No. 17 - _____

IN THE SUPREME COURT OF THE UNITED STATES

NORBERTO SERNA

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NORBERTO SERNA, Defendant and Appellant.	H041769 (Santa Clara County S. Ct. No. F1138256)

On February 6, 2011, defendant Norberto Serna and several other men broke into Gary Wise's house, beat him, and robbed him of valuables stored in two safes. Following a police investigation, defendant and his accomplices were arrested. Serna was charged with 10 counts, including kidnapping to commit extortion (Pen. Code, § 209, subd. (a)),[1] kidnapping to commit robbery (§ 209, subd. (b)), and torture (§ 206). Serna, who was tried separately from his codefendants, was convicted by a jury of all 10 counts and was sentenced to a term in prison of life without the possibility of parole.

On appeal, Serna raises numerous arguments, including: (1) there was insufficient evidence supporting his convictions for kidnapping to commit robbery and kidnapping to commit extortion, (2) the trial court should have granted his pretrial motion to dismiss the charges of kidnapping to commit robbery and kidnapping to commit extortion, (3) the police lacked probable cause to arrest him without a warrant, (4) he was insufficiently advised of his *Miranda*[2] rights and his waiver of rights was not voluntarily made, (5) his

[1] Unspecified statutory references are to the Penal Code.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

statements to the investigating officer were made involuntarily as a result of police coercion, (6) his son's testimony at trial was improperly impeached with prior inconsistent statements, (7) the trial court erred when it instructed the jury on kidnapping to commit extortion, (8) his sentence of life in prison without the possibility of parole is disproportionate under the federal and state Constitutions, and (9) his sentence violates equal protection principles. As set forth below, we find no merit to any of his claims. We affirm the judgment.

BACKGROUND

1. *The Complaint*

On May 28, 2013, the Santa Clara County District Attorney's Office filed an information charging Serna and codefendants Ernesto Gonzales, Juan Carlos Fonseca, and Juvenal Angel Reyes with the following 10 counts: (1) kidnapping for ransom, reward, or extortion and causing bodily harm with an enhancement for personally using a firearm (§§ 209, subd. (a), 12022.53, subd. (b)); (2) kidnapping to commit robbery and enhancements for personally using a firearm and inflicting great bodily injury (§§ 209, subd. (b)(1), 1203, subd. (e)(3), 12022.53, subd. (b), 12022.7, subd. (a)); (3) torture and enhancements for inflicting great bodily injury and personally using a firearm (§§ 206, 12022.7, 12022.53, subd. (b)); (4) assault with a deadly weapon (a pool cue) and an enhancement for personally using a firearm (§§ 245, subd. (a)(1), 12022.5, subd. (a)); (5) making a criminal threat and an enhancement for personally using a firearm (§§ 422, 12022.5, subd. (a)); (6) first degree robbery while acting in concert and an enhancement for personally using a firearm (§§ 211, 213, subd. (a)(1)(A), 12022.5, subd. (a)); (7) first degree burglary (§§ 459, 460, subd. (a)); (8) grand theft person (firearms) (§§ 484, 487, subd. (c)); (9) theft of an automobile (Veh. Code, § 10851, subd. (a)); and (10) arson of another person's property (a truck) (§ 451, subd. (d)). Serna was tried separately from his codefendants.

2. *The Offense*

On February 6, 2011, Wise lived on Rucker Avenue in a house in an unincorporated area in Gilroy, California. The driveway between Wise's house and Rucker Avenue was approximately a quarter mile long. Reyes lived across the street from Wise.

Serna knew Reyes. He and his son, Isaias Serna, sometimes worked for Reyes.[3] Reyes told Serna that Wise was wealthy and they should rob him. Reyes introduced Serna to Gonzales and Fonseca and told the men that Wise had two safes inside his house. Serna, Isaias, Gonzales, and Fonseca met with Reyes to plan the burglary. The men devised a plan to watch Wise, wait for him to leave his house, and break into the house under the cover of darkness. Gonzales asked Isaias to watch Wise during the burglary.

The day of the crime, Gonzales followed Wise to Wise's ex-wife's house. After Wise reached his destination, Gonzales drove back, picked up Serna and Fonseca, and dropped them off at Wise's house. Serna and Fonseca broke into the house while Wise was away. Meanwhile, Gonzales drove back to Wise's ex-wife's house to continue his surveillance.

The objective of the crime was to steal the two safes inside Wise's home. Serna and Fonseca attempted to move the safes, but they were too heavy to be moved. Fonseca called Gonzales and told him they were unable to take the safes. Gonzales called Isaias and asked him to take over surveilling Wise at his ex-wife's house. Shortly thereafter, Gonzales joined Fonseca and Serna at Wise's house. Gonzales wore gloves and a mask, and was in possession of a semiautomatic handgun. Together, the three men again attempted to move the safes but were still unable to do so. In the meantime, they took

[3] We refer to Isaias by his first name for clarity.

several television sets. Sometime later, Isaias called Gonzales and told him that Wise was on his way back home.

Serna and Fonseca told Gonzales they should leave, but he refused. Gonzales told Serna to position himself at the door. Fonseca stood in the hallway and Gonzales stood on the other side. Serna armed himself with what he called a "children's bat," an item that was described during the trial as a tire thumper. Gonzales and Fonseca picked up pool cues. Gonzales told Fonseca and Serna the plan was to hit Wise and tie him up.

When Wise returned home, he opened the front door to his house. Immediately, Serna, Gonzales, and Fonseca beat Wise. A pool cue used during the beating splintered in half during the assault. The tire thumper Serna used broke into several pieces when he hit Wise. At trial, Wise testified he was beaten inside the house. However, during Serna's interview with officers following his arrest, Serna said that when Wise fell from the front steps of his door outside when the men started beating him.[4] While Wise lay on the ground, the men zip-tied his feet together, carried him inside the house into the kitchen past the room where Wise kept his two safes, and tied him to a kitchen chair. The kitchen was approximately 25 or 30 feet from the front door. The men spoke to each other in Spanish, which Wise could not understand.

Afterwards, the three men picked the chair up with Wise in it and sat him in front of one of his two safes, which was approximately 20 feet away. One of the men placed a towel over Wise's head, obscuring his view. Wise already had trouble seeing out of one of his eyes due to the injuries he had sustained during the beating. Wise recalled that one of the men asked him for the combination to his black-colored safe and threatened his son if he refused. That man then put a gun inside Wise's mouth. Wise initially told the men he did not have the combination to the safe, because he did not want them to steal the

[4] During the investigation, officers found a pool of blood outside.

items, which included guns, that were inside. Wise acceded to the men's demands after they threatened his son.

The men attempted to open the safe with the combination, but were unable to do so. Wise asked the men to untie him so he could open the safe for them. They told him no. Wise then offered to open the safe if the men stood him up. The men agreed, and Wise opened the safe, which contained approximately 25 to 30 guns. The men emptied the safe and placed the guns on a blanket.

The men then turned their attention to Wise's second safe. The men asked Wise for the second safe's combination. Wise told them he did not know the combination, because the safe belonged to his wife. The safe contained several keepsakes Wise intended on giving to his son, casino chips Wise had been collecting, antique jewelry, and approximately $20,000. One of the men beat Wise several times with the pool cue to get him to divulge the combination. Another one of the men took a pair of pliers and squeezed the inside of Wise's nostrils. Afterwards, Wise told them the combination to the second safe was the same as the combination for the first safe. The men were able to open the safe by themselves. They emptied the contents of the safe into plastic storage bins and loaded the items onto Wise's truck.

After the men gathered the items in the safe, the house became quiet. Wise did not hear anything for the next 15 or 20 minutes. He continued to sit in the chair for approximately 30 minutes. Eventually, he was able to get inside his kitchen and free himself with a knife. The entire process took approximately three hours.

Wise opened the front door and saw his truck was gone. He was unable to find his cell phone or his wallet. He went back to his bedroom and sat on his bed for half an hour. He then made his way to a neighbor's house. It took him approximately an hour to an hour and a half to walk over, because he was in pain and kept falling down. His neighbor answered the door and called the police.

Sometime after committing the crime, Gonzales and Fonseca took the stolen property and stored it in an apartment Gonzales shared with his wife, Araceli. Gonzales drove Wise's truck, with Fonseca and Serna following. They reached a mountainous area and doused the truck with gasoline. Gonzales lit the truck on fire.

Afterwards, Serna called Gonzales and asked for a share of the stolen property. Gonzales told Serna he would have to wait. At some point, Gonzales disconnected his phone. Serna never received payment from Gonzales.

On February 7, 2011, Santa Clara County Sheriff's Office Deputy John Gonzalez responded to a report of a vehicle fire on Highway 9. When he arrived, the truck was still burning. The fire department was working to extinguish the flames. Deputy Gonzalez was unable to read the full license plate, but he noticed it was a personalized license plate. California Highway Patrol Officer Tyler Pudg obtained the charred license plate. Officer Pudg was able to make out a portion of the license plate. He went through several combinations of what the license plate could be, and was eventually able to match the license plate to Wise's truck.

On March 23, 2011, Santa Clara County Sheriff's Office Detective Sergeant Julian Quinonez received a tip from a citizen's informant about Wise's robbery. The informant provided Quinonez with information that had not been released to the media, including several names and a telephone number. Based on the information given by the informant, Quinonez focused his investigation on Serna, Gonzales, Reyes, and Isaias.

On May 3, 2011, officers arrested Serna, Gonzales, Fonseca, Isaias, and Araceli. Officers searched Gonzales's apartment but did not recover any stolen property. Isaias and Serna admitted they participated in the crime.

A few weeks later, Araceli called Sergeant Quinonez. Araceli told Quinonez that she had been cleaning her apartment, which she shared with Gonzales, when she noticed

her carpet looked different. She consented to another search of the house. After removing the carpet and some of the floorboards, officers discovered the stolen property.

3. *The Verdict and Sentencing*

On August 21, 2014, the jury found Serna guilty of all 10 counts. It also found true the allegation as to count 1 that Serna caused great bodily harm and the allegations as to counts 2 and 3 that he inflicted great bodily injury. The jury found the firearm use enhancements not true. On December 5, 2014, Serna was sentenced to a term of life without the possibility of parole. Serna appealed.

DISCUSSION

1. *Insufficiency of the Evidence*

a. **Standard of Review**

"In reviewing a challenge to the sufficiency of the evidence, we 'review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.' " (*People v. Sandoval* (2015) 62 Cal.4th 394, 423, italics omitted.)

b. **Kidnapping to Commit Robbery**

Wise was moved several times during the course of the crime. At trial, there was evidence he was beaten either inside or outside his front door and was transported approximately 25 to 35 feet to his kitchen. After he was tied to the kitchen chair, he was moved approximately 20 feet to the family room where his two safes were located. Serna argues these movements were merely incidental to the commission of the robbery, and

Wise was not subjected to an increased risk of physical or psychological harm from being moved. Thus, Serna argues there was insufficient evidence to convict him of the crime of kidnapping to commit robbery (§ 209, subd. (b)(1)). As we explain below, we disagree with Serna. We find sufficient evidence supports the jury's finding that moving Wise from the front porch to the room with the safes satisfied the two prongs of the asportation element of kidnapping to commit robbery.

Section 209, subdivision (b)(1) provides in pertinent part: "Any person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." Kidnapping for robbery has an asportation element. The asportation element for kidnapping for robbery requires "movement of the victim [that] is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (§ 209, subd. (b)(2).)

These additional requirements were derived from the California Supreme Court's decision in *People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*). In *Daniels*, two defendants committed several rapes. During each of the crimes, the defendants moved the victims a short distance within the premises in which the defendants found them. The California Supreme Court concluded that "some brief movements are necessarily incidental to the crime of armed robbery" and that "such incidental movements are not of the scope intended by the Legislature in prescribing the asportation element of the same crime." (*Id*. at p. 1134.) Applying this rule, the *Daniels* court held that the brief movements the defendants subjected their victims to did not satisfy the asportation element of the crime. (*Id*. at p. 1140.)

The two elements of the asportation element (movement that is not merely incidental to the crime that increases the risk of harm to the victim) "are not distinct, but interrelated, because a trier of fact cannot consider the significance of the victim's

changed environment without also considering whether that change resulted in an increase in the risk of harm to the victim." (*People v. Martinez* (1999) 20 Cal.4th 225, 236.)

Even small movements may satisfy the asportation element. "[N]o minimum distance is required to satisfy the asportation requirement [citation], so long as the movement is substantial." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*).) "Measured distance . . . is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors . . . . For example, moving robbery victims between six and 30 feet within their home or apartment [citation] or 15 feet from the teller area of a bank to its vault [citation] may be viewed as merely incidental to the commission of the robbery and thus insufficient to satisfy the asportation requirement of aggravated kidnapping. Yet, dragging a store clerk nine feet from the front counter of a store to a small back room for the purpose of raping her [citation] or forcibly moving a robbery victim 40 feet within a parking lot into a car [citation] might, under the circumstances, substantially increase the risk of harm to the victim and thus satisfy the asportation requirement." (*Ibid.*)

Thus, at issue here is not whether the relatively minimal movement (approximately 25-35 feet from the front door to the kitchen and an additional 20 feet to the family room) is, by measurement, sufficient to satisfy the asportation element. Rather, the dispositive issue is whether the movement was not merely incidental to the underlying crime of robbery and increased the victim's risk of harm.

Serna argues the movement was merely incidental to the crime. In part, he relies on *People v. Hoard* (2002) 103 Cal.App.4th 599. In *Hoard*, the appellate court concluded the defendant's forcible movement of jewelry store employees approximately 50 feet to the office at the back of the store was merely incidental to the robbery. (*Id.* at

p. 607.) The appellate court concluded that confining the two employees to the back office gave the defendant the freedom to access the jewelry and allowed him to conceal the robbery from entering customers. Thus, the movement was merely incidental to the robbery. (*Ibid*.) The movement also did not substantially increase the risk of harm to the women, because being restrained in the backroom had less risk of harm compared with remaining held at gunpoint at the front of the store. (*Ibid*.)

Similarly, in *People v. Washington* (2005) 127 Cal.App.4th 290, the appellate court found there was insufficient evidence of asportation to support a conviction of kidnapping to commit robbery. There, the defendants moved the victims from their original positions in the bank to the vault room. The court concluded these brief movements were merely incidental to the robbery. (*Id*. at p. 299.) The court derived a general rule, stating that a "robbery of a business owner or employee includes the risk of movement of the victim to the location of the valuables owned by the business that are held on the business premises." (*Id*. at p. 300.) Thus, the movement of the employees could not elevate robbery to aggravated kidnapping, because "the movement occurred within close proximity to where the robbery commenced and the only thresholds crossed were those that separated appellants from the bank's property." (*Ibid*.)

"Standing alone, the fact that the movement of a robbery victim *facilitates* a robbery does not imply that the movement was merely incidental to it. . . . Similarly, a movement of the victim that is *necessary* to the robbery might or might not be merely incidental, based on the circumstances." (*People v. James* (2007) 148 Cal.App.4th 446, 454 (*James*).) In both *Hoard* and *Washington,* the movements of the victims not only facilitated the robbery but were *incidental* to the robbery. A movement is incidental if "the asportation play[s] no significant or substantial part in the planned [offense], or that it be a more or less ' "trivial change[] of location having no bearing on the evil at hand." ' " (*People v. Ellis* (1971) 15 Cal.App.3d 66, 70 (*Ellis*).)

The People argue the facts of this case align more closely with those cases in which the victim's movements were not found to be incidental, such as *Ellis*, *supra*, 15 Cal.App.3d 66, *People v. Simmons* (2015) 233 Cal.App.4th 1458 (*Simmons*), and *People v. Vines* (2011) 51 Cal.4th 830 (*Vines*). In *Ellis*, the defendant was charged with several robberies where he confronted women outside their apartments or homes, forced them inside, and subsequently robbed them of money and other valuables. (*Ellis*, *supra*, at pp. 72-73.) The trial court set aside the charges under section 995, and the appellate court reversed. The appellate court found the asportation of the victims was essential to the accomplishment of the crime and the movement of the victims from the street to their homes increased the risk of harm above that of the crime of robbery. (*Ellis*, *supra*, at pp. 72-73.)

In *Simmons*, the defendants committed several home invasion robberies where they robbed victims outside their homes, forced them inside where additional people were present, and robbed them of additional items. (*Simmons*, *supra*, 233 Cal.App.4th at pp. 1469-1471.) The appellate court found there was sufficient evidence to support the defendants' convictions of kidnapping for robbery, finding the movement decreased the likelihood the defendants would be detected and increased the victims' risk of harm. (*Id*. at p. 1472.)

In *Vines*, the defendant walked an employee toward the safe of a McDonald's restaurant and ordered the employee to open it. (*Vines*, *supra*, 51 Cal.4th at p. 841.) The defendant then directed the employee to the back of the restaurant, where other employees were gathered. The defendant then directed all the employees to go downstairs, locking them inside the restaurant's freezer. (*Id*. at p. 842.) The Supreme Court noted that the victims were moved *inside* the restaurant premises. However, the Supreme Court distinguished the situation from that which was contemplated in *Daniels* by noting that the movement of the victims down into the locked freezer was *not* merely

incidental to the robbery and substantially increased the victim's increased risk of harm, citing to the low temperature of the freezer, decreased likelihood of detection, and the danger in the victim's attempts to escape. (*Id*. at pp. 870-871.)

Regarding the first prong of the *Daniels* analysis, we find the facts present a close case. We agree with Serna that some of the men's movements of Wise—such as moving Wise from the kitchen area to the room with the two safes—can be seen as facilitating the robbery. Serna also notes that Wise had to open one of the safes for the men after they were unable to unlock it with the combination. However, even movements of victims that are *necessary* to a robbery are not always *incidental*. (*James*, *supra*, 148 Cal.App.4th at pp. 454-455.) "Lack of necessity is a sufficient basis to conclude a movement is not merely incidental; necessity alone proves nothing." (*Id*. at p. 455.) Additionally, a reasonable jury could conclude that several of the movements were unnecessary, such as the movement of Wise from the front door to the kitchen where he was tied up. In fact, a jury could conclude moving Wise inside the house *at all* was unnecessary. The men could have asked Wise for the combination when they assaulted him at his front door. And there was evidence the men did not need to tie Wise to the chair in the kitchen in order to subdue him. At trial, Wise testified he could not move after the men beat him. Yet, the men zip-tied his legs together.

Furthermore, whether a movement was incidental and whether it increased a victim's risk of harm are not mutually exclusive elements; they are interrelated. (*People v*. *Rayford* (1994) 9 Cal.4th 1, 12.) There was evidence presented at trial that Wise fell outside after he was beaten, and moving Wise from outside the house to inside the house was not merely trivial in nature. By moving Wise inside, the men were able to gain even greater control over him. Despite the fact that Wise was not moved a great distance (he was moved a total of approximately 45 to 55 feet), the movement substantially decreased Wise's possibility of detection, escape, or rescue. (*Dominguez*, *supra*, 39 Cal.4th at

pp. 1153-1154 [movement of rape victim from side of road to spot in orchard approximately 25 feet away reduced possibility of detection, escape, or rescue, and was not merely incidental to rape].)

Although Wise lived in a secluded area, the jury could also reasonably infer that moving him from the outside of his house, where he had just parked his truck, into the interior of the house decreased his risk of escape and further reduced the likelihood that a neighbor or passerby would detect a crime. And there was evidence presented at trial that Wise lived close enough to his neighbors that they could hear cries of distress and increase his likelihood of rescue. During trial, Wise testified that outside his home, he could hear his neighbors working on cars and motorcycles and could also hear raised voices and children playing in his neighbor's backyard.

In his opening brief, defendant notes that *Daniels* implemented the two-pronged movement element in order to " 'eliminate[] the absurdity of prosecuting for kidnapping in cases where the victim is forced into his own home to open the safe, or to the back of his store in the course of a robbery.' " (*Daniels*, *supra*, 71 Cal.2d at p. 1138.) This statement in *Daniels*, however, does not undermine our conclusion. The *Daniels* court employed this sentence to explain why the drafters of the Model Penal Code decided on the particular formation for its statute defining kidnapping. (*Daniels*, *supra*, at pp. 1137-1138.) Furthermore, the generic situations presented in *Daniels*—merely moving a victim to his own safe and moving victims into the back of a store during a robbery—are not present here.[5] As we previously noted, some of the movements, such as moving Wise inside the kitchen where he was subsequently tied to the chair, were not necessary to facilitate the robbery. Furthermore, this particular scenario was not at issue

[5] Indeed, in *Vines*, *supra*, 51 Cal.4th 830, our Supreme Court found the asportation element satisfied in a case where victims were moved *within* the premises of the restaurant that was robbed.

in *Daniels*, so the court did not discuss or analyze whether the victim's movement would increase the victim's risk of harm.

Thus, we find substantial evidence supports Serna's conviction for kidnapping to commit robbery. As discussed above, we find that the movement increased Wise's risk of harm, was unnecessary, and thus satisfied the asportation element of the crime.

c. **Kidnapping for Extortion**

Next, Serna challenges the sufficiency of the evidence supporting his conviction for kidnapping for extortion (§ 209, subd. (a)). Section 209, subdivision (a) provides in pertinent part: "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to extract from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony . . . ." Serna argues there is insufficient evidence that Wise gave consent, that Serna extracted property from Wise, and that there was a secondary victim.

i. *Consent*

First, Serna argues that there is insufficient evidence Wise consented to the taking of any property. Serna argues that he and the other men never intended to induce Wise's consent; their only goal was to get to the items inside the two safes.

"[T]he crime of extortion is related to the offense of robbery; indeed, courts have sometimes found it difficult to distinguish these two offenses. [Citations.] The statutory definitions of robbery and extortion are structurally similar. [Citation.] Both offenses have their roots in common law larceny and both share a common element—acquisition by means of force or fear. [Citation.] The two crimes are distinguishable—in an extortion, the property is taken with the victim's consent, while in a robbery, the property is taken against the victim's will." (*People v. Kozlowski* (2002) 96 Cal.App.4th 853, 866

(*Kozlowski*).) Robbery requires "a specific intent to permanently deprive the victim of the property" and also "requires the property be taken from the victim's 'person or immediate presence.' " (*People v. Torres* (1995) 33 Cal.App.4th 37, 50 (*Torres*); § 211.) Extortion, on the other hand, "require[s] the specific intent of inducing the victim to consent to part with his or her property." (*Torres, supra*, at p. 50.) The consent may be induced by the wrongful use of force or fear. (§ 518.)

Serna argues that Wise never made a deal with Serna or any of the other men, and there was no evidence he had the specific intent to induce Wise into parting with his property. (See *People v. Peck* (1919) 43 Cal.App. 638, 643-644 [sufficient evidence of extortion when victim made deal with defendant].) Furthermore, Serna claims that once the safes were open, Wise did not give the men his permission to take the items inside the safe.

We disagree with Serna's characterization of the crime. "To constitute extortion the victim must consent, albeit it is a coerced and unwilling consent, to surrender of his property; the wrongful use of force or fear must be the operating or controlling cause compelling the victim's consent to surrender the thing to the extortionist." (*People v. Goodman* (1958) 159 Cal.App.2d 54, 61.) Here, the combinations to the two safes were intangible items. Serna and the other men could not physically take the combinations to the safes from Wise against his will, as required for a robbery. Thus, the jury could reasonably infer from the evidence presented that Serna acted with the intent to force Wise to consent—unwillingly, through the use of fear—and divulge the combinations to the safes.

Serna argues extortion cannot occur if the victim has no choice but to consent. He claims that the men's demands for Wise to give up the combination to the safe were akin to the demands of a mugger who threatens the victim with violence to obtain his or her purse or wallet. Serna relies on *People v. Anderson* (1922) 59 Cal.App. 408, 426

(*Anderson*). In *Anderson*, the defendants demanded the victim assign a certificate of registration, assign a bill of sale, and make a check in the amount of $95. (*Ibid*.) The court held that there was no evidence in the record that the property was "obtained 'under color of official right.' " (*Ibid*.) The court also concluded there was no evidence that the property was taken with the victim's consent. (*Ibid*.)

The issue in *Anderson*, however, was not whether there was sufficient evidence of extortion to justify a conviction. In *Anderson*, the court was concerned with whether the facts supported a conviction of *extortion* and not the charged crime of *robbery*. (*Anderson*, *supra*, 59 Cal.App. at p. 411.) Cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566.) Furthermore, we respectfully disagree with *Anderson* to the extent it construes the crime of extortion requires *willing* consent, in contrast to *unwilling* consent. "The victim of an extortioner might openly consent to the taking of his money 'and yet protest in his own heart' against its being taken." (*People v. Goldstein* (1948) 84 Cal.App.2d 581, 586.) In other words, Wise may have unwillingly parted with the combination to his safes. However, his unwillingness does not as a matter of law negate his consent. Thus, we find no merit in Serna's argument that there was no evidence he intended to commit extortion.

ii. *Property*

Next, Serna argues his conviction for kidnapping to commit extortion must be reversed, because there was insufficient evidence he intended to obtain money or property. He insists the combinations to the safes are intellectual constructs and are not "property" as defined under section 7, subdivisions (10) and (12).

A similar argument was considered and rejected in *Kozlowski*, *supra*, 96 Cal.App.4th 853. In *Kozlowski*, the defendants obtained the personal identification number (PIN code) from their victims. On appeal, the defendants argued the PIN codes were not property that could be extorted. (*Id*. at p. 864.) The *Kozlowski* court noted that

section 7, subdivision (10) provides that "property" includes "both real and personal property." "Personal property" includes "money, goods, chattels, things in action, and evidences of debt." (§ 7, subd. (12).) However, "[b]y its terms, subdivision 12 of section 7 does not create an exclusive list of personal property limited to those specifically named." (*Kozlowski, supra,* at p. 865.) "Property" also includes intangible items. (*Id*. at pp. 867-868.)

Construing the term "property" for the purposes of extortion, the *Kozlowski* court considered cases involving robbery, larceny, and extortion. (*Kozlowski, supra,* 96 Cal.App.4th at p. 866.) It concluded that for theft-based offenses, courts have construed "property" as "the exclusive right to use or possess a thing or the exclusive ownership of a thing." (*Ibid*.) "Thus, it may reasonably be said that a PIN code is property because it implies the right to use that access code—and to access the funds in the related bank account by means of that code. [Citation.] Operating as it does as a means of account access, a PIN code can be characterized as intangible property." (*Id*. at p. 867.)

Serna acknowledges the decision in *Kozlowski*, but urges this court not to adopt its rationale. He argues that by doing so, we would be overstepping our authority by expanding the definition of property to include something contrary to the explicit definition in the Penal Code. We reject Serna's arguments, and find *Kozlowski* to be persuasive. The Penal Code itself provides guidance. Section 7, subdivision (12) states that the term "personal property" *includes* "money, goods, chattels, things in action, and evidences of debt." There is no indication this list is meant to be wholly exhaustive of all items that can constitute personal property. Additionally, the term "property" should be broadly construed when used within the extortion statute. (*Kozlowski*, *supra*, 96 Cal.App.4th at p. 865.)

In short, we find the reasoning set forth in *Kozlowski* to be applicable to the factual circumstances presented here. Combinations to safes are analogous to PIN codes

associated with bank accounts. Like PIN codes, combinations to safes are intangible properties. Possessing them implies a right to use them to open whatever safes are associated with the combinations and access the items inside. Thus, there was sufficient evidence from which the jury could infer Serna extorted property from Wise.

iii. *Secondary Victim*

Lastly, Serna argues his conviction must be reversed, because there is no evidence of a secondary victim. Citing to *People v. Martinez* (1984) 150 Cal.App.3d 579, disapproved of on another ground in *People v. Hayes* (1990) 52 Cal.3d 577, 628, footnote 10, and *People v. Chacon* (1995) 37 Cal.App.4th 52, Serna claims that section 209, subdivision (a) is intended to apply only to those situations involving a primary and a secondary victim, where one of the victims is taken and the other is subjected to either a ransom or extortion demand. Serna argues that due process requires us to interpret section 209, subdivision (a) to require a secondary victim, because a contrary interpretation would be far from clear and violate the principles of due process.

Appellate courts have considered similar arguments and rejected them. Multiple courts have concluded that kidnapping for extortion does not require a secondary victim. (*Kozlowski, supra,* 96 Cal.App.4th at pp. 870-871; *People v. Ibrahim* (1993) 19 Cal.App.4th 1692, 1693, 1696-1698 (*Ibrahim*); *People v. Superior Court* (*Deardorf*) (1986) 183 Cal.App.3d 509, 513-514.) In *Ibrahim*, the court noted that section 209, subdivision (a) is phrased in the disjunctive, and it describes four types of aggravated kidnapping: "(1) for ransom; (2) for reward; (3) to commit extortion; and (4) to exact from another person any money or valuable thing." (*Ibrahim, supra,* at p. 1696.) The statute's disjunctive language precludes the application of "the 'another person' " requirement found in the fourth type of aggravated kidnapping to the first three types. (*Ibid.*)

Furthermore, we find Serna's reliance on *Martinez* and *Chacon* to be misplaced. The *Kozlowski* court, acknowledging these two decisions, stated: "In two other decisions, courts have suggested in dicta that even aggravated kidnapping for extortion is a two-victim crime involving a primary kidnap victim and a secondary extortion victim. (*People v. Chacon*, *supra*, 37 Cal.App.4th at p. 63 [kidnapping for ransom case]; *People v. Martinez*[, *supra*,] 150 Cal.App.3d 579, 590-591 . . . ; see *People v. Ibrahim*, *supra*, 19 Cal.App.4th at pp. 1696-1697 [rejecting this interpretation of *Martinez*].) Citing these cases, [defendants] reason that there are two conflicting lines of case law and argue that we should find the *Chacon-Martinez* cases more persuasive than *Ibrahim*. Like the *Ibrahim* court before us, we read the suggestions in *Chacon* and *Martinez* as dicta and decline to elevate them to law. Thus, we find no conflict in the case law. [Citation.] One may lawfully be convicted of kidnapping for extortion even if the kidnap victim and the extortion victim are the same person." (*Kozlowski*, *supra*, 96 Cal.App.4th at p. 871.)

We agree with *Kozlowski* that the language in *Chacon* and *Martinez* suggesting kidnapping for extortion requires a secondary victim is dicta. Thus, contrary to Serna's suggestion, there is no conflict in the law. And we agree with *Kozlowski* and *Ibrahim*'s conclusion that kidnapping to commit extortion does not require a secondary victim. Therefore, Serna's claim that there is insufficient evidence of a secondary victim to support his conviction under section 209, subdivision (a) is without merit. Additionally, having found no ambiguity with section 209, we also reject Serna's claim that the statute is unconstitutionally vague in violation of his due process rights. (*Kozlowski*, *supra*, 96 Cal.App.4th at pp. 871-872.)

2. *Denial of Serna's Section 995 Motion*

Serna argues the trial court erroneously denied his motion to set aside the information under section 995, because there was insufficient evidence he committed

extortion or kidnapping. We must reject this contention, because Serna fails to develop it on appeal.

At a preliminary hearing, the magistrate is tasked with determining whether there is sufficient cause to believe the defendant is guilty of the charged offense. (§§ 871, 872, subd. (a).) " '[S]ufficient cause' " is " ' reasonable and probable cause' " or "a state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (*People v. Uhlemann* (1973) 9 Cal.3d 662, 667.)

When deciding whether to set aside an accusatory pleading under section 995, the trial court must review the sufficiency of the evidence made before the grand jury or the magistrate in the preliminary hearing. (*Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 269.) On appeal, we review the preliminary hearing magistrate's determination and disregard the judge's ruling on the section 995 motion. (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 813.)

Here, Serna cites to the trial court's determination that there was sufficient evidence in the preliminary hearing that Serna kidnapped Wise to commit extortion and sufficient evidence of asportation in violation of section 209, subdivision (b)(1). He then argues the trial court's conclusion is flawed. He premises his arguments not by citing to the sufficiency of the evidence presented during the preliminary hearing, but to the sufficiency of the evidence presented during the *trial*.

We do not, however, review a denial of a section 995 motion by examining the evidence presented at trial. We review the sufficiency of the evidence presented at the preliminary hearing. Serna's failure to cite to the preliminary hearing transcript compels a finding that he waived this argument on appeal. He has not provided citations to the record and pertinent legal argument to support his claim. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029.)

Serna argues that the material facts presented during the section 995 motion are materially the same as the facts presented at trial. Assuming this is true, his arguments would still be without merit. As we discussed above, there was sufficient evidence presented at trial to support his convictions for kidnapping to commit robbery and kidnapping to commit extortion. The burden of proof at a preliminary hearing is less than that required at trial, requiring only reasonable or probable cause. (§ 995, subd. (a)(2)(B).) Thus, Serna's claim would still be meritless even if we were to consider them not to be waived.

3. *Denial of Serna's Motion to Suppress Based on a Warrantless Arrest*

a. **Background**

On August 19, 2013, Serna filed a motion to suppress evidence obtained by the police following his arrest, including his subsequent admissions to the police. In his motion, Serna argued he was arrested without probable cause.

On September 18, 2013, the trial court held a hearing on the motion to suppress. During the hearing, Sergeant Quinonez, who investigated the crime, testified about the circumstances that led to Serna's arrest.

Sergeant Quinonez testified that he received a phone call from a citizen informant who had information about the robbery that had not been released to the media. The informant told Quinonez that Gonzales, his brother, and another individual had committed the robbery. The informant provided Quinonez with Gonzales's cell phone number, which had since been deactivated.

Based on this information, Sergeant Quinonez obtained a court order for Gonzales's cell phone records. The phone records showed there were six calls made back and forth between Gonzales's cell phone and several other phones numbers during the time the crime occurred. Quinonez was able to obtain a search warrant for these additional phone numbers, one of which belonged to Serna.

After reviewing the cell phone records, Sergeant Quinonez tracked Serna's phone by following its ping against cell phone towers. Quinonez determined that Serna's cell phone was near Wise's home during the robbery. He also determined that Serna's cell phone was near the area where Wise's truck was eventually found.

Sergeant Quinonez admitted he had not taken classes in how to interpret cell phone tower data and would not call himself a cell tower expert. He learned how to analyze the data from his investigation after receiving information from cell phone companies. He also learned how to interpret the data from speaking to other detectives who worked with "cell towers" and "pinging orders" as well as officers from the United States Marshals office. Quinonez explained that based on his experience, some cell phone companies provide the latitude and longitude of the cell phone towers. Other cell phone companies provide numbered cell phone towers, which correspond with a specific sector number that can be matched in a map book.

b. **Overview and Standard of Review**

When ruling on a motion to suppress, "the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. . . . [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, viz., the reasonableness of the challenged police conduct, is also subject to independent review. [Citations.] The reason is plain: 'it is "the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness." ' " (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

A warrantless arrest by a law enforcement officer is reasonable under the Fourth Amendment if there is probable cause to believe that a crime has been committed or is being committed. (*People v. Thompson* (2006) 38 Cal.4th 811, 817.) Probable cause to arrest exists when an arresting officer is aware of facts that would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime. (*People v. Harris* (1975) 15 Cal.3d 384, 389.) "[A] police officer views the facts through the lens of his police experience and expertise." (*Ornelas v. United States* (1996) 517 U.S. 690, 699.) The United States Supreme Court has recognized that "a police officer may draw inferences based on his own experience in deciding whether probable cause exists." (*Id*. at p. 700.) "The rule requiring probable cause 'should not be understood as placing the ordinary man of ordinary care and prudence and the officer experienced in [a particular type of criminal activity] in the same class. Circumstances and conduct which would not excite the suspicion of the man on the street might be highly significant to an officer who had extensive training and experience [in the area].' " (*People v. Medina* (1972) 7 Cal.3d 30, 37.) Whether probable cause exists is evaluated by examining the totality of the circumstances at the time of the arrest. (*People v. Mims* (1992) 9 Cal.App.4th 1244, 1250.)

c. **Sergeant Quinonez's Testimony on Cell Phone Towers**

During the hearing on the motion to suppress, defense counsel objected to Sergeant Quinonez's testimony on cell phone towers, stating that the testimony "may call for expert testimony." On appeal, Serna argues the trial court erred by relying on Quinonez's testimony about cell phone towers when making its determination that probable cause existed for the warrantless arrest, because the testimony amounted to expert witness testimony and Quinonez was not qualified as an expert.

Before we address the merits of Serna's claim we first address the People's argument that defense counsel's objection to Sergeant Quinonez's testimony was too

vague and ambiguous to preserve the claim on appeal. An " 'objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' " (*People v. Partida* (2005) 37 Cal.4th 428, 435; Evid. Code, § 353.) When Quinonez testified that he was able to track defendant's cell phone, defense counsel objected by stating: "Your Honor, I would object at this point. Ambiguous. Also, may call for expert testimony." Based on this colloquy, we reject the People's claim that defense counsel's objection failed to preserve the issue on appeal. As stated, the objection apprised the trial court that defense counsel sought to exclude Quinonez's testimony on the matter because he believed it required expert testimony.

Reaching the merits of the claim, the People argue Serna's arguments must be rejected, because the trial court's ruling on the motion to suppress hinged on whether Quinonez knew facts at the time of the arrest that supported a reasonable suspicion of criminal activity. Thus, the People insist that whether Quinonez was the "best person to explain how cell towers worked" was irrelevant in this context.

We agree. In this case, Sergeant Quinonez testified that from his experience working on this case, he learned that if a phone call was made in a particular cell phone tower sector the cell phone would "ping" off that particular tower. Quinonez also explained that he knew that in mountainous areas, it is possible to have a cell phone ping off a further tower, because if it is difficult to get reception a cell phone will automatically try to find a "direct sight" tower. Quinonez did not believe this happened in this particular case, because the areas at issue were flat. Based on cell phone records, Quinonez observed that Serna's cell phone pinged near Wise's home when the robbery occurred and pinged again near the location where Wise's burned truck was later found.

When determining whether probable cause existed for a warrantless arrest, a trial court must examine whether the arresting officer was aware of facts that would lead a

person of ordinary care and prudence to entertain a strong suspicion that the person arrested is guilty of a crime. (*People v. Harris*, *supra*, 15 Cal.3d at p. 389.) And, a police officer may draw upon his or her experience and expertise when determining whether probable cause exists. (*Ornelas*, *supra*, 517 U.S. at pp. 699-700.) Based on the facts known to Quinonez at the time of the arrest, and drawing on his experience investigating the case, the court did not err in determining he had probable cause to arrest Serna.

Serna claims that before reaching a conclusion on whether Quinonez had probable cause to arrest defendant, the trial court *had* to hear expert testimony on cell phone data in order to properly interpret and rely on Quinonez's statements during the preliminary hearing. Serna insists the trial court could not rely on Quinonez's statements regarding the operation of cell phone towers, because he was a lay witness and was not qualified as an expert on cell phone towers.

Serna supports his arguments by pointing to Evidence Code sections 800 (limitations on lay witnesses' opinion testimony) and 801 (limitations on expert witness testimony). He also relies on *United States v. Banks* (Dist. Kansas 2015) 93 F.Supp.3d 1237 (*Banks*), arguing that there the federal district court concluded that expert testimony was required before the district court could infer a conclusion about the location of a cell phone in the context of a motion to suppress. (*Id*. at p. 1248.)

Serna's reliance on *Banks* is misplaced. First, *Banks* is not within our jurisdiction and is not binding on this court. Second, *Banks* interpreted *federal* law, not state law. Additionally, the motion to suppress at issue in *Banks* is substantively different than the motion to suppress at issue here. In *Banks*, the defendants sought to exclude wiretap evidence on the basis it was obtained outside a certain authorized territorial jurisdiction. (*Banks*, *supra*, 93 F.Supp.3d at p. 1240.) In response, the government sought to *prove* that certain cell phones pinged at a particular location based on cell tower data. (*Ibid*.)

The defendants challenged the admission of the cell site data, arguing it failed to meet Federal Rule of Evidence section 702's criteria governing the admissibility of expert testimony. (*Banks, supra,* at p. 1241.) *Banks* went on to analyze whether the government's expert testimony on cell phone tower data was admissible. (*Id*. at pp. 1248-1250.) In so doing, it remarked that the government could not prove the physical location of the cell phones unless it offered expert testimony on the cell site data. (*Id*. at p. 1249.)

Unlike the motion to suppress at issue in *Banks*, Sergeant Quinonez's cell tower data was not offered to *prove* Serna's cell phone pinged off certain towers. Quinonez's testimony was offered to demonstrate to the trial court that given the facts known to Quinonez at the time, there was probable cause justifying the warrantless arrest.

We find the rationale set forth in *Wimberly v. Superior Court* (1976) 16 Cal.3d 557 to be persuasive. There, the defendants sought to vacate the trial court's denial of its motion to suppress evidence of marijuana. (*Id*. at p. 561.) Two officers stopped a car after they observed the car weaving and swerving between lanes. One officer peered into the car and observed round, dark seeds next to a pipe on the floor. The officer asked to see the pipe, smelled the pipe, and detected the odor of burnt marijuana. Subsequently, the two officers conducted a search of the car and found marijuana. (*Id*. at p. 562.) The defendants argued the officers lacked probable cause to conduct the search. In part, the defendants claimed the officer who observed the seeds was not an expert in the identification of marijuana. (*Id*. at p. 565.) In rejecting this argument, our Supreme Court noted that "[i]t is not necessary . . . that the officer qualify as an expert to be able to form the reasonable belief necessary to justify his actions," so long as the search was not justified "by only a mere hunch" and was supported by sufficient experience and training. (*Ibid*.) Our Supreme Court's conclusion in *Wimberly* comports with the established principle that police officers may draw on their experience and expertise as law

enforcement when determining if probable cause exists. (*Ornelas*, *supra*, 517 U.S. at p. 700.)

Sergeant Quinonez was not qualified as an expert on cell tower data. Nonetheless, we do not believe he needed to qualify as an expert in order to reasonably entertain a strong suspicion that defendant had committed a crime based on the facts known to him at the time. Quinonez's suspicion that Serna had committed a crime cannot be examined in a vacuum without considering his experience and knowledge as a police officer, which *includes* his knowledge and experience with cell phone towers. During the hearing on the motion to suppress, Quinonez described that he learned how cell towers worked through his work on investigating the current case. He also learned about cell towers from other officers who had worked with cell towers in the past.

Additionally, the trial court did not need an expert to testify about the operation of cell tower data in order to assess whether probable cause existed to justify the search. In ruling on a motion to suppress, a trial court must examine whether the arresting officer was aware of facts that would lead a person of ordinary care and prudence to entertain a strong suspicion that the person arrested is guilty of a crime. (*People v. Harris*, *supra*, 15 Cal.3d at p. 389.) It did not need expert testimony on the subject to assess the existence of probable cause in this context. Thus, we do not find the trial court erred when it considered Sergeant Quinonez's testimony about cell phone towers.

d. **Sufficient Evidence of Probable Cause**

Next, Serna argues that even if the trial court correctly considered Sergeant Quinonez's testimony, there was still insufficient evidence of probable cause to support his warrantless arrest. He argues the cell phone tower data is itself flawed and unreliable. Primarily, Serna cites to several law review articles discussing the flaws associated with using cell phone tower data to pinpoint a suspect's location. The People argue Serna has forfeited this argument, and we agree.

"A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court. [Citations.] A party may not assert theories on appeal which were not raised in the trial court." (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.) "[U]nder section 1538.5, as in the case of any other motion, defendants must specify the precise grounds for suppression of the evidence in question, and, where a warrantless search or seizure is the basis for the motion, this burden includes specifying the inadequacy of any justifications for the search or seizure." (*People v. Williams* (1999) 20 Cal.4th 119, 130.)

In his motion to suppress, Serna argued there was insufficient probable cause supporting his warrantless arrest, because officers had relied on an unidentified tipster, and it was only assumed that Serna used the cell phone that was registered under his name. Serna made no arguments pertaining to the accuracy of cell tower data in his motion and did not raise this argument during the hearing. Serna's claim that his arguments about the accuracy of cell tower data is subsumed within his generalized claim that there was no probable cause to conduct the warrantless arrest must be rejected. A defendant must make *specific* objections and arguments to avoid forfeiting his or her claim. Since Serna did not make specific objections regarding the reliability of cell phone tower data, we find he has forfeited his argument on this point.[6]

4. *Admission of Serna's Statements in Violation of* Miranda v. Arizona

a. **Background**

On August 11, 2014, Serna filed a motion in limine seeking to exclude the statements he made to Sergeant Quinonez after his arrest. Serna argued he was not properly advised of his rights under *Miranda, supra*, 384 U.S. 436, and his waiver was not knowing or voluntary.

[6] Based on our conclusions, we need not reach Serna's argument that he was prejudiced by the trial court's denial of his suppression motion.

The trial court held a hearing on the matter the same day. According to testimony presented at the hearing, Serna was arrested after an officer used a canine to locate him in a field. He was thereafter taken to the cafeteria at the second floor of the sheriff's office in San Jose at approximately 9:30 a.m. At approximately 4:30 p.m., Serna was taken to an interrogation room. Sergeant Quinonez began Serna's interrogation at approximately 6:00 p.m. A video and a transcript of the interview were submitted to the court.

Prior to the start of the interview, Sergeant Quinonez advised Serna in Spanish of his *Miranda* rights. Spanish was Quinonez's first language, and he regularly spoke Spanish to his family. With some alterations, Quinonez read Serna *Miranda* advisements from a department-issued *Miranda* card.

When Sergeant Quinonez advised Serna he had the right to remain silent, he used the words "no decir nada," which the defense's expert, Romero Rivas, translated as "[y]ou have the right to say nothing." Quinonez asked Serna if he understood, and Serna answered in Spanish, "Well, um, I don't know. I can answer whatever you tell me, whatever." Quinonez found Serna's statement to be ambiguous. Thus, Quinonez repeated the same admonition (that he had the right to "say nothing") to Serna. After repeating the admonition, Serna responded that he understood. The prosecution's interpreter translated the phrases as "you have the right not say anything" and "you have the right to not say anything."

Next, when Sergeant Quinonez advised Serna of his right to have an attorney, he did not use the verb "to pay" as printed on the department's *Miranda* card ("pagarle"). Instead, Quinonez used the verb "a pagar." Quinonez testified he used "a pagar" in the form of two words, which meant to pay. If he had used the word "apagar" (one word), he would have been telling Serna he could "turn off" the attorney.

Serna's expert testified that after listening to the interrogation tape it was unclear whether Sergeant Quinonez used the words "a pagar" or "apagar." If Quinonez used the

word "apagar," his statement would have been: "Okay. And if you cannot turn off for an attorney, one be named for free, um, before and during any integration." If Quinonez used the word "a pagar," his statement would be translated as: "Okay. And if you cannot pay for an attorney, one be named for free, um, before and during any integration." Additionally, instead of using the word "interrogation," Serna's expert believed Quinonez used the word "integration" when advising Serna of his rights. The prosecution's interpreter heard Quinonez use the word "interrogation," which was reflected in the prosecution's prepared transcript.

After completing his interrogation, Quinonez asked Serna if he wanted an attorney. Serna responded he did not have the money to pay for one.

Following the hearing, the trial court determined the admonitions given by Sergeant Quinonez were sufficient. The trial court acknowledged there were issues with the *Miranda* warning, as the defense expert heard the word "integration," not "interrogation," and there was a dispute over whether Quinonez used the words "a pagar" or "apagar." Nonetheless, the trial court determined Serna understood the required admonitions under the totality of the circumstances. The court also concluded that in context, Serna's statement about not being able to afford an attorney had "nothing to do with the current right to a lawyer in the interview, but had to do more with whether a lawyer in the future would cost him."

b. **Overview**

Miranda held that a defendant in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda*, *supra*, 384 U.S. at p. 479.)

A defendant may waive these rights so long as the waiver is voluntary, knowing, and intelligent. (*Miranda, supra,* 384 U.S. at p. 444.) " 'First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.' " (*People v. Clark* (1993) 5 Cal.4th 950, 986, disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under [*Miranda*], we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we ' "give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' " (*People v. Wash* (1993) 6 Cal.4th 215, 235-236 (*Wash*).)

We evaluate whether under the totality of the circumstances a defendant knowingly and voluntarily waived his or her *Miranda* rights. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) "*Miranda* warnings are 'prophylactic' [citation] and need not be presented in any particular formulation or 'talismanic incantation.' [Citation.] The essential inquiry is simply whether the warnings reasonably ' "[c]onvey to [a suspect] his rights as required by *Miranda*." ' " (*Wash, supra,* 6 Cal.4th at pp. 236-237.) Thus, translation of *Miranda* warnings to a defendant's native language need not be perfect so long as the translation adequately conveys the substance of the rights. (*U.S. v. Hernandez*

(10th Cir. 1996) 93 F.3d 1493, 1502.) We must accept a trial court's resolution of disputed facts and inferences if supported by substantial evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.)

c. **Sufficiency of Quinonez's Spanish *Miranda* Warnings**

Serna argues Sergeant Quinonez's Spanish *Miranda* warnings insufficiently apprised him of his rights. We disagree.

i. *Right to Have Attorney Present During Questioning*

First, Serna argues Sergeant Quinonez's statements did not accurately convey he had the right to an attorney during questioning. He argues that according to his expert witness's translation, Quinonez told him he had a right to an attorney during any "integration," not any "interrogation." He opines that a lay person could have interpreted an "integration" to mean some sort of future legal proceeding. Thus, he claims the statement did not sufficiently convey to him that he had the right to an attorney during his interview with the police.

Serna's argument ignores the fact that the People's translator found that Quinonez advised Serna he had the right to an attorney "before and during any questioning," not before an "integration," and an attorney could be appointed for free if he could not afford one. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Advising Serna he had the right to an attorney before questioning by the police adequately conveyed Serna of his rights.

ii. *Right to Have an Attorney Appointed at No Cost*

Next, Serna argues Sergeant Quinonez's statements did not accurately convey he had the right to an appointed attorney at no cost. Serna argues that when advising him of

his *Miranda* rights, Quinonez told him that if he could not "apagar" (to turn off) an attorney one could be appointed for him. In response, the People argue there is no ambiguity in the *Miranda* warning, because Quinonez told Serna that if he could not "a pagar" (to pay) for an attorney, one could be appointed for him.

The disputed terms, "a pagar" and "apagar" are phonetically the same. The only difference is whether there was a pause in between the two words. Quinonez may have caused confusion if he had indeed used the word "apagar" in the context of the *Miranda* advisement. Nonetheless, we find there is substantial evidence supporting the trial court's inference that Quinonez used the phrase "a pagar" and sufficiently conveyed to Serna his *Miranda* rights.

A clip of the interrogation was played for the court to consider. Serna's expert himself conceded the statement could be interpreted as either Quinonez using the words "a pagar" or "apagar." And the prosecution's transcript of the admonition used the phrase "a pagar." As noted by the court, the use of the word "apagar" would have resulted in a nonsense phrase—that Serna could turn off an attorney if he so chose. Yet when asked, Serna did not seek clarification of the admonition and did not appear to misunderstand Quinonez's explanation of his rights. If he had interpreted Quinonez's advisement to mean he could "turn off" an attorney if he so desired, it seems likely he would have asked for further clarification or indicated he did not understand the nonsensical phrase.

Serna argues the ambiguity in Sergeant Quinonez's statements is clear, because toward the end of the interrogation, while Serna was being booked, Serna told Quinonez he could not afford an attorney when asked if he wanted one. In its decision, the trial court concluded that after considering the context of the conversation, it believed Serna's statement had to do with his understanding of whether an attorney would be provided to him to mount his defense, *not* whether he had the right to an attorney present during the

interrogation. Substantial evidence supports the trial court's interpretation. As previously discussed, the prosecution's transcript of Quinonez's admonitions indicates he advised Serna of his right to have an attorney present during questioning. When asked at that time, Serna said he understood Quinonez's admonitions and did not seek further clarification. Thus, we find the court did not err when it concluded Quinonez's advisements reasonably conveyed to Serna that an attorney could be appointed to him at no cost.

iii. *Right to Remain Silent*

Lastly, Serna argues Sergeant Quinonez used the phrase "no decir nada" when reciting his *Miranda* rights, which meant Quinonez effectively advised Serna as having the "right not say nothing" [*sic*]. Serna argues that by using this double negative in his admonition, Quinonez essentially conveyed to Serna he had the right *to speak to an officer*, not a right *not to speak to an officer*. Although Quinonez later clarified his statement by advising Serna he had the "right to say nothing," Serna argues this clarification was insufficient.

We reject Serna's argument. At the suppression hearing, Sergeant Quinonez testified his statement translated to "the right not to say anything" or "the right to say nothing." Additionally, the prosecution's transcript translated the phrase as "you have the right not say anything" and "you have the right to not say anything." Thus, there is substantial evidence that the Spanish phrase spoken by Quinonez advised Serna he had the right to not say anything to the police, not the converse.

Serna argues that after Sergeant Quinonez gave the first admonition, he expressed confusion. After Quinonez advised him of his right to remain silent the first time, Serna

responded "I don't know" and "I can answer what you tell me, whatever."[7] After Serna's response, Quinonez clarified to Serna that he had "the right to not say anything," or, as Quinonez testified, "the right to say nothing."[8] After this clarification, Serna said he understood Quinonez's advisement. Thus, under the totality of the circumstances, the record reflects Quinonez's advisements reasonably conveyed to Serna that he had the right to not speak with the police.

iv. *Conclusion*

In sum, Serna was sufficiently apprised of his *Miranda* rights under the totality of the circumstances. In coming to this conclusion, we note that courts have found *Miranda* waivers to be ineffective in cases where the Spanish translation created a substantial risk of confusion or did not reasonably convey the substance of a particular right. (*People v. Diaz* (1983) 140 Cal.App.3d 813, 823; *U.S. v. Botello-Rosales* (9th Cir. 2013) 728 F.3d 865, 867; *U.S. v. Perez-Lopez* (9th Cir. 2003) 348 F.3d 839, 848-849.) Nonetheless, we find Serna's case distinguishable. Although there were minor discrepancies and irregularities with Sergeant Quinonez's Spanish *Miranda* warnings, what is important is that the warnings were reasonably conveyed to Serna. (*Wash, supra,* 6 Cal.4th at pp. 236-237.)

d. **Serna's Waiver was Voluntary and Knowing**

Serna argues his waiver of rights was neither voluntary nor knowing, because it was obtained by coercive police tactics. The People bear the burden to establish by a preponderance of the evidence that a defendant's statements were voluntarily obtained.

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[7] The defense and prosecution's translation of Serna's response varied. However, in all variations of Serna's statements, Serna does express some confusion as to whether he understood Sergeant Quinonez's advisement.

[8] According to the transcript, Sergeant Quinonez first advised Serna as follows: ". . . usted tiene su derecho a no decir nada, entiendes ese derecho?" The second time, Quinonez advised defendant as follows: ". . . usted tienes su derecho de no decir nada? Entiendes o no?"

(*People v. Guerra* (2006) 37 Cal.4th 1067, 1093, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76.) A statement obtained from "[p]sychological coercion is equally likely to result in involuntary statements, and thus is also forbidden." (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 416.) Serna opines the psychological coercion he endured stemmed from his terrifying arrest involving a police canine, his nine-hour detention before he was interrogated, and the stress he endured from not knowing why he was in police custody. Serna also points out that he was handcuffed during his detention and was only released from the handcuffs after *Miranda* warnings were given.

First, there is nothing to indicate the presence of the police dog during Serna's arrest, which occurred hours *before* his interrogation, led to a coercive environment *during* the interrogation. The dog was not used during the interrogation to apply psychological or physical pressure on Serna, and he was not advised of his *Miranda* rights in the dog's presence.

Second, Serna's claim that the length of time between his arrest and initial interrogation contributed to the psychological coercion is unpersuasive. Certainly, relinquishment of *Miranda* rights must be made by a defendant's free choice, not by intimidation, coercion, or deception. (*People v. Clark, supra,* 5 Cal.4th at p. 986.) Serna, however, does not point to anything in the record that suggests the delay in the interrogation was some type of psychological coercion employed by the police. (See *People v. Williams* (1997) 16 Cal.4th 635, 659 ["A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity."].)

Here, despite Serna's claim that the circumstances of the interrogation—the nine-hour delay (where he waited in an empty cafeteria), the use of handcuffs, and Serna's lack of knowledge of the circumstances warranting his detention—were intimidating to the point of rendering his waiver involuntary, Serna does not cite to

evidence in the record demonstrating these circumstances were employed by the police to pressure him into waiving his rights. Furthermore, the trial court found the evidence indicated that Serna's interrogation was delayed not because of some police tactic but because Quinonez was busy interviewing several other subjects who had been arrested the same day. The evidence presented was that Serna was interviewed last, because he was the last one arrested. He was allowed to make a phone call while he was waiting and was not denied food or water in the interim. Based on the totality of the circumstances, Serna's waiver of rights was voluntary and knowing.[9]

5. *Voluntariness of Serna's Statements to Sergeant Quinonez*

Related to his arguments pertaining to the voluntariness of his *Miranda* waiver, Serna next claims the trial court erred in admitting his statements to Sergeant Quinonez because they were involuntarily obtained in violation of his constitutional rights.

a. **Overview**

"A statement is involuntary if it is not the product of ' "a rational intellect and free will." ' [Citation.] The test for determining whether a confession is voluntary is whether the defendant's 'will was overborne at the time he confessed.' [Citation.] ' "The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' [Citation.]" [Citation.] In determining whether or not an accused's will was overborne, "an examination must be made of 'all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.' " ' " (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

[9] Serna also incorporates in this argument a claim that his waiver of rights was not knowing or voluntary, because Sergeant Quinonez failed to reasonably convey the *Miranda* warnings. We have already addressed these issues in the previous section of this opinion.

A confession is involuntary if it is extracted by threats, violence, direct or implied promises, or by any other improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778 (*Benson*).) " '[C]oercive police activity is a necessary predicate to the finding that a confession is not "voluntary" . . . .' " (*Ibid*.)

On appeal, we review the trial court's determination as to the voluntariness of a confession independently, taking into consideration the surrounding circumstances. (*Benson*, *supra*, 52 Cal.3d at p. 779.) "The trial court's determinations concerning whether coercive police activity was present, whether certain conduct constituted a promise and, if so, whether it operated as an inducement, are . . . subject to independent review as well. The underlying questions are mixed; such questions are generally scrutinized de novo; that is especially true when—as here—constitutional rights are implicated." (*Ibid*.)

b. **Serna's Statements**

Serna argues his statements to Sergeant Quinonez were involuntarily obtained, because (1) he was taken into custody by a deputy handling a dog, (2) he was not told the reason for his arrest until the start of his interrogation and was given confusing *Miranda* warnings, (3) he was afraid of retaliation from his accomplices and Quinonez made an implicit promise to protect him in exchange for a statement, (4) Quinonez improperly appealed to his "manhood" during the course of the interrogation, and (5) Quinonez promised him leniency in exchange for his statement.

We again reject Serna's contentions regarding the presence of the police dog. As we previously discussed, the dog was *not* present at Serna's interrogation. Nor is there any indication the police used the dog to pressure him into speaking with officers.

Second, we have already concluded the *Miranda* warnings given by Sergeant Quinonez reasonably communicated to Serna his rights. Thus, we do not believe

confusion over *Miranda* warnings was used as a coercive police tactic meant to entice Serna into confessing.

Next, we examine whether Sergeant Quinonez improperly coerced Serna into testifying by promising him protection. During the interrogation, Serna told Quinonez he could corroborate everything, but he was afraid for his son and for himself. Defense counsel asked Quinonez if he responded, "If you have something to do with this, right now is the time that you have to tell me." Quinonez agreed. Serna argues Quinonez's statement was an implicit promise to protect him from retaliation in exchange for information about the crime.

We fail to see how Sergeant Quinonez's statement contained an implicit promise of protection. Quinonez was merely encouraging Serna to tell the truth. "Absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth." (*People v. Williams* (2010) 49 Cal.4th 405, 444.) Serna's reliance on *Arizona v. Fulminante* (1991) 499 U.S. 279 is unavailing. There, a jailhouse informant promised the defendant "protect[ion]" from " 'tough treatment' " in prison due to rumors of his involvement in the sexual assault and murder of a child. (*Id*. at p. 283; *id*. at pp. 287-288.) Here, no such offer of protection was made.

As the People note, at one point Serna told Sergeant Quinonez he would tell Quinonez the truth in exchange for protection. In response, Quinonez told Serna that he was going to be taken to jail today and he would have protection there. Although this statement appears similar to the promise of protection offered by the confidential informant in *Fulminante*, our Supreme Court has held that " '[i]n terms of assessing inducements assertedly offered to a suspect, " '[w]hen the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made." ' "

(*People v. Tully* (2012) 54 Cal.4th 952, 993 [assertion to defendant that his family may be placed into a witness protection program did not render his statement involuntary].)

Applied here, Sergeant Quinonez's statement to Serna that he would be placed in jail and would receive protection there was merely an observation of the realities of Serna's situation. Later, Serna told Quinonez that he did not believe protective custody was necessary, because he was not afraid of retaliation "inside" the jail but was afraid of retaliation "outside." Thus, we do not find that under these circumstances Quinonez's statement to Serna that he would receive protection *inside* the jail was coercive and overrode Serna's free will.

Next, Serna argues his statements were involuntarily obtained, because Sergeant Quinonez "appealed to [Serna's] manhood" by displaying concern about Serna's son, urging Serna that it would be in his son's best interest to talk to the police about his involvement in the crime.

In support, Serna relies on *People v. Esqueda* (1993) 17 Cal.App.4th 1450. There, the appellate court concluded that the totality of the circumstances, which included the officer's appeal to the defendant's manhood, raised doubts as to whether the defendant's statements were voluntary. (*Id.* at pp. 1486-1487.) *Esqueda*, however, is distinguishable. There, the court considered the fact that the detectives "used lies, accusations, exhaustion, isolation and threats" to overcome the defendant's initial resistance. (*Id.* at p. 1486.) The defendant was "hysterical" at the time the interview started, and the officers conceded the defendant was in a fraught mental state yet "unremittingly pressured" the defendant until he yielded. (*Id.* at p. 1485.) As part of its psychological pressure, the officers questioned and appealed to the defendant's "manhood, his religion, and his Hispanic heritage." (*Ibid.*)

A review of the facts contemplated in *Esqueda* demonstrates how distinguishable it is from the situation contemplated here. There is no evidence Sergeant Quinonez took

advantage of Serna's mental state or used accusations and threats to obtain his statements. Although he mentioned Serna's son during the interrogation, his suggestion to Serna that speaking to the police would be in his son's best interest does not rise to the level of psychological coercion overriding Serna's free will. Contrary to the situation contemplated in *Esqueda*, the circumstances of Serna's interrogation does not compel a conclusion that his will was overborne.

Lastly, Serna argues his statements were involuntary, because Sergeant Quinonez promised him leniency. Serna points to a colloquy between himself and Quinonez toward the latter part of the interview.[10] Serna asked Quinonez if he was "going to help me out a little bit?" In response, Quinonez stated: "Yeah, I will talk with . . . our attorney, I will tell him what's happening . . . ."

Even assuming the statement by Sergeant Quinonez was an equivocal promise of leniency, we reject Serna's contention that it renders his statements involuntary. Promises of leniency do not automatically render statements involuntary unless the circumstances demonstrate the promise was a motivating factor in giving the statement. (*People v. Vasila* (1995) 38 Cal.App.4th 865, 874; *People v. Williams*, *supra*, 16 Cal.4th at pp. 660-661.) Given the totality of the circumstances, we do not find the promise of leniency to be a motivating factor in Serna's statements. By the time Sergeant Quinonez told Serna he would speak with the prosecuting attorneys, Serna had already recounted what had transpired when he and his accomplices robbed Wise. Thus, any promise by Quinonez that he would "help" Serna could not have conceivably motivated Serna into confessing.

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[10] The transcript of Serna's interview was divided amongst five different audio tracks. The particular exchange between Sergeant Quinonez and Serna in question here is found in the fourth audio track.

6. *Admission of Isaias's Hearsay Statement*

a. **Background**

Isaias, Serna's son, testified at Serna's trial. Isaias confirmed his father had previously worked with a person named Juvenal Angel Reyes. He also confirmed that he knew Gonzales and Fonseca. Isaias denied ever being involved in a conversation with Gonzales, Fonseca, and his father about robbing a house on Rucker Avenue. He did, however, acknowledge he was asked to watch a man in Gilroy on February 6, 2011, and was told to update Gonzales with information about the man's movements.

At trial, Isaias was asked about some of the statements he had previously made to police officers during his interrogation three years ago during the original criminal investigation. Isaias said he could not remember the interview. He also did not believe that reading a transcript of his own interview with the officer would help him remember what he had said about how the robbery was planned. He could not remember Reyes telling him that his neighbor had money and could not remember his father telling him not to get involved in the robbery. He could not recall that he told the officer during his interrogation that Gonzales and Fonseca discussed the robbery a week before it took place. He could not remember telling the officer that there were guns inside Wise's house. He also could not remember telling the officer that Gonzales and Fonseca told him they took gold and weapons after the robbery. He could not remember whether he told his father he was going to watch a man for Gonzales.

Later, the officer who interviewed Isaias, Deputy Leon, was called to impeach Isaias's testimony with the statements he had made during his original interrogation three years ago. Defense counsel objected to the admission of the statements. Finding Isaias to be evasive and untruthful while testifying, the trial court admitted Isaias's statements to Deputy Leon during the original investigation as prior inconsistent statements.

b. **Analysis**

Serna argues Isaias's statements should not have been admitted, because they were not prior inconsistent statements as discussed in Evidence Code section 1235. We disagree.

A witness's prior inconsistent statements are admissible as an exception to the hearsay rule if the earlier statements are inconsistent with his or her trial testimony. (Evid. Code, § 1235.) " 'Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, . . . [w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 711.) We review the trial court's decision to admit prior inconsistent statements for abuse of discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 859.)

Here, there was a reasonable basis in the record for concluding Isaias was not being truthful when he claimed he could not recall his earlier statements. Although Isaias asserted he could not recall some of the more incriminating details of the crime, he could recall certain details of the events leading to the robbery. He claimed he could not remember certain aspects of his involvement in the crime, even though he personally went through a juvenile adjudication for the crime. The trial court noted the juvenile adjudication proceedings should have made it easier for Isaias to recall certain details, thus finding his inability to recall implausible. Furthermore, when asked, Isaias refused to look at the transcript of the interrogation he had with Deputy Leon to see if it would refresh his memory of what he had previously said.

Thus, the trial court did not abuse its discretion when it admitted Isaias's prior inconsistent statements.

7. *Jury Instruction on Kidnapping for Extortion*

Serna claims the trial court erred when it instructed the jury with CALCRIM No. 1202 instead of CALJIC No. 9.53. Both instructions discuss the elements of the crime of kidnapping to commit extortion. CALCRIM No. 1202 states that as one of the elements, the People must prove that "[t]he defendant did so (. . . to get money or something valuable)." In contrast, CALJIC No. 9.53 describes one of the elements as, "The perpetrator of the [crime] had the specific intent . . . [to obtain something of value from another]." Serna argues CALCRIM No. 1202's omission of the term "from another" renders it an incorrect statement of law.

We have, however, previously concluded that the crime of kidnapping for extortion does not require a secondary victim. "One may lawfully be convicted of kidnapping for extortion even if the kidnap victim and the extortion victim are the same person." (*Kozlowski*, *supra*, 96 Cal.App.4th at p. 871.) Thus, even if we accept Serna's argument that CALCRIM No. 1202 erroneously omits a reference to a secondary victim, any error was not prejudicial.

8. *Disproportionality of Serna's Sentence*

Serna was sentenced to a term of life in prison without the possibility of parole for his conviction of kidnapping to commit extortion. He argues his sentence is disproportionate to his offense in violation of the state and federal Constitutions. He claims his involvement in the crime was less than that of the other perpetrators, the sentence of life in prison for kidnapping for extortion exceeds the sentences for more serious crimes in California, and similar crimes in other jurisdictions are punished less severely.

a. **Overview**

"Whereas the federal Constitution prohibits cruel 'and' unusual punishment, California affords greater protection to criminal defendants by prohibiting cruel 'or' unusual punishment." (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.) Thus, "a punishment may violate article I, section 6, of the Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*); *People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*).)

"Findings of disproportionality have occurred with exquisite rarity in the case law. Because it is the Legislature which determines the appropriate penalty for criminal offenses, defendant must overcome a 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) In *Lynch*, the court examined three areas of focus: the nature of the offense and offender, a comparison of the punishment of the penalty for more serious crimes in the same jurisdiction, and a comparison of the punishment to the penalty for the same offense in different jurisdictions. (*Lynch*, *supra*, 8 Cal.3d at pp. 425-427.) "Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82.)

b. **Serna's Culpability**

First, we address Serna's argument that his punishment is not proportional to his individual culpability. When examining whether a sentence is disproportionate and relatively cruel or unusual, we look to "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Lynch*, *supra*, 8 Cal.3d at p. 425.) An inquiry into " 'the nature of the offender' . . . asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown

by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon*, *supra*, 34 Cal.3d at p. 479.) The punishments imposed on the coparticipants of the crime are also considered. (*Id*. at p. 488.) We also consider "the facts of the current crime, the minor nature of the offense, the absence of aggravating circumstances, whether it is nonviolent, and whether there are rational gradations of culpability that can be made on the basis of the injury to the victim or to society in general." (*People v*. *Carmony* (2005) 127 Cal.App.4th 1066, 1085.)

Serna cites to various factors that he argues demonstrates the sentence was disproportionate to his culpability, including his social history. Serna spoke limited English, was married with four children, and had received only a fourth grade education in Mexico. His only prior convictions were for traffic-related misdemeanors, and he had no felony convictions. He claims he is less culpable than his accomplices, because he had initially agreed to only burglarize Wise's home, not to rob him. Serna also argues he initially suggested that the men leave the house after they were unsuccessful in taking the safes out. He further argues he was afraid of Gonzales, and he believed he and his son were both at risk of retaliation. He also expressed remorse for the crime.

However, there is evidence Serna freely and equally participated in the crime. Serna took part in the planning process and, although he initially told Gonzales and Fonseca he thought they should leave, he decided to wait with them until Wise returned home. Wise testified that he was beaten by at least three men, and Sergeant Quinonez confirmed that Serna admitted he participated in the attack. Serna also admitted he used a tire thumper to hit Wise, striking him with enough force to break the tire thumper into three pieces. Serna also helped Gonzales and Fonseca when they picked Wise up, tied

him to the chair, and carried him to the safes. Additionally, his accomplices, Gonzales, Fonseca, and Reyes, received similar sentences.[11]

Based on these circumstances, we find Serna has failed to show that his background or the circumstances of the offense were so unusual and mitigating as to render his sentence of life without parole to be constitutionally excessive.

c. **Disproportionality to Sentences for More Serious Crimes in California and Punishments Imposed in Other Jurisdictions**

Next, Serna argues his sentence of life without the possibility of parole is disproportionate to punishments imposed for other, more serious crimes in California. Serna notes that serious crimes like first degree murder (§ 190, subd. (a)) can be punished by a lesser sentence of 25 years to life. He also argues the punishment imposed is disproportionate compared to the punishment imposed for the same crime in other jurisdictions.

Serna's argument that the penalty of life without the possibility of parole is constitutionally disproportionate has been rejected numerous times in the context of aggravated kidnapping for robbery and ransom. (*People v. Castillo* (1991) 233 Cal.App.3d 36, 66 (*Castillo*); *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1237; *People v. McKinney* (1979) 95 Cal.App.3d 712, 745-746; *People v. Isitt* (1976) 55 Cal.App.3d 23, 31; *In re Maston* (1973) 33 Cal.App.3d 559, 565-566.) "By legislatively and judicially recognized contemporary standards, kidnapping is one of the most serious of all crimes. [Citations.] By its very nature it involves violence or forcible restraint." (*In re Maston*, *supra*, at p. 563.) Thus, "the legislative intent is . . . clear. Aggravated kidnapping for ransom involves an inherent danger to the life of the victim; the penalty

[11] The People requested judicial notice of the abstracts of judgments entered for Gonzales, Fonseca, and Reyes. We grant the request for judicial notice. (Evid. Code, §§ 452, 459.)

provisions for the crime are tied to this risk of harm." (*People v. Ordonez*, *supra*, at p. 1237.)

We find the rational set forth in *Castillo, supra,* 233 Cal.App.3d 36 to be instructive. There the court concluded: " '[T]he selection of a proper penalty for a criminal offense is a legislative function involving an appraisal of the evils to be corrected, the weighing of practical alternatives, and consideration of relevant policy factors and responsiveness to the public will.' [Citation.] This broad legislative discretion is subject to constitutional limitation, but given the long-standing, even ancient, horror of kidnapping [citation] and the substantial risk to human life that it presents [citation], we [conclude] that the punishment is not excessive." (*Id.* at p. 66.)

In arguing his sentence is disproportionate, Serna relies on *Ibrahim*, *supra*, 19 Cal.App.4th 1692. The *Ibrahim* court stated: "We are disturbed, however, by the fact that where there is no secondary victim, the distinction between kidnapping for extortion and kidnapping for robbery can be subtle [citation], yet the difference in penalty is substantial where the result is death/life without possibility of parole for the former [citation], but life with possibility of parole for the latter . . . . Absent a secondary victim, we can discern no reason for punishing the kidnapper-extortionist far more severely than the kidnaper-robber. . . . We therefore urge the Legislature to reconsider the sentencing schemes for these offenses." (*Id.* at pp. 1698-1699.) *Ibrahim* does not aid Serna. The concerns raised by the *Ibrahim* court is merely dicta. And, as acknowledged in *Ibrahim*, determining the appropriate penalties for crimes is a *legislative* function.

Serna also opines that the sentence imposed on him here is disproportionate to the sentences imposed for the same crime in states with similar constitutional provisions. This argument has likewise been rejected by other appellate courts. (*People v. Chacon*, *supra*, 37 Cal.App.4th at p. 64; *Castillo*, *supra*, 233 Cal.App.3d at p. 66; *In re Maston*, *supra,* 33 Cal.App.3d at p. 564.) Additionally, as the People point out, Serna's review of

more lenient punishments for the same crime in other jurisdictions ignores the fact that there are other jurisdictions that impose similar punishments. (*U.S. v. Nguyen* (11th Cir. 2001) 255 F.3d 1335, 1343, fn. 12 [imposition of life imprisonment or death for crime of kidnapping for ransom with bodily injury in Georgia]; *Sosa v. State* (Fla.App. 3d Dist. 1994) 641 So.2d 935, 936 [kidnapping with weapon punishable by life in prison in Florida].)

Thus, we find Serna's sentence is not grossly disproportionate in violation of the state and federal Constitutions.

9. *Equal Protection*

Next, Serna argues his sentence of life without the possibility of parole for his conviction of kidnapping to commit extortion with bodily harm violates equal protection because it is harsher than the sentences of similarly situated defendants convicted of kidnapping to commit robbery or robbery.

a. **Overview**

" 'Guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article 1, section 7 of the California Constitution prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. ' " (*People v. Chavez* (2004) 116 Cal.App.4th 1, 4.) "The constitutional guarantee of equal protection of the laws has been defined to mean that all persons under similar circumstances are given ' "equal protection and security in the enjoyment of personal and civil rights . . . and the prevention and redress of wrongs. . . ." ' [Citation.] The concept ' " 'compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' " ' " (*Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 939.)

" ' " The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly*

situated groups in an unequal manner." ' " (*People v. Dial* (2004) 123 Cal.App.4th 1116, 1120.) Generally, " ' "Persons convicted of different crimes are not similarly situated for equal protection purposes." [Citations.] "[I]t is one thing to hold . . . that persons convicted of the same crime cannot be treated differently. It is quite another to hold that persons convicted of different crimes must be treated equally." ' " (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565, italics omitted.) However, this is not an absolute rule. A state cannot "arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different criminal statutes." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*), overruled on other grounds as stated in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871.)

" ' "If it is determined that the law treats similarly situated groups differently, a second level of analysis is required. If the law in question impinges on the exercise of a fundamental right, it is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. All other legislation satisfies the requirements of equal protection if it bears a rational relationship to a legitimate state purpose." ' " (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1384.)

b. **Similarly Situated Groups**

i. *Kidnapping to Commit Robbery*

Serna argues that when there is no secondary victim, those convicted of kidnapping to commit extortion (§ 209, subd. (a)) with bodily harm and kidnapping to commit robbery (*id.*, subd. (b)) are similarly situated to each other. We are not persuaded by his arguments.

As acknowledged in *Hofsheier*, there is no blanket rule that persons who are convicted of different crimes are not similarly situated to each other. (*Hofsheier, supra,* 37 Cal.4th at p. 1199.) In *Hofsheier*, the court examined whether the lifetime sex offender registration requirement mandatorily imposed on defendants convicted of the

crime of oral copulation with a minor (§ 288, subd. (b)(1)) but not mandatorily imposed on those convicted of sexual intercourse with a minor (§ 261.5) violated equal protection principles under the federal and state Constitutions. The court looked to the prohibited conduct and determined that both "concern[ed] sexual conduct with minors" and noted "[t]he only difference between the two offenses is the nature of the sexual act." (*Hofsheier*, *supra*, at p. 1200.) Thus, defendants convicted of these two offenses were similarly situated to each other. (*Ibid*.)

Serna, who was convicted of kidnapping to commit extortion, attempts to group himself with those defendants who committed the crime of kidnapping to commit robbery, which is punishable by life in prison *with* the possibility of parole. (§ 209, subd. (b).) However, his attempt to demonstrate defendants convicted of these two crimes are similarly situated falls short. Unlike in *Hofsheier*, those convicted of kidnapping to commit extortion with bodily harm are not similarly situated to those convicted of kidnapping to commit robbery. Not all kidnappings to commit extortion are subjected to a heightened punishment. It is only those kidnappings to commit extortion that result in either *bodily harm, death, or intentional confinement that exposes that person to a substantial likelihood of death* that are punishable by life in prison *without* the possibility of parole.[12] (§ 209, subd. (a).) As illustrated by the statutes' wording, the two crimes are distinguishable in several ways: by the nature of the prohibited conduct (extortion and robbery) and the elements of the crime. Those convicted of kidnapping to commit *robbery*, unlike those defendants convicted of kidnapping to commit *extortion* and are punishable by a term of life in prison without the possibility of parole, need not have caused the victim bodily harm, death, or have confined the victim in a way likely to cause death.

[12] Under section 209, subdivision (a), those convicted of kidnapping to commit extortion where there is no death or bodily harm is punishable to life in prison *with* the possibility of parole.

Thus, Serna is not similarly situated to those convicted of kidnapping to commit robbery. Serna is only subject to the greater sentence of life without the possibility of parole because the additional prerequisite—bodily harm—was found by the jury. (See *People v. Rhodes*, *supra*, 126 Cal.App.4th at pp. 1382-1388 [defendants convicted of second degree murder of a peace officer while engaged in performance of his or her duties not similarly situated as those convicted of first degree murder of a non-peace officer or a peace officer not in performance of his or her duties]; *People v. Adair* (2014) 228 Cal.App.4th 1469, 1478-1480 [comparing elements of offense of annoying a child and indecent exposure and finding defendants convicted of those offenses are not similarly situated].)

Finding the groups are not similarly situated, we need not determine if there is a rational basis for the Legislature's different treatment of the groups.

ii. *Robbery*

Serna also argues he is similarly situated to those convicted of robbery. However, for the same reasons set forth above, we find the two groups are not similarly situated. Like kidnapping to commit robbery, the crime of robbery does not require bodily harm. (§§ 211, 212.5, 213.)

10. *Cumulative Error and Constitutional Violations*

Lastly, Serna argues the cumulative errors in his trial violated his constitutional rights and warrants reversal of his convictions.[13] Since we find no individual prejudicial errors, we must reject his claim of cumulative error.

DISPOSITION

The judgment is affirmed.

[13] In his supplemental opening brief, Serna also claimed the multiple errors in his case as argued in his opening brief warranted reversal of his convictions due to various constitutional violations. Having found no errors, we find Serna's constitutional rights were not violated.

Premo, J.

WE CONCUR:

Elia, Acting P.J.

Mihara, J.

People v. Serna
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Appendix B

Court of Appeal, Sixth Appellate District - No. H041769

S247496

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

NORBERTO SERNA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice