PEOPLE v. RAMOS

No. D056828.

View Case

Cited Cases

THE PEOPLE, Plaintiff and Respondent, v. ROLANDO LUDA RAMOS et al., Defendants and Appellants.

Court of Appeals of California, Fourth District, Division One.

Filed June 14, 2011.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McDONALD, J.

Rolando Luda Ramos and Eric Alan Aguilera appeal judgments following their jury convictions of various offenses arising out of the robbery of the Soboba Casino. On appeal, Aguilera contends: (1) his convictions must be reversed because the statements he made during custodial interrogation were admitted in violation of his *Miranda*[1] rights; (2) execution of the sentence for his tear gas use conviction should have been stayed pursuant to Penal Code[2] section 654; and (3) the trial court abused its discretion by imposing consecutive sentences for his robbery convictions. On appeal, Ramos contends: (1) his two battery convictions must be reversed because they are (a) not lesser included offenses of kidnapping for robbery, (b) second convictions for single counts, and/or (c) barred by the statute of limitations; (2) the trial court abused its discretion by imposing consecutive sentences for his robbery convictions; (3) the trial court erred by not staying pursuant to section 654 execution of sentences it imposed for his three false imprisonment convictions and one tear gas use conviction; and (4) the trial court erred by imposing a Government Code section 70373 assessment.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of August 2, 2007, a robbery of the Soboba Casino (Casino) in San Jacinto occurred, resulting in its loss of $1,581,800. An information subsequently charged Ramos and Aguilera with three counts of kidnapping for robbery (§ 209, subd. (b)(1), counts 1, 2 & 3), seven counts of

robbery (§ 211, counts 4 through 10), one count of tear gas use (§ 12403.7, subd. (g), count 11), one count of commercial burglary (§ 459, count 12), and one count of false imprisonment by violence, menace, fraud or deceit (§ 236, count 13).[3] The information also alleged that in committing the seven robbery offenses Ramos and Aguilera took, damaged, and destroyed property with a value exceeding $1,300,000 (§ 12022.6, subd. (a)(3)).

Prosecution's Case.

Ramos and Aguilera were tried jointly with separate juries. Most of the prosecution's evidence was presented to both juries. Testimony was presented that Ramos and Aguilera were friends who worked together at the Casino. Ramos was a surveillance department technician, and Aguilera was a surveillance agent. During July 2007, they planned a robbery of the Casino. They discussed how Ramos would obtain a gun, pepper spray and duct tape; how he would access the Casino's vault; and how Aguilera would just drive the getaway car. Sonya Boyorquez, Aguilera's girlfriend at the time of the robbery, heard their conversations planning the robbery. She initially thought Ramos and Aguilera were joking, but later realized they were not and pleaded with Aguilera not to participate in the robbery. Aguilera told Boyorquez that Ramos was looking for a gun, but later told her Ramos was unable to get a real gun.

At about 4:00 a.m. on August 2, 2007, a car approached the Casino, driving along its main driveway and parking near the employee's entrance. Ramos got out of the car and entered the Casino through the employee's entrance. The car then drove out of the parking lot onto Sobobo Road. Ramos walked into the monitoring room of the Casino's surveillance office where his coworkers, Osbaldo Parga, Lillian Garcia, and Colin Quayle, were on duty. Garcia and Quayle were surprised by Ramos's appearance because he was not scheduled to work that early and usually did not work at that time.

Ramos asked to speak with Parga (the surveillance supervisor), who accompanied Ramos into the videotape storage back room (which had no surveillance cameras). They returned a few minutes later and Ramos acted as if he were calling the gaming commissioner. Ramos asked if he could speak with Parga again in the back room and Parga accompanied Ramos there. On entering the back room, Ramos told Parga he had a fight with his girlfriend and was "on the run." Ramos then suddenly sprayed Parga in the face with pepper spray and ordered him to get down on his knees. Parga complied and held his hands on his head. Using duct tape, Ramos bound Parga's hands to his legs and ankles and told him he was robbing the Casino.

Ramos returned to the monitoring room and pretended to call a commissioner. Standing behind Garcia and Quayle, Ramos asked them to stand up and face him. When they did so, Ramos asked them: "Um, you guys know I'm a good guy, right?" When they replied "yes," Ramos pulled a gun from his waistband and directed them to walk to the back of the video room. He threatened to use pepper spray on them. Quayle pleaded with Ramos not to hurt them. On entering the video room, Ramos used duct tape to bind

Garcia and Quayle together, back-to-back, and then taped them to a pole. He took Quayle's cell phone. Ramos told Garcia and Quayle not to report to anyone that they saw him because he knew where they lived. Ramos ripped out and destroyed wires and tapes from an equipment panel for the surveillance cameras. Before leaving the room, Ramos kissed Garcia on the lips and told her he always liked her.

Ramos returned to the monitoring room and answered phone and radio calls.[4] Ramos then called and asked Casino security officers to meet him at the main vault, stating he needed go inside the vault to perform a camera repair. Miguel Cachu and Carlos Rocha, unarmed security officers, met Ramos outside the main vault. After obtaining clearance to enter the vault, they asked Ramos to put on a smock over his clothing.[5] They then took Ramos inside the vault where Elizabeth Guizar, Erika McGuire, Rosa Shackles, Ruben Rodrigo, and Ashley Clark were working. Ramos claimed a camera was not working, stood on a counter, and removed a lens from a camera. Ramos then pulled out a black gun, pointed it at the seven employees, and ordered them to put their hands up and stand in the corner facing the wall. He threatened to shoot them if they did not comply. While the employees faced the wall, Ramos filled a duffel bag with cash (totaling $1,581,800) from the vault. Ramos made a call on his radio and left the vault with the money. Ramos walked through the Casino's gaming area and out an emergency exit. He walked toward an embankment leading to Soboba Road.

Boyorquez met Ramos and Aguilera at a Motel 6 in Palm Springs, about a 45-minute drive from the Casino. At 6:14 a.m., Aguilera checked into room 242, using his driver's license for identification and paying cash. In the room, Boyorquez saw a large amount of stacks of cash on the bed. Aguilera got some of the cash. When asked whether Ramos gave Aguilera a duffel bag with cash in it, Boyorquez testified: "I believe so. I don't remember." Boyorquez testified she later drove Ramos and Aguilera to a San Bernardino motel and registered for a room in her name. At trial, she admitted she had pleaded guilty to being an accessory after the fact.

Later that day, Gregory Harrell, a Riverside County Sheriff's Department investigator, executed a search warrant at the Hemet home where Aguilera resided. Inside a garage cabinet, Harrell found a black duffel bag containing about $550,000 and some .177-caliber BB's or pellets. Harrell interviewed Boyorquez regarding the incident and later testified at trial regarding her statements.

On August 4, Deputy Jerry Osterloh arrested Ramos in a motel room in Gardena. Executing a search warrant for that room, Detective James Campos found a large amount of cash in a pillowcase under a mattress. Campos seized a total of $804,239.

The parties stipulated that a black Crossman BB gun, a replica of a .177-caliber gun, was found on August 2 in the back of Ramos's black Mustang. They further stipulated that Ricky Aban told Campos he was involved in the robbery in that he gave Ramos a ride from San Bernardino to the Gardena motel and checked him into a room there.

Evidence Presented Only to Ramos's Jury.

During the joint trial, the prosecution presented certain evidence only to Ramos's jury. Detective Doug Frey interviewed Ramos on August 4. Ramos stated that he and Aguilera had discussed and planned the robbery before August 2 and had conducted a trial run, driving to the Casino together. On August 2, they drove to the Casino together in Ramos's black Mustang. Ramos went into the Casino, leaving Aguilera in the car. Aguilera was to leave the Casino property and wait for Ramos's call. Ramos said that he entered the surveillance office and asked to speak with Parga in a separate room. He used pepper spray on Parga and bound him with duct tape. He then went back into the main room and bound two other employees back-to-back, using duct tape. Ramos stated he had a gun that he displayed to them. He described how he pulled video cables to disable the security cameras and requested access to the vault. After entering the vault, he removed a camera lens cover to appear he was working on it. He then pulled out a gun, ordered everyone to go to the far side of the room and look away, and began filling a duffel bag with money. Ramos told Frey he walked through the Casino and out a side door, called Aguilera to tell him to pick him up, and walked across the parking lot to an embankment where Aguilera met him with the car. Ramos told Frey that he (Ramos) and Aguilera were in contact during the entire course of the robbery.

Evidence Presented Only to Aguilera's Jury.

During the joint trial, the prosecution presented certain evidence only to Aguilera's jury. Frey testified that he interviewed Aguilera during the evening of August 2. Aguilera initially denied any involvement in the robbery, but stated he knew Ramos committed the robbery. Ramos told him the night before about his robbery plans and had previously joked about robbing the Casino. Later, Aguilera told Frey he had not told him the whole truth and had left something out. Aguilera then stated he was involved in the robbery and had been asked by Ramos to drive the car. He received a call from Ramos asking him to pick him up at the Casino. Aguilera then picked Ramos up. Aguilera denied he knew a robbery had been committed and stated he thought Ramos merely called for a ride.

Believing Aguilera was not merely a witness, Frey advised Aguilera of his *Miranda* rights, which he waived. Aguilera then admitted to Frey that he had planned the robbery with Ramos and drove away from the Casino after the robbery. The night before the robbery, he and Ramos performed a trial run, driving to the Casino and to the designated meeting place. In the early morning on August 2, Aguilera and Ramos drove to the Casino in Ramos's Mustang; Ramos parked in the employee parking lot, and entered the Casino as if he were going to work. Aguilera got in the driver's seat and fell asleep while waiting for Ramos. Ramos texted and called him during the robbery. Aguilera then drove the car to the designated meeting place, where Ramos was waiting for him. They drove to a Palm Springs motel where Ramos split the money with him, giving him about $580,000. Following the prosecution's case-in-chief, the trial court granted the defendants' section 1118.1 motion to dismiss count 1 against them.

Defense Cases.

Neither Ramos nor Aguilera presented any testimony or other evidence in their defense. However, the parties stipulated that Aban received $50,000 in cash for driving Ramos to the Gardena motel.

Verdicts and Judgments.

The jury found Ramos guilty of second degree robbery (§ 211), false imprisonment (§ 236), and battery (§ 242) as lesser included offenses of each of counts 2 and 3, and found him guilty on all remaining counts (i.e., counts 4 through 13). The jury also found true the section 12022.6, subdivision (a)(3), allegation. Prior to sentencing, the trial court dismissed Ramos's lesser included offense robbery convictions on counts 2 and 3.

The jury found Aguilera guilty on counts 4 through 13 and found true the section 12022.6, subdivision (a)(3), allegation. The jury could not reach a verdict on counts 2 and 3. The court later dismissed those counts.

The trial court sentenced Ramos to a total of 16 years in prison. It imposed the upper term of five years for the count 4 robbery conviction (the principal term), consecutive terms of one year (one-third the midterm) each for the remaining robbery convictions (counts 5 through 10), a consecutive three-year term for the section 12022.6, subdivision (a)(3), enhancement, consecutive eight-month terms (one-third the midterm) each for two false imprisonment convictions (counts 2 and 13) and the tear gas use conviction (count 11), and a concurrent two-year term for the remaining false imprisonment conviction (count 3). The court stayed pursuant to section 654 a two-year term for the burglary conviction (count 12). It also stayed pursuant to section 654 jail terms of 180 days for each of the two battery convictions. The court also imposed a $360 assessment pursuant to Government Code section 70373. The trial court sentenced Aguilera to a total term of 12 years in prison. Ramos and Aguilera each timely filed a notice of appeal.

DISCUSSION

AGUILERA'S APPEAL

I

Miranda Violation

Aguilera contends the trial court erred by denying his motion to suppress the statements he made to Frey after he (Frey) did not adequately advise him of his *Miranda* rights. He asserts Frey did not advise him that anything he said could be used against him in a court of law.

A

The Fifth Amendment of the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." This provision applies to the states under the Fourteenth Amendment's due process clause. (*Malloy v. Hogan* (1964) 378 U.S. 1, 8.) The Fifth Amendment right against self-incrimination generally applies to preclude the admission of involuntary pretrial confessions or other incriminating statements made by a defendant during coercive police interrogation. (*Dickerson v. U.S.* (2000) 530 U.S. 428, 433-435; *Oregon v. Elstad* (1985) 470 U.S. 298, 304 (*Elstad*).) If a defendant's statements were obtained "by `techniques and methods offensive to due process,' [citation] or under circumstances in which the [defendant] clearly had no opportunity to exercise `a free and unconstrained will,' [citation] the statements would not be admitted." (*Elstad,* at p. 304.)

Miranda sets forth an exclusionary, prophylactic rule that unless certain warnings are given to a defendant, statements made by the defendant during custodial interrogation are presumed involuntary and are generally inadmissible at trial.[6] (*Miranda, supra,* 384 U.S. at pp. 478-479; *Elstad, supra,* 470 U.S. at pp. 306-307; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 242.) "Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda.*" (*Elstad,* at p. 307.) *Miranda* stated that a defendant who is 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,* at p. 479, italics added.) Each of the four warnings is an "absolute prerequisite" to the admission in court of the suspect's statements to police. (*Id.* at pp. 468, 471.) "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." (*Id.* at p. 444.)

In determining whether a suspect has been adequately advised of his or her *Miranda* rights, the relevant inquiry is whether the warnings would *reasonably convey* to a suspect those rights. (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203.) No talismanic incantation or precise or exact wording of the *Miranda* warnings is required to satisfy *Miranda.* (*Duckworth,* at pp. 201-203; *California v. Prysock* (1981) 453 U.S. 355, 359.) However, absent a "fully effective equivalent" of each of the four *Miranda* warnings, a suspect's statements must be excluded. (*Miranda, supra,* 384 U.S. at p. 476.)

The second warning required by *Miranda* "is needed in order to make [the suspect] aware not only of the privilege [i.e., privilege against self-incrimination and right to remain silent], but also of the consequences of forgoing it. *It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.* Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary

system—that he is not in the presence of persons acting solely in his interest." (*Miranda, supra,* 384 U.S. at p. 469, italics added.) In *U.S. v. Tillman* (6th Cir. 1992) 963 F.2d 137, the court stated:

> Defendant was never told any statements that he would make could be used against him. Of all of the elements provided for in Miranda, this element is perhaps the most critical because it lies at the heart of the need to protect a citizen's Fifth Amendment rights. . . . By omitting this essential element from the Miranda warnings[,] a person may not realize why the right to remain silent is so critical. Although we as judges and lawyers may be aware of the link between these elements[,] we can not be so presumptuous as to think that it would be common knowledge to laymen. It would clearly be unreasonable to say defendant was somehow informed of this right. He was informed he did not have to say anything to the police, [but] was never told that any statements he might make could be used against him. This is a dangerous omission because a person under arrest [or in custody] would feel more compelled to answer questions of police officers. (Id. at p. 141.)

We apply federal standards in reviewing a defendant's claim that extrajudicial statements were elicited from him or her in violation of *Miranda.* (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 360; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) In reviewing a trial court's ruling on a claim that statements or confessions are inadmissible because they were obtained in violation of a defendant's rights under *Miranda,* "we accept its resolution of disputed facts and inferences, and its evaluations of credibility, if substantially supported [by evidence] [citation], but we independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged [statements or] confessions were obtained illegally." (*People v. Samayoa* (1997) 15 Cal.4th 795, 829.) Alternatively stated, we apply the independent or de novo standard of review to the extent "the trial court's underlying decision entails a measurement of the facts against the law." (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) Extrajudicial statements obtained in violation of *Miranda* are inadmissible to establish the defendant's guilt. (*People v. Sims* (1993) 5 Cal.4th 405, 440.) However, the erroneous admission of extrajudicial statements obtained in violation of *Miranda* is *not* per se reversible error. (*Sims,* at p. 447; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 878-879.) Rather, we apply the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) to determine whether reversal is required. (*Sims,* at p. 447; *Johnson,* at pp. 32-33; *Peracchi,* at p. 363.) Under the *Chapman* standard, an error is reversible unless it is harmless beyond a reasonable doubt. (*Chapman,* at p. 24.)

B

At the beginning of his trial, Aguilera moved to suppress or exclude statements he made to Frey because he was not given adequate *Miranda* warnings. Aguilera presented a video recording and transcript of his interview with Frey. Frey testified that he advised Aguilera of his *Miranda* rights by reading from a card issued by the Sheriff's Department. The trial court read the transcript and viewed the video

recording. Regarding the second *Miranda* warning, instead of advising Aguilera that anything he *says* can and will be used against him in a court of law, Frey advised him: "Anything you *use* can and will be used against you in a court of law." (Italics added.) Aguilera argued the second warning was deficient and did not comply with *Miranda*'s requirements. The prosecutor argued that Frey simply misread a word in the second *Miranda* warning (i.e., read "use" instead of "say") and that the second warning was nevertheless reasonably conveyed to Aguilera.

The following is the relevant portion of the transcript of Aguilera's interview:

FREY: [D]id . . . you ever hear about Miranda? [¶] . . . [¶] You know, you know what it is? You know what I'm talking about? Miranda, that uh, people having their rights?AGUILERA: Oh yeah. [¶] . . . [¶]FREY: Um, because [we're] doing an investigation, um something that I, I need to do is, I'm a, I'm going to read those to you. Don't get excited about it. It's not a big deal, it's, it's just a formality[;] it's what we have to do, okay[?] And, and um, I'm surprised that you haven't been through that [before] . . . . [¶] . . . [¶] I just assumed you knew what I was talking about. Um, so I'm going to read those to you and just let you know then, um, we'll just go on okay[?]AGUILERA: So wait does, does this mean I'm not going to be going home tonight?FREY: You know what dude it's . . . The possibility of going home always exists. . . . Honesty is . . . a big deal right now, okay[?] And that goes uh, it goes [a long] way to make sure everybody . . . gets home safe tonight. . . . I'm gonna need to talk to you about some serious issues about JR [presumably referring to Ramos]. . . . Alright [s]o I'm just, um [it's] on a card. We have to read it from a card that way I can always say I read it exactly the way it is . . . . [L]ike I said sometimes people get freaked out . . . [¶] . . . [¶] . . . [S]o anyway, let, [let's] get through that and then it will be over with and you can take a deep [breath] and go Ahhhh . . . [¶] . . . [¶] Okay. Alright, you have the right to remain silent. Anything you use can and will be used against you in a court of law. You have the right to talk to a lawyer. And have them present with you while you are being questioned. If you [cannot] afford to hire a lawyer[,] one will be appointed to represent you for any questioning if you wish one. Okay. You understand all those? (Italics added.)

Aguilera apparently nodded his head affirmatively in response to Frey's question.

The trial court denied Aguilera's motion to suppress his statements to Frey. The court stated:

[I]t appeared that [Frey] was reading from a Miranda card. The entire right appeared to be proper without issue. There is nothing before or after. The officer misspoke on one word—albeit a key word—but he misspoke on one word in this Court's determination the Miranda warnings were flawless except for the misspeak of one word. . . . [¶] The investigator . . . appeared to be reading albeit somewhat hastily while he was going from the card. [¶] . . . [¶]There was never, at any time, a question to readback anything. . . . There was never a question that was proposed or an indication in this way that he did not understand what the rights were. [¶] . . . [¶]The Miranda advisement, which is written and given in this manner, albeit there was one word that was misspoken by the investigator. In this

Court's determination, . . . a reasonable person in . . . the defendant's position would have logically inferred and reasonably understood that the officer was telling him that anything that was said in the interview would be used against him.As I said, this could be inferred from a number of things: The entire interview that the Court had an opportunity to observe, the entire record that was before the Court, by the pinpoint misspeak of one word, the conversation that occurred before and after the Miranda advisement was given, this Court will determine that the defendant knew or reasonably should have known what the officer was referring about.

The trial court distinguished the facts in this case from those in *People v. Bradford* (2008) 169 Cal.App.4th 843, in which the officer wholly omitted the second *Miranda* warning. The court found Frey's "*Miranda* advisements [were] complete almost in their entirety" and concluded "proper advisements [were] given." Accordingly, the court denied the motion to suppress.

At trial, the prosecution presented the testimony of Frey regarding Aguilera's statements during the August 2 interview, including his admissions that he planned the robbery with Ramos and drove the getaway car. Excerpts from the video recording of Aguilera's statements to Frey were also played for the jury.

C

Based on our independent review and consideration of the undisputed evidence, including the video recording and transcript of Aguilera's interview with Frey, we, unlike the trial court, conclude Frey's *Miranda* advisement did *not* reasonably convey to Aguilera that anything he *said* could be used against him in a court of law. Although Frey advised Aguilera that he had the right to remain silent (i.e., the first *Miranda* warning), Frey misread the card's version of the second *Miranda* warning. As quoted above, Frey advised Aguilera: "Anything you *use* can and will be used against you in a court of law." By mistakenly replacing the intended word "say" with the word "use," Frey changed the entire meaning of the second warning. The subject of that warning was changed from anything Aguilera would "say" to anything he would "use." Although it is difficult to understand the meaning of Frey's second warning as given, it is nevertheless clear Frey did *not* effectively advise Aguilera that anything he *said* could be used against him in a court of law.[7] Although judges and attorneys arguably would interpret Frey's second warning as applying to statements made during the custodial interrogation, we cannot "be so presumptuous as to think that it would be common knowledge to laymen" that the word "use" in Frey's second warning was actually intended to be "say." (*People v. Tillman, supra,* 963 F.2d at p. 141.)

We cannot conclude a reasonable layperson in Aguilera's position would interpret Frey's second warning as advising that any statements he or she made could be used against him or her in court. Lacking an adequate second warning, a layperson in Aguilera's position would not be aware of the consequences of forgoing the right to remain silent (i.e., that his or her statements would be used against him or her in

court). (*Miranda, supra,* 384 U.S. at p. 469.) "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." (*Ibid.*)

The People argue we should reject Aguilera's contention as "a classic attempt to reverse a judgment on a meaningless technicality." However, we do not consider a *substantive*misstatement of one of the four required *Miranda* warnings to be a "meaningless technicality." Rather, we reject the People's attempt to diminish the fundamental importance of the Fifth Amendment right against self-incrimination, as interpreted by *Miranda.* As noted above, each of the four *Miranda* warnings is an "absolute prerequisite" to the admission in court of a suspect's statements to police. (*Miranda, supra,* 384 U.S. at pp. 468, 471.) Absent a fully effective equivalent that reasonably conveys the second *Miranda* warning, Aguilera's statements must be excluded.[8] (*Miranda, supra,* 384 U.S. at p. 476; *Duckworth v. Eagan, supra,* 492 U.S. at p. 203.) Frey's error in giving the second *Miranda* warning was "not one of form or phrasing, but of substance and omission. [Aguilera] was not told that anything he *said* could be used against him in court . . . ." (*U.S. v. Street* (11th Cir. 2006) 472 F.3d 1298, 1312, italics added.)

Furthermore, we do not consider Aguilera's background or knowledge in determining whether an adequate *Miranda* warning has been given. We cannot "inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." (*Miranda, supra,* 384 U.S. at pp. 468-469, fn. omitted.) Furthermore, "[n]o amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right." (*Id.* at pp. 471-472.) Applying that principle, one court reasoned that the determination whether *Miranda* warnings were adequate should be made as if the suspect were a layman despite the suspect's "twenty-plus years of experience as a cop." (*U.S. v. Street, supra,* 472 F.3d at pp. 1310-1311; see also *U.S. v. Longbehn* (8th Cir. 1988) 850 F.2d 450, 453; cf. *U.S. v. Bland* (9th Cir. 1990) 908 F.2d 471, 474, fn. 1 [rejecting argument that because suspect had prior experience with criminal justice system, he knew his *Miranda* rights and did not have to be completely warned].)

Although the parties do not cite, and we have not found, any case with facts directly apposite to those in this case, we believe this case is more analogous to those in which the second *Miranda* warning is wholly omitted than to those in which minor or trivial misstatements or omissions were made in that or other *Miranda* warnings. We conclude this case is more aligned with those cases that found *Miranda* violations where an interrogator completely omitted the warning that any statements by the suspect can and will be used against him or her in a court of law. (See, e.g., *People v. Bradford,*

supra, 169 Cal.App.4th at pp. 849-854; *U.S. v. Tillman, supra,* 963 F.2d at pp. 140-142; *Commonwealth v. Dagraca* (Mass. 2006) 854 N.E.2d 1249, 1254; *U.S. v. Street, supra,* 472 F.3d at pp. 1311-1312.)

In contrast, we conclude those cases in which no *Miranda* violations were found based on minor or trivial mistakes or omissions are factually and analytically inapposite to this case and do not persuade us to reach a contrary conclusion. (See, e.g., *People v. Samayoa, supra,* 15 Cal.4th at pp. 830-831 [no *Miranda* violation where suspect was initially advised that anything he said could be used against him, but without the specification "in court"; suspect was subsequently given complete second *Miranda* warning]; *People v. Mayfield* (1993) 5 Cal.4th 142, 170-172 [no *Miranda* violation where suspect was given second *Miranda* warning in the first person (i.e., "[a]nything I say can and will be used as evidence against me in court"]; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 681-682 [no *Miranda* violation where suspect was advised of his right to consult an attorney regarding the interrogation, but without the specification the attorney could be consulted before and during the interrogation]; *Duckworth v. Eagan, supra,* 492 U.S. at pp. 203-204 [no *Miranda* violation where suspect was advised that an attorney would be appointed for him if he could not afford one when he went to court, but without the specification that an attorney would be appointed before any interrogation]; *People v. Kelly* (1990) 51 Cal.3d 931, 948 [no *Miranda* violation where suspect was advised that an attorney would be appointed for him before any "question," rather than before any "questioning"].) We reject the People's assertion that, like those cases involving minor or trivial errors, Frey's error was a "meaningless defect" and Aguilera was adequately advised of each of his *Miranda* rights. Because Aguilera was not adequately advised that anything he said could be used against him in a court of law, the trial court erred by denying Aguilera's motion to suppress the statements he made during his interrogation by Frey.[9]

D

Because a *Miranda* violation does not constitute per se reversible error, we now consider whether the People have carried their burden on appeal to show that the erroneous admission of evidence of Aguilera's statements to Frey was harmless beyond a reasonable doubt. (*People v. Sims, supra,* 5 Cal.4th at p. 447; *People v. Johnson, supra,* 6 Cal.4th at pp. 32-33; *Chapman, supra,* 386 U.S. at p. 24.) After considering the totality of the evidence, we conclude the People have not carried their burden to show the error was harmless.

The evidence presented by the prosecution at trial, *including* Aguilera's statements to Frey, showed that he was guilty, at most, of aiding and abetting Ramos's commission of the robbery, false imprisonment, and tear gas use offenses. "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "The taking

element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot." (*Id.* at p. 1165.) Accordingly, for conviction of a defendant for aiding and abetting a robbery, "a getaway driver must form the intent to facilitate or encourage commission of the robbery *prior to or during the carrying away of the loot to a place of temporary safety.*" (*Ibid.,* fn. omitted.) In contrast, "[a] getaway driver, whose intent to aid in the escape is formed after asportation has ceased, cannot facilitate or encourage commission of the robbery. Rather, the effect of his or her actions is only to lessen the chance that the perpetrators will be captured and held accountable for their crimes. Thus the culpability of such a getaway driver is that of an accessory after the fact, rather than that of a principal. This distinction comports with the language of section 32, which expressly defines accessory liability as including a person who aids a principal with intent that the principal `avoid or escape from arrest.'" (*Id.* at p. 1168, fn. omitted.) As *Cooper* noted, "[t]he intent of such a getaway driver is to be distinguished from one who agrees before (or during) commission of a robbery to be a getaway driver and thereby encourages and/or facilitates the commission of the robbery. In such circumstances, the driver could be liable as an aider and abettor of the robbery." (*Id.* at p. 1168, fn. 12.)

The People argue that, *absent* admission of Aguilera's statements, Boyorquez's trial testimony and statements to Harrell nevertheless showed Aguilera was guilty of aiding and abetting Ramos's commission of the robbery offenses. That evidence supported a finding that Aguilera and Ramos discussed and planned the robbery before its commission and Aguilera agreed to be the getaway driver. Boyorquez testified that she met Ramos and Aguilera at a Motel 6 in Palm Springs. In the room, she saw stacks of cash on the bed. Aguilera got some of the cash. She later drove Ramos and Aguilera to a San Bernardino motel and registered for a room in her name. The People argue that "independent of Aguilera's statement to Detective Frey, there was *ample evidence* of Aguilera's liability as an aider and abettor—with the requisite knowledge and intent—rather than an accessory after the fact." (Italics added.) However, in so arguing, the People either misconstrue and/or misapply the applicable standard of review. To show the erroneous admission of Aguilera's statements was harmless beyond a reasonable doubt, the People have a greater burden than merely showing there was "ample evidence" to support a finding he aided and abetted the robbery offenses. The People's argument is, in effect, that there is substantial evidence to support the jury's verdict that Aguilera aided and abetted Ramos's offenses. However, that argument is insufficient to show the error was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.) The People are required to show beyond a reasonable doubt that the error did not affect the jury's verdict. (*Ibid.*)

As Aguilera argues, the jury in this case had to weigh the credibility of Boyorquez's trial testimony and Harrell's testimony regarding her prior inconsistent statements and then make a determination from that and other evidence whether Aguilera aided and abetted Ramos's offenses. At trial, Boyorquez denied she had ever heard Ramos and Aguilera discussing or planning the robbery of the Casino. She could not recall telling police that they discussed robbing the Casino or that Aguilera would be the driver.

However, she did recall telling police that Ramos jokingly told Aguilera he was going to rob the Casino and that Ramos told Aguilera all he had to do was drive. She testified that Ramos's conversations with Aguilera became more serious, but Aguilera became irritated and told Ramos he did not want to have anything to do with it. She did not recall Ramos thereafter asking Aguilera to be the driver. She also did not remember begging Aguilera not to get involved. She testified she went to the Motel 6 because Aguilera told her his friend (i.e., Ramos) needed a ride.

Harrell testified that he interviewed Boyorquez after the robbery. Initially, she told Harrell that Ramos and Aguilera had joked about robbing the Casino. He then confronted her with the fact she had made phone calls to Ramos. Harrell testified that Boyorquez thereafter became emotional and more forthcoming. She told him she overheard a conversation between Ramos and Aguilera regarding robbing the Casino and heard Ramos ask Aguilera to just drive the car. She heard Ramos tell Aguilera he (Ramos) would get the tape, gun, and pepper spray for the robbery. She told Harrell she asked Aguilera not to participate in the robbery. Harrell further testified that he found a duffel bag containing $550,000 at Aguilera's residence.

Based on that conflicting evidence, the jury could have inferred either that Aguilera rejected Ramos's attempt to involve him in robbing the Casino *or* that Aguilera agreed to be Ramos's getaway driver after the robbery. If the jury found credible Boyorquez's trial testimony and not Harrell's testimony regarding her prior conflicting statements, the jury *could* have inferred Aguilera did *not* intend to aid and abet Ramos's robbery of the Casino and, when driving Ramos to the Palm Springs motel, he was unaware of Ramos's robbery of the Casino or, at most, knew about it but did not intend to aid him in asporting the stolen cash. Furthermore, the jury could infer Aguilera did not learn of the robbery or intend to assist Ramos until *after* he (Ramos) got to a place of safety after the robbery (e.g., the Palm Springs motel). (*People v. Cooper, supra,* 53 Cal.3d at pp. 1165, 1168.) Therefore, the jury could have concluded Aguilera was guilty, at most, of being an accessory after the fact. (*Ibid.*) However, given the trial court's (erroneous) admission of Aguilera's statements to Frey that he planned the robbery with Ramos and agreed to be his getaway driver, the jury chose to reject Boyorquez's trial testimony and found Aguilera guilty of aiding and abetting Ramos's offenses. In so doing, it found Aguilera guilty based not only on Harrell's testimony, but also (and most likely primarily) on Aguilera's own confession to Frey regarding his planning and participation in the robbery.

As Aguilera argues on appeal, the admission of his statements to Frey resolved any reasonable doubt the jury may have had regarding his aiding and abetting Ramos's offenses. Based on the totality of the evidence in this case, the admission of Aguilera's confession was the most probative and damaging evidence that could have been admitted against him to show he aided and abetted Ramos's offenses. We cannot conclude beyond a reasonable doubt that, absent admission of Aguilera's statements, the evidence of his guilt was so overwhelming that the jury would have nevertheless convicted him. Because the trial court's error in admitting Aguilera's statements to Frey was not harmless beyond a reasonable doubt, we

reverse his convictions. (*Chapman, supra,* 386 U.S. at p. 24; *People v. Sims, supra,* 5 Cal.4th at p. 447; *People v. Johnson, supra,* 6 Cal.4th at pp. 32-33.)

RAMOS'S APPEAL

II

Battery Convictions

Ramos contends his two battery convictions must be reversed because they are (1) not lesser included offenses of kidnapping for robbery, (2) second convictions for single counts, and/or (3) barred by the statute of limitations.

A

After dismissal of count 1, the information charged Ramos with two remaining counts of kidnapping for robbery (§ 209, subd. (b)(1)). Count 2 alleged he "did [willfully] and unlawfully kidnap and carry away [Garcia] to commit robbery . . . ." Count 3 alleged he "did [willfully] and unlawfully kidnap and carry away [Quayle] to commit robbery . . . ."

At trial, the trial court instructed on kidnapping for robbery, as well as kidnapping, false imprisonment, robbery, and battery as lesser included offenses of kidnapping for robbery. Ramos objected to instructions on any lesser included offenses of counts 2 and 3. On counts 2 and 3, the jury found Ramos not guilty of kidnapping for robbery and simple kidnapping, but found him guilty of false imprisonment, robbery, and battery as lesser included offenses of kidnapping for robbery.[10] In sentencing Ramos, the court imposed a consecutive eight-month prison term for his false imprisonment of Garcia (count 2) and a concurrent two-year prison term for his false imprisonment of Quayle (count 3), and imposed, but stayed, 180-day jail terms for each of his convictions for battery of Garcia (count 2) and Quayle (count 3).

B

A trial court has a sua sponte duty to instruct on all lesser included offenses that are necessarily included in a charged offense and substantially supported by the evidence. (*People v. Licas*(2007) 41 Cal.4th 362, 366; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Birks* (1998) 19 Cal.4th 108, 118; *People v. Earp* (1999) 20 Cal.4th 826, 885; *People v. Hardy* (1992) 2 Cal.4th 86, 184.) "[A] lesser offense is necessarily included in a greater offense if *either* the statutory elements of the greater offense, *or* the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser

[offense.]" (*Birks,* at pp. 117-118, italics added.) "When . . . the accusatory pleading describes a crime in the statutory language, an offense is necessarily included in the greater offense when the greater offense cannot be committed without necessarily committing the lesser offense." (*People v. Marshall* (1997) 15 Cal.4th 1, 38.) Accordingly, the statutory elements test is the only relevant test when the accusatory pleading describes the charged offense in statutory language. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1533.)

Battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) A battery requires a touching of the victim. (*People v. Marshall, supra,* 15 Cal.4th at p. 38.) Kidnapping is committed when a person "forcibly, *or* by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . ." (§ 207, subd. (a), italics added.) "[T]he force used against the victim `need not be physical. The movement is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances.'" (*People v. Majors* (2004) 33 Cal.4th 321, 326-327.) "Any person who kidnaps *or* carries away any individual to commit robbery" is guilty of kidnapping for robbery. (§ 209, subd. (b)(1), italics added.) The asportation element of kidnapping for robbery is satisfied if by using force or by instilling reasonable fear, the defendant moves the victim *or* makes the victim move a distance beyond that incidental to the commission of the robbery. (CALCRIM No. 1203.)

As the People concede, because the offense of kidnapping can be committed without force or touching (i.e., by merely instilling fear), battery is not a lesser necessarily included offense of kidnapping for robbery under the legal elements test. However, the People nevertheless argue battery is a lesser included offense of kidnapping for robbery under the alternative accusatory pleading test. They argue that because the information alleged Ramos "did . . . kidnap *and* carry away" Garcia and Quayle, it alleged facts in addition to the statutory elements and therefore the alternative accusatory pleading test can be applied. They argue under that test battery is a lesser included offense because carrying away cannot be accomplished without a touching.

We reject the People's argument that the accusatory pleading test applies in this case. Although the information alleged in the conjunctive that Ramos "did . . . kidnap *and* carry away" Garcia and Quayle, we are persuaded by case law holding that such conjunctive accusatory pleading should be considered as pleaded in the disjunctive. "When a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way."[11] (*People v. Lopez, supra,* 129 Cal.App.4th 1508, 1532-1533.) Accordingly, "when the accusatory pleading describes the crime in its statutory language, but in the conjunctive . . ., the allegation is treated as being in its statutory disjunctive." (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 981.) "In such cases only the statutory elements test is relevant in determining if an uncharged crime is a lesser included

offense of that charged [offense]." (*Ibid.*) Therefore, assuming arguendo "carrying away" requires a touching, we nevertheless apply only the statutory elements test to the conjunctively pleaded information. Applying that test, we conclude that because kidnapping for robbery can be committed without a touching (e.g., by instilling fear to make the victim move without touching), battery is *not* a lesser included offense of kidnapping for robbery.[12] Accordingly, Ramos's two convictions for battery (on counts 2 and 3) must be reversed.

C

Because we reverse Ramos's convictions for battery on the grounds discussed above, we do not address the merits of his alternative contentions that those convictions must be reversed because they are second convictions for single counts and/or barred by the statute of limitations.

III

Consecutive Terms for Robbery Convictions

Ramos contends the trial court abused its discretion by imposing consecutive prison terms for his robbery convictions.

A

When a defendant is convicted of multiple offenses, the trial court must decide whether the sentences imposed for those convictions should run concurrently or consecutively. (§ 669.) A trial court has discretion in determining whether sentences are to run concurrently or consecutively. (*People v. Scott* (1994) 9 Cal.4th 331, 349; *People v. Bradford* (1976) 17 Cal.3d 8, 20.) *Bradford* stated:

> It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered. (People v. Bradford, at p. 20.)

California Rules of Court, rule 4.425,[13] sets forth criteria a trial court may consider in determining whether to impose concurrent or consecutive sentences:

> Criteria affecting the decision to impose consecutive rather than concurrent sentences include:(a) Criteria relating to crimesFacts relating to the crimes, including whether or not:(1) The crimes and their objectives were predominantly independent of each other;(2) The crimes involved separate acts of violence or threats of violence; or(3) The crimes were committed at different times or separate

places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.(b) Other criteria and limitationsAny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences.

Rules 4.421 and 4.423, respectively, set forth circumstances in aggravation and circumstances in mitigation relating to the crime and to the defendant.

Rule 4.425 provides "guidelines, not rigid rules courts are bound to apply in every case . . . ." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 87 [regarding predecessor rule to rule 4.425].) Rule 4.408(a) provides: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge."

Finally, "[o]nly one criterion or factor in aggravation is necessary to support a consecutive sentence." (*People v. Davis* (1995) 10 Cal.4th 463, 552.) However, "there is no requirement that, in order to justify the imposition of consecutive terms, the court find that an aggravating circumstance exists. [Citations.] Factual findings are not required." (*People v. Black* (2007) 41 Cal.4th 799, 822.) Accordingly, "the reasons given [by a trial court] for imposing a consecutive sentence need only refer to the `primary factor or factors' that support the decision to impose such a sentence [citations]." (*Ibid.*)

B

In sentencing Ramos, the trial court cited certain circumstances in aggravation under rule 4.421, including his use of great violence and threat of great bodily harm, his planning and sophistication, the monetary loss, the violation of a position of trust, his danger to society as shown by his violent conduct, and his probation status at the time of the instant offenses. As a circumstance in mitigation under rule 4.423, the court (apparently erroneously) noted Ramos had no prior record. The court also considered rule 4.425's criteria in determining whether to impose concurrent or consecutive sentences, stating:

The court did consider the Rules of Court under [rule] 4.425, and the court believes that given the nature of the testimony of each of the individuals, the description of the fear of harm that each of these individuals suffered, the fact that the defendant acted in various stages throughout the entire robbery, moving from one place to the camera room, with two individuals there, moving on to another individual, and then moving on to the vault, the court does believe that in its discretion this is not an appropriate sentence [sic] for concurrent sentences. And, accordingly, the court will impose consecutive sentencing for each of the robbery sentences.

The court then sentenced Ramos to the upper term of five years for the count 4 robbery conviction (the principal term) and consecutive terms of one year (one-third the midterm) each for the remaining robbery convictions (counts 5 through 10).

C

Ramos argues the trial court abused its discretion by imposing consecutive terms for his robbery convictions (counts 5 through 10) because the robberies were committed against multiple victims in only one location and with only one objective. He argues he intended only to take money from the Casino's vault and not from each of his robbery victims.

We conclude the trial court properly exercised its discretion in imposing consecutive sentences for Ramos's robbery convictions. As noted above, in sentencing Ramos, the court expressly cited numerous aggravating circumstances, including his use of great violence and threat of great bodily harm, his planning and sophistication, the monetary loss, the violation of a position of trust, his danger to society as shown by his violent conduct, and his probation status at the time of the instant offenses. The court further noted the fear of harm that each of Ramos's robbery victims suffered. Accordingly, in deciding to impose consecutive terms for Ramos's robbery convictions the court cited, and properly relied on, multiple factors. As noted above, only one aggravating factor is necessary to support imposition of a consecutive sentence. (*People v. Davis, supra,* 10 Cal.4th at p. 552; *People v. Black, supra,* 41 Cal.4th at p. 822.) Ramos has not carried his burden on appeal to persuade us that the court abused its discretion in considering the multiple aggravating factors and imposing consecutive terms for his robbery convictions.[14]

IV

Section 654

Ramos contends the trial court erred by not staying pursuant to section 654 execution of sentences it imposed for his three false imprisonment convictions and one tear gas use conviction.

A

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all

of the offenses were merely incidental to, or were the means of accomplishing or facilitating[,] one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551, fn. omitted.)

Furthermore, even if "defendant entertained but a single principal objective during an indivisible course of conduct, he may nevertheless be punished for multiple convictions if during the course of that conduct he committed crimes of violence against different victims." (*People v. Miller* (1977) 18 Cal.3d 873, 885, overruled on another ground in *People v. Oates* (2004) 32 Cal.4th 1048, 1067-1068, fn. 8.) "[G]ratuitous violence against a helpless and unresisting victim . . . has traditionally been viewed as not `incidental' to robbery for purposes of . . . section 654." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190.) "[A]t some point the means to achieve an objective may become so extreme they can no longer be termed `incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*Id.* at p. 191.) Section 654 does not apply to preclude multiple punishment where there is "gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense." (*Ibid.*)

In reviewing a trial court's determination whether section 654 precludes multiple punishment, we apply the deferential substantial evidence standard of review. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) "The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*Ibid.*) We view the evidence favorably to support the judgment and presume every factual finding that could reasonably be deduced from the evidence. (*Id.* at pp. 1312-1313.) When a trial court has not expressly determined whether section 654 applies but nevertheless imposes multiple punishment, we infer the court has made a determination that section 654 does not apply (i.e., that the defendant had more than one objective in committing multiple offenses). (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

B

The jury convicted Ramos of the false imprisonment of Garcia (count 2), Quayle (count 3), and Parga (count 13) and using tear gas against Parga (count 11). The trial court sentenced Ramos to consecutive eight-month terms (one-third the midterm) each for two of his false imprisonment convictions (counts 2 and 13) and for the tear gas use conviction (count 11), and to a concurrent two-year term for the remaining false imprisonment conviction (count 3).

C

Ramos asserts section 654 precludes punishment for his conviction on count 11 for his use of tear gas against Parga in violation of section 12403.7, subdivision (g). In sentencing Ramos, the trial court stated: "The tear gas count, the violation of . . . section 12403.7[, subdivision] (g), the court does believe . . . that was an unnecessary use of a tear gas. It's separate and distinct from his other offenses. And while the court did consider the entire goal of the defendant, the court will impose consecutive sentencing on that." In so doing, the court implicitly found section 654 did not preclude punishment for that offense.

We conclude there is substantial evidence to support the trial court's finding that section 654 does not apply to preclude punishment for Ramos's count 11 conviction for tear gas use. As the People argue, the trial court could reasonably find that Ramos's use of tear gas (i.e., pepper spray) against Parga was entirely unnecessary to achieve Ramos's objective of taking money from the Casino's vault. The evidence showed Parga had been cooperative in going to the back room to speak with Ramos. Nevertheless, Ramos suddenly used pepper spray on Parga even though he (Parga) had not resisted or interfered with Ramos's plans or instructions. Because Ramos could have falsely imprisoned Parga and taken money from the vault without use of the pepper spray, the trial court could have reasonably found Ramos's tear gas use constituted gratuitous violence against an unresisting victim and was not incidental to Ramos's objective of robbing the vault. (Cf. *People v. Nguyen, supra,* 204 Cal.App.3d at p. 190; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267, 272.) Alternatively stated, there is substantial evidence to support the court's implied finding that Ramos's tear gas use involved a separate criminal objective (e.g., to cause Parga pain and suffering) independent of his objective to rob the vault. (*People v. Perez, supra,* 23 Cal.3d at p. 551.)

D

We likewise conclude there is substantial evidence to support the trial court's implied finding that section 654 did not apply to preclude punishment for Ramos's false imprisonment of Garcia and Quayle (counts 2 and 3). In imposing the consecutive sentence for count 2, the court stated: "[T]he court believes that the [false imprisonment] was separate and distinct. The entire robbery was carried out at various stages. There were different individuals that were tied up, bound by duct tape." Thereafter, the court imposed a concurrent sentence for count 3. The evidence showed Ramos displayed a gun and directed Garcia and Quayle to walk to the video room. He threatened to use pepper spray on them. Quayle pleaded with Ramos not to hurt them. On entering the video room, Ramos used duct tape to bind Garcia and Quayle together, back-to-back, and then taped them to a pole. He took Quayle's cell phone. Ramos told Garcia and Quayle not to report to anybody that they saw him because he knew where they lived.

Based on that evidence, the trial court could reasonably find that, in falsely imprisoning Garcia and Quayle, Ramos used gratuitous violence entirely unnecessary to achieve Ramos's objective of taking

money from the Casino's vault. The evidence showed Garcia and Quayle had been cooperative in going to the video room. Nevertheless, Ramos displayed a gun, threatened them with use of pepper spray, and impliedly threatened retaliation if they reported him, even though they had not resisted or interfered with Ramos's plans or instructions. Ramos also extensively used duct tape to tightly bind them together and to a pole. Because Ramos could have falsely imprisoned Garcia and Quayle and taken money from the vault without that use of gratuitous violence against unresisting victims, the trial court could reasonably find the manner in which Ramos falsely imprisoned them was not merely incidental to his objective of robbing the vault. (Cf. *People v. Nguyen, supra,* 204 Cal.App.3d at p. 190; *People v. Cleveland, supra,* 87 Cal.App.4th at pp. 267, 272; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1654, 1657-1658 [threatening victim with future harm to dissuade him from reporting the kidnapping reflected a separate criminal objective from kidnapping objective].) Alternatively stated, the court could reasonably find Ramos's false imprisonment of Garcia and Quayle reflected a separate criminal objective independent of his objective to rob the vault. (*People v. Perez, supra,* 23 Cal.3d at p. 551.) The court's finding of separate criminal objectives for counts 2 and 3 is also supported by evidence that Garcia and Quayle were falsely imprisoned in a different place from the site of the vault robbery and at a time significantly before the robbery. Likewise, the false imprisonment of Garcia and Quayle did not involve any of the actual victims of Ramos's robbery convictions (i.e., Cachu, Rocha, Guizar, McGuire, Shackles, Rodrigo, and Clark). Accordingly, we conclude there is substantial evidence to support the court's implied finding that section 654 did not preclude punishment of Ramos for his false imprisonment convictions on counts 2 and 3.

E

However, unlike Ramos's punishment for false imprisonment of Garcia and Quayle, we conclude section 654 precludes separate punishment for Ramos's false imprisonment of Parga (count 13). Absent Ramos's use of tear gas to subdue Parga, which we discussed above, there is insufficient evidence to support a finding that Ramos's false imprisonment of Parga involved a separate criminal objective from his intent to rob the vault. The only reasonable inference is that Ramos's false imprisonment of Parga by binding him with duct tape was part of, and merely incidental to, his objective of taking money from the vault. Had Ramos not bound Parga, he (Parga) presumably could have alerted security officers or other persons regarding Ramos's plan to rob the vault. Therefore, Ramos's false imprisonment could only be viewed as merely incidental to, or the means of accomplishing or facilitating, Ramos's objective to rob the vault. Therefore, Ramos cannot be separately punished for his false imprisonment of Parga (count 13). (*People v. Harrison, supra,* 48 Cal.3d at p. 335.)

V

Government Code Section 70373 Assessment

Ramos contends the trial court erred by imposing a Government Code section 70373 assessment. He asserts the court erred by applying that statute retroactively.

Effective January 1, 2009, Government Code section 70373, subdivision (a)(1), was enacted, providing in pertinent part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony . . . ."

Ramos committed the instant offenses on August 2, 2007, was convicted of those offenses on July 1, 2009, and was sentenced by the trial court on August 28, 2009. In sentencing Ramos, the court imposed a Government Code section 70373 assessment in the total amount of $360, representing $30 per conviction.

Ramos argued that because his criminal offenses were committed before the effective date of Government Code section 70373 (i.e., January 1, 2009), the trial court erred by applying that statute retroactively and imposing an unauthorized $360 assessment. We disagree. In *People v. Lopez* (2010) 188 Cal.App.4th 474, we stated:

> [W]e follow the persuasive reasoning of the Third District Court of Appeal, and subsequent cases, that the date of conviction, not the date of the crime, controls application of the statute. [Government Code] [s]ection 70373 can and does apply to crimes committed before its enactment. (People v. Castillo (2010) 182 Cal.App.4th 1410, 1413-1415 . . .; [citations].) (Lopez, at p. 479.)

In *Lopez,* we also agreed with *People v. Phillips* (2010) 186 Cal.App.4th 475 that the language of the statute controlled and the Legislature intended Government Code section 70373 to apply to convictions occurring after its January 1, 2009, effective date. (*People v. Lopez, supra,* 188 Cal.App.4th at pp. 479-480.) We concluded an assessment under Government Code section 70373 is not punitive and therefore such an assessment was properly imposed for a criminal conviction that occurred after January 1, 2009. (*Id.* at p. 481.) We adopt and apply our reasoning in *Lopez,* and the supporting cases cited therein, to this case and conclude the trial court properly imposed a $360 Government Code section 70373 assessment for Ramos's criminal convictions that occurred after January 1, 2009.

DISPOSITION

The judgment against Aguilera is reversed in its entirety. Ramos's convictions for battery on counts 2 and 3 are reversed and execution of his consecutive eight-month term for his false imprisonment conviction on count 13 is stayed pursuant to section 654. In all other respects, the judgment against Ramos is affirmed. The matter is remanded to the trial court with directions that the court enter an amended judgment as to Ramos, amend its abstract of judgment to reflect that amended judgment, and

forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

WE CONCUR:

McCONNELL, P. J.

IRION, J.

FootNotes

1. *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).
2. All statutory references are to the Penal Code unless otherwise specified.
3. The information also charged Ramos with possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a), count 14), which was subsequently dismissed.
4. If the monitoring room phone and radio calls were not answered, security officers would have been alerted.
5. A smock prevents a person from accessing his or her pockets, thereby discouraging theft.
6. *Elstad* notes: "[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination." (*Elstad, supra,* 470 U.S. at p. 307.)
7. Perhaps a layperson might interpret Frey's second warning as advising him or her that any items he or she literally or physically "used" (e.g., coffee cups, pencils, etc.) could be used against him or her in court (e.g., as a source of incriminating DNA evidence). Or, perhaps a layperson might be totally confused by that warning's apparent circularity and refrain from obtaining clarification for fear of appearing inattentive or ignorant.
8. Alternatively stated, Frey's second warning was *not* a "recognizable version" of the second warning required by *Miranda.* (*People v. Bradford, supra,* 169 Cal.App.4th at p. 852.)
9. Although we conclude the trial court erred by admitting Aguilera's statements based on the inadequacy of Frey's second *Miranda* warning, we nevertheless are compelled to express our concern regarding the manner in which Frey read the *Miranda* warnings and the comments he made prior thereto. As quoted above, prior to giving the *Miranda* warnings, Frey told Aguilera: "*Don't get excited about it. It's not a big deal, it's, it's just a formality*[;] it's what we have to do, okay[?]" Frey also implicitly discouraged or dissuaded Aguilera from exercising his *Miranda* rights by stating that after he read him those rights, "*we'll just go on* [i.e., continue with his interrogation] okay[?]" (Italics added.) Furthermore, Frey read the *Miranda*warnings from the card very quickly and in a monotone

manner. Although the trial court noted Frey read the *Miranda* warnings "somewhat hastily," based on our independent viewing of the video recording of Frey's interview of Aguilera, we believe the trial court mischaracterized and underestimated the haste with which Frey read the *Miranda* warnings. Also, contrary to Frey's pronouncement, the reading to Aguilera of his *Miranda* rights was *not* "just a formality," nor was it "not a big deal." Rather, it was an advisement of Aguilera's Fifth Amendment right against self-incrimination with such content specifically mandated by the United States Supreme Court in *Miranda.* Frey's characterization of his reading of those rights as a mere formality and nothing to get excited about or as not a big deal diminished the importance of that reading and likely caused Aguilera to not give those warnings the attention they deserved. Whether or not that was his intent, Frey's prefatory comments were improper and had the effect of downplaying Aguilera's constitutional rights as set forth in the *Miranda* warnings. (*Doody v. Schriro* (9th Cir. 2010) 596 F.3d 620, 624, 635-637 [detective undermined *Miranda* warnings by informing suspect they were merely a technicality or formality].) Likewise, Frey's reading of the *Miranda* warnings very quickly and in a monotone manner had the same effect of undermining those warnings and downplaying their significance. Although we do not base our decision on these grounds, Frey's prefatory comments and manner of reading the *Miranda* warnings were not appropriate and arguably could have provided an independent basis on which to find a *Miranda* violation.

10. Citing *People v. Lewis* (2008) 43 Cal.4th 415, the trial court subsequently dismissed Ramos's robbery convictions on counts 2 and 3 as not lesser included offenses of kidnapping for robbery.

11. That standard practice was presumably established long ago as reflected by the California Supreme Court's 1970 advice: "When a statute . . . lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, should do so in the conjunctive to avoid uncertainty. [Citations.] Merely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts." (*In re Bushman* (1970) 1 Cal.3d 767, 775, disapproved on another ground in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.)

12. Contrary to the People's apparent assertion, *People v. Sakarias* (2000) 22 Cal.4th 596 did *not* hold that a lesser offense is included within a conjunctively pled greater charged offense if either of the conjunctively pled elements satisfies the lesser offense. Rather, *Sakarias* expressly declined to address that assertion by the defendant. (*Id.* at p. 622, fn. 4.) Furthermore, we note that in *Sakarias* the People disputed that assertion, presumably supporting the position we now adopt. (*Ibid.*)

13. All rule references are to the California Rules of Court.

14. In a misguided effort, Ramos primarily argues the trial court abused its discretion by considering the fact that he committed multiple offenses against multiple victims in contrast to multiple offenses against merely one victim. Ramos extensively argues the facts in *People v. Leung* (1992) 5 Cal.App.4th 482 are inapposite to those in this case. However, in sentencing *Ramos,* although the court *could* have expressly cited that factor in imposing consecutive terms for his robbery convictions, it did *not* cite that factor. (In contrast, in subsequently sentencing *Aguilera,* the court *did* note the

multiple offenses committed against multiple victims.) Because the court did not cite the aggravating factor of multiple victims in sentencing Ramos, it presumably did not consider that factor and therefore we need not address it.