vilar contends that trial counsel was incompetent in failing to seek a change of venue in light of the pendency of the criminal action against John Gardner arising out of the Chelsea King and Amber Dubois murders. However, counsel explained that he did not seek a change of venue because Chelsea King's body was found just as this trial started, the information available to him at that time did not provide any basis for seeking a change of venue and Vilar desired to get to trial as soon as possible to establish his innocence and thus had no interest in waiving time. Counsel's decision in this regard is tactical in nature and entitled to great deference, and Vilar has not shown that it fell outside "the wide range of reasonable professional assistance" (*Strickland, supra*, 466 U.S. at p. 689.)

2. *Dismissal of Three Prospective Jurors*

Both the federal and state Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based upon bias against members of an identifiable group distinguished on racial, religious, ethnic or similar grounds. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277; see also *Batson v. Kentucky* (1986) 476 U.S. 79, 88-89.) "Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under

article I, section 16 of the California Constitution." (*People v. Lenix* (2008) 44 Cal.4th 602, 612.)

Here, the three prospective jurors were dismissed *at defense counsel's request* based on their statements that they did not think they could be fair *to Vilar* if they sat on his jury panel, rather than on any racial, religious or other similar characteristics that they shared. Vilar's claim that he was somehow prejudiced by the exclusion of these prospective jurors is specious.

3. *Admission of Identification Evidence*

Vilar contends that the court "erroneously and sadistically allowed evidence that was insufficient to legally support" the charged offenses against him, focusing this challenge on the sufficiency of Brittany's identification of him as her assailant. On appeal, our review of any claim of insufficiency of the evidence is limited to a determination of whether the record as a whole, viewed in the light most favorable to the judgment, includes substantial evidence—that is, evidence that is reasonable, credible, and of solid value—to permit a reasonable trier of fact to find him guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Even in the face of evidence that is subject to differing inferences, we cannot make our own determination of guilt, but must instead assume that the trier of fact properly resolved all conflicting inferences in favor of the prosecution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, fn. 13, 326.)

Vilar claims that Brittany's identification is legally insufficient to support his conviction because of the discrepancies between the initial description she gave to the

deputies and his actual appearance. However, any such discrepancies affect the weight of the evidence, not its sufficiency. (*People v. Turner* (1983) 145 Cal.App.3d 658, 671, disapproved of on another ground in *People v. Majors* (1998) 18 Cal.4th 385, 411.)

Further, where the trier of fact credits the testimony of a witness, we must accept that testimony as sufficient to support the conviction unless it is physically impossible or inherently improbable. (*People v. Keltie* (1983) 148 Cal.App.3d 773, 781-782; Evid. Code, § 411; see also *People v. Johnson* (1960) 187 Cal.App.2d 116, 122.) There was nothing inherently incredible or physically impossible in Brittany's identification of Vilar as her assailant and thus this evidence supports Vilar's conviction of the attempted kidnapping charges.

4. *Failure to Curb the Prosecutor's Inflammatory Comments*

Vilar argues that the court erred in not responding to the prosecutor's description of him as a "monster" and a "predator" during closing argument. Generally, a claim of prosecutorial misconduct is not reviewable on appeal unless the defendant makes a timely objection and asks the trial court to admonish the jury to disregard the prosecutor's improper remarks. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) Where, as here, the defendant fails to object in the trial court, the purported misconduct is reviewable only if an admonition would not have cured the harm caused by the misconduct. (*Ibid.*) Because the challenged references would have been curable by admonition, the lack of objection in the proceedings below precludes consideration of this issue by appellate (or habeas) review. (See generally *People v. Stansbury* (1993) 4 Cal.4th 1017, 1056-1057, reversed on other grounds by *Stansbury v. California* (1994) 511 U.S. 318, 326-327.)

5. *Failure to Instruct the Jury Regarding Factual and Actual Innocence*

Vilar challenges the court's failure to instruct the jury on the principles of factual innocence and actual innocence. However, the issue of factual innocence is determined by the court, not the jury, and thus the court was not required to instruct the jury on it. (See Pen. Code, § 851.8, subd. (c)⁵ [providing that in any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action to make a finding that he is factually innocent of the charges for which the arrest was made].) Similarly, actual innocence is an element of a civil claim for legal malpractice against a criminal defense attorney; it is not a matter on which the jury in a criminal proceeding must be instructed. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1205.)

6. *Failure to Instruct on Lesser Included Offenses of Attempted Kidnapping*

Vilar also contends that the court failed to instruct on lesser included offenses of attempted kidnapping. Notably, however, he does not identify any lesser included offenses of attempted kidnapping and we have found none. Vilar has not established error in this regard.

7. *Failure to Continue the Sentencing Hearing*

Vilar argues that, after the court relieved his trial counsel, it improperly failed to give the OAC attorney sufficient time to prepare for sentencing. However, neither Vilar,

⁵ All further statutory references are to the Penal Code.

nor the OAC attorney, raised any objection to proceeding immediately with the sentencing at the continued hearing, nor did either make a showing that the attorney was unprepared to proceed or that there was other good cause for a continuance. (See § 1050, subds. (a), (e).) Moreover, because the issue was not raised below, it has not been preserved for appellate review. (See generally *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98 [recognizing that an appellate court generally will not consider challenges to a proceeding or ruling as to which an objection could have been, but was not, presented to the lower court].)

8. *Imposition of Consecutive Sentences on Counts 1 and 2*

Vilar objects that the court erred in imposing consecutive sentences on the attempted kidnapping counts. Under California law, when a person is convicted of two or more crimes, the trial court has the discretion to impose the sentence on subordinate counts consecutively or concurrently. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000.) Here, the court ordered the sentence on count 1 to run consecutively to the sentence on count 2 rather than concurrently based on the fact that Vilar was on probation at the time he committed the offenses. We review this decision under an abuse of discretion standard, which requires that Vilar show the decision was irrational or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) He has not met that burden. (See Cal. Rules of Court, rules 4.421(b)(4) [recognizing a defendant's probationary status as an aggravating circumstance], 4.425(b) [allowing the court to rely on any aggravating circumstance that is not also used as the basis for the selection of an upper term sentence to impose consecutive terms].)

9. *Ineffective Assistance of Appellate Counsel*

Vilar contends that he suffered from ineffective assistance because his appellate counsel requested an extension of time to file an opening brief and then "erroneous[ly] filed a *Wende* brief." He provides no explanation as to what counsel should have done or how he was prejudiced by counsel's actions or inaction. As such, Vilar has not met his burden of showing that his appellate counsel's representation fell outside "the wide range of reasonable professional assistance" or that he has suffered prejudice as a result of such representation. (*Strickland, supra*, 466 U.S. at pp. 689, 691-692.)

10. *Imposition of Sentence*

A. The Calculation of Credits

The court initially awarded Vilar custody credits of 692 days (462 actual days plus 230 days of conduct credits) on the sentence for the attempted kidnapping convictions and 842 days (562 actual days plus 280 days of conduct credits on the probation revocation sentence, but later reduced the credit award on the probation revocation sentence so that Vilar received 156 days of credits (104 actual days plus 52 custody credits).⁶ Vilar challenges this reduction of his custody credits, contending that he should have received the 692 days of credits he accrued in custody between his arrest for the current offenses and the sentencing hearing as to the probation revocation offenses as well.

⁶ This correction, which did not appear in the original record prepared for this appeal, obviates the Attorney General's challenge to the credit award relating to the probation revocation offenses.

Pursuant to section 2900.5, a convicted person is entitled to credits against his sentence for all presentence custody (including conduct credits that accrue during the period of actual custody), "where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subds. (b), (a).) Thus, if the time served in custody on a revocation term is based solely on the conduct that resulted in a later criminal sentence, the defendant will be entitled to presentence credit for that period. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180; *People v. Williams* (1992) 10 Cal.App.4th 827, 834-835.)⁷

The statute further provides, however, that custody credits can only be awarded once "for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b).) As the court here ordered that the sentence on the probation revocation offenses would run consecutively to the sentence on the attempted kidnapping offenses, Vilar is not entitled to have the custody credits applied to both sentences. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1415.)

⁷ The underlying purpose of the statute is to "eliminate the unequal treatment [that would be] suffered by indigent defendants who, because of their inability to post bail, [would otherwise serve] a longer overall confinement than their wealthier counterparts." (*In re Rojas* (1979) 23 Cal.3d 152, 156.)

B. The Imposition of Sentence on Probation Revocation Counts 2 and 4

In general, a person may be convicted of more than one crime arising out of the same act or course of conduct. (§ 954; *People v. Reed* (2006) 38 Cal.4th 1224, 1226.) However, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) When multiple convictions are permissible, but multiple punishment is not, the trial court must stay the execution of sentence on the convictions for which multiple punishment is prohibited. (*People v. Sloan* (2007) 42 Cal.4th 110, 116.)

Section 654's prohibition against multiple punishment is construed broadly because few, if any, crimes are the result of one physical act. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1467.) Thus, section 654 applies not only to sentences arising out of a single act, but also to those arising out of a course of conduct that comprises an indivisible transaction. (*Id.* at pp. 1467-1468.) Whether a course of conduct is divisible or indivisible turns on the intent and objective of the defendant; if all of the offenses were committed pursuant to a single objective, only one punishment may be imposed. (*Id.* at p. 1468.)

In his supplemental briefing on this appeal, Vilar's counsel argues for the first time that the superior court erred in imposing (rather than staying) sentence on two of the counts for which probation was revoked. At this late point in the proceedings (and given that the current record does not include the details of the underlying offenses), we decline

to address this contention, but note that Vilar may seek relief from an unauthorized sentence from the trial court in the first instance. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764-765.)

DISPOSITION

The judgment is affirmed; petition denied.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.