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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOE NAVARRO, Defendant and Appellant.	C087120 (Super. Ct. No. 16FE017331)

Defendant Joe Navarro attacked the victim, E.C., when defendant's codefendant, Crystal Graham, got into the victim's car in a "stroll area" for prostitutes in Sacramento and brought him back to their motel room. Defendant relieved him of his wallet and keys. Graham took his bank card, went to an ATM, withdrew $400, and returned to the motel. Defendant and Graham left the motel with the victim tied up in the backseat of their 4Runner driven by defendant and Graham driving the victim's Prius. After they transferred the victim to the Prius, he escaped by partially untying the tape binding his

hands and jumping out of the car when it slowed down on the freeway. Graham abandoned the Prius and defendant and Graham fled in the 4Runner.

Defendant and Graham were tried jointly by separate juries. Defendant's jury convicted him of kidnapping during a carjacking (Pen. Code, § 209.5, subd. (a)),[1] second degree robbery (§ 211), and kidnapping (§ 207, subd. (a)). The trial court found true that defendant had served seven prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to life with the possibility of parole on the kidnapping during carjacking offense and a consecutive term of 12 years for the second degree robbery offense, consisting of the upper term of five years plus seven years for the seven prior prison terms. The court stayed the kidnapping sentence under section 654.

Defendant contends: (1) the trial court erred in denying his *Batson/Wheeler*[2] motion for a new trial without an adequate inquiry into the prosecutor's reasons for striking three African-American jurors; (2) his confession was improperly admitted because the *Miranda*[3] warnings given him were deficient; (3) his conviction for simple kidnapping must be reversed as a lesser included offense of kidnapping during a carjacking; and (4) the restitution fine (§ 1202.4) and other fees and fines assessed by the trial court should be stricken because the court failed to conduct a hearing under *Dueñas*[4] regarding his ability to pay.

The Attorney General concedes defendant's conviction and sentence for simple kidnapping must be reversed. We reject defendant's other claims.

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[1] All undesignated statutory references are to the Penal Code.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

[4] *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

In addition, Senate Bill No. 136 (2019-2020 Reg. Sess.) amending the circumstances under which a one-year enhancement for a prior prison term may be imposed under section 667.5, subdivision (b) applies retroactively to defendant.[5] None of defendant's prior prison terms qualify for the enhancement under the amended statute. We will order the one-year enhancements stricken.

The judgment is otherwise affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Robbery and Kidnapping

On August 27, 2016, defendant and Graham rented a room in a Sacramento motel. Video surveillance from the motel shows defendant entering with Graham, both of them laughing and smiling while talking to the motel clerk.

The victim testified that, on August 28, 2016, he got off work from a night shift and drove his Prius to a gas station. He had heard that the gas station was in a "stroll area" for prostitutes. He was eating peanuts when Graham walked by in front of his car. Graham smiled at him, opened the passenger door, and got in his car. He told Graham to get out but she put her hand on his crotch and his hand on her breast. Graham said she needed a ride back to her motel. He decided to drive her there to get her out of his car. On the way to the motel, he stopped at a liquor store.

When they arrived at the motel, Graham invited him to come into the room for a drink but he hesitated. Graham went into the room and called to him to come in.

When the victim entered the room, defendant grabbed him from the left side and pushed him face down on the bed. Defendant was wearing a Halloween mask. He was

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[5] We granted defendant's request for supplemental briefing regarding Senate Bill No. 136. Navarro and the Attorney General submitted supplemental briefs in which both agreed the one-year enhancements should be stricken.

holding a box cutter with the blade exposed. Defendant had metal chains wrapped around his other hand.

While the victim was face down, his wallet and keys were taken out of his pants. He thought it was defendant who did it. The wallet contained his Golden One Credit Union Visa card and ID. Graham got his card. Graham and defendant asked him for the personal identification number (PIN).

Graham left the room. Defendant was pressing the box cutter against the victim's neck. Defendant was still asking him for the PIN. Defendant threatened to hurt him. The victim was mixed up because he had several PINs. He finally got the right one. He could hear defendant repeating the PIN on the telephone. He later learned that $400 had been withdrawn from his bank account at an ATM.

Graham came back to the motel room. Defendant made the victim stand up. Defendant took off his mask. Either Graham or defendant told him to stand in the corner. They told him to take off his clothes but changed their minds.

Defendant taped the victim's wrists together in front of him and put tape over his eyes. Graham opened the door to the motel room and went out first. They took the tape off his eyes. Defendant put a towel over his taped wrists. Defendant shoved him towards the 4Runner. Defendant put him in the rear passenger-side seat, sitting up. Defendant was driving the 4Runner. Graham was driving the victim's car.

When they were getting ready to put him in the car, the victim heard Graham say that they were going to take him "to the woods." He was afraid he might be shot or killed or left in the woods.

Both vehicles got on the freeway and off at the next exit. They stopped at a vacant lot. Defendant grabbed the victim and shoved him in the back seat of the Prius. Defendant went to a gas station in the 4Runner. As defendant was pumping gas, Graham and the victim circled the parking lot and then pulled in behind the 4Runner.

When defendant was finished getting gas, both vehicles left the gas station and got back on the freeway, with Graham driving in front of defendant. Graham did not talk to the victim. The victim started biting the end of the tape to get it off his hands. He thought Graham saw him in the rearview mirror. She pulled over and stopped. Defendant stopped and came over to the Prius. Graham said that the victim was trying to take off the tape. Defendant said, "No, he's fine."

Defendant left and Graham drove off. The victim kept unraveling the tape. Graham was looking back at him. When Graham saw him unravel a length of the tape, she stopped on the freeway again. The victim opened the door while the car was still moving and tried to get out. Defendant came up quickly from behind and almost hit him. The victim's hands were still bound. He ran down the shoulder of the freeway towards traffic. He held his hands up to show they were bound. Graham and defendant drove off. The victim ran back to an exit ramp.

A husband and wife testified they were driving east on the freeway and saw the victim running west with his hands bound waving his arms. The husband got off at an exit and his wife called 911. The victim walked up to their car and the police arrived shortly after.

Another husband and wife were driving east on the freeway when they saw a red Prius in front of a gray or silver 4Runner suddenly pull over. They saw a man jump out with his arms in the air running west on the shoulder. Two people got out of the vehicles, jumped right back in, and drove off in the slow lane with the Prius in front. At this point, the vehicles were behind the couple, who saw turn signals indicating the Prius and 4Runner were going to get off at the next exit. All three cars got off at the exit. The couple eventually allowed the Prius and 4Runner to go ahead and took pictures of the license plates. The couple decided to go back to the exit where others were helping the man who jumped out of the car. On the way, they noticed the Prius abandoned in a parking lot.

A witness testified he was driving east on the freeway and saw a red Prius in front of a 4Runner, both vehicles spinning their tires to get back on the freeway. The Prius attempted to pass the witness, who saw the female driver of the Prius looking in her rearview mirror. In his side mirror, the witness saw the driver of the 4Runner motioning for her to get over. The Prius got behind the witness and all three vehicles took the exit. The witness saw the driver of the 4Runner motioning for the Prius to turn right. Both cars went around the witness and turned right. The witness followed and saw the Prius park. The female driver got out and ran to get in the 4Runner, which drove off.

Defendant's Interview

Defendant was arrested in Salinas, transferred to Sacramento, and interviewed by detectives in the main jail in Sacramento. A detective read defendant his *Miranda* rights; he said he understood them and agreed to talk to the detective. The interview was recorded. The recording was played for the jury. A transcript of the interview was passed out to jurors to use while listening to the recording and collected afterwards.

In the interview, defendant stated that he and Graham came to Sacramento in a 4Runner and stayed in a motel. Graham "turned tricks" near the motel. Graham was supposed to bring a man back to the motel so they could take his money and take off. Graham came back to the motel with a man defendant described as a "Short Asian dude." Defendant had a Halloween mask on. Defendant told the man to lie on the bed. According to defendant, the "next thing I know it's like a whole different fucking person took over from her [Graham]." Graham told defendant to tie the man up; defendant did it with some tape from the car. Defendant had a box cutter but he told the man he did not want to hurt him. Graham took the man's bank cards and left for about 10 minutes.

When Graham came back, they put the man in the backseat of the 4Runner. They were supposed to drive the man's car around the corner, put him out, and leave as soon as possible. They stopped in a vacant lot and moved the man to the car Graham was

driving. Graham gave defendant money for gas. Graham got on the freeway with defendant following in the 4Runner. The man managed to get the tape undone and Graham pulled over to the shoulder. The man jumped out and defendant and Graham continued on the freeway. They dropped off the man's car up the road and went to Reno.

Throughout the interview, defendant attributed the kidnapping and carjacking to Graham's sudden exhibition of an aggressive personality.

Graham's Defense

Graham testified in her defense. She was engaged in prostitution from 2010 to 2013. Graham was incarcerated for six months from January 2016 to June 2016 for felony vehicle theft in Monterey. As a result of the felony conviction her children were placed in foster care. She was attempting reunification with her children.

Graham met defendant in early August 2016. She called a friend to pick her up and they drove to a gas station where they got in a 4Runner with defendant and his girlfriend. The group went to a house where Graham had a conversation with defendant. Graham told defendant where her children went to school. Defendant told Graham that he used to work for the probation department and had connections and resources in the area. Graham relapsed on alcohol that night.

On August 10, 2016, Graham encountered a woman she knew from when she was incarcerated. The woman wanted methamphetamine. Graham called defendant, who picked them up. They were pulled over by the police, who arrested defendant and released the women. Defendant's wife called Graham's phone and Graham went to their apartment. Defendant's wife wanted help with his bail but Graham didn't have the funds. Defendant talked to his wife on Graham's phone. He called back and said he had been released. When defendant returned, he told his wife to lock the entrance and said Graham was leaving with him. They drove around but Graham did not return to the apartment.

Graham testified that, after this incident, defendant would call Graham's phone "ask[ing] where I was, who am I with, that I needed to tell him who I was with, where I was at all times; that he could basically find me anywhere, because he knows everything, so I cannot hide."

Graham testified that, "the next time [she] had an encounter with" defendant, she was meeting with a team of social workers and therapists to let them know she had relapsed and wanted to enter an in-patient program. Defendant demanded to know where she was and picked her up from the meeting. They went to a friend's house in the marina where defendant did drugs. Afterwards, Graham told defendant she couldn't do this anymore and needed to not have contact with him. On the way from the marina to Salinas, defendant pulled into a strawberry field at sunset. Graham's phone was going dead and she could not call or text anybody. She testified that "it just really freaked me out."

They followed a man defendant said was his uncle to another part of the field. There, defendant slapped Graham and said, "Bitch, you're not going nowhere. Don't you know who I am?" Defendant told Graham she was going to make money for him. He shot himself up with drugs, injected Graham with drugs in the anus, and penetrated her anally. Defendant threatened Graham, telling her he could bury her right then and no one would find out. He said he knew where her kids went to school, knew everything about her, and her kids would not be able to hide.

Defendant asked Graham where she had made money. Graham said out of state and Sacramento. Defendant said he had a son in Sacramento. They went to Sacramento. Graham did "two car dates" on Watt Avenue in Sacramento, while defendant was close by in his truck. She made two hundred dollars from the two dates. They checked into a motel using Graham's ID.

They went back to Watt Avenue the next morning. Defendant told Graham she needed to make some more money before they checked out. Graham was walking away

from Watt Avenue when she saw the victim. He went around a couple times. She waved at him and he waved back. He pulled into a 7-Eleven and Graham got into his car. Graham touched his private area and took out her breast, which he touched. Graham asked him if he was the police and he said, no. She asked if he wanted a date and he said, yes. Graham said she had a room and the price was $100. He did not want to go the room but agreed to go when Graham said the price was $60. On the way to the motel, they went to a liquor store and he bought a bottle of tequila and condoms.

When they got to the motel, the victim was not sure about coming in. Graham told him no one was there and offered to look first and wave him in. Graham opened the door and waved him in. Graham did not think defendant was in the room. She thought defendant was in the 4Runner parked out front, because he was "always paranoid."

When the victim came in the room, Graham took a drink of the tequila and began to open the condoms when defendant came out of the closet wearing a Halloween mask. Defendant ordered the victim down on the bed and demanded his wallet. Defendant told Graham to go to an ATM and ordered the victim to give Graham his PIN. Graham went to an ATM and got $400. Defendant had told Graham to get the $400. Graham was concerned that defendant might hurt the victim and wanted to follow instructions.

When Graham got back, the victim was still on the bed. She gave defendant the money and he ordered the victim to get up, go to the corner, and get undressed. Graham suggested they take the victim to the woods because she thought defendant wanted to strip and hurt him in the room.

Defendant put the victim in the 4Runner. Graham got in the Prius and they got on the freeway. Graham then got off the freeway onto some side streets. There, defendant put the victim into the Prius. Graham was relieved because she was not going to hurt him.

When they got to a gas station, Graham drove around in circles to get other people's attention. They got back on the freeway. Graham did not "want to be a part of

the continuance of any of this." She pulled over hoping that the victim would get out. He didn't, so she pulled over another time and that's when he got out. Defendant pulled up, asked what Graham was doing, and told her to go. Graham got on the freeway and off at the next exit.

Graham and defendant went back to Salinas. In Salinas, they picked up defendant's girlfriend. Defendant told Graham to get in the driver's seat. Graham saw that defendant had a gun; she had seen he had bullets before. They drove to Monterey and parked. They dropped off defendant's girlfriend and went to a field where defendant wanted to have sex. Graham said she had gotten her period. They went to a McDonald's. Graham disposed of the gun in a garbage can. She told defendant she did not want to be part of this and would rather call the police. He drove off. That was the last time she saw him.

Trial and Sentencing

Defendant did not testify.

Graham and defendant were charged in count one with kidnapping to commit robbery (§ 209, subd. (b)(1)), in count two with kidnapping during a carjacking (§ 209.5, subd. (a)), in count three with second degree robbery (§ 211), and in count four with kidnapping (§ 207, subd. (a)).

The trial court granted Graham's motion to empanel two juries. The court observed that defendant "gave a formal statement to law enforcement wherein he implicates himself and the other defendant. [¶] As of right now . . . he's not testifying. So I think we do need two juries."

The jury found defendant not guilty of kidnapping to commit a robbery and guilty of kidnapping during a carjacking, robbery, and simple kidnapping. Defendant waived jury trial on the prior prison term enhancements. The trial court found beyond a reasonable doubt that defendant had served seven prior prison terms. The court

sentenced defendant to the upper term of five years for second degree robbery plus seven years for seven prior prison terms. Defendant was sentenced to life with parole eligibility after seven years for kidnapping during a carjacking. The court stayed the sentence for simple kidnapping under section 654. Defendant was ordered to pay a restitution fine of $10,000 under section 1202.4. The court stayed a parole revocation fine in the same amount under section 1202.45. The court imposed a court operations assessment of $120 under section 1465.8 and a conviction assessment of $90 under Government Code section 70373.

DISCUSSION

Batson/Wheeler Motion

Defendant contends the trial court erred in denying his *Batson/Wheeler* motion after the prosecutor exercised peremptory challenges to exclude three African-American prospective jurors from the jury. "Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*); *People v. Silva* (2001) 25 Cal.4th 345, 386; see also *Foster v. Chatman* (2016) 578 U.S. ___, ___ [195 L.Ed.2d 1, 12] (*Foster*) ["The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.' [Citation]"].)

"[The Supreme Court's] decision in [*Batson*], provides a three-step process for determining when a strike is discriminatory: [¶] 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.' [Citation.]" (*Foster, supra,*195 L.Ed.2d at p. 12.)

Here, after the prosecutor exercised a peremptory challenge to a third African-American juror, defense counsel made a *Batson/Wheeler* motion, claiming a pattern of

striking African-American jurors. The trial court ruled "there is enough of an inference raised here that maybe the exercise was for an improper purpose, I think we'll go to the next step." Having ruled that defendant had made a prima facie showing that a peremptory challenge was based on race, the court called on the prosecutor to present race-neutral reasons for challenging these three jurors: Ms. W., Ms. J. and Mr. R.

Ms. W.: In voir dire by the court, Ms. W. stated she had friends in law enforcement in the sheriff's department, youth authority and probation department. Ms. W. said she would have no problem following the rule that police witnesses are not treated as more credible. Ms. W. had been arrested in 1997 or 1998 but admitted she was in the wrong and did not think she was singled out unfairly or that her rights were violated. There was nothing about this case that troubled her such that she could not be objective. She could be fair to both sides.

In response to the prosecutor's questions, Ms. W. acknowledged her case had involved the Sacramento County District Attorney's Office. She had no negative feelings about the district attorney's office or the court system. Her arrest was an isolated incident and was "actually a positive experience," because it helped her change.

After the court advised the venire that there might be drugs involved in this case and asked if that would be a problem for any prospective juror, Ms. W. disclosed that she had a personal experience with drugs. She knew a lot of people doing methamphetamine. Ms. W. personally used methamphetamine and went through a treatment program. She said if she heard that a witness or someone was involved with drugs, she would not lose track of other evidence to just focus on that fact. Ms. W. said she would keep an open mind. The prosecutor exercised a peremptory challenge to excuse Ms. W.

When the court asked the reasons Ms. W. was excused, the prosecutor explained that Ms. W. had been prosecuted for possession of a narcotic with intent to sell, and while she said it turned her life around, Ms. W. said she personally used methamphetamine and knew many people who used and dealt drugs. Given defendant's statements about being

under the influence of methamphetamine, the prosecutor was concerned about the uncertain tenor of Ms. W.'s statements in voir dire concerning people using drugs and how that affects their decisions. Ms. W. also had yelled, "Yes!" when she was excused.

Ms. J.: In voir dire by the court, Ms. J. stated she had been involved in a domestic violence matter that led to prosecution of the perpetrator and a sentence of 15 years. Ms. J. thought the system worked in that case. Ms. J. said she had not had a bad experience with law enforcement in that instance.

However, 15 years ago she was an officer with the Yolo County Sheriff's Department. She resigned after three years when her sergeant threatened her with a job-related action. Afterwards, the department was under investigation for three years. Ms. J. did not pursue further employment in law enforcement. She ended up working in the Sacramento County jail for almost five years in a medical capacity. She interacted with deputies there and got along with them. Ms. J. did not have a negative view of law enforcement because of what happened in Yolo County.

After the court's advisement to prospective jurors regarding the involvement of drugs in this case, Ms. J. said she knew someone with a drug problem 15 years ago. It was the person she referred to earlier who threatened her. Drugs played a role in what happened then but it was gone and in the past. The prosecutor exercised a peremptory challenge to excuse Ms. J.

The prosecutor's reasons for excusing Ms. J. included that "she was very expressive when the Court was speaking," "very excited when the Judge made comments about what the police cannot do," and "shaking her head, audibly talking." Ms. J. was visibly agreeing with everything the court said about law enforcement and having bad experiences with law enforcement, until the court said that jurors "cannot put law enforcement at a negative." Ms. J. did not agree with the court on that point. Ms. J. was a law enforcement officer who was threatened by her sergeant, left the department, and never became an officer again. The prosecutor also brought up that Ms. J. was a victim

of domestic violence, though she said she was happy with the prosecution. Ms. J. murmured under her breath the entire time the court was questioning her. Ms. J. was not in agreement with what the prosecutor said, but very agreeable to what defense counsel and the court said about negative views of law enforcement. This concerned the prosecutor because Ms. J. would not explain why she left law enforcement after being threatened by a sergeant.

Mr. R.: In voir dire by the court, Mr. R. stated he is an inventory auditor who counts items in stores. He disclosed that his brother-in-law is a correctional officer. He said he would have no problem assessing a police witness. Neither Mr. R. nor anyone he knew had had a bad encounter with police.

Mr. R. had been arrested for a domestic violence incident in Sacramento three years ago. The case did not go to trial because the district attorney dropped the charges. Mr. R. did not have negative feeling towards police because he was arrested but the charges were dropped. The sheriff's department made the arrest. He did not think he would have a concern that witnesses from the sheriff's department would testify in this case. The prosecutor struck Mr. R.

The prosecutor explained that she was concerned that Mr. R. did not complete high school. He failed to disclose the domestic violence incident on his jury form. He didn't discuss in voir dire a DUI and other arrests that were on the form. When the prosecutor asked about incidents with law enforcement in voir dire, he mentioned the one he didn't write down and didn't talk about those that he did write down. The prosecutor noted that the jury did not include anyone who had had a negative experience with law enforcement or arrests.

The prosecutor also argued that she had passed an African-American juror who was seated and challenged four White males and two White females.

Defense counsel responded that Mr. R. wrote on his jury form questionnaire "DUI, unpaid fines, etc." She argued that he volunteered his domestic violence arrest and was

not trying to hide anything, the prosecutor simply did not follow up. She further argued the fact that the prosecutor had seated one African-American juror did not free her to excuse 50 others. Defense counsel stated that the majority of the panel was White. The court agreed but the prosecutor did not.

In ruling on the *Batson/Wheeler* motion, the trial court readily found that the race-neutral reasons given by the prosecutor for excusing Ms. W. and Ms. J. were valid. The court deemed Mr. R. "a closer call" in terms of whether his responses were "candid or not candid in terms of the prior criminal record of his contact with law enforcement." However, to find that the prosecutor "is doing something for a racial reason requires . . . pretty clear evidence. And I don't think that's met here."

The court noted it had gone to the next step of the *Batson/Wheeler* analysis because the prosecutor excused three African-American jurors. But one African-American was seated on the jury.

Even though it was closer question for Mr. R. versus Ms. W. and Ms. J., the reasons the prosecutor gave were enough to satisfy as non-race-related basis for excusing him. The prosecutor had laid out valid reasons. The court reiterated that to make a finding that the prosecutors acted for a discriminatory reason "requires some pretty clear evidence in my mind." The court denied the motion.[6]

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[6] At the hearing on the motion, the trial judge offered some general observations regarding the purpose the court attributed to *Batson/Wheeler*. "The idea . . . that everybody of a certain race, everybody thinks a certain way, has a same approach of things, is expected to view, think in this way or that based on their race, which is a whole reason for underlying this whole Wheeler/Batson thing, that because you have a black person on trial, you should have a black person on the jury, which would make it very sympathetic to that black defendant. Well, I reject that. I don't think that that is what should be expected of anyone. And the idea that somebody could not give somebody of a different race a fair trial, kind of like by definition, and I think it's something that I do not accept." The court continued that "the appellate courts apparently have bought into the notion" and trial courts "have to live with it." Suffice it to say, the trial court had it

On appeal, defendant urges us to "consider step three of the analysis because the trial court made a prima facie finding when it proceeded to the second step of the *Batson/Wheeler* analysis and ultimately ruled on the credibility of the prosecutor's reasons."

In the third step, the trial court must determine whether the defendant has proved purposeful discrimination. The inquiry is on the subjective believability of the prosecutor's reasons, not their objective reasonableness. The credibility of the prosecutor's explanation is pertinent and the court can consider the prosecutor's demeanor, the reasonableness or improbability of the explanation, and whether the prosecutor's reasons have some basis in acceptable trial strategy. The court must make a sincere and reasoned effort to evaluate the prosecutor's justification, considering the facts of the case, acceptable trial tactics, and observations of the prosecutor's examination of potential jurors and the subsequent exercise of challenges to jurors. Implausible or fantastic explanations may be considered pretexts for purposeful discrimination. The trial court has the advantage of being in the courtroom to assess the prosecutor's credibility. (*Gutierrez, supra*, 2 Cal.5th at pp. 1158-1159.)

We review the trial court's decision on the sufficiency of the prosecutor's justifications with great restraint. In addition, we presume the prosecutor's use of peremptory challenges occurs in a constitutional manner. We apply the substantial evidence standard, giving deference to the court's conclusions if made based on a reasonable evaluation of the prosecutor's stated justifications. (*Gutierrez, supra,*

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backwards. A *Batson/Wheeler* motion is intended to counter discrimination based on the assumption by a prosecutor that all African-American jurors will be biased in favor of an African-American defendant. (See, e.g., *Batson, supra*, 476 U.S. at p. 97 ["the Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black"].) It is unfortunate that the trial court made these inaccurate and apparently gratuitous remarks. However, as we hold, the trial court applied the law correctly to the matter before it.

2 Cal.5th at p. 1159.)

We agree with the trial court that the prosecutor's race-neutral reasons for excusing Ms. W., Ms. J. and Mr. R. were valid.

The prosecutor's principal reason for striking Ms. W. focused on her report that she had been arrested for methamphetamine use and knew many people who used and dealt drugs. The prosecutor could be validly concerned that Ms. W. would view the facts through the lens of her drug prosecution and association with people involved with drugs. (*People v. Melendez* (2016) 2 Cal.5th 1, 20 (*Melendez*); *People v. Hensley* (2014) 59 Cal.4th 788, 805; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1044.)

The prosecutor principally relied on Ms. J.'s report of an incident where she was threatened by a sergeant in the Yolo County Sheriff's Department. She was reluctant to disclose details and had abandoned a law enforcement career as a result. Principal prosecution witnesses, including the detectives who took defendant's statement, were sheriff's deputies. The prosecutor expressed a valid concern that Ms. J. could be influenced by a negative experience with law enforcement. (*People v. Lomax* (2010) 49 Cal.4th 530, 573; *People v. Panah* (2005) 35 Cal.4th 395, 442; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.)

The trial court deemed it "a closer call" whether or not Mr. R. was forthcoming regarding a domestic violence arrest that he disclosed in voir dire but had omitted from his juror questionnaire. It is established that a juror's less than forthcoming responses constitute a race-neutral reason to challenge a prospective juror. (*People v. Winbush* (2017) 2 Cal.5th 402, 441 [failure to disclose arrest in juror questionnaire reflected lack of candor which was a legitimate reason for a peremptory challenge]; see also *People v. Booker* (2011) 51 Cal.4th 141, 166; *People v. DeHoyos* (2013) 57 Cal.4th 79, 114.)

Defense counsel's argument that Mr. R. had not hidden his domestic violence arrest was based on the questionnaire where he wrote "DUI, unpaid fines, etc." We do not find this response to be forthcoming but more of an attempt to minimize the

significance of such events, as well as omitting mention of the incident which was likely Mr. R.'s most negative experience with law enforcement, i.e., an arrest for domestic violence by sheriff's deputies where the charges were ultimately dropped. While we may disagree with the trial court that the prosecutor's reason for excusing Mr. R. required more analysis than Ms. W. and Ms. J., that the court did so provides further supports for our conclusion that the court's evaluation of the prosecutor's reasons for challenging these three jurors was sincere and reasoned. (See *Melendez, supra*, 2 Cal.5th at p. 15; *People v. Smith* (2019) 32 Cal.App.5th 860, 871-872.)

On this record, we find no *Batson/Wheeler* error.

Miranda Warnings

Defendant claims that "[t]he trial court erred in allowing [defendant's] confession into evidence because the *Miranda* advisements given to [defendant] were incomplete because he was not told he could consult with counsel before and during questioning." This argument is without merit.

Prior to questioning defendant, a detective advised defendant of his *Miranda* rights:

"Hoen: I wanna talk to you, but since you're in jail I need to share your Miranda rights with you so I'm gonna do that with you right now okay. You have the right to remain silent you understand?

"[Defendant]: Yes.

"Hoen: Okay. Anything you say may be used against you in court. Do you understand?

"[Defendant]: Yes.

"Hoen: You have the right to the presence of an attorney before and during any questioning. Do you understand?

"[Defendant]: Yes.

"Hoen: If you cannot afford an attorney one will be appointed free of charge before any questioning if you want. Do you understand that?

"[Defendant]: Yes."

Defendant moved to exclude his statement on the ground that the detective gave him a defective *Miranda* warning that failed to explicitly inform defendant he had a right to consult an attorney. The court listened to the recording and read the transcript of the interview. At the hearing on the motion, the court observed "if you tell somebody you have a right to have an attorney present while you're being questioned, that . . . certainly conveys the idea that they have a right to a person to be there because they have a right to talk to that person to consult with them and ask them questions." The court issued a written ruling that the "[w]ording of *Miranda* advisements may vary but at the very least they must convey to the defendant of the right to consult with an attorney prior to questioning and to have one present during questioning. In this case the detective advised defendant, before beginning the interrogation, that the latter had the right to the presence of an attorney 'before and during any questioning.' The Court concludes this advisement is sufficient." The court denied the motion to suppress.

More than 40 years ago, in *People v. Bennett* (1976) 58 Cal.App.3d 230, the appellate court stated that *Miranda* "holds that before a defendant's out-of-court statements, exculpatory or inculpatory, resulting from custodial interrogation can be received against him, the prosecution must prove that the defendant was informed in clear and unequivocal terms of (1) his right to remain silent; (2) that anything he says can and will be used against him in court; and (3) *his right to the presence of counsel, which means the right to consult an attorney* and to have his attorney with him during the interrogation so as to protect his privilege against self-incrimination." (*Id.* at pp. 236-237, italics added, fn. omitted, citing, inter alia, *Miranda*, *supra*, 384 U.S. at pp. 467-471.)

We see no reason to depart from the commonsense notion expressed in *Bennett*

that an advisement of the right to the presence of an attorney conveys the right to consult with that attorney. No reasonable person would understand that the right granted was merely to have an attorney play the role of a "potted plant" and, though present, remain mute before or during police questioning.

Miranda advisements "need not be presented in any particular formulation or 'talismanic incantation.' [Citation.]" (*People v. Wash* (1993) 6 Cal.4th 215, 236.) However, *Miranda* itself articulates the warning in terms of presence of attorney as conveying the protection afforded by the ability to consult with any attorney. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the *presence of an attorney*, either retained or appointed." (*Miranda, supra*, 384 U.S. at p. 444, italics added.)

On a habeas petition from a California state court conviction, a juvenile offender made the same argument as here, claiming he was only warned he had " 'a right to the presence of an attorney before and during any questioning.' " (*DeLaTorre v. Haws* (E.D. Cal., June 20, 2011, No. 2:09-cv-1974-TJB) 2011 U.S. Dist. Lexis 65277, *21.) The federal court memorably stated: "Even a fourteen-year-old would understand that this encompassed more than a right to have an attorney sit next to him before and during questioning, without the ability to communicate with the attorney or for the attorney to act on your behalf. The presence of an attorney necessarily implies the counsel of that attorney." (*Ibid.*; see also *U.S. v. Davis* (D. Nev., June 1, 2016, No. 2:12-CR-289 JCM (PAL)) 2016 U.S. Dist. Lexis 71925, *12-*13 ["A reasonable person would understand that the right to the presence of an attorney would include the right to consult with an attorney prior to and during questioning. The defendant's argument that a suspect would be appointed an attorney prior to questioning but would not be allowed to consult with that attorney is an unnecessarily narrow interpretation that defies common sense"].)

The trial court did not err in denying defendant's motion to suppress.

Simple Kidnapping

Defendant contends that his conviction for simple kidnapping (§ 207, subd. (a)) should be reversed because it is a lesser included offense of kidnapping during a carjacking (§ 209.5). Defendant argues "[i]t is well-established that a conviction for a lesser included offense cannot stand where the defendant is also convicted of the greater offense."

The Attorney General agrees that simple kidnapping is a lesser included offense of kidnapping during carjacking and defendant's simple kidnapping conviction should be reversed on that basis. We also agree.

"A judicially created exception to the general rule permitting multiple convictions 'prohibits multiple convictions based on necessarily included offenses.' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) "When a defendant is convicted of a greater and a lesser included offense, reversal of the conviction for the lesser included offense is required." (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1416.)

There is no dispute that simple kidnapping is a lesser included offense of kidnapping during a carjacking. (*People v. Stringer* (2019) 41 Cal.App.5th 974, 988; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1368; see also *People v. Russell* (1996) 45 Cal.App.4th 1083, 1088-1089.) Therefore, defendant's conviction for simple kidnapping must be reversed. (*Stringer, supra,* at p. 988.)

Fines and Fees

Defendant contends that the restitution fine the trial court imposed under section 1202.4 and parole revocation fine under section 1202.45, as well as assessments under section 1465.8 and Government Code section 70373, "must be stricken or stayed because there was no evidence presented that [defendant] had any ability to pay them." This argument is based on the recent *Dueñas* decision.

In *Dueñas, supra,* 30 Cal.App.5th 1157, an indigent and homeless mother of young children was trapped in a cycle where she could not pay the fees to reinstate a

suspended driver's license and incurred additional fees and fines associated with misdemeanor convictions for driving with a suspended license that she could not afford to pay. (*Id.* at pp. 1160-1161.) After pleading no contest to another misdemeanor charge of driving with a suspended license, Dueñas requested that the trial court conduct an ability to pay hearing, at which the court determined that she lacked the ability to pay attorney fees for representation by a public defender (§ 987.8, subd. (b)) and waived these fees. (*Dueñas, supra*, at p. 1163.) Nonetheless, the court imposed assessments and a minimum restitution fine. (*Ibid.*)

The appellate court held "the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.)[7]

As for the restitution fine under section 1202.4, the court noted that the statute prohibits a trial court from considering a defendant's ability to pay unless the fine exceeds the statutory minimum amount. (§ 1202.4, subds. (b)(1), (c).) The court in *Dueñas* held this statute violates due process. (*Dueñas, supra*, 30 Cal.App.5th at p. 1171.)[8]

We also lament the plight of indigent defendants who, like Dueñas, find themselves trapped in a set of unfortunate circumstances created by the imposition of

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[7] The court acknowledged "case law in this area historically has drawn on both due process and equal protection principles." (*Dueñas, supra*, 30 Cal.App.5th at p. 1168, fn. 4.)

[8] The court also acknowledged that in that context due process and the constitutional ban on excessive fines are similar in application. (*Dueñas, supra*, 30 Cal.App.5th at p. 1171, fn. 8.)

fines and fees they cannot afford to pay. Though the seeds of their predicament were sowed by their own misconduct, it may nonetheless seem unfair that those with money can avail themselves of opportunities and avoid consequences that the poor cannot. But the constitutionality of a fine or fee does not rest on whether it seems unfair. As pointed out in *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted November 26, 2019, S258946, the Constitution has been held to bar the imposition of financial exactions on the impecunious only in limited circumstances when to do so "would otherwise preclude criminal and civil litigants from prosecuting or defending lawsuits or from having an appellate court review the propriety of any judgment," or when the failure to pay would result in the incarceration of persons lacking the ability to pay. (*Id.* at p. 325; see also *People v. Lowery* (2020) 43 Cal.App.5th 1046, 1055-1057; *People v. Petri* (2020) 45 Cal.App.5th 82, 91.)

We agree with *Hick*'s explication of the constitutional principles on which *Dueñas* relies and therefore disagree with the holding in *Dueñas*. The imposition of fees and fines in this case does not compromise defendant's constitutional right of access to the courts nor will it result in any additional incarceration, and thus no liberty interest protected by due process is implicated. Indigency is not a defense to criminal sanctions, and does not warrant the relief sought here.

Senate Bill No. 136

Under section 667.5, subdivision (b), the trial court imposed seven 1-year enhancements for prior prison terms defendant served for: (1) grand theft from a person and assault with a deadly weapon (§§ 487, subd. (c) [former § 487.2], 245, subd. (a)(1)); (2) vehicle theft (Veh. Code, § 10851); (3) transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)); (4) unlawful sexual intercourse with a minor (§ 261.5, subd. (d)); (5) possession of ammunition by a felon (former § 12316, subd. (b)(1)); (6) sexual battery (§ 243.4, subd. (a)); and (7) failure to register as a sex offender (§ 290.003).

Section 667.5, subdivision (b), formerly provided in relevant part that "where the new offense is any felony for which a prison sentence or sentence of imprisonment in a county jail . . . is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term . . . for any felony . . . ."

Senate Bill No. 136, signed by the Governor on October 8, 2019, amended this provision to substitute "a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code" in place of "any felony." This amendment was effective January 1, 2020. (Stats. 2019, ch. 590, § 1.) None of defendant's prior prison terms was served for an offense listed in the definition of a "sexually violent offense" in Welfare and Institutions Code section 6600, subdivision (b), including defendant's three sexual misconduct offenses.

We assume, absent a clear indication to the contrary, that the Legislature intended an "amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 742-748; *People v. Lopez* (2019) 42 Cal.App.5th 337, 341-342 (*Lopez*).) Defendant's judgment is not final on appeal and therefore he benefits from Senate Bill No. 136. (*Lopez*, *supra*, at p. 342.)

We need not remand for resentencing because the trial court imposed the maximum sentence against defendant of the upper term of five years in count three for second degree robbery. (§ 213, subd. (a)(2).) (*Lopez*, *supra*, 42 Cal.App.5th at p. 342.) "Because the trial court imposed the maximum possible sentence, there is no need for the court to again exercise its sentencing discretion." (*Ibid.*, citing *People v. Buycks* (2018) 5 Cal.5th 857, 896, fn. 15.)

Therefore, in accordance with section 667.5, subdivision (b), as amended, we order the seven 1-year enhancements imposed by the trial court stricken and direct the trial court to amend the abstract of judgment to reflect this modification. (See *People v.*

Martinez (2008) 161 Cal.App.4th 754, 761-763; *People v. Wilson* (1976) 62 Cal.App.3d 370; *People v. Fleig* (1967) 253 Cal.App.2d 634, 642-643.)

DISPOSITION

Defendant's conviction and sentence for simple kidnapping (§ 207, subd. (a)) is reversed and the seven 1-year enhancements imposed under section 667.5, subdivision (b) are stricken. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

/s/
RAYE, P. J.

I concur:

/s/
RENNER, J.

ROBIE, J., Concurring and Dissenting.

I concur fully in all parts of the Discussion except the fines and fees part addressing defendant Joe Navarro's argument that *Dueñas* calls into question the imposition of the $10,000 restitution fine, the $10,000 stayed parole revocation fine, the $120 court operations assessment, and the $90 court facilities assessment. (Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157.) As to the fines and fees part, I concur and dissent.

I concur in the result as to defendant's challenge to the $10,000 restitution fine and $10,000 stayed parole revocation fine because the challenge is forfeited for failing to object in the trial court. Established California Supreme Court precedent provides an objection to such fines must be made in the trial court to preserve the challenge for appeal, and defendant failed to do so here. (*People v. Avila* (2009) 46 Cal.4th 680, 729 [a defendant must object to a restitution fine in excess of the statutory minimum to preserve the argument on appeal because the imposition thereof is explicitly conditioned on the defendant's ability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [same]; Pen. Code, § 1202.45, subd. (a) [amount of parole revocation fine shall be the same as the amount of restitution fine].)

I dissent to the majority's conclusion that *Dueñas* was wrongly decided and defendant's challenge based on *Dueñas* as to the remaining assessments do not have merit. (Maj. opn. at pp. 22-23.) I do not find *Hicks* to be well-founded or persuasive. (*People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946.) I agree with *Dueñas* that principles of due process would preclude a trial court from imposing the court operations and court facilities assessments if a defendant demonstrates he or she is unable to pay them. (*People v. Dueñas*, *supra*, 30 Cal.App.5th at p. 1168.) In that regard, I believe a limited remand under *Dueñas* is appropriate to permit a hearing on the court operations and court facilities assessments because defendant's conviction

and sentence are not yet final. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 490-491.)

/s/
Robie, J.