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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOE TREJO, Defendant and Appellant.	B226436 (Los Angeles County Super. Ct. No. NA082886)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Richard R. Romero, Judge. Affirmed and remanded with instructions.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of the **Factual Background, Discussion Part B and Discussion Part C.**

INTRODUCTION

Following a jury trial, defendant and appellant Joe Trejo (defendant) was convicted of two counts of attempted second degree robbery and five counts of second degree robbery. On appeal, he contends that the unsuccessful and sometimes contentious plea bargain negotiations that took place prior to trial resulted in a denial of his due process right to a fair trial. Defendant also contends that the trial court committed prejudicial error when it denied his motion for a mistrial. The Attorney General disagrees with both of defendant's contentions and asserts that additional fees and assessments should have been imposed by the trial court.

In the published portion of this opinion, we hold that the plea bargain negotiations did not deprive defendant of a fair trial. In the unpublished portion of the opinion, we hold that the trial court did not abuse its discretion in denying the motion for mistrial and that the trial court is required to impose additional fees and assessments.

FACTUAL BACKGROUND

Counts 5 and 6—Attempted Robberies of Wilman and Edgar Recinos

On June 3, 2009, at about 12:30 p.m., Wilman Recinos was eating lunch with his cousin Edgar Recinos at a construction site near 1925 Homeworth Drive in Rancho Palos Verdes. Two Hispanic men approached the cousins and pointed guns at them. The two men demanded money from the cousins, but the cousins refused the demand. One of the robbers then struck Wilman on the head with a gun. The cousins were in fear for their lives. Wilman ran into the house and the two assailants ran away. Wilman did not "really see [the assailants] that well because it all happened so fast." He was unable to identify defendant in court as one of the robbers.[1]

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[1] Edgar Recinos testified and corroborated Wilman's account of the attempted robbery and assault, but he also could not identify defendant as one of the robbers.

On June 3, 2009, at about 12:30 p.m., Raul Rivera was working as a gardener in the vicinity of 1948 Homeworth Drive in Rancho Palos Verdes. He noticed two men following a tall, elderly man who was carrying grocery bags in each hand. He identified one of the two men as defendant. Rivera was concerned the two men were going to rob the man with the bags. The two men, who were wearing hooded jackets, then turned around and approached Rivera who grabbed a pickax. Defendant stood in front of Rivera and said "What are you looking at, faggot?" Rivera saw defendant holding a gun. Defendant and his cohort then crossed the street and approached two men who were eating about six houses from his location. Rivera saw defendant point a gun at the men, heard defendant's cohort demand money, and saw the cohort hit one of the victims with a gun. When the two victims stated they did not have any money, defendant and his cohort ran away.

Count 7—Robbery of Arthur Harmon

On June 3, 2009, at about 12:50 p.m., Arthur Harmon was near the intersection of 10th Street and Pacific Avenue in San Pedro. Harmon had just completed some banking and, as he walked from the bank parking lot to the sidewalk, he was approached by two men wearing hooded sweatshirts. The two men "stuck guns in [his] ribcage and told [him], 'Give us your money.'" When Harmon told the men his wallet was in his back pocket, one of them took the wallet from his pocket and then both men "took off running." At the time of the incident, Harmon was recovering from laser eye surgery, but because defendant was only a foot away from him during the robbery, Harmon was able to identify defendant in court as one of the robbers. Harmon's credit card was subsequently used at a restaurant and two gas stations, and someone unsuccessfully attempted to use it at a Target store. Harmon had $100 to $125 in cash in his wallet.

Count 8—Robbery of Gary Bodak

On June 3, 2009, at about 3:45 p.m., Gary Bodak was taking a walk near the vicinity of 228th Street and Cypress Avenue in the City of Torrance. Two dark-skinned

men wearing hooded sweatshirts came up behind him and grabbed his wallet. He turned around, held up his closed umbrella, and one of the men took out a gun and pulled the trigger. Bodak heard a plastic clicking sound, but did not hear the gun discharge and was not shot. The men ran away with Bodak's wallet and all of its contents, including his credit cards and cash. Bodak identified the man with the gun as defendant from a subsequent photographic lineup, but was unable to identify defendant in court as one of the robbers.

Count 9—Robbery of Joe Leiva

On June 19, 2009, at approximately 6:45 p.m., Joe Leiva was working on his laptop computer in front of his apartment building located on the 1000 block of West 19th Street in the City of San Pedro. He noticed two men "coming around the corner, and they were running [toward him] pretty fast." Leiva identified one of the two men as defendant from a photographic lineup and in court. Defendant said to Leiva, "Hey, homey, give me your shit." Defendant then pointed a gun at Leiva's abdomen, and Leiva gave him the laptop computer. The entire incident lasted 10 to 15 seconds.

Count 10—Robbery of Richard Jacobelly

On June 22, 2009, at about 1:00 a.m., Richard Jacobelly was walking down 1st Street near Grand Avenue in the City of San Pedro. He was walking from his apartment to a bus stop when a man passed by him. Jacobelly identified the man as defendant from a photographic lineup and in court. After defendant passed Jacobelly, he "came at [Jacobelly]" from behind with a gun and said, "Give me your wallet." As defendant put the gun to Jacobelly's head, Jacobelly turned and saw another man with a gun coming at him from the other direction. Defendant told Jacobelly to lie on the ground, and he complied. At some point during the robbery, Jacobelly heard one of the two robbers cock the hammer of a gun. Jacobelly said, "I have a little girl. Please don't shoot. Please don't shoot me." The two robbers took Jacobelly's wallet from his back pocket and

"[a]fter that they just . . . scrammed . . . ." Jacobelly had over $100 in his wallet, as well as his credit cards and identification cards.

Count 11—Robbery of Tiffany Smith

On June 28, 2009, as Tiffany Smith was leaving work, her coworker, Maria Medina, asked Smith to take her to San Pedro to see Medina's boyfriend. Smith agreed, but when the two women arrived in San Pedro, Medina's boyfriend asked Smith to take him and a friend back to Long Beach. Smith complied and drove the group back to Long Beach where the males gave Smith directions to a house by an alley. As Medina "let [the two males] out [of] the back seat, the boy behind [Smith] grabbed [her] neck and put a gun to [her] head . . . ." The male who grabbed Smith from behind then said, "Give me your shit bitch, or I'm gonna kill you." He took the keys from the ignition, threw them, took Smith's purse, and ran. Medina followed and came back to the car with Smith's purse, which had been dropped in the alley, but Smith's wallet was missing. The police showed Smith a photographic lineup and she circled the photographs of two different men who looked like the male that robbed her, one of which was defendant's photograph. But Smith could not identify defendant in court as the man who robbed her. Medina told police that the man who threatened Smith and took her purse was named Shady, and she identified defendant as the robber at trial.

Testimony of Ivana Baresic

On the morning of June 3, 2009, codefendant Ivana Baresic was on her way to her boyfriend's house when her friend Moises Trejo, whom she called Mo, asked if she could give him and his two brothers[2] a ride. She was acquainted with Mo and often gave him rides, so she allowed the three men into her car. The three brothers appeared "hyper," "excited," and "in a good mood." Once Baresic started driving, the brothers directed her to an area in Rancho Palos Verdes across from Peck Park. Baresic parked her car and Mo

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[2] She knew the two brothers as Duke and Raider.

and Duke exited the vehicle while Raider remained behind with Baresic. Mo and Duke returned to the car after about five minutes. Mo returned to the back seat with Raider, and Duke sat in the front passenger seat. Duke said, "Let me sit in front because I'm strapped," which Baresic understood to mean he had a gun. The comment made Baresic "really nervous, and [she] started getting . . . nervous butterflies in her stomach." She said, "Are you fucking serious?" Duke did not respond, but he showed her a gun "in the front of his pants." When Duke told Baresic to start driving, she told the brothers she was taking them home. Duke replied, "No, you're not" and told her to turn right. Duke repeatedly showed Baresic the gun and repeatedly told her she was not taking the brothers home. Duke ordered Baresic to "[s]top being a scary bitch." Baresic began crying because she was scared. She thought that if she did not keep driving, Duke would use the gun on her or take her car. She was afraid she would be killed.

Baresic drove the brothers to a Bank of America on 10th Street and Pacific Avenue. She initially parked in front of the bank, but when Duke said, "Are you fucking serious? There's cameras," she made a u-turn and parked on the other side of the street. Duke and Raider then exited the car and left for two or three minutes. When the two brothers returned, Duke had a brown wallet in his hand. Duke removed the contents of the wallet and, as they were driving, he threw the wallet out the window.

Baresic drove to a Jack-In-The-Box restaurant and the group ordered food for which Baresic paid with a card provided by Duke. Duke then told Baresic to drive to a gas station where he filled the car with gas. After leaving the gas station, Duke instructed Baresic to drive to a Best Buy store where she and Raider tried unsuccessfully to purchase prepaid phones with a credit card. The pair left the store quickly and returned to the car. The group next went to a Target store where Baresic and Duke again tried to make a purchase with a credit card, but the card was rejected. They left the Target store and returned to the car.

At that point, Duke told Baresic that he needed to use a restroom and directed her to a location a block or two down from the Target store. Duke and Mo exited the vehicle, but Raider stayed behind with Baresic. When the two brothers returned after two or three

minutes, Duke had another wallet. The brothers then instructed Baresic to take them home. Duke told Baresic that if the police contacted her, not to tell them anything.

Two days later, Duke contacted Baresic to determine if she had heard anything, and he contacted her every day thereafter until she contacted him to advise him that the police had gone to her mother's house. When Baresic heard that the police were looking for her, she voluntarily went to the police station and informed the police that strangers had kidnapped her and forced her to drive them to the robberies. But she subsequently told the police that the men in the car were Mo, Duke, and Raider. She identified defendant in court as Raider.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney in an amended information charged defendant in counts 5 and 6 with attempted second degree robbery in violation of Penal Code sections 664 and 211[3] and in counts 7 through 11 with second degree robbery.[4] The District Attorney alleged that as to counts 5 through 11, defendant personally used a handgun within the meaning of section 12022.53, subdivision (b) and that in the commission and attempted commission of each of those offenses a principal was armed with a handgun within the meaning of section 12022, subdivision (a)(1). The District Attorney further alleged that defendant had been convicted of two prior felonies within the meaning of section 1203. Defendant pleaded not guilty and denied the allegations.

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3 All further statutory references are to the Penal Code unless otherwise indicated.

4 Counts 1 through 4 were charged against codefendant Baresic.

Following trial, a jury[5] found defendant guilty as charged and found the firearm allegations true. The trial court denied probation and sentenced defendant to a total prison term of 40 years and 4 months.

DISCUSSION

A. Plea Negotiations

1. Background

During jury selection, the exchanges quoted below took place between and among the trial court, defendant, and the attorneys for the parties concerning ongoing plea negotiations.[6]

"The Court: Back in session outside the jury's presence. [¶] Counsel and the defendant are here. There were some settlement negotiations. [Prosecutor Fuhrman] was here, wanted an offer from [defendant]. He said 16 or 17, and [Prosecutor Fuhrman] declined that so we will proceed with jury selection. [¶] . . . [¶] The Defendant: I'm not saying that. You guys are playing with me with them deals. That's not even a deal. [¶] The Court: I used to be a federal prosecutor, and we used to do armed robberies. The standard offer for an armed robber, one bank, one bank, one robbery is 25 years. That's when I was a prosecutor. 25 years was the minimum sentence we ever asked for a bank robber committing one robbery. [¶] You're alleged to have committed a lot of robberies here. So that's why when [Prosecutor Fuhrman] said 28 years, I thought, boy, that's a light offer from [Prosecutor Fuhrman]. I thought he was gonna be asking for 35 years or

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[5] Defendant and Baresic were tried jointly at a consolidated trial, but two separate juries were empanelled to decide the case against each defendant.

[6] Prosecutor Fuhrman was the calendar deputy and Prosecutor O'Crowley represented the People during the trial. Fuhrman apparently handled certain plea negotiations with defendant's counsel that took place off the record prior to the discussions conducted on the record.

40. His offer of 28, in my mind, is very lenient. [¶] [Defense Counsel]: *For the record, it's now 20*. [¶] The Court: 20 and you're turning it down? [¶] The Defendant: That's half my life. [¶] The Court: [Defendant], he offered you 20, and you're turning it down? [¶] [Prosecutor O'Crowley]: At 85 percent, which is 17 years. [¶] [Defense Counsel]: Which is 17 years. [¶] The Court: No one is playing with you if they are offering you 20. [¶] The Defendant: That's right, but I'm not getting no strike—well, I'm gonna have strikes, but they are not stricken, right? [¶] [Defense Counsel]: He is concerned about the fact that he would end up with strikes. There is no alternative to that based on the agreement that was proffered. It carries a risk, carries a substantial risk. [¶] The Defendant: I know they are strikes, but they are stricken strikes, you know. If I go to prison, any little thing, I get beat up and something happens, I'm gonna get another strike just on anything. That's like saying, here, take 20 years with two or three strikes, you gonna do life by the time you do a year in there. [¶] The Court: That may happen. [¶] The Defendant: I'm trying to get out there and work and have kids. [¶] The Court: We are having this conversation, but it doesn't do any good. I'm not going to offer you 20. I wouldn't offer you 20. [Prosecutor Fuhrman] *offered you 20, and you turned it down so there is really nothing to talk about because I don't think you should get 20*. [¶] [Prosecutor O'Crowley]: If I may add something, your Honor. [¶] The Court: Go ahead. [¶] [Prosecutor O'Crowley]: There is no way you're gonna come out of this case, in my opinion, with less than two strikes. You're going to go to prison with at least two strikes. The situation you're worried about, being in prison having two strikes behind you, I don't think there is any way to avoid that. The only thing we are talking about here is how much time you get going in. [¶] [Defense Counsel]: I think it's a phenomenal offer, given the exposure of 48 years. We're talking about, I think, seven counts, plus the car burglary, plus the probation violation issue. [The defendant confers with his counsel off the record] [¶] The Defendant: If I could think about this offer? [¶] [Defense Counsel]: Could we continue picking a jury and, hopefully, we will reach a resolution before tomorrow morning? [¶] The Court: We need to continue picking a jury. I have jurors outside. [¶] [Defense Counsel]: I understand. [¶] The Court: I have

no control over the offer. I don't know if it's still on the table or will be, but we need to finish jury selection. So I'll ask the bailiffs to do what we need to do, and let's proceed with jury selection." (Italics added.)

The next day, defendant's counsel informed the trial court that Prosecutor Fuhrman was denying that a 20-year offer had been made, which information triggered the following colloquy: "The Court: We're back in session outside the jury's presence on [defendant's] case. [¶] [Defendant] is in the lockup, not before the court. [Defense counsel] is here, and the calendar deputy [Prosecutor Fuhrman], is here. [¶] Your request, [defense counsel], was what? [¶] [Defense Counsel]: Your Honor, yesterday afternoon I appeared before this court and picked a jury. Towards the end of the day, before your Honor and your staff, [Prosecutor Fuhrman] and I and [Prosecutor O'Crowley] discussed the settlement of the case. I believe a record was made. I think the court reporter was here, and at some point in time, I, on the record put the 20-year offer from [Prosecutor Fuhrman]. The court looked at my client and said to my client, essentially, 'you're crazy not to accept it.' [¶] The Court: I didn't use the word 'crazy' but something along those lines. [¶] [Defense Counsel]: Something like that, it would be wiser to accept it, and that he was facing approximately 48 years if you combined both cases. My client asked if he could think about it until this morning, and that's where it ended. [¶] I walked in a few minutes ago, and [Prosecutor Fuhrman] said he never made any offer—that offer of 20. He said his offer was 28. I would rather—I've spoken to your clerk who was present during the entire proceedings. She advised me that the offer was 20 years. [¶] The Court: Isn't the main issue what's on the table now? [¶] [Defense Counsel]: No. The main issue was was the offer made, number two, whether or not there was a time limit, and, number three, whether or not it was withdrawn. There was no time limit on it. [¶] The Court: I didn't hear a time limit. [¶] [Defense Counsel]: My client wanted to talk to his mom. I asked him before he left whether he could talk to his mother, you know, over the phone last night, and he said he believed he could. That was the end of it. [¶] The Court: Okay. [Prosecutor Fuhrman] is the 20-year offer still on the table so we can bring [defendant] down? [¶] [Prosecutor

Fuhrman]: *There was never a 20-year offer given by the people in this case.* As I recall, I came in yesterday afternoon at the request of counsel. He began speaking with his client, and his client didn't want anything. He asked me to address his client at that time, and the client indicated he didn't want an offer. [¶] The Court: How did we get to 20 years? Because I remember discussing 20 years, and the issue was, in [defendant's] mind, that he had to plead to three counts as part of what was understood to be your offer, at least three. [¶] [Defense Counsel]: Correct. [¶] The Court: We even got to the details of how many counts and a number of 20. [Prosecutor O'Crowley], in fact, even stepped into the discussion and said, essentially, '[Defendant], you're going to be convicted of at least two strikes so the issue is not the strikes. The issue is how many years you're going to go behind the strikes.' [¶] So I clearly understood the offer you were making was 20 years. In fact, at one point, [defendant] was talking about something or something was going on, and the bailiff stopped you from leaving the courtroom. It was something unrelated to the plea discussions, and you said something to the effect, 'oh, I thought he had decided to accept the offer.' Accept what offer? [¶] [Prosecutor Fuhrman]: No, that was not at all what I said as I was leaving the courtroom. As I remember, I was stopped about something, I can't remember the particular detail, but I was sarcastically indicating, in essence, was he wasting my time again with another attempt at an offer? [¶] As I told [defense counsel] before, the original offer was 28 years. There was no point in the people bidding against ourselves. I think there was a counter of 15 . . . which I summarily rejected. During the short conversation I had with [defense counsel] and the defendant, I think the defendant then said 17. Again, I said, 'no.' So if counsel is euphemistically thinking 20 was what he wanted to accomplish, that was never conveyed. [¶] The Court: Just a second. Just a second. [¶] [Prosecutor Fuhrman]: I remember specifically asking counsel directly if he had authority, and his response was, no, he had to speak with his client. So at no time yesterday did the people make an offer. [¶] The Court: If I were required to make a finding, my finding would be that the offer was made either explicitly or by accepting what was being discussed, the 20 years, three counts was discussed, and at no point did the D.A. correct the court—correct

me or anyone else about the offer. [¶] So, in my recollection, when you were stopped by the bailiff, he stopped you because we were concerned that one of the jurors outside might see the defendant handcuffed. You said something to the effect of, 'is he changing his mind about accepting the offer?' It's clear in my mind that's what was said. There was no time limit put yesterday as to the offer. [¶] So is that offer of 20 years withdrawn, or is it still on the table? [¶] [Prosecutor Fuhrman]: *There was never an offer of 20 years*. The court was not privy to all the discussion so the court has no right to even be having this colloquy and making any determination whatsoever. If there is something on the record, that can certainly be read back and decided. Albeit all this nonsense regarding this discussion, the offer would have expired at sundown, anyway. There is no offer. There has been no offer. [¶] The Court: We will bring [the defendant] down and ask the clerk to call the D.A.'s office, and we need to speak with someone superior to [the prosecutor] because we have a clear misunderstanding that affects the interests of justice here. So, as soon as possible. [Recess was taken.]" (Italics added.)

After a recess, the trial court and counsel continued the plea bargain discussion as follows: "The Court: We're back in session outside the jury's presence. Counsel, defendant, and [Prosecutor Fuhrman], the calendar D.A., is here. [¶] I asked for his superiors from the D.A.'s office to be here because there was something unusual that's never happened in my career before, and I thought I should resolve it right away. But on second thought, it might be best just to get transcripts, and everybody can look at the transcripts and see what happened. [¶] My concern was that it was clear in my mind yesterday a 20-year offer, three counts was made to [defendant], and we had a long discussion on the record. I talked to [defendant] directly about that. I told him that I couldn't believe the D .A.'s office would make a 20-year offer. I said in the federal system, 25 years would be the minimum sentence that could be expected, and I went into some long colloquy with [defendant] because I couldn't believe the D.A. was making that offer. [¶] There was no corrections about the D.A. not making that offer. [Prosecutor O'Crowley] was here and spoke directly to [defendant], telling him that the issue is not

the number of strikes, he's gonna get two strikes, at least, the only issue is the number involved. So either I just totally misunderstood what was going on or someone didn't correct me when they should have corrected me as to what the offer was. It's a very important case, and everyone here, I think, believed the D.A. was making a 20-year offer. And if he wasn't, he should have told me after I told [defendant] he was being offered 20 by the D.A. [¶] [Prosecutor Fuhrman]: I read that part of the transcript, your Honor. I understand what the court is saying. No offer was ever made yesterday in terms of 20 years. As a matter of fact, no offer was made whatsoever. Counsel asked me earlier in the day if I would take 15, I was brought down for that purpose, and I said, 'no.' The colloquy was then would I take 17, I said, 'no.' [¶] *The court then relied on a statement when I was not here made by* [*defense counsel*] *that the offer was 20 years. That was never made.* The court also indicated in that transcript, the little bit that I've been allowed to see this morning because I wasn't allowed to see the rest—and I think that's patently unfair. I'm not sure why that occurred. But be that as it may, later in the day when the court was having the colloquy with the defendant, it was patently clear that he was not accepting it, and the court indicated to him that at that time the court didn't know if the offer was still open. [¶] There was a subsequent discussion between [defense counsel] and [Prosecutor O'Crowley] later in the day where [defense counsel] was even indicating by his acts and his words that he was not sure that offer was still open or if it even existed. [Prosecutor O'Crowley] can comment on that, if need be, nonetheless, the offer was not accepted, it's the next morning, there is no offer. [¶] [Defense Counsel]: May I be heard? [¶] The Court: Just briefly. *My position is the D.A. controls the offer. He says there is no offer, then there is no offer on the table.* But I just feel that both sides, the prosecutor and the defense, has to be really open to the court, and if I'm stating that the D.A. has made an offer of 'X' years and that's not true, I expect the party that knows the truth to correct me rather than have, in my opinion, a miscarriage of justice occur. That's all my concern is. If I was wrong, you should have said, 'Judge, we are not offering three counts at 20 years. You're mistaken. I don't know where you got that, Judge.' [¶] [Prosecutor Fuhrman]: It was a little hard for me to say that when I was not

in the room. [¶] [Prosecutor O'Crowley]: Your Honor, that addresses me, really. I was surprised to hear [defense counsel] say 20 years because I was sitting here when the conversation took place. I didn't hear it. I intended to check with [Prosecutor Fuhrman] before anything would go forward after [defense counsel] said to the court that the offer was 20 years. [¶] I talked to [defense counsel] after when we were walking out of the courtroom and asked him whether [Prosecutor Fuhrman] had made a 20-year offer, and I told him I didn't hear it conveyed. And, [Prosecutor Fuhrman] is also correct, I also heard the court indicate that at the end of the day the court had no idea whether the offer that was described by [defense counsel] was open or not. [¶] So while we certainly disagree about what happened yesterday, ultimately, the defendant did not avail himself of, you know, what was going on yesterday, and I think that sort of is the end of that." (Italics added.)

The plea bargain discussions concluded as follows: "The Court: Yes, briefly, [defense counsel]. [¶] [Defense Counsel]: Your Honor -- [¶] The Court: I am going to order a transcript of all the discussion yesterday. [¶] [Defense Counsel]: In the transcript the court will find that [Prosecutor O'Crowley] even went so far as to discuss with my client, with the court, and with myself that the 20 years actually came out to 17 at 85 percent and that he would end up with three strikes. [¶] I personally no longer have any credibility with my client, nor with my client's family. I'm going to declare irreconcilable differences with my client on this case and ask to withdraw. [¶] The Court: That's denied. I apologize to the D.A. hierarchy here. If you want to state your appearances, you can, or not. [¶] [Defense Counsel]: Furthermore -- [¶] The Court: Thank you very much. [¶] [Defense Counsel]: We now have a court that's going to hear this trial where the D.A., [Prosecutor O'Crowley], and, specifically, [Prosecutor Fuhrman] on the record has essentially called this court a liar. I don't see how we can have—we can have a trial that's fair to my client under those circumstances. It's an abomination, and I think that this court has to take control of this courtroom and relieve me and sanction the D.A. [¶] The Court: That's denied. We will start trial. Thank you very much. [¶] [Prosecutor Fuhrman]: My silence is in no way accepting the irreverent

comments of the defense attorney, and I in no way feel that this court is lying about anything. This court may have heard things that weren't communicated to it properly by the defense, and that may have led the court to make certain statements. I think the counsel who made that comment ought to reexamine his own communicative ability before making the comments that were just made. [¶] The Court: We are in recess. Thank you."

Defendant contends that the plea negotiations created acrimony between the prosecutors and defense counsel, as well as between defendant and defense counsel. According to defendant, the prosecutors' conduct regarding the disputed 20-year offer affected the integrity of the plea bargaining process and contributed to defendant's rejection of a 28-year offer. Defendant suggests that such a situation can affect the fairness of the trial and that there was a denial of due process. He requests that under "these unusual circumstances . . . this Court should exercise its inherent power to reshape the judgment (Pen. Code, § 1260)[7], and remand to afford [defendant] the opportunity to take the 20-year deal discussed at length on the record."

2. Analysis

"'[P]lea negotiations and agreements are an accepted and "integral component of the criminal justice system and essential to the expeditious and fair administration of our courts." [Citations.] Plea agreements benefit that system by promoting speed, economy, and the finality of judgments. [Citations.]'" (*People v. Feyrer* (2010) 48 Cal.4th 426, 436-437.) "'The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by

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[7] Section 1260 states as follows: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment [citation], by the People's acceptance of a plea to a lesser offense than that charged, either in degree [citations] or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the "bargain" worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of "bargaining" between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them.'" (*People v. Orin* (1975) 13 Cal.3d 937, 942.)

Defendant concedes that he never accepted the disputed 20-year offer and that he did not detrimentally rely on that offer. Defendant also concedes that there is no case law supporting his position, but nevertheless argues that under the "unique" circumstances in this case this Court should require the trial court to allow defendant to accept a plea bargain to a 20-year sentence.

As an initial matter, the prosecutor was not obligated to make an offer; there is no constitutional right to a plea bargain. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 561.) Moreover, plea bargaining is governed by principles of contract law (*Mabry v. Johnson* (1984) 467 U.S. 504, 507, abrogated on other grounds by *Puckett v. United States* (2009) 556 U.S. 129), and under contract law, an offer may be revoked by the offeror any time prior to acceptance. (*T.M. Cobb v. Superior Court* (1984) 36 Cal.3d 273, 278.) Thus, a prosecutor may withdraw from a plea bargain, or revoke or withdraw the offer, before the defendant pleads guilty or otherwise detrimentally relies on the bargain. (*People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1352; see also, *People v. McClaurin* (2006) 137 Cal.App.4th 241, 248.)

Based on these authorities, defendant's contentions based on the plea bargain negotiations are not meritorious. The record may demonstrate that there was confusion about the disputed 20-year offer based on miscommunications and the involvement of two different prosecutors in the negotiation process.[8] But the confusion was cleared up within a day, and defendant took no action to his detriment in reliance on the disputed offer prior to the proceedings in which the matter was clarified. Even assuming there had been an offer, the prosecutor effectively revoked or repudiated it before it was accepted.

Although defendant's trial counsel made a request to be relieved as his counsel based on the failed negotiations, there is nothing in the record to suggest, much less establish, that those negotiations or their purported impact on his relationship with defendant and the prosecutors adversely affected defense counsel's performance. Defendant makes no specific complaint on appeal about his trial counsel's performance. And there is no indication in the record that the plea bargain discussions actually affected the trial. There is no suggestion of any prosecutorial vindictiveness (see *United States v. Goodwin* (1982) 457 U.S. 368, 371-372, 381; *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 368-369) or other overt interference with trial counsel's defense (see *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 757 [deliberate effort to undermine the attorney-client relationship]; see also *Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [defense counsel's deficient performance may be caused by the Government when it "interferes" in defense counsel's ability to make "independent decisions about how to conduct the defense"].) Absent case law holding that the type of miscommunications and confusion that occurred during the bargaining process here warrants reversal of a conviction, we perceive no legal basis upon which to reverse the judgment.

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8 "In plea bargaining arrangements it is the responsibility of lawyers in the prosecutor's office to '"let the left hand know what the right hand is doing" or has done.'" (*United States v. Hammerman* (4th Cir. 1975) 528 F.2d 326, 331.)

B. Motion for Mistrial

1. Background

During the prosecutor's cross-examination of Baresic, the prosecutor pursued the following line of questions in an attempt to impeach Baresic by showing that her trial testimony concerning Raider's, i.e., defendant's, involvement in the robberies was different than statements she made to the investigating detective and that her trial testimony was intended to shift blame for some of the crimes from defendant to Duke and Mo because Duke was absent and not involved in the trial and Mo was in custody and had confessed.

"[Prosecutor]: You told [the detective investigating the robberies] that Duke and Raider got out of the car, didn't you? [¶] [Baresic]: No. [¶] [Prosecutor]: Now, so today what you're saying is that Raider stayed in the car, right? [¶] [Baresic]: Yes. [¶] [Prosecutor]: Now, you know Raider is on trial? [¶] [Baresic]: Yes. [¶] [Prosecutor]: You know that Duke's whereabouts are unknown to the police, right? [¶] [Baresic]: I don't know. [¶] [Prosecutor]: Do you know where he's at? [¶] [Baresic]: No. [¶] [Prosecutor]: He's not on trial here, is he? [¶] [Baresic]: No. [¶] [Prosecutor]: You know where Mo is? [¶] [Baresic]: No. [¶] [Prosecutor]: You lost touch with Mo? [¶] [Baresic]: Yeah. [¶] [Prosecutor]: *Isn't it true that you know that Mo is in custody and has admitted his guilt in this case?* [¶] [*Baresic*]*: No. From what I had heard, he had already gotten out.*" (Italics added.)

At that point, defense counsel requested a sidebar conference and the following exchange took place between the trial court and counsel: "The Court: We are at sidebar. This is a dangerous area to go into. [¶] [Defense Counsel]: This is where I get to ask for the mistrial. The People have now elicited in the middle of trial that a suspect in the case -- [¶] The Court: Accomplice of your client. [¶] [Defense Counsel]: Accomplice of my client and his brother has confessed and is in jail for this offense. Just splendid. Motion for mistrial."

After hearing further argument from counsel, the trial court and counsel had this further exchange: "The Court: Final word. [¶] [Defense Counsel]: There is no cure. How do you unring the bell? You can't unring the bell. It's like a tractor trailer rig going through the courtroom. [¶] [Prosecutor O'Crowley]: Fair enough. But the bell doesn't need to be unrung ultimately. [¶] The Court: I don't believe there is irreversible prejudice here. I'll tell the jury to ignore the question, ignore the answer, and I believe your client can still get a fair trial here. So we will proceed. I know you have an issue on appeal."

Following additional colloquy, the trial court concluded: "The Court: The problem is the prejudice that the Court of Appeals [*sic*] would see that, okay, you have three male subjects and the [co]defendant here, Miss Baresic. Now, if the jury learns that one of the subjects, Mo, has been duly convicted in court, then, let's see, the People's theory that these three did it, this guy has already been convicted, the natural inference is that, well, the others are guilty, too. That's kind of the natural inference a normal person would take. So, well, [defense counsel's] client is guilty and so is Duke, who is not here. Then there is the separate issue about her involvement. More complicated because of the duress, so I don't see much prejudice against her. [¶] But as to [defense counsel], there is distinct prejudice, but I believe it is cura[ble] by telling the jury to ignore the question and answer. And the prejudice is not from Ms. Baresic testifying against his client already and fingering him to some degree for some of the crimes. That's not—the prejudice that stems from it is that the D.A. is telling us they already convicted one of three guys and now here is [defendant]. The motion is denied for mistrial."

2. Analysis

Defendant contends that the trial court committed prejudicial error when it denied his motion for mistrial. As defendant reads the record, the prosecutor's suggestion that Mo had been arrested for the robberies and had confessed to his involvement in them was so prejudicial that it could not be cured by either an admonition or instruction to the jury.

"In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. (*People v. McLain* (1988) 46 Cal.3d 97, 113 [249 Cal.Rptr. 630, 757 P.2d 569].) 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' (*People v. Haskett* (1982) 30 Cal.3d 841, 854 [180 Cal.Rptr. 640, 640 P.2d 776].)" *People v. Wallace* (2008) 44 Cal.4th 1032, 1068]

Here the trial court struck both the challenged question and answer, admonished the jury, and thereafter instructed the jury not to consider any question or answer that had been stricken. Under the applicable legal standard, we presume the jury followed the trial court's admonition and instruction. As the court in *People v. Bennett* (2009) 45 Cal.4th 577, 612 explained, "even if the question was improper, defendant suffered no prejudice. The trial court sustained defendant's objection and admonished the jury to disregard the question and not draw any inferences from it. We assume the jury followed the admonition and that prejudice was therefore avoided."

The exchange itself is ambiguous. The response, in part, to the question was "no." The reference that "he had already gotten out," could mean anything from bail, acquittal, or completion of the sentence. That there was at least some ambiguity helps make the admonishment justifiable.

Moreover, given the evidence that the jury had heard prior to the question and answer at issue, we cannot conclude that the trial court abused its discretion in denying the mistrial motion. By the time the question had been asked, at least five witnesses—Rivera as to counts 5 and 6, Harmon as to count 7, Bodak as to count 8, Leiva as to count 9, Jacobelly as to count 10, and Medina as to count 11—had identified defendant as one of the robbers in the crimes charged in each of the seven counts. Moreover, Baresic had already testified at length that defendant had been with Mo and Duke in her car and participated to some degree in the events of June 3, 2009, upon which counts 5 through 8 were based. Thus, the prosecutor's suggestion that Mo was in custody and had admitted

his guilt in the case was not so prejudicial that it could not be cured by the admonition and instruction given by the trial court. The evidence of defendant's involvement in the charged crimes was already substantial by the time the prosecutor made that suggestion, and it must be presumed that the jury understood from the admonition and instruction that the suggestion was inappropriate and could not be considered as evidence of defendant's guilt. Thus, the prior evidence suggests that the question was, in light of that evidence, not so prejudicial and that the answer to the question, although ambiguous, could be read favorably from defendant's standpoint. Moreover, even if there were error, in light of that prior evidence, such an error would not be prejudicial under *People v. Watson* (1956) 46 Cal.2d 818.

C. Additional Fees and Assessments

The Attorney General argues that at the time sentence was imposed in this case, section 1465.8, subdivision (a)(1)[9] required the trial court to impose a $30 court security fee for *every* criminal conviction and Government Code section 70273, subdivision (a)(1)[10] required a similar imposition of a $30 court facilities assessment for *every* criminal conviction, with exceptions not relevant here. Because the trial court imposed only one court security fee and one court facilities assessment, even though defendant

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[9] At the time of sentencing, section 1465.8, subdivision (a)(1) read as follows: "To ensure and maintain adequate funding for court security, a fee of thirty dollars ($30) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code." The fee is now $40.

[10] Government Code section 70373, subdivision (a)(1) provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction."

had been convicted on seven counts, the Attorney General contends that the matter should be remanded so the trial court can impose such fees and assessments on each count. Defendant does not address, much less dispute, that contention. We agree with the Attorney General and remand with instructions to impose court security fees and court facilities assessments on each of the seven counts upon which defendant was convicted.

DISPOSITION

The judgment of conviction is affirmed and the matter is remanded with instructions to the trial court to impose a $30 court security fee on each of the seven counts on which defendant was convicted and a $30 court facilities assessment on each of those seven counts.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.