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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. AMADOU DIAKITE, Defendant and Appellant.	B252501 (Los Angeles County Super. Ct. No. BA398892)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Jean Ballantine, under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee, Deputy Attorney General, Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Amadou Diakite of three counts of second degree robbery (Pen. Code, § 211 [counts 1-3]),[1] unlawful firearm activity (§ 12021, subd. (d)(1) [count 4]), and possession of marijuana for sale (Health & Saf. Code, § 11359 [count 5]). The jury found true the allegations that a firearm was used in commission of the crimes with respect to counts 1-3. (§ 12022.53, subd. (b).)[2]

The trial court sentenced defendant to a total of 16 years 4 months in prison. Defendant was sentenced in count 1 to the low term of two years, plus ten years for the firearm enhancement. In count 2, the court imposed a consecutive sentence of one year (one-third of the mid-term of three years), plus three years four months (one-third of ten years) for the firearm enhancement. Concurrent sentences were imposed in counts 3-5.

Defendant contends the prosecutor exercised a peremptory challenge to a black juror in violation of the principles set forth in *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*). He also challenges the trial court's disposition of his motion for review of the personnel records of a police officer pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Defendant further contends that the trial court erred in admitting evidence of voice identification and a cell phone video, that there is insufficient evidence to support his conviction for possession of marijuana for sale, and that the cumulative errors prejudiced him. We affirm the judgment.

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[1] All further statutory references are to the Penal Code, unless otherwise specified.

[2] Defendant was found not guilty of attempted second degree robbery in count 6. (§§ 664, 211.)

FACTS

Prosecution

The Varma Robbery (count 1)

Remy Varma listed a MacBook Pro laptop computer for sale on Craigslist sometime before March 7, 2011. The computer was brand new, and still sealed in the original box. A prospective buyer sent him a text message from (323) 603-7076. The two exchanged text and phone messages and arranged to meet. The buyer changed the location several times, but they finally agreed to meet at 10:00 p.m. on March 7, 2011, at the Rainforest Café in Hollywood. Varma parked in the restaurant parking lot around 10:00 p.m. and got out of his car while using his iPhone 4 cell phone. A black male came over and identified himself as the buyer. Varma handed him the computer. The man asked Varma if his cell phone was an iPhone 4. Varma responded that it was. The man grabbed the phone out of Varma's hand and backed away. Varma began to follow him, but he stopped when the man pointed a gun at him. The man went into an alley behind the restaurant, where a car was parked. Varma thought the man got into the car and drove away, but he was not certain. Varma reported the incident to police in Hollywood the next day. Surveillance video of the incident showed Varma interacting with a person in a blue jacket.

After the robbery, Varma watched Craigslist to see if his computer was listed for sale. Within two days, he found an advertisement selling the same computer with the same specifications. The language in the advertisement was similar to the one Varma had placed, as was the listed price. A photo showed a brand-new Mac Book Pro on a "dingy" couch. The advertisement referred to the Hollywood location at the corner where Varma was robbed. On March 9, 2011, Varma e-mailed the ad to the investigating detective at the Hollywood Station. He also recorded a voicemail message left on his cell

phone by the person who talked to him about buying his Mac Book Pro, and forwarded the recording to the detective.

Max Shmain worked at a cell phone store in Hollywood. He bargained with people for merchandise daily and had purchased many electronic items from defendant over a period of six years. Shmain knew defendant as "Ahmad" and "Blue." Shmain had a telephone number in his cell phone associated with defendant, under "Blue." On January 4, 2011, Shmain received a text message from defendant stating, "Please call me when you get a chance Pablo new number."

Between March 8, 2011, and March 10, 2011, Shmain negotiated with defendant to buy a Mac Book Pro 13″ laptop computer by text. The computer was brand new and sealed in the box. The text messages only indicated what "SIM" card or phone number was sending and receiving the messages, but Shmain knew they were from defendant. One text from defendant's number to Shmain also asked if an iPhone 4 was "unlockable," i.e., whether it was usable through carriers other than AT&T. Shmain responded no.

Later, Shmain got a text from defendant's number asking, "Do you have Sean's number on Melrose?" Shmain knew a person named Sean who worked at a cell phone store, so he gave defendant the name of the shop, "Dialnet." He exchanged additional text messages with defendant's number about the price of an iPhone 4. Eventually, Shmain bought a brand new MacBook Pro from defendant, which he later sold on eBay.

On March 15, 2011, Shmain sent a text message to "Mr. Pablo" at defendant's number, asking if he could get "some more new Apple laptops like that?" He received a response, "K, I'll let you know." On March 21, 2011, Shmain exchanged a series of text messages with defendant's number about Apple iPads. Shmain did not buy any iPads or iPhones from defendant in March 2011.

Payam Kohanbashir and his co-worker, Sean, worked at Dialnet, a cell phone store on Melrose. Defendant was a customer there. Kohanbashir knew him as "Blue." In March 2011, defendant came in with a newer black iPhone 4, trying to activate service. At some point, defendant purchased a new SIM card from Dialnet.

The Marcuse Robbery (count 2)

Four to five days before March 23, 2011, Marc Marcuse listed two iPad 2's for sale on Craigslist for $1,600 each. They were brand-new in sealed shrink wrap packaging. Marcuse was contacted on March 23, 2011, by phone call and text from a prospective buyer using the phone number (323) 603-7067. They arranged to meet in front of Marcuse's apartment in the early afternoon on March 23, 2011. At around 1:30 p.m. Marcuse sent the buyer a text message saying, "I'll be home from 4:00 on . . . ." The buyer did not show up, so they reset the meeting for 7:30 p.m., and then again for 11:00 p.m. Marcuse spoke to the prospective buyer by phone at around 7:30 p.m. It was the same male voice as in the earlier call. At around 11:20 p.m., the buyer texted that he had arrived and was waiting outside. Marcuse came outside with the iPads. The buyer was a young black male, age 18 to 25, with a dark hoodie closed tightly around his face. Marcuse handed him the iPads to inspect. The buyer asked if Marcuse had any iPhones, and Marcuse said no. The buyer backed away from Marcuse. He pulled up his shirt and displayed a handgun with a dark-colored handle in his waistband, told Marcuse he was a "lucky guy," and warned him not to follow. The buyer walked backwards 20-30 feet and then turned and walked quickly to a parked vehicle. Marcuse ran to his own vehicle and followed the vehicle, a light colored sedan, while calling 911. Police stopped the car and detained the driver, a male Hispanic. Marcuse immediately knew they had the wrong suspect and he had followed the wrong car. Marcuse videotaped the incident from the window of his upstairs apartment.

The Setiabudi Robbery (count 3)

On March 24, 2011, Heru Setiabudi had a Rolex Yachtmaster watch advertised for sale on Craigslist for $7,300. He received telephone calls and text messages from (323) 603-7076, expressing an interest in the watch. He spoke four or five times with a prospective male buyer who identified himself as Pablo. Pablo arranged to meet him in

front of an apartment at 1826 South Hauser Boulevard. Setiabudi arrived at the location and parked. A dark-skinned black male, age 20 to 25, wearing a baseball cap over part of his face, approached Setiabudi's car and got into the passenger seat. Setiabudi handed over the watch for the buyer to examine. They agreed on a price of about $7,000 for the Rolex. The man took a black gun from his left pocket. He took Setiabudi's iPhone and car keys. He told Setiabudi that if he did not call the police, his car keys would be across the street. He sounded different from the man Setiabudi had talked to on the phone. The man took Setiabudi's watch, phone, and keys. He ran across the street, and got into the rear passenger seat of a white or silver car with distinctive taillights. Setiabudi reported the incident to police that day.

A few days later, Setiabudi received more text messages from (323) 603-7076, telling him to meet at an Arco gas station, giving the address, 10 West East La Brea North, and directions, "Make a left first light, and I'll meet you there by the gas station."

The Attempted Robbery of Rivera (count 6)

In March 2011, J.C. Rivera listed a Rolex watch on Craigslist for $4,500. On March 28, 2011, Rivera received a text message from (323) 603-7076, asking about the watch. He spoke with the prospective buyer, a male, and exchanged text messages with him. They arranged to meet at a Starbucks in front of the USC campus the same day, but the buyer texted him and asked to change the location to a gas station off of LaBrea. Rivera was unfamiliar with the location, so he asked the buyer to meet him at Pink's. When Rivera arrived, the buyer changed the location to a nearby Baskin Robbins store, so Rivera left his vehicle at Pink's and walked to the Baskin Robbins. Four male friends followed Rivera in a vehicle. At the time, Rivera was six feet tall and weighed 340 pounds. Three of his friends were also large.

Rivera saw defendant, walked over, and asked if he was the person he had arranged to meet. Defendant responded that he was. Defendant was wearing a white striped polo shirt and jeans. Rivera's friends got out of their car. Rivera got in the

driver's seat, defendant got in the passenger's seat, and Rivera showed him the watch. Defendant said he wanted to take the watch to a friend at a pawn shop to authenticate it. Rivera did not have time for that, so defendant asked if his friend could come to the Baskin Robbins to look at the watch.

Defendant left. After a few minutes, he returned in the passenger seat of a gray Ford sedan driven by another male. Defendant's companion got into Rivera's car, and Rivera showed him the watch. The friend said it looked like the real thing. He went back to the Ford sedan. Rivera got out of his vehicle, stood with his friends, and then approached the Ford and asked if they were still interested. Defendant and his friend indicated they still wanted to take the watch to a pawn shop. Rivera declined and left. Over the next several days, they exchanged text messages negotiating the price of the watch. Rivera lowered the price to $2,000. When defendant offered $3,000 if Rivera would come to him for the sale because he could not get to Rivera's location in Covina, Rivera felt that he was being set up and stopped negotiating.

Rivera did not initiate a robbery report because he didn't believe defendant was trying to rob him. Defendant did not threaten Rivera or display a weapon.

The Investigation

The case was initially assigned to Detective Hankins, who obtained the March 6-8, 2011 mobile phone records for (323) 603-7076.

In March 2011, Detective Dave Vinton took over the case and investigated the phone records obtained by Detective Hankins. At the time, he was only aware of the Varma robbery. The (323) 603-7076 number associated with the Varma robbery was a prepaid phone with no subscriber information, so Detective Vinton investigated several of the numbers most frequently called from that number. He determined that one frequently called number ((323) 500-8046) belonged to Tenell Mantock in Long Beach and that another number ((213) 448-6567) belonged to defendant's mother with an associated address of 1436 North Vista, Hollywood. Further records searches associated

defendant with the North Vista address, and provided a description matching that given by Varma. The North Vista address was within a block or two of the Rainforest Café where Varma was robbed.

On March 31, 2011, Detective Vinton set up surveillance at the North Vista address, searching for defendant. Before sending officers to the location, Detective Vinton called the residence and determined that defendant was not there. Around 2:00 p.m. or 2:30 p.m., Officer Adrian Maxwell saw defendant drive up in a white Ford Fusion with one male passenger. Defendant parked and went inside. Officer Maxwell called Detective Vinton and informed him a suspect fitting the robber's description had arrived. Detective Vinton called the (213) 448-6567 number associated with the Vista Street address and spoke with defendant. He told defendant he needed to talk to him about defendant's recently stolen car. He asked defendant to come outside.

Officer Maxwell detained and handcuffed defendant when he came outside. Officer Maxwell removed a clear plastic baggie containing a green leafy substance which he believed was marijuana from the waistband of defendant's underwear. He removed a wallet and a white Apple iPhone from defendant's back pockets. He returned the cell phone to defendant's pocket and did not book it in evidence, which was not usual police procedure. Detective Vinton later took possession of the white iPhone as evidence. Defendant's wallet contained $1,372 in currency, consisting of ten $100 bills, eighteen $20 bills, two $5 bills, and one $2 bill. The cash and baggie of suspected marijuana were booked into evidence. Jeremy Deshone, the black male passenger in defendant's car, was arrested with defendant. Detective Vinton was advised that defendant had been arrested. Officer Maxwell remained at the North Vista address to monitor the location.

On the same day, Detective Vinton discovered the Marcuse and Setiabudi robberies were connected to the same phone number as the Varma robbery. Following defendant's arrest, Detective Vinton showed Varma a photographic six-pack including defendant's photograph at position No. 2. Varma picked the individual in position No. 2 and wrote, "#2 looks like him . . . ." Vinton then prepared a search warrant affidavit containing details of defendant's arrest, the Varma robbery, Varma's six-pack

identification, and the information he had learned about the Marcuse and Setiabudi robberies.

The search warrant was served at 1436 North Vista address about five hours after defendant's arrest. No one was home. Detective Vinton used keys recovered from defendant to gain access. Officers recovered an iMac, iMac keyboard, five containers containing a green leafy substance resembling marijuana, and one empty container. The clear plastic baggie recovered from defendant's waistband (item No. 1) and the six containers recovered from the bedroom (items Nos. 2-7) were booked into evidence. The baggie weighed 34.91 gross grams. Item Nos. 2, 3, 4, 5, and 6 weighed 607 gross grams, 273 gross grams, 369 gross grams, 51.99 gross grams, and 21.98 gross grams, respectively. Item No. 7 was empty. The leafy substances in container numbers 2 and 3 were determined to be marijuana weighing 214.88 net grams and 5.35 net grams, respectively. The baggie from defendant's waistband was determined to be marijuana weighing 33.02 net grams. No marijuana paraphernalia was recovered in the search.

On April 4, 2011, defendant's mother consented to a search of a storage locker at her North Vista apartment, where a loaded silver-colored revolver was recovered. The same day, Detective Vinton photographed the living room couch at the North Vista apartment, which appeared to be the same couch shown in the Craigslist posting for a MacBook Pro computer emailed by Varma to Detective Vinton on March 9, 2011.

Detective Vinton conducted a recorded interview of defendant in custody on March 31, 2011. Defendant denied committing any robberies. Detective Vinton questioned defendant about a black cell phone recovered from Deshone, the man who was arrested with defendant. Detective Vinton thought the black cell phone belonged to defendant because there were photos of defendant on it. Defendant said it was not his phone and that the photos of a young black male on that phone were not him, they were Deshone. Detective Vinton asked defendant for the number of his iPhone; defendant said he did not remember the number because he just got a new number a few days ago. Defendant said it was possible the robber had used his new cell phone number to commit

the robberies because he bought the SIM card associated with the number used. Defendant denied having any nicknames.

Detective Vinton had called defendant's girlfriend, Tenell Mantock, and defendant's friend, Scott Thenen, prior to the interview. During the interview, Detective Vinton told defendant that both Mantock and Thenen had confirmed that (323) 603-7076 was his number, and that Mantock said he had the number for three months. Defendant maintained that he did not rob anyone.

After defendant was arrested, Thenen received a call from the police in Hollywood saying that they had his car, a Ford Fusion. Thenen was friends with defendant and knew him only as "Blue." In March 2011, Thenen lent his car to defendant, usually for just a day but possibly for as long as a week. For about a year, Thenen had been buying marijuana from defendant once or twice a week. He paid $60 to $70 dollars at a time for a quarter ounce. He never exchanged use of his car for marijuana. Thenen communicated with defendant by texts and phone calls. No one other than defendant ever answered his phone. Thenen knew defendant kept two phone numbers at a time, one for calling women and another for business. If defendant left a phone in Thenen's car, Thenen would not have used it or allowed others to use it.

On March 31, 2011, the day defendant was arrested, Detective Vinton called the (323) 603-7076 number associated with the robberies, to see if the white iPhone would respond with a recorded message and associated name. The cell phone responded with an automated message. One or two days later, Detective Vinton called the number again and got a different message with defendant's voice saying that he was in jail and needed bail money to get out. Detective Vinton recorded the message.

On April 1, 2011, Vinton called Bernitha Meteyer, a friend of defendant's who communicated with him frequently on the (323) 306-7076 number. Meteyer testified that during the time she knew defendant, he was looking for work but she did not know if he ever found work. She usually paid when they went out. Around March 25, 2011, defendant wanted to borrow money from her to get a car. She did not lend the money to him because he was not working.

Identifications

On March 25, 2011, prior to defendant's arrest, Marcuse and Setiabudi each separately identified a different suspect, Vincent Cleveland, shown in position No. 2 in a photographic six-pack, as the person who "looked like" the person who robbed them. After defendant's arrest, Detective Vinton again met separately with Marcuse and Setiabudi. He showed them a different six-pack with defendant's photograph in position No. 2. Both witnesses wrote that the subject in position number 2 "looked like" the person who took their property. Detective Vinton then played the recording he had made of defendant's outgoing message on his iPhone and asked whether it sounded like the guy who had robbed them. Both witnesses said the voice sounded similar to the individual who robbed them.

Setiabudi testified at trial that the perpetrator was not present in the courtroom. He was not sure the voice in the recording was the man who talked to him or who met him and took his watch. Varma could not positively identify defendant at trial. Marcuse identified defendant in court as the man who robbed him, and Rivera identified defendant as the man who met him about his watch from a photographic six-pack and at trial. He also identified Deshone as the friend who was with defendant.

Detective Vinton did not send either the recording he made of defendant's voice message on the white iPhone, or the recording sent in by Varma of the person who wanted to buy Varma's computer, to forensics for a comparison analysis to determine if they were the same person.

Cell Phone Evidence

Detective Vinton obtained a search warrant and sent defendant's iPhone to Apple to be unlocked on May 4, 2011. He received the unlocked cell phone back from Apple on May 11, 2011. Detective Vinton went through the contents of the cell phone. He did

not delete any items, add any text messages, or intentionally alter any items. He did make some calls on the cell phone, trying to obtain the identities of the contacts in the phone and discern who previous calls were made to.

LAPD/SID retrieved the cell phone for analysis on May 17, 2011. SID specialist Eric Wahlberg used various forensics software tools to examine the contents of the cell phone and generate reports of the contents, including contacts, text messages, call logs, photos, and videos. Wahlberg testified that a SIM card is a computer chip inserted into a cell phone, which the service provider uses to identify the individual to be billed for the phone's usage. The SIM card is associated with a particular telephone number, not with a particular device, because the SIM card used in a device can be changed. Wahlberg's analysis was based on information he retrieved from the cell phone, not from the SIM card. The cell phone can be used without a SIM card.

The device name assigned to the white iPhone was "Blue." The cell phone contained photos of a Rolex watch and internet searches for a Rolex Yachtmaster watch. It contained more than 50 photos of defendant. A video stored in the cell phone was played for the jury and transcripts of the audio content were supplied to the jurors. The video was created or stored in the phone on or about July 19, 2010. It showed defendant and another young black male smoking marijuana and talking about wanting a Rolex watch, and taking one from the first "cracker."

Google Maps information stored on the cell phone showed that either the phone was physically located at 1826 Hauser Boulevard in Los Angeles at some point in time or that the phone was used to search for the Hauser address location. Entries in the cell phone's contact list included "ZH marc i-pad, number is 1-323-841-4044" and "Z Rolex, and the number is 626-864-3285," Setiabudi's number. An incoming text message in the phone from "ZH marc i-pad" said, "I will be home from 4[:00] on . . . ." Additional text messages between the white iPhone and "ZH marc i-pad" indicated an agreement to meet at 11:00 p.m. There were no call logs in the cell phone for any date prior to March 31, 2011. Wahlberg testified that calls can be deleted, cell phone memory can be wiped clean, and data can be changed. The cell phone could have been erased from March 30,

2011, and before. If a cell phone is not locked or password protected, it can be used by anyone in possession of it. This particular phone contained an application called "I-Spoof" that would allow the phone's user to make calls without using the phone's SIM card; the user could imitate another phone number which would show up on the recipient's end, so that it seemed like the call was coming from a number different than the one actually being used. Putting a new SIM card in an iPhone would wipe out all of the previously existing data on the device.

Detective Vinton testified about cell phone records for the (323) 603-7076 number obtained from the carrier, Simple Mobile. The records showed a text message from Shmain on March 21, 2011, two days prior to the Marcuse robbery, inquiring, "What kind of iPad is that again?"

Detective Michael Saragueta, assigned to the LAPD Narcotics Division lab squad, testified that in his opinion, the marijuana was possessed for the purpose of sale.[3]

At the close of evidence, the trial court took judicial notice that defendant was placed on probation on September 22, 2009, and remained on probation through March 25, 2011, and instructed the jury this fact could be considered with respect to defendant's responses on his medical marijuana application.

The court took judicial notice that Deshone pled no contest to a charge of robbery on June 17, 2013, that he was convicted of robbery based on that plea, and that those charges were unrelated to the charges in the present case.

Defense

Defendant testified he is a student at Santa Monica College pursuing a Bachelor's Degree in Business, and works for a concierge service promoting different venues in Hollywood. He bought the white iPhone that was on his person at the time of his arrest from Apple in May 2010. He produced the receipt for it. He lost the cell phone several

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[3] This is discussed in more detail below.

times and did not keep track of it. It was a "floater" phone that many people used. He would loan it to friends overnight. It was not his main phone. In early 2011, he had three or more cell phone numbers. He cancelled the AT&T service on the white iPhone, "jail broke" the phone, and used a Simple Mobile SIM card in it. He and his friends used the phone in hot spots, to watch porn, and to store videos and girls' phone numbers they wanted to hide from their girlfriends. Defendant let Deshone and his kids and girlfriend use the phone. Defendant changed his phone number in February or March 2011, due to random calls he started getting after his phone had been lost for a day or two, or maybe a week or two. He did not know if he had the phone at the time of the text messages in question. His girlfriend may have had the phone at that time, and he had her phone. He did not remember sending and receiving messages with her at that time. He was pretty sure he did not have the white iPhone on March 7, 2011, the day of the Varma robbery. He was not texting Shmain to sell a MacBook Pro on March 8, 2011; he was selling a laptop for Deshone as a favor. He purchased a different SIM card just before his arrest.

Defendant did not remember where he was on the dates of the robberies and did not commit them. He had no knowledge someone was using his phone to commit robberies, and he would not have allowed it.

Defendant and Deshone made the video that was stored on his iPhone purely for entertainment. They were smoking marijuana and he could have been drunk. It was Deshone who said he wanted to steal a Rolex from a "cracker." Defendant responded, "That's lethal," meaning it would be dangerous and someone could be hurt. He had money to buy a Rolex at that time, or would be getting money soon from an auto accident settlement. He was working a boat maintenance job, and he bought and sold items on Craigslist to make money at the time.

Just before March 31, 2011, he thought about buying a Rolex. Deshone helped him out, looking for Rolexes on Craigslist. Deshone went with him to look at Rivera's watch. He took $3,000 in cash with him and knew everything would be okay because there were surveillance cameras in the area.

Defendant testified Detective Vinton was confused when he interviewed defendant, and thought a picture of Deshone in Deshone's Blackberry phone was him.

Defendant had a current medical marijuana card at the time of his arrest, which allowed him to have marijuana for personal use. The marijuana in his apartment was for personal use. He never intended to sell any of it. At the time of the arrest he was smoking a lot, and cooking with marijuana. He kept his marijuana paraphernalia in a backpack under the bathroom sink. He bought enough marijuana at the medical dispensary so that he could store and save it, because it gets better with age in glass jars and tightly sealed bags.

Defendant had not kept anything in the storage locker at the North Vista address in the last 10 years. He did not have a key or know how to open it. The gun recovered from the locker was not his gun and he never saw it before.

Defendant previously had problems with police from the Hollywood Division who planted evidence against him; he had been arrested for possession of marijuana for sale and the charge became possession of methamphetamine. He was prosecuted and found not guilty.

The record of defendant's March 25, 2010 application for a medical marijuana card was introduced in evidence. On the application, defendant indicated that he was not on probation.

Eyewitness identification expert Dr. Robert Shomer testified there is a large body of consistent scientific research regarding the accuracy of eyewitness identification. He offered opinions about how eyewitness identification works and the various factors relevant to eyewitness identification. He opined that the procedure used for making an identification is paramount and the circumstances of the observation can determine the accuracy of the identification. A true eyewitness identification is not an opinion or a guess, but a "demonstrated ability to pick out the very same person you saw in the context of a fair representative test . . . ." A fair test, or identification procedure, cannot suggest the answer or influence what is in the witness' mind. A witness' statement that a subject "looks like" the perpetrator is not a positive identification because very often

people look like each other. The way a witness is questioned influences the identification, and can result in a misidentification of someone who was not present. In a proper six-pack procedure, the witness should be informed that the subject may or may not be shown in the photographs, and that it is just as important to clear the innocent as to identify the guilty. Without this balance, the procedure is tilted toward a witness believing that one of the photos in a six-pack is the suspect. Further, the entire session should be recorded on video or at least audio, to insure accurate review of the procedure followed by the officer administering the identification procedure and what the witness said in response. A witness's memory of a subject changes over time to match the person that the witness picked out in a six-pack. The accuracy of identification of a stranger falls off very quickly after the first 24 hours, even though a witness may feel his or her memory has improved. If a witness is going to be shown more than one six-pack array, the position of the actual suspect should be changed because pattern placement of the suspect in the same position from six-pack to six-pack is not random, but instead increases the suggestibility of the procedure.

Thomas Guzman-Sanchez, a court-approved expert in audio, video, and photo analysis, testified to his examination of photos of the couch at defendant's North Vista address compared to the couch in the Craigslist advertisement Varma supplied to law enforcement, and still photos created from the iPhone video of defendant and Deshone compared to the surveillance videos admitted in evidence. The fabric patterns in the North Vista address couch were noticeably different from the fabric shown in the Craigslist photo, and one couch had a pleat in the cushion and the other did not. One couch was in front of a gray wall, the other in front of a blue wall. Guzman-Sanchez observed skeletal differences in the chin, nose, profile, and hips of the subject portrayed in the iPhone video compared to the subjects portrayed in the surveillance videos. He testified that a voice identification can be 100 percent positive only by comparison of two recordings done in the same manner.

Humberto Jaime, a computer forensics expert, examined an Apple iMac computer recovered in the search of defendant's North Vista apartment, at the request of Detectives Vinton and Hankins. It contained no hits for "Craigslist."

Prosecution's Rebuttal Evidence

Jack Nadelle, an investigative photographer for the District Attorney's office, testified that Guzman-Sanchez's comparisons of defendant as portrayed in the iPhone video to the subjects portrayed in the surveillance videos, were not forensically sound.

DISCUSSION

Batson/Wheeler Motion

Peremptory Challenge

The prosecutor exercised a peremptory challenge against Prospective Juror No. 20. Prospective Juror No. 20 was a single black female who had no children. She was a nursing student, and had not previously served on a jury. Prospective Juror No. 20 was questioned as follows:

"[Prosecutor]: Juror 20, if I proof [sic] all the elements to you and you believe them beyond a reasonable doubt, would you have any problem voting guilty?

"Prospective Juror 20: Uhm, I don't think so, but the sympathy part kind of, you know, I'm conflicted with that sometimes.

"The Court: Let me give the instructions since I have to give you all the instructions. You're not to consider sympathy or prejudice. You're to decide the case on whether or not the evidence proves the case or not. So you can't be thinking, oh, my goodness, you know, I feel so bad, or I'm so nervous, you know, hold it against him, or

anything like that. That's a – that takes away from the solemn obligation of the jury to make a decision based on what they think happened, what's been proven.

"And, you know, again, you can have your private hat on . . . your own time. You can feel any kind of emotion you want. We just want to make sure as a juror that you can keep that separate, not ignore that you feel certain things, but keep it from your decision, not let it affect your decision. So it's not – we're not telling you [that you] may not feel emotion. We are not saying that like that. We're saying you have to keep it separate from your deliberations and make your decision based on the evidence and the law. Does that make sense?

"Prospective Juror 20: Yeah, it does.

"The Court: Can you do that?

"Prospective Juror 20: Yeah.

"The Court: No one is telling you not to feel. Ladies and gentlemen, we need jurors who will make their decision regardless of how you feel based on what's been proven and what hasn't.

"[Prosecutor]: You said earlier that you felt conflicted. Now that the judge gave you that additional explanation, do you not feel that same conflict?

"Prospective Juror 20: I understand what I need to do as far as make a decision. And if it's proven beyond a reasonable doubt, that I should vote not guilty or guilty according to the prosecution or the defense, whatever is stronger.

"[Prosecutor]: And now that you understand that, do you think you can do it?

"Prospective Juror 20: Yeah, I think so."

Several jurors were excused by both the prosecution and defense, and Prospective Juror No. 20 was asked to take seat No. 9. The prosecution then requested that Prospective Juror No. 20/9 be excused, and the defense moved as follows:

"[Defense counsel]: At this point, I'd like to make a Batson Wheeler motion. My client is black. And they're only two black jurors here in the courtroom. There were a total of three. [O]ne was dismissed for cause. I don't believe [this juror] said anything that, uhm – [¶] . . . This juror, she indicated that she understood she needs to – to when

questioned about sympathy – I believe the first page of jurors were not instructed that they're not to take sympathy as a factor, but your honor had instructed her and she said that she would follow that.

"The Court: All right. [Prosecutor]?

"[Prosecutor]: Your honor, I based my decision on many factors, including her age. She seems conflicted. It doesn't seem like she has a lot of life experience and – in that . . . situation. That is why I selected her or using [sic] a peremptory on her.

"The Court: All right. Anything further?

"[Defense counsel]: No.

"The Court: All right. I'm going to find that there's no prima facie showing, even though I asked her questions and explained to her that, you know, she couldn't consider sympathy, the fact that she expressed it, she expressed it in a way that was emotional. And she said she was conflicted. She wasn't matter of fact. She was emotional. And under the circumstances, I don't think there's any indication that the challenge was based on race, when, you know, regardless of my attempt to rehab her, the prosecutor had strong reasons based on her statement to believe that she could be swayed by anything outside the evidence. So it does not appear to me that there's any showing that race was a consideration in this . . . ."

Analysis

Defendant contends the trial court committed reversible error by denying his motion under *Batson*, *supra*, 476 U.S. 79, and *Wheeler*, *supra*, 22 Cal.3d 258. We disagree.

The *Wheeler* court held that a prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group membership violates a criminal defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) *Batson* held, among other things, that such a practice violates a defendant's right to

equal protection of the laws under the United States Constitution's Fourteenth Amendment. (*Batson*, *supra*, 476 U.S. at p. 97.) The *Batson/Wheeler* principles apply to peremptory challenges excusing jurors improperly on the basis of race, gender, or ethnic grounds. (*United States v. Martinez–Salazar* (2000) 528 U.S. 304, 315; *People v. Willis* (2002) 27 Cal.4th 811, 813-814.)

The standard for reviewing a *Batson/Wheeler* motion is well established. State and federal constitutional authority imposes a three-step inquiry: "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. (*Rice v. Collins* (2006) 546 U.S. 333, 338.)" (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613.)

The parties dispute whether our inquiry must focus on the first or third step of *Batson/Wheeler* review. Defendant argues that the trial court asked the prosecution for its reasons for challenging Prospective Juror No. 20, and that we must therefore presume that it reached the third step of the inquiry and decide whether the trial court erred in failing to properly determine whether he proved purposeful discrimination. The Attorney General disagrees, arguing that because the trial court explicitly stated that it found no prima facie case of discrimination, our inquiry must focus on step one. We agree with the Attorney General. In support of his argument that we must perform a third step inquiry, defendant relies on *People v. Lewis* (2008) 43 Cal.4th 415, 470-471 (*Lewis*), overruled on another point in *People v. Black* (2014) 58 Cal.4th 912 (*Black*).). In *Lewis*, the trial court asked for the prosecutor's reasons for its challenge, and did not make a ruling on whether a prima facie case had been made at *any* point in its decision. (*Ibid*.) Under these circumstances, our Supreme Court determined that the trial court had proceeded to the third stage of the *Batson/Wheeler* inquiry by implication. (*Ibid*.) The *Lewis* court distinguished the circumstances before it from those in *People v. Bittaker*

(1989) 48 Cal.3d 1046, 1091-1092 (*Bittaker*), where it performed a third step review because "after soliciting the prosecutor's response, the trial court expressly found that a prima facie case had not been established." (*Lewis*, *supra*, at pp. 470-471.) The instant case is analogous to *Bittaker*. Here, the trial court explicitly ruled that it found no prima facie case of discrimination after questioning the prosecutor. Therefore, we evaluate its ruling at the first step. (See *Bittaker*, *supra*, at pp. 1091-1092 [trial court may call upon prosecutor to respond to defense's *Batson/Wheeler* motion in determining whether a prima facie case of racial discrimination has been made without moving past first step of inquiry], overruled on other grounds by *Black, supra,* 58 Cal.4th 912; see also *People v. Taylor* (2010) 48 Cal.4th 574, 612 (*Taylor*) ["a trial court's request that the prosecutor provide reasons for his or her exercise of a peremptory challenge is not an implicit finding the defendant has established a prima facie case"].) The ruling is clear, and there is no need for us to delve further to establish the trial court's intention.[4]

"In [the] first stage of any *Wheeler/ Batson* inquiry, the defendant must show that '"the totality of the relevant facts gives rise to an inference of discriminatory purpose."' (*Johnson v. California* (2005) 545 U.S. 162, 168, quoting *Batson*, *supra*, 476 U.S. 79, 96; accord, *Wheeler*, *supra*, 22 Cal.3d 258, 280-281.)" (*People v. Garcia* (2011) 52 Cal.4th 706, 746.) "To establish such a case, the defendant first must show that he is a member of a cognizable racial group, [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' [Citation.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of

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[4] The Attorney General argues that defendant has waived any challenge to the trial court's first step ruling by arguing only that it erred in making its third step ruling. The Attorney General has cited no case law on this specific issue, and we are not inclined to construe waiver so broadly. We review the claim on its merits.

their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination." (*Batson*, *supra*, at p. 96.) "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." (*Id*. at pp. 96-97.) On appeal, we review independently the trial court's determination that no prima facie showing of racial discrimination has been made. (*Taylor*, *supra*, 48 Cal.4th at p. 614.)

Here, it is uncontested that defendant and Prospective Juror No. 20 are both black, and therefore part of the same cognizable racial group. None of the remaining circumstances raise an inference that the prosecutor used the challenge to discriminate on the basis of race. At the time the peremptory challenge was made, one prospective black juror had been removed for cause. Two prospective black jurors remained. The prosecution exercised a peremptory challenge against only one of those jurors, Prospective Juror No. 20. There was no pattern of strikes against black jurors. Nor was there anything in the prosecutor's questioning to support an inference of discriminatory purpose. The prosecutor simply asked Prospective Juror No. 20 if she would follow the law. Prospective Juror No. 20 was equivocal in her answer, and said that her feelings of sympathy might make it difficult for her. Prospective Juror No. 20 was very young, had no children, and little life experience, as the prosecutor noted when asked to respond to defendant's motion. The trial court observed that Prospective Juror No. 20 responded in an emotional and conflicted manner when the court attempted to rehabilitate her, and was not "matter of fact." The totality of the circumstances surrounding the peremptory challenge reveal no discriminatory basis for the prosecutor's exercise of a peremptory

challenge. Because our independent review of the record discloses no basis for inferring the prosecutor excused Prospective Juror No. 20 because of her race, we conclude that the trial court's ruling was not error.

Pitchess Motion

Pretrial Hearings

Defendant contends that the trial court erred in denying his motion for discovery of relevant portions of Detective Vinton's personnel records pursuant to *Pitchess*, *supra*, 11 Cal.3d 531. He argues that he was entitled to discovery under *Pitchess* because he "showed a plausible factual foundation" for his claim that officer misconduct might have occurred. He asserts the evidence showed that Detective Vinton was misleading in his affidavit supporting the search warrant, and that he may have manipulated defendant's iPhone. Alternately, defendant argues that he received ineffective assistance of counsel, because trial counsel failed to file a *Pitchess* motion despite knowing that Detective Vinton's veracity was central to his case.

Prior to trial, defendant moved to quash and traverse the search warrant on the basis that Detective Vinton made false or reckless statements in his affidavit in support of the warrant. At the hearing held on July 23, 2013, defendant asserted that Detective Vinton stated victim Remy Varma identified defendant as the person who robbed him, when in fact, Varma stated that a photo shown to him in a six-pack photographic line-up "looks like [defendant] based on eyes, facial hair, facial features. He looks similar to the person who stole my laptop and phone at gunpoint." Detective Vinton also stated in the affidavit that defendant's cell phone number was used in the robbery, and was also used in two other robberies, but that the victims of those robberies had not yet been shown photographic line-ups that included defendant's photo. This statement was inaccurate, because although the evidence connected defendant to the phone number, defendant was not the subscriber to the number. Detective Vinton omitted that the two victims of the

other robberies had already identified Vincent Cleveland as the robber, and that Cleveland had been arrested and charged with the two robberies, which was also very misleading.

The prosecution argued that in addition to the statements he made, Varma circled defendant's photograph, making a positive identification. Additionally, in the days surrounding the robbery, the cell phone in question had been used to make calls to defendant's mother's apartment, which defendant had given as his home address in prior police reports, and to a woman that defendant had a relationship with, so there was a connection between defendant and the number.

The trial court ruled:

"… I have to say, Detective Vinton, that I'm a little concerned at the language [¶] [d]ealing with the identification on page 5 of 6, "Varma looked at the photographs and identified [defendant] as the suspect who had robbed him," I think it probably would have been more accurate to indicate what the actual statement is. "Number 2 looks like him based on eyes, facial hair, facial features. He looks similar to the person who stole my laptop and phone at gunpoint," and indicated that the witness circled the person in position number 2 rather than just saying identified [defendant] as the suspect who had robbed him. [¶] But, nonetheless, even if I were to excise that portion and reweigh the evidence with the actual statements coming in, I'm satisfied that there is more than enough evidence for the magistrate to have issued the warrant based on the defendant's close proximity to the offense, the connection to the cell phone that he used, the fact that it's [connected to] the same address the defendant listed when he was previously booked in this matter. [¶] I'm satisfied there is a sufficient basis for the granting of the search warrant, even reweighing it and removing the statement that he identified that individual."

Defendant concurrently moved to suppress evidence obtained through the warrant, through a warrantless search of his person made upon defendant's arrest, and evidence obtained through an allegedly consensual search of his mother's storage cabinet, which

was located in a parking garage in her apartment building.[5] The items seized pursuant to the warrant were essential to the prosecution's case, and included the iMac, iMac keyboard, and marijuana. Officers also observed the apartment and took photographs of it. The items seized from defendant's person were likewise critical, and included defendant's iPhone, approximately 33 grams of marijuana, and over $1,300 in cash. In the search of defendant's mother's storage cabinet, officers discovered a gun and ammunition.

Detective Vinton testified that defendant's mother consented to the search of her apartment and storage cabinet. He and another detective went to defendant's mother's apartment on April 4, 2011. Defendant's mother asked them to come in and allowed them to take some photographs. She also took them to a storage cabinet in the parking area and voluntarily unlocked the cabinet, which contained a gun and ammunition.

Detective Vinton also testified regarding probable cause to arrest defendant. He stated that prior to defendant's arrest, Varma had provided Detective Vinton the cell phone number the robber had used to contact him. Detective Vinton obtained the phone and cell tower records for the phone number on the day of the robbery, the day before, and the day after. Cell tower information showed that the phone was used frequently in the area of the robbery, which was a very short distance from defendant's mother's apartment. Approximately 38 calls had been made at all times of the day and night to a woman who defendant had been involved with in a relationship. Three to four calls had been made to defendant's mother's address. Defendant had previously listed his mother's address as his own in a police report concerning a stolen vehicle. Varma gave a description of the robber that was similar to defendant, but with small variances in height, weight, and age.

Defendant's mother testified regarding the officer's search of her apartment and storage cabinet, sometimes giving conflicting or inconsistent statements. The officers knocked on her door and asked if she would speak to them and she replied that she

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[5] This hearing began on July 23, 2011, and was continued on July 24, 2011.

would. The officers came in, but she could not remember if she invited them or if they just walked in. She could not remember if they looked around the house. Defendant's mother then testified that she did not give them permission to search and that they did not give her any "papers." They went downstairs to the parking lot to see her car, and gave her something to sign. She did not know what it was because she does not read English. The storage cabinet was in the garage, but she had never used it. She testified at one point that the cabinet had a small lock and that she wanted the officers to break it. She also testified there was no lock, so she told the officers it was unlocked, and they opened it. The officers found a gun in the cabinet. She then testified that the officers gave her a paper to sign after the gun was found. She did not read it, but she did sign and print her name. She was shown handwriting on the consent form, located above her name that appeared to be the same printing as in her name, but she testified that it was not hers. She was asked whether defendant later called her from jail and told her to say that the police forced her to open the cabinet. She did not remember the conversation, but it could have happened.

The court denied the motion after hearing defendant's mother's and Detective Vincent's testimony, and additional argument. The court ruled:

"This is clearly a credibility call. With regards to the witnesses that have testified, I did find Detective Vinton to be a credible witness. With regards to [defendant's mother], she's a relatively poor historian . . . .

"In this matter, the [section] 1538.5 motion is respectfully denied. With regards to the items that were seized from the defendant, I find that it is pursuant to a lawful arrest. With regards to the items that are seized pursuant to the search warrant, they are presumptively lawfully seized, and I find that they are. And with regards to the search of the locker, I do find that consent was given."

The court additionally found that there was probable cause to arrest defendant at the time that he was arrested.

Following the court's ruling on the suppression motion, the following discussion ensued:

"[Defense Counsel]: Your honor, my client wishes that I file a *Pitchess* motion based upon –

"The Defendant: I was also told that a *Pitchess* motion was going to be filed. And I believe it was actually told on the record that we were going to file a *Pitchess* motion a couple months ago.

"The Court: This is a March 2011 offense date. So filing a *Pitchess* motion on day 1 of 10 for trial is untimely."

The case was called for trial on July 31, 2014. Defense counsel filed several motions in limine that day, including motions to exclude evidence contained in defendant's iPhone. Defense counsel asserted that Detective Vinton, who had earlier stated that he booked the iPhone separately from other seized evidence, had tampered with the iPhone and deleted a portion of the logged call history. The prosecution's position was that the calls were deleted before the cell phone was seized. The trial court denied the motions pertaining to the phone, stating that these were matters for cross-examination.

Analysis

When a duly filed *Pitchess* motion is before the trial court, we review a trial court's denial of the motion for an abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221, abrogated on other grounds as stated in *McGee v. Kirkland* (2009) 726 F.Supp.2d 1073, 1080.) "The legal principles guiding our review of *Pitchess* motions are well-established. A defendant has a limited right to discovery of a peace officer's confidential personnel records if those files contain information that is potentially relevant to the defense. [Citations.] . . . [¶] To initiate discovery, a defendant must file a motion seeking such records, containing affidavits 'showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . .' [Citation.]" (*Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 33.) Importantly, the defendant must give written

notice of the hearing on a *Pitchess* motion at least 16 court days before that hearing. (Evid. Code, § 1043, subd. (a); Code Civ. Proc., § 1005, subd. (b).)

We reject defendant's contention that the trial court committed error under *Pitchess*, because no motion had been filed and duly served as required by statute. The oral request made on July 24, 2011, day one of ten of trial, did not require any action by the trial court. Counsel did not pursue the matter beyond stating that defendant requested the hearing, and did not ask for a continuance.

Defendant also contends that trial counsel's failure to file a *Pitchess* motion deprived him of his right to the effective assistance of counsel, as required by due process. "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694; see *Williams v. Taylor* (2000) 529 U.S. 362, 391-394; *People v. Kraft* (2000) 23 Cal.4th 978, 1068.) 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

To establish the first prong, "defendant must show that counsel's action or inaction was not a reasonable tactical choice . . . ." (*People v. Michaels* (2002) 28 Cal.4th 486, 526.) "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' (*People v. Pope* (1979) 23 Cal.3d 412, 426; see *In re Avena* (1996) 12 Cal.4th 694, 721.)" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

In this case the record does not contain an explanation of why defense counsel did not move earlier for discovery under *Pitchess*. An inference can be drawn from the record that counsel believed the motion would not be useful, as counsel told the court that defendant wanted the *Pitchess* motion. In any event, on a silent record we must reject the claim of ineffective assistance of counsel on direct appeal.

We reject defendant's argument that the matter should be remanded to the trial court for a *Pitchess* hearing. There is no unresolved motion to remand because no motion has been duly filed. If defendant wishes to pursue the issue, he must do so by petition for writ of habeas corpus or other appropriate remedy.

Voice Identification

Voice Recording and Identifications

Defendant contends that a recording of his voice, which was played to Marcuse and Setiabudi for the purpose of identification, was unduly suggestive and created a substantial likelihood of misidentification. The recording played for the victims was defendant's outgoing message on his iPhone, which stated: "Hi. You know who this is. Um, I'm in the hole right now. I'm locked up in jail. Anybody who could help me out, I would appreciate it. Leave your name and number after the beep, and I'll get back at you. Can you guys help with whatever money, lawyer, bails bond, whatever. Thanks."[6]

Defendant argues that the recording is unduly suggestive because it is a single-voice identification, it was played directly after the victims were shown photographic line-ups including defendant, and the content of the recording suggested that the voice was of the guilty party. Both victims had previously identified Vincent Cleveland as the robber in an earlier photographic line-up.

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[6] Defendant changed his previous outgoing message to this one after being arrested.

At a hearing prior to trial, Detective Vinton testified that he met with Marcuse on April 4, 2011, to show Marcuse a photographic line-up and play the recording for him. It was Detective Vinton's practice to orally admonish witnesses prior to asking them to look at a line-up or make a voice identification, and he believed that he had done so with both Marcuse and Setiabudi.[7] He showed Marcuse the six-pack photographic line-up, from which Marcuse picked defendant as someone who looked like the robber. He did not positively identify defendant as the robber. He then played the voice recording for Marcuse, and asked whether he recognized the voice as that of the robber. Marcuse stated that the recording sounded like the person who robbed him. Detective Vinton also met with Setiabudi on April 4, 2011, showed him the same photographic line-up, and then played the same recording for him. Detective Vinton asked whether he recognized the voice as that of the robber. Setiabudi said defendant looked like the robber, and that the recording sounded like the robber.

The trial court ruled that the recording was not unduly suggestive. The recording was played for each witness soon after admonitions were given in connection with the photographic line-ups, and those admonitions carried over to the recording. The witnesses were told that Detective Vinton only wanted them to identify a person if they actually recognized him as the robber. Any suggestiveness created by the recording's statement that the person was in jail would be cured by the admonition.

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[7] The trial court read the standard admonition given by Detective Vinton aloud: "In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hairstyles, beards, and mustaches may be easily changed. Also photos may not always depict the true complexion of a person. They may be lighter or darker in the photograph. Pay no attention to marks or numbers that may appear on the photos or any other differences in the type or style of the photographs. When you have looked at all the photos, tell me whether or not you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone."

Analysis

"A pretrial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification." (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819; *Simmons v. United States* (1968) 390 U.S. 377, 384; cf. *Stovall v. Denno* (1967) 388 U.S. 293, 301-302, overruled on other grounds in *Griffith v. Kentucky* (1987) 479 U.S. 314, 321-322.) In determining whether defendants' rights have been violated in this regard, "the court first determines whether the identification procedure was unduly suggestive and unnecessary." (*People v. Clark* (1992) 3 Cal.4th 41, 135 (*Clark*), overruled on other grounds by *People v. Pearson* (2013) 56 Cal.4th 393, 462.) "[A]n identification procedure is considered suggestive if it 'caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) "If [an identification procedure is unduly suggestive], the court must determine whether the identification itself was nevertheless reliable, under the totality of the circumstances, taking into account such factors as the witness's opportunity to view (or hear) the person, the degree of the witness's attention, the accuracy of any prior description of the person (or voice), the level of certainty of the identification, and the time between the incident and the confrontation." (*Clark*, *supra*, at p. 135.) "'If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Defendants have the burden of showing that the identification procedure was unduly suggestive and unfair "as a demonstrable reality, not just speculation." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) We review such a claim independently. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

We do not believe that the procedure was so unduly suggestive as to lead to irreparable misidentification. In our view, the procedure was reliable after considering

the totality of the circumstances. Both witnesses spoke to defendant prior to being robbed, and interacted with him sufficiently to allow them to identify his voice. Neither had been previously asked to identify defendant's voice, and both stated that the recording sounded like the robber, evidencing a reasonable degree of certainty. The witnesses had just been admonished that any of the photographs they viewed may or may not be the robber, and it was clear when the detective asked whether they recognized the voice as that of the robber the admonishment applied to the voice identification, as well. Finally, the voice identifications were made within less than two weeks of the robberies, when the victims' memories were still fresh. The trial court did not err in its ruling. (See *Clark*, *supra*, 3 Cal.4th at p. 137.)

Cell Phone Video

Trial Court Proceedings

Prior to trial, the prosecution sought to introduce a portion of a video recording, taken from defendant's iPhone, in which defendant and Deshone discussed stealing a Rolex watch from a "cracker."[8] Both men were smoking marijuana, and continually used profanity. The prosecution explained that the video was relevant because defendant was charged with robbery of a Rolex in count 3, and attempted robbery of a Rolex in count 6. The prosecution asserted that it only wished to show the portion of the video in which the two men were discussing stealing a Rolex, and not an earlier portion where Deshone appeared to be lighting a marijuana cigarette. Defense counsel argued that the video was more prejudicial than probative and that it was too old to be relevant to the crimes at issue.

The trial court stated: ". . . [I]t's on his phone a couple days after these two alleged offenses. Even if it was recorded earlier, if it was on his phone and he kept it on

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[8] "Cracker" is a pejorative word for a Caucasian person.

his phone and he talks about getting Rolexes from crackers and the two crimes alleged involved robbery and attempted robbery of Rolexes, where's the prejudice? [¶] . . . . It certainly sounds like pretty strong evidence of intent as well as identity, certainly intent . . . . [¶] I don't see an argument as to how – if there's any prejudice at all, how it would substantially outweigh what seems to me to be significant probative value . . . I don't think it's cumulative."

The court ruled: "I think weighing this under [Evidence Code section] 352, there's absolutely no reason to preclude the jury from hearing it. It's up to them to decide what meaning and significance it has, not for me to keep them from hearing about it. So that's denied."

Defense counsel then stated, "It almost seems like a prior bad act that is coming in, your honor."

The trial court responded: "Well, it seems to me like it's significant evidence of specific intent as well as identity and – well, normally prior acts have to involve significant crimes if there's . . . as much other evidence as the People maintain of eyewitness I.D. and he's talking specifically about, you know, getting Rolexes from crackers and it's on his phone three days after and – four days after the alleged offenses . . . . I'm going to base my ruling on evidence of intent . . . . I think the factors that make it relevant and probative and tie it to the defendant are so significant that the jury should hear it . . . . [T]hat's my ruling."

Later, defense counsel asked to revisit the issue of the video to verify that the jury would not be shown the portion where the men were smoking. It was established that an early part of the video, in which Deshone was lighting a marijuana cigarette, would not be shown. The trial court further responded, "Well, if he's smoking what appears to be a joint while they're talking about this, then I'm going to find that the probative value significantly outweighs the prejudice. And I think it should be allowed. I don't think that's a reason to exclude it when he's making statements about taking Rolexes from crackers. [¶] If that's what he's smoking, marijuana, then it was his decision to be video'd while smoking marijuana, so I don't think he should have the benefit of having

statements about taking Rolexs [sic] from crackers excluded. He made the decision to do this."

Defense counsel then requested that the recording be "sanitized" by presenting only the audio component to the jury, rather than the whole video. The prosecution objected because the video was needed to establish defendant was in the car, and that he was with Deshone, with whom he was later arrested. The camera movements were also important to understanding the audio. The trial court added that it "reflects an extremely cavalier attitude which I think the People have the right to show," and that the video was "not exactly an example of good citizenship."

Defense counsel again attempted to have the video excluded prior to trial, arguing that it was "stale" because it had been last modified on July 19, 2010, seven and a half months prior to the robberies. The trial court found that the passage of seven and a half months was not great, and did not affect its determination that the video was highly probative.

At trial, defense counsel objected to a transcript of the video that the prosecution intended to offer as an aid to the jury, because it differed from the defense's transcript. The trial court ruled that both parties could present their individual transcripts to the jury, who would be told that they were merely offered as an aid, not evidence, and may or may not be accurate.

The prosecution played a portion of the video for the jurors, who were admonished that the transcript was only an aid, and that if there were any discrepancies between the video and the transcript, the video was controlling.

The next day, the defense moved for mistrial on the basis that the prosecution played a greater portion of the video than agreed, and that the transcript it provided the jury was inaccurate. The trial court denied the motion, explaining that it had only excluded the portion of the video in which Deshone was lighting a marijuana cigarette, and that the prosecution had not shown that portion of the video. The trial court stated that counsel should go over the transcripts together and determine what corrections should be made. Defense counsel then moved to show 0-23 seconds of the video where

one of the men said something to the effect of ". . . here we go, My Not Entertainment, we are about to show you . . ." and both men were "doing a little show off for the camera." The prosecution objected on the basis of the rules of completeness. The trial court identified the relevant law as Evidence Code section 356, which provides that when part of a conversation is offered into evidence by one party, the remaining portion may be admitted into evidence by the adverse party. The trial court ruled, "I will let you show the 0 to 23 [seconds], but if that's your offer of proof, then [the prosecution] can then on redirect show the whole thing because the whole point is putting on a show, they can see the entire show. You can't have it both ways. If your theory is, it puts on a show, then [Deshone], he is totally engaged in the conversation, which is part of that show, and [the jury] should be allowed to see the whole thing. It's up to you if you want to play the whole thing, but if you do play zero to 23 [seconds]. I will let [the prosecution] play the whole thing because that's part of the show."

The defense played the first 23 seconds of the video for the jury, and the portion that had been previously played by the prosecution, starting at 45 seconds. The jury was provided with the defense's transcript of the video. The trial court again admonished the jury that the video controlled if there were discrepancies between it and the transcripts.

At the close of the prosecution's case, it requested to play the entire video. Defense counsel argued that it still did not agree with the prosecution's transcript of the video. The trial court allowed the prosecution to play the entire video, and told defense counsel that to the extent the transcripts conflicted, counsel could argue that in closing.

In closing, the defense argued that the video was made as entertainment only, many months before the charged offenses. Deshone had talked about stealing Rolexes; defendant said that doing so would be "lethal." The prosecutor argued that the video was evidence defendant and Deshone intended to rob people of their Rolexes.

Analysis

Defendant contends the trial court abused its discretion by admitting the video on defendant's iPhone into evidence because it was improper propensity evidence, and was more prejudicial than probative. We disagree.

Under Evidence Code section 1101, subdivision (a), evidence of a person's character, including specific instances of his or her conduct, "is inadmissible when offered to prove his or her conduct on a specified occasion." This notwithstanding, "admission of evidence a person committed a crime, civil wrong, or other act" is admissible when it is relevant to prove some fact such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (Evid. Code, § 1101, subd. (b)), "'or to overcome any material matter sought to be proved by the defense.' [Citation.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 631, superseded by statute on other grounds as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911). The trial court has discretion in admitting evidence, and we will not disturb the exercise of the court's discretion absent a showing of abuse, i.e., a showing that the trial court acted in an arbitrary, capricious or patently absurd manner resulting in a miscarriage of justice. (*People v. Gray* (2005) 37 Cal.4th 168, 202; *People v. Kipp* (1998) 18 Cal.4th 349, 371 [trial court's decision to admit evidence under Evidence Code section 1101 reviewed for abuse of discretion].)

Here, the trial court did not abuse its discretion in admitting evidence of defendant's conduct. Defendant's defense rested in great part on his assertion that someone else used his cell phone to orchestrate the robberies. The video of defendant and Deshone made on defendant's iPhone, tends to show that the cell phone was indeed defendant's, and that he intended to rob someone of a Rolex watch. This was the exact crime that he was charged with committing in count 3, and attempting to commit in count 6, and the iPhone was the instrument used to set up both encounters. It is hard to imagine evidence that would be more strongly probative of intent or identity in this case. The

evidence was relevant to prove material issues in the case under Evidence Code section 1101, subdivision (b).

Our conclusion does not end the inquiry, however. Even though we find the trial court did not err in concluding the evidence was relevant, it must also be examined for its prejudicial effect under Evidence Code section 352, which provides: "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This court will not disturb a trial court's exercise of discretion under Evidence Code section 352 absent a sowing that the trial court abused its discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Evidence Code section 352 is intended to prevent undue prejudice, that is """evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues"' not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800.) Undue prejudice must substantially outweigh relevance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

The trial court did not abuse its discretion in concluding the probative value of the video outweighed any prejudice. The video had strong probative value. It was compelling and directly relevant to the issues of intent and identity. Evidence that defendant used profanity and smoked marijuana may have been prejudicial, but it was not so prejudicial as to outweigh the great probative value of the video, and its admission did not constitute an abuse of discretion.

Nor can defendant successfully attack the prosecution's admission of the video in its entirety after he introduced a portion previously undisclosed to the jury in attempt to show that he was merely "putting on a show." Evidence Code section 356 provides, "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a

letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." That is exactly what happened here. Defense counsel requested to admit an additional portion of the video to show that defendant and Deshone were showing off. The trial court allowed counsel to do so, but warned that the entire video would then be available to the prosecution for admission. The prosecution introduced the video in its entirety to establish that defendant was serious in his intent to steal a Rolex. Whether defendant and Deshone were engaged in a serious discussion or simply joking was brought into issue by defendant, and consideration of the full video was necessary to place their comments about taking a Rolex from a "cracker" into context. The trial court did not abuse its discretion in allowing the video to be admitted in its entirety.

Substantial Evidence of Possession of Marijuana for Sale

Evidence

The prosecution presented evidence that defendant was arrested with approximately 33 grams of marijuana in his underwear and over $1,300 in cash in his possession. Five containers of marijuana were discovered in a search of his bedroom, for a total of over 1,350 grams of marijuana. No paraphernalia for ingestion of marijuana were found in the search. Defendant's friend, Scott Thenen, testified that defendant sold him approximately a quarter of an ounce of medical marijuana once or twice a week from the time they met in March 2010, until defendant's arrest. Thenen did not have a medical marijuana card.

Detective Saragueta testified as the prosecution's expert witness. Detective Saragueta had been a police officer for 17 years and was assigned to the narcotics division lab squad, which investigates clandestine drug laboratories. He worked primarily in the narcotics division for 10 or 11 years, had experience in narcotics sales,

and had made hundreds of narcotics arrests. Defense counsel objected to Detective Saragueta giving opinion testimony because he was not qualified to do so based on this information alone, and the trial court agreed the evidence of qualification was "marginal." The prosecution questioned Detective Saragueta further about his experience over his years in narcotics. Detective Saragueta had worked in plain clothes making arrests for narcotics sales and undercover buying drugs, so that officers could arrest the sellers. He bought narcotics in this capacity over 700 times, and had testified over 100 times as an expert on the sale of narcotics. The defense objected on the same grounds, and the trial court overruled the objection.

Saragueta was questioned regarding his observations of individuals dealing in medical marijuana. He stated: "While working on observation posts or just in an undercover capacity, you will see people coming into dispensaries and coming back out and either they will go a short distance and sell what they have bought from a dispensary or go back to a car and see them differently, set it up amongst 4 people in the car." Over the hundreds of arrests he made, Detective Saragueta had interviewed individuals involved in the illegal sale of medical marijuana. Detective Saragueta had also made many undercover buys at medical marijuana collectives, but had not done that for three to four years before trial.

Detective Saragueta did not know how much marijuana obtained at a dispensary would cost. An average person would possess about an eighth of an ounce of marijuana for personal use. Saragueta had no knowledge how much a typical medicinal marijuana user would possess or how much a medical marijuana user legally could possess in their home. He had no experience in arrests for marijuana sales in the five years preceding trial. Detective Saragueta primarily dealt with laboratories that manufactured drugs such as methamphetamine and PCP.

Detective Saragueta opined the marijuana recovered from defendant and his apartment was possessed for sale, based on the amount of marijuana recovered, the cash in defendant's wallet, Thenen's purchases from defendant on several occasions, and the lack of paraphernalia for using marijuana.

Analysis

Defendant claims that insufficient evidence supports his conviction for possession of marijuana for sale. He contends that Detective Saragueta was unqualified to testify as an expert. Additionally, he argues that there was inadequate remaining evidence to support the jury's guilty verdict. Sufficient evidence supports the conviction.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]'" (*Zamudio*, *supra*, at pp. 357-358.) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence." (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

A conviction for unlawful possession of marijuana for sale requires proof the defendant possessed marijuana while also intending to sell it. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) "Intent to sell may be established by circumstantial evidence" and reasonable inferences drawn from that evidence. (*Ibid*.)

In general, an expert witness is qualified to testify on a particular subject if he has "special knowledge, skill, experience, training, or education sufficient to qualify him as

an expert" on the subject. (Evid. Code, § 720.) The trial court has discretion on the question of whether an expert is so qualified, and we will not reverse its ruling absent "manifest abuse." (*People v. Jones* (2013) 57 Cal.4th 899, 949.) "'"'"Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility.'" [Citation.]' [Citations.]" (*People v. Eubanks* (2011) 53 Cal.4th 110, 140.) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness '"'*clearly lacks* qualification as an expert.'" [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.)

Defendant relies on *People v. Hunt* (1971) 4 Cal.3d 231 (*Hunt*) and *People v. Chakos* (2007) 158 Cal.App.4th 357 (*Chakos*) to support his argument that Detective Saragueta was unqualified as an expert. Both cases dealt with the illegal sale of medicinal drugs that had been lawfully obtained, and in both cases the officers involved lacked experience in the sale of drugs that were possessed lawfully, but sold illegally. *Hunt* held that, in the absence of evidence not to be expected in connection with the lawful use of drugs, an officer's opinion that possession of lawfully prescribed drugs is for purposes of sale "is worthy of little or no weight and should not constitute substantial evidence sufficient to sustain the conviction." (*Hunt*, *supra*, at p. 238.) The *Hunt* court explained that "the officer experienced in the narcotics field is experienced with the habits of both those who possess for their own use and those who possess for sale because both groups are engaged in unlawful conduct. As to drugs, which may be purchased by prescription, the officer may have experience with regard to unlawful sales but there is no reason to believe that he will have any substantial experience with the numerous citizens who lawfully purchase the drugs for their own use as medicine for illness." (*Id.* at pp. 237-238.) *Chakos* held the same, relying on *Hunt* in its reasoning. (*Chakos*, *supra*, at pp. 363-369.)

The present case differs from *Hunt* and *Chakos* in two important respects. First, Detective Saragueta had experience with the sale of medical marijuana. He had observed people selling it, arrested people involved with its illegal sale, interviewed those people,

and personally participated in many undercover buys of medical marijuana. In light of this experience, which the officers in *Hunt* and *Chakos* lacked, we cannot say that he clearly lacked qualifications as an expert on the sale of medical marijuana, and that the trial court abused its discretion. Any concerns defense counsel had regarding the depth or recentness of his experiences could be brought out in cross-examination for the jury to assess their weight. Second, in *Hunt* and *Chakos*, there was an absence of evidence not to be expected in connection with the lawful use of drugs. Here, that was clearly not the case. Thenen, who did not have a prescription for medical marijuana, testified that he bought marijuana from defendant once or twice a week for over a year. This is undoubtedly evidence not to be expected in connection with the lawful use of drugs.

Substantial evidence supports defendant's conviction even in the absence of Detective Saragueta's expert opinion. Defendant was arrested carrying a substantial amount of marijuana in his underwear. The amount and the unusual and secretive location of the marijuana indicate that he possessed it with the intention to sell. He also had a relatively large amount of cash with him, as one might when selling drugs. A search of defendant's house uncovered an even larger stash of marijuana, yet no paraphernalia that would be used to ingest the drug was found. It is reasonable to infer that if defendant possessed marijuana only for personal use, he would likely have paraphernalia on hand to ingest it. Finally, and most importantly, defendant's friend Thenen testified that he bought medical marijuana from defendant once or twice a week, every week, for approximately a year, although he himself did not hold a medical marijuana card. Viewing this evidence in the light most favorable to the prosecution, we conclude that a reasonable trier of fact could find the defendant guilty of possession of marijuana with intent to sell beyond a reasonable doubt.

Cumulative Error

Finally, defendant contends that cumulative errors at trial deprived him of due process. As we have concluded that the trial court did not err, the contention necessarily fails. (See *People v. Hines* (1997) 15 Cal.4th 997, 1061.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

GOODMAN, J. *

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.