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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KARINA ROCHA,

Defendant and Appellant.

H037640

(Monterey County

Super. Ct. No. SS101400)

Defendant Karina Rocha was convicted by jury trial of two counts of second degree robbery (Pen. Code, § 211) and one count of commercial burglary (Pen. Code, § 459) and committed to state prison for a six-year term. On appeal, she contends that her trial counsel was prejudicially deficient and that the trial court erred in prejudging her sentence.<sup>1</sup> We find no prejudicial deficiencies and conclude that the trial court did not prejudice her sentence. Hence, we affirm the judgment.

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<sup>1</sup> Defendant also filed a petition for a writ of habeas corpus, which we dispose of by separate order.

## I. Factual and Procedural Background

Defendant and her boyfriend Javier Diaz were good friends with Armando Navarrete, and they spent a lot of time together in the summer and fall of 2007. Defendant had been working for a year as a teller at a Union Bank in Prunedale.

On October 9, 2007, the bank opened at 7:30 a.m. Defendant was working at the bank that day along with Luisa Parra, the customer service manager, and Cristina Quintero, another teller. Parra had the “master key” for the vault, but it took two keys to open the vault. Quintero and defendant each had a second key for the vault.

A couple of customers came in right after the bank opened. As soon as those customers left, Diaz and Navarrete came into the bank. The two men had material wrapped around the lower parts of their faces so that only their eyes and foreheads could be seen. Navarrete had a single fake bushy eyebrow above one eye. With a gun in his hand, Navarrete jumped onto and over the counter, stood between Quintero and the counter (where the alarm button was located), and put his gun to Quintero’s head.<sup>2</sup> He told her not to look at him and to look down. Navarrete told her to give him “all the money.”

Quintero called out to Parra to “come over.” Parra did so. Navarrete pointed the gun at the two women’s “faces” and demanded money, and Parra told Quintero to “give him her money.” The bank’s policy was to hand over money to robbers for the safety of employees and customers. Quintero gave Navarrete money from her teller drawer. Navarrete repeatedly told them not to look at his face.

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<sup>2</sup> Although she did not immediately recognize Navarrete, Quintero eventually realized that the man with the gun had been Navarrete, whom she had previously met when defendant tried to set up a date between Quintero and Navarrete. Defendant had described Navarrete to Quintero as a friend of her boyfriend. The two met at a club, but Navarrete was “very drunk.” Quintero did not like him, and the date never happened.

Because Navarrete stood “very close” to both Parra and Quintero, neither Parra nor Quintero had the opportunity to press the “panic button” that would notify the police. Defendant was not near them. Diaz escorted defendant to the front door, and she locked the door. After Quintero gave Navarrete the money from her drawer, Navarrete asked “‘Now, where’s your vault area?’” Parra pointed to the back, and Navarrete said “‘Okay. Let’s go over there.’” Diaz and defendant joined them, and they all proceeded to the vault area. Navarrete appeared to be in charge, and Diaz said nothing.

Navarrete demanded that Parra “hurry” and open the vault. The “vault” was just a couple of safe deposit boxes. Parra inserted her master key and obtained a key from one of the tellers. She opened the vault, pulled out money, and put it in the plastic bags that the two men provided. The men “kept asking for more.” After Parra had put over \$40,000 in the bags, she looked over their shoulders and falsely said “they’re coming,” which scared the men. They stopped demanding more money and said “Let’s get out of here.” Navarrete pushed the three women into the nearby safe deposit room and closed the door, and the two men ran. After going the wrong way at first, the two men left the bank by the rear exit. Once she was sure they had left, Parra came out and pushed the alarm button.

Deputies from the sheriff’s department arrived 10 to 15 minutes later. Defendant told them that she did not recognize either man. She also reported that the gunman had a “Hispanic type accent.” Defendant claimed that she was not near her station and therefore could not have activated the alarm.

Parra later that afternoon found on the floor the fake bushy eyebrow that Navarrete had been wearing. The police retrieved the eyebrow. DNA from two contributors was found on the eyebrow.

Defendant quit her job at the bank in January 2008. Monterey County Sheriff’s Detective Martin Opseth contacted defendant that month to request an interview. He called her several times on her cell phone, and she was always the one to answer that

phone. During their subsequent interview, defendant confirmed that she had known Navarrete since August 2007. Opseth asked defendant to make a pretext call to Navarrete. She agreed, but the phone number she provided for Navarrete was disconnected. A week later, she provided a different number, and the call was made. During that call, Navarrete calmly, and without surprise, denied any involvement in the robbery.

In February 2008, Diaz's car was stopped by police. A gun resembling the one used in the robbery was found in his car and seized.

A few weeks after the pretext call, Opseth obtained Navarrete's DNA. Navarrete's DNA matched one of the contributors of the DNA found on the eyebrow. Parra identified a photo of Navarrete as looking like the gunman. Opseth arrested Navarrete in March 2008, and Navarrete was charged with and convicted of bank robbery.

The second DNA contributor on the eyebrow was subsequently determined to be Diaz. By that time, Diaz could not be found. Opseth had obtained defendant's cell phone records, which showed that there had been many calls between her cell phone and Navarrete's cell phone in early October 2007. There were 18 calls between these two phones on the day before the robbery. The last of these was a call just before midnight. There was also a call just after midnight on October 9, the day of the robbery, and two calls just after 5:00 a.m., two hours before the robbery. After this flurry of calls, the next call between these two phones was in the afternoon on the day of the robbery. There were 16 more calls that day, and one the following day. Then there were no more calls between these two phones for the rest of the month of October 2007.

## II. Procedural Background

Defendant was arrested and charged by information with two counts of second degree robbery, two counts of kidnapping for robbery, and one count of commercial burglary. Defendant's motion to dismiss the kidnapping charges was granted.

Christina Orozco, defendant's best friend from the age of 13 or 14 until January 2008, testified for the prosecution at trial. Defendant and Diaz introduced Orozco to Navarrete in July or August 2007. The four of them spent a lot of time together thereafter.<sup>3</sup> Although Orozco and defendant talked to each other every day, defendant did not mention the robbery until after Orozco, who had read about the robbery, asked her about it.

Navarrete also testified for the prosecution at defendant's trial. He was in prison serving a sentence of 17 years and four months for the bank robbery. He was testifying in exchange for the prosecutor's promise to ask a judge to reduce his sentence by four to six years and move him to "a safer prison." Navarrete testified that, a "few months" before the robbery, Diaz suggested that it would "be easy to rob that bank." Navarrete did not take him seriously the first time he mentioned it. Shortly thereafter, Diaz brought it up again in defendant's presence. Defendant agreed with Diaz that it would be "easy to rob the bank when she worked there." Defendant said that the bank had been robbed before of \$5,000 and the "investigation wasn't really ran like in-depth." Navarrete expressed interest in the idea.

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<sup>3</sup> Navarrete became the father of Orozco's son. Navarrete and Orozco became engaged in January 2008. Orozco was no longer romantically involved with Navarrete at the time of defendant's 2011 trial, but she still talked to him "[e]very other day." On October 5, 2007, Orozco had purchased two cell phones; one for herself and one for Navarrete. The one she purchased for Navarrete was the one that was used to communicate with defendant's cell phone repeatedly around the time of the robbery.

They began to make plans to obtain a gun and a getaway car. Defendant “showed us a map of the bank and told us, like the exit routes and told us about, like, the marked money, like security issues . . . stuff like that.” Defendant actually “drew a map” of the inside of the bank. Defendant “thought it would be a better idea if we exited through the fire exit, through the back. Because no one really knew about that exit, and if we came out of the back exit, no one would actually see us running from the bank.” She also showed them the bank’s work “schedule” and told them “when she thought it would be best like to commit the robbery because it was just her and two other females working.” Defendant told them that she would need to lock the front door so that no one would come in during the robbery. They arranged that Diaz would escort her to the front door after the two men came into the bank, while Navarrete held the gun on Quintero. She also told them that they needed to make sure that the women stayed away from the counter because that was where the silent alarms were located. Defendant informed them that there would be more money in the vault. And she told them that there was a little room where the two men could put the women while they escaped. Navarrete arranged for them to buy a gun, and Diaz and defendant went and picked up the gun. They gave the gun to Navarrete. Navarrete recruited a getaway driver. Diaz decided that they would use his father’s truck as a getaway vehicle.

On the day before the robbery, they did “a dry run.” Defendant and Diaz picked up Navarrete and the getaway driver, and they drove to the bank, scoped out the area, and planned the getaway. Defendant and Diaz gave Navarrete the fake bushy eyebrow to “wear as a disguise, so that we wouldn’t get recognized.”

After the robbery, defendant informed Navarrete that the fake eyebrow had been found, and “that if she had an opportunity to, she would retrieve it and get rid of it.” Navarrete got \$15,000 of their take, while the getaway driver got \$3,000, and Diaz and defendant split the rest. Defendant told them that some of the money they had taken was “marked” so it needed to be spent “far from where we were at.” She drove them to Los

Angeles to spend this portion of the money. After defendant was asked to do the pretext call, she warned Navarrete in advance so that he would not be surprised.

Defendant's trial counsel argued to the jury that Navarrete was "lying about everything" in order to get a sentence reduction for himself. The jury returned guilty verdicts on all three counts. The court committed defendant to state prison for a six-year term. Defendant timely filed a notice of appeal.

### **III. Discussion**

#### **A. Ineffective Assistance of Counsel**

Defendant contends that her trial counsel was prejudicially deficient in "fail[ing] to object to clearly inadmissible testimony" at trial. She divides these instances into "three categories:" (1) testimony about a confidential informant, (2) "*inadmissible hearsay*" corroborating Navarrete's testimony, and (3) "irrelevant or unduly prejudicial testimony that unfairly cast suspicion on appellant or invited the jury to make unwarranted inferences."

When a defendant challenges her conviction based on a claim of ineffective assistance of counsel, she must show that counsel's performance was deficient and that her defense was prejudiced by those deficiencies. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland*, at p. 687.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694.)

## **1. Testimony About Confidential Informant and Search Warrant**

Before Opseth testified, defendant's trial counsel asked the court to rule "that he not in any way make reference to any comments that were made to him by a person who's mentioned in the police reports as a confidential informant, it's hearsay." He clarified that he "just didn't want any of the statements." It was agreed by counsel that Opseth could testify that he "got information and acted after that" "just simply . . . to explain his conduct."

The prosecutor asked Opseth: "And in bank robberies in general, and particularly this one, are tellers sometimes suspected? And if so, why?" Opseth explained that "they're the ones with all the information. They have the bank layouts, they know the schedules, they know how to get in and out the quickest, they have access to keys for vaults and that kind of stuff." The prosecutor asked Opseth if his investigation had focused "on any one of those tellers." Opseth said yes, and, when the prosecutor asked who, said "[t]hat would be [defendant]." The prosecutor then asked why. Opseth explained that, "[s]everal months" after the robbery, "I received some information that led me in that direction." Opseth testified that a "confidential informant" (CI) who was "a good samaritan" had "passed" "information" to him at the end of December 2007 or the first week of January 2008.

This colloquy then occurred: "Q. Okay. Let me take it by point. What was the next thing you did after you got this information, again without detailing that information? [¶] A. Based on my observations from the crime scene and -- and the information I received from -- from the CI, I was able to put together a search warrant, and it was signed and approved by a judge, sealed the information involved in the CI's information for his or her protection, and went on from there. And the purpose of that search warrant was to first obtain phone records from [defendant]." Opseth went on to testify that "we didn't know enough what we were actually looking for on the phone

records, we just wanted to see who [defendant] had -- maybe if she had called anyone or if she had any type of relationships or something that we could use to talk to her about.”

Defendant contends that her trial counsel was prejudicially deficient in failing to object to Opseth’s testimony that the CI’s “information” had supported a search warrant for defendant’s phone records. Even if we assume that trial counsel was deficient in failing to object to this testimony, we find no prejudice.

Opseth obtained the warrant for defendant’s phone records on January 15, 2008. When he interviewed defendant on January 25, she admitted knowing Navarrete. A week later, Parra and Quintero identified Navarrete in a photo lineup. Navarrete was swiftly arrested, charged, and convicted of the bank robbery. However, defendant remained free.

Defendant’s prejudice contention is based on her claim that the jury would have inferred from Opseth’s testimony that the CI provided Opseth with information incriminating defendant. The only inference that could be drawn by the jury from Opseth’s testimony was that the CI’s “information” incriminated Navarrete in the bank robbery and identified defendant as an associate of Navarrete. It was evident to the jury that the CI’s “information” did no more because Opseth testified that he “didn’t know” what he was “looking for on the phone records,” and he did not immediately pursue defendant as a suspect. Since it was undisputed at trial that Navarrete robbed the bank and that defendant knew Navarrete well and spent a lot of time with him in the time period leading up to the robbery, the sole inference that the jury could have drawn regarding the nature of the CI’s “information” added nothing to the case against defendant and therefore was not prejudicial to defendant.

## **2. Hearsay Testimony**

Defendant contends that her trial counsel was prejudicially deficient in failing to object to testimony by Orozco regarding a statement made by defendant and to testimony by a police officer regarding a computer found in Diaz’s residence.

Orozco testified that, sometime in November 2007, the month after the bank robbery, Orozco and defendant were shopping together when defendant received a cell phone call. Defendant told Orozco that “it was Javi [Diaz].” After defendant got off the phone, defendant “said they were planning to do a job at the bank.” On cross, defendant’s trial counsel asked Orozco if she had ever told Opseth about this “reference that they were planning another job.” Orozco responded that she had told Navarrete’s defense attorney but had “no reason” to “help” the prosecution against Navarrete.

Defendant claims that Orozco’s testimony that defendant “said they were planning to do a job at the bank” was inadmissible hearsay. This testimony was not inadmissible hearsay. Orozco’s testimony regarding defendant’s statement was admissible hearsay because defendant’s statement was the admission of a party. (Evid. Code, § 1220.) Defendant assumes that Orozco’s repetition of defendant’s statement was inadmissible because defendant was allegedly repeating a statement made by Diaz, making Orozco’s testimony double hearsay, only one level of which was within a hearsay exception. However, Orozco’s testimony was *not* that defendant said *that Diaz said something*. Instead, Orozco testified that defendant merely made this statement *after receiving the call from Diaz*. The fact that one might be able to intuit that defendant had learned this information from Diaz during their conversation does not mean that defendant’s statement became hearsay. In any case, there was no indication that defendant’s statement was admitted for its truth. It was irrelevant whether “they” were in fact planning another “job at the bank.” The relevance of this statement was that it demonstrated that defendant was privy to “the[ir]” plans regarding a future “job at the bank.” A reasonable factfinder could infer from her *knowledge* of such future plans that she had also been privy to the advance planning for the prior “job at the bank,” the October 2007 bank robbery with which she was charged. Because this statement was

admissible for a nonhearsay purpose, Orozco's testimony was not inadmissible hearsay. Thus, defendant's trial counsel was not deficient in failing to object.<sup>4</sup>

Defendant claims that her trial counsel was deficient in failing to object to testimony he elicited regarding the identity of the "administrator" on a computer found in Diaz's residence. After Salinas Police Officer Carlo Calupad testified that he had found a firearm in Diaz's vehicle, defendant's trial counsel asked him on cross if he had subsequently searched Diaz's residence. Calupad said he had. Defendant's trial counsel asked Calupad if he had found anything with defendant's name on it. Calupad responded: "Documents, no; but we did find a desktop computer, and one of the administrators on that computer was in the name of Karina." Defendant's trial counsel asked if Diaz "was also an administrator" on the computer. Calupad said he did not know. Defendant's trial counsel then asked: "So, you only remember that there was one administrator on the computer?" Calupad responded: "Yes, *according to the report submitted by Officer Danny Warner, the forensic evidence officer.*" (Italics added.)

Defendant appears to contend that, after eliciting this testimony, defendant's trial counsel should have moved to strike it as hearsay because it was based on another officer's personal knowledge. We see no possibility of prejudice from this snippet of testimony. The search in question occurred in 2008, not in 2007 when the bank robbery occurred. There had already been testimony by Diaz's father that defendant had lived with Diaz in his parents' home in 2007, the year the robbery occurred. Navarrete later testified that, at the time of the robbery, defendant and her son were living with Diaz. In light of the fact that Diaz's father corroborated Navarrete's testimony that defendant was living with Diaz at the time of the bank robbery, evidence that she was the administrator

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<sup>4</sup> During deliberations, the jury submitted the following inquiry: "re: testimony of Christina Orozco: [¶] When did she say (what date?) that Karina (defendant) called on phone and told her 'they were going to rob the bank?'" The court responded to this inquiry by having the court reporter read back Orozco's testimony to the jury.

on a computer found in his residence the following year was of such little import that the failure to move to strike could not possibly have resulted in any prejudice to defendant.

### **3. Irrelevant or Unduly Prejudicial Testimony**

Defendant asserts that her trial counsel was prejudicially deficient in failing to object to (1) Orozco's testimony about defendant's "shopping 'habits' and credit card usage," (2) Opseth's testimony about why tellers are sometimes suspects in bank robberies, and (3) Opseth's testimony that defendant had lost custody of her son.

The prosecutor asked Orozco if defendant "ever discuss[ed] with you monetary problems?" Orozco said no.<sup>5</sup> The prosecutor then asked Orozco about defendant's spending habits. Orozco testified that she and defendant would go shopping, and defendant "would always be buying stuff . . . with different credit cards." Orozco testified that defendant was working part-time as a bank teller, while Orozco was working full-time as a paralegal. The prosecutor asked Orozco if defendant "spent more or less than you on these shopping sprees?" Defendant's trial counsel's unspecified objection was overruled. Orozco responded "Oh, more than me." The prosecutor also elicited Orozco's testimony that, because Orozco "did not have good credit," in November 2007 defendant purchased a car under her name with Orozco paying the down payment and insurance. After Orozco had made one payment on the car, defendant "took

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<sup>5</sup> Sheriff's Sergeant Fred De La Santos testified about his interview with defendant a week after the robbery. This colloquy occurred: "[The Prosecutor:] Did you talk to her about whether or not she had money problems? [¶] A. Yes. [¶] Q. What did she say? [¶] A. She said everybody has money problems, but nobody talked about needing a lot of money." Defendant's trial counsel explored this issue on cross. "Q. And you asked Ms. Rocha, I believe, as it says in the police report, 'Did you notice anybody in the bank having money problems?' [¶] A. Correct. [¶] Q. And that was the question; right? [¶] A. Something along those lines. [¶] A. Did you want -- [¶] A. Has anybody talked about having money problems or needing money, something like that. [¶] Q. Okay. And it was with reference to that that Ms. Rocha replied to you, 'Everyone has money problems'? [¶] A. Correct."

the car away” from Orozco. Their friendship ended after that. Orozco admitted on cross that she continued to have “a lot of hostility towards” defendant.

It is difficult to understand how this testimony was prejudicial to defendant. Orozco did not testify that defendant had monetary problems. Indeed, she testified that, despite the fact that defendant spent more money than Orozco did, it was Orozco, not defendant, who had poor credit. In light of Orozco’s admitted hostility toward defendant and the fact that their friendship ended due to a property dispute, Orozco’s testimony about defendant’s spending habits and credit card usage was more likely to demonstrate Orozco’s jealousy and bias than to result in prejudice to defendant. Indeed, defendant’s trial counsel’s failure to object to this testimony appears to have been a tactical choice in light of the fact that, on cross, defendant’s trial counsel asked Opseth if he had “noticed” defendant, since the robbery, “buying any expensive automobiles” or “making any exorbitant purchases?” Opseth replied: “No. I actually got the impression that money was very tight for her and her family.” Even if the omission of an objection to Orozco’s testimony was not tactical, any deficiency in failing to object was not prejudicial.

Defendant claims that her trial counsel was prejudicially deficient in failing to object to Opseth’s testimony about the reasons why tellers are sometimes suspected in bank robberies. As we mentioned earlier, the prosecutor asked Opseth: “And in bank robberies in general, and particularly this one, are tellers sometimes suspected? And if so, why?” Opseth explained that “they’re the ones with all the information. They have the bank layouts, they know the schedules, they know how to get in and out the quickest, they have access to keys for vaults and that kind of stuff.” Opseth’s testimony was not irrelevant; it explained why defendant might have been investigated regardless of any incriminating evidence. This was not a case where the evidence of defendant’s guilt was based on the mere fact that she was a teller. Instead, the evidence of her guilt was based on her close associations with the two robbers, who were her live-in boyfriend and his good friend, and testimony by one of the robbers that she had played a large role in the

planning of the robbery. Under these circumstances, defendant's trial counsel was not deficient in failing to object to Opseth's relevant and nonprejudicial testimony.

Finally, defendant claims that her trial counsel was prejudicially deficient in failing to object to Opseth's testimony that defendant had lost custody of her son.<sup>6</sup> Opseth testified that defendant had told him that she had married Diaz. The prosecutor asked if she had provided "a date of marriage." Opseth said no, and he explained that defendant had told him that "they had separated because she had lost custody of her son, I believe his name is Jaden, to her previous boyfriend. So, I guess she was no longer with him at that point in order and hopes that she would get her son back." While we agree with defendant that this testimony was irrelevant, we find no prejudicial deficiency in her trial counsel's failure to object. This testimony had both positive and negative aspects. The positive aspect was that it portrayed defendant as such a devoted mother that she was willing to end her marriage in order to regain custody of her son. The negative aspect was that it pointed out that defendant had lost custody of her son. Defendant's trial counsel could have reasoned that this testimony helped defendant more than it hurt her. In any case, evidence that defendant had lost custody of her son was not likely to prejudice the jury against her with regard to its factual findings concerning the charges against her. Even if the jury assumed that her loss of custody was due to parental unfitness, there was nothing to connect that to her culpability for the bank robbery.

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<sup>6</sup> Defendant mentions, but does not actually fault her trial counsel in regards to, testimony by Opseth that he "had reason to believe that" the gun found in Diaz's car in February 2008 "was possibly the gun used in the bank robbery." Although Opseth did not explain the basis for his belief, both Navarrete and Parra testified that the gun looked like the one used in the robbery.

#### **4. Cumulative Prejudice**

Defendant maintains that her trial counsel's alleged deficiencies were cumulatively prejudicial. However, since we have concluded that none of the alleged deficiencies resulted in any significant prejudice, they were not cumulatively prejudicial.

#### **B. Sentencing**

Defendant argues that the trial court erroneously "prejudged" her sentence because, after pretrial plea negotiations, the court suggested that she likely faced a prison sentence of more than the three years in prison that was then being offered by the prosecution under a proposed plea agreement.

##### **1. Background**

After the court had ruled on in limine motions, the court made a statement "siz[ing] up the Court's perspective on the effort at negotiating a disposition this morning." The court expressed the opinion that the prosecutor's offer of three years in prison was "particularly reasonable." It elaborated on the basis for this opinion. Defendant's maximum exposure was seven years in prison, and she would be limited to 15 percent credit. The court noted that it was "extremely familiar with the circumstances of what happened in the bank at the time" because "I've been through the trial [apparently of Navarrete]." In the court's view, probation would not be a "realistic expectation" if defendant was convicted. The lowest possible prison term would be two years, but the court felt that was "not likely." Hence, it would be unrealistic for defendant to expect to receive a prison term less than the offer if she was convicted. "You can get three years, but . . . that means the Court would have to strike the weapons enhancement<sup>7</sup> and not impose a consecutive term, which would be one year for the

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<sup>7</sup> There was no weapons enhancement alleged. At the sentencing hearing, the prosecutor said: "And we did not add a gun enhancement, a vicarious arming

second robbery. There are two robberies alleged because there are two victims that are alleged. And it would be ignoring the fact of the second robbery and it would be ignoring the fact of the weapons enhancement.” “I don’t know what the case is going to actually look like until the evidence is in and the jury’s returned its verdict. [¶] If they should convict you, it’s just that it’s difficult for me conceptually to think in a bank robbery, I’m going to ignore the gun, I’m going to ignore the second victim. Each one of those is worth an additional year. Okay? And so, if you get convicted of everything, it just seems that it’s really unlikely that you’re going to get anything less than four, and that you very well could get five.” “So the offer that’s being made to you today is three years, which is I’ve already explained the only way you get there is by maybe a lower term plus one, ignoring a lot of things.” “Awful lot to lose if you do lose in the trial.” The court urged defendant to think about the offer over the lunch break. Defendant did not accept the offer.

After the jury returned guilty verdicts, the prosecutor sought a six-year prison term. The defense sought probation. The court rejected probation. “This is a case that is the definition of prison. An armed bank robbery.” “[T]he only [one] issue really here is what’s the term? And I do take into consideration the uncharged enhancement in this case. [¶] There was a gun used. . . . That is a factor in aggravation.” The court found that defendant’s role in the crime was “central to the plan.” “And then I cannot eliminate from the facts and circumstances of this case that you were able to pass a voice test, stress test. That says something to me.” The court found that two factors, “the threat of violence with a gun” and “the sophistication, planning” “individually without reference to one or the other is an aggravating factor that far out weighs any factors in mitigation.” The only factor in mitigation was defendant’s “lack of record.” The court also found, as

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enhancement, for strategic reasons.” Apparently, an arming enhancement had been “discussed,” but it “was never added.”

“another factor in aggravation” that defendant was “the leader of a group.” For those reasons, the court selected the upper term of five years for one robbery count. It imposed a consecutive one-year term for the other robbery count because there were “separate victims.” The court also imposed a concurrent two-year term for the burglary count.

## 2. Analysis

Defendant contends that due process was violated because the court imposed “the maximum term after trial” after the court had “predicted [it] would impose such a sentence before any evidence or argument was received.”

She relies on *United States v. Crowell* (5th Cir. 1995) 60 F.3d 199 (*Crowell*). In *Crowell*, the Fifth Circuit found that a federal district court judge had violated a federal rule by participating in discussions about the as-yet-undetermined terms of a proposed plea agreement. Although the judge was permitted to comment on the finalized terms of a plea agreement presented to the judge for approval, the judge’s comments on a not-yet-finalized plea agreement were improper. (*Crowell*, at p. 204.) The federal rule at issue in *Crowell* is not applicable here, and the trial judge’s comments in this case were not made regarding *undetermined terms* of a proposed plea agreement. The terms of the prosecution’s offer were determined: it was offering a three-year prison sentence.

None of the other cases cited by defendant are on point. Nothing in the trial court’s pretrial comments suggested that it was threatening to impose a harsh term if defendant did not enter guilty pleas. Indeed, the court took pains to explain to defendant the full range of possible sentences that she might face if the jury convicted her of all of the counts in order to make sure that she was aware that the prosecution’s offer was a reasonable one. These pretrial comments did not in any way purport to commit the court to impose any particular sentence. Defendant’s claim that the court prejudged defendant’s sentence is belied by the record. The court accurately informed defendant of the legal reasons why she would likely receive a minimum of a four-year prison term and could well receive a five-year term. It made no specific mention of a six-year term. In

fact, defendant ended up receiving a six-year term because the evidence at trial disclosed the existence of multiple aggravating circumstances. The court certainly did not predetermine that defendant would receive an aggravated term. We find nothing in the trial court's pretrial comments to suggest that it violated defendant's due process rights by prejudging her sentence.

#### **IV. Disposition**

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Márquez, J.