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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. ARAMIS GOMEZ, Defendant and Appellant.	B275236 (Los Angeles County Super. Ct. No. SA089098)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark E. Windham, Judge. Affirmed.

Sarvenaz Bahar, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Aramis Arango Gomez (defendant) was convicted by a jury of nine crimes: carjacking, robbery, attempted robbery, and six counts of false imprisonment committed in the course of the attempted robbery. The crimes that formed the basis of the charges occurred on three separate dates over a two-week period in the neighborhood where defendant lived. Defendant does not challenge his carjacking conviction, so we consider only whether the other convictions should be reversed because they are supported by insufficient evidence, were influenced by improper lay opinion identification testimony, or were the product of a prejudicial joinder of charges.

I. BACKGROUND

A. The Offense Conduct

1. Subway robbery

On October 17, 2014, Zin Aung Leyraud (Leyraud) and Alfredo Enciso Balderas (Enciso) were working at a Subway sandwich shop on Venice Boulevard in Los Angeles. Leyraud was behind the counter and Enciso was clearing trays near the front of the restaurant. Shortly before 6 p.m., a Hispanic man wearing a dark short-sleeved shirt, blue jeans, white sneakers, and a black beanie-style cap walked into the shop. The man approached the register, pulled the beanie down over his eyes, and asked Leyraud, "How much you got?" He removed a black handgun from his pocket and placed it on the counter, with the muzzle pointed at Leyraud. Leyraud gave the man all the cash in the register.

The man left, and Enciso called 911. Leyraud told the dispatcher the robber was "fat," about 40 years old, and had acne scars on his face. When the police arrived, Leyraud told them the

robber was approximately 5 feet 5 or 5 feet 6 inches tall. She recalled he had a thick, black mustache.

Enciso likewise noticed the robber had a thick, dark mustache and pockmarks on his face. He told the police the man was 40 to 45 years old. Surveillance video cameras at the Subway captured much of the robbery, and the footage was later shown to the jury at defendant's trial.

2. Gloria's Cafe attempted robbery

Six days later, at about 10:00 p.m., Kryssia Campos (Campos) and Grecia Mondragon (Mondragon) were finishing dinner at Gloria's Cafe on Venice Boulevard in Los Angeles.[1] It was closing time. A Hispanic man entered the restaurant wearing a black beanie, black gloves, a bandana covering his face from the nose down, and a short-sleeved, light-colored plaid shirt. He was carrying a black handgun. The man ordered the women and their waiter, William Avila (Avila), to "go to the back."

Campos, Mondragon, and Avila went to a bar area in the back of the restaurant, where Gloria Flores (Gloria), the restaurant's owner, was counting money. The man pointed the gun at Gloria and instructed everyone to stay put. A busboy, Javier Gutierrez (Gutierrez), stepped out of a restroom he had been cleaning, saw the man with the gun, and ran into the kitchen and out the back door. The man with the gun followed Gutierrez.

Behind the restaurant, Rene Flores (Rene), Gloria's son, was unloading supplies from a truck when Gutierrez ran outside.

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[1] Gloria's Cafe was located about a block away from the Subway that was robbed on October 17.

The man with the gun emerged, directed Gutierrez and Rene back into the restaurant, and forced them, along with the restaurant's cook, Salvador Villabeso (Villabeso), to the bar area where the others were gathered.

At that point, Gloria dashed toward the front door and the man with the gun pursued her. Gloria ran to her car in the parking lot in front of the restaurant. The man pointed the gun at her and said, "I told you not to move." He then ran away on foot.

Campos called 911. She told the operator the would-be robber appeared to be a Hispanic man who was "definitely" over 40. She said he was wearing a white and gray shirt patterned with "squares" like plaid, blue jeans, and a white and black bandana. Campos later recalled the man was about 5 feet 4 or 5 feet 5 inches tall and 180 pounds. When a police officer spoke to Mondragon after the incident, she told him the perpetrator was a Hispanic man, approximately 5 feet 1 to 5 feet 6 inches tall, 40 to 45 years old, and about 220 pounds. Rene recollected the man was about 5 feet 6 to 5 feet 8 inches tall and "stocky," weighing about 250 pounds. Both he and Mondragon said the man's skin was light-colored. As with the Subway robbery, much of the incident at Gloria's Cafe was captured by surveillance video, which was later played for the jury at defendant's trial.

3. Carjacking

Five days later, at approximately 6:00 p.m., Quinan Bao (Bao) parked her white Honda Civic in the garage of her apartment building, which was owned by UCLA, on Clarington Avenue in Los Angeles. Bao was returning home from work.

As Bao was exiting her vehicle, a man approached her holding a black handgun. The man was wearing a dark beanie pulled down to his eyes. He told Bao to "[l]eave everything in the car and then step out of the car." She did as he instructed, leaving her purse, keys, cell phone, groceries, and a black lunch bag, which was emblazoned with a logo of her workplace, Torrance Memorial, in the car. The man told Bao to stand in the corner and turn away from him. He then drove away in her Civic.

B. Defendant's Arrest

At the time of the foregoing incidents, defendant was living with his cousin and her son in an apartment on Vinton Avenue within a couple blocks of Gloria's Cafe and the Subway that was robbed. Bao's apartment complex was also close by.

Defendant had been dating Gloria Martinez (Martinez) for three or four months. As far as Martinez knew, defendant did not own a car, but on the evening Bao was carjacked, defendant showed up at Martinez's house in La Puente in a white car, which defendant said a friend had loaned him. Defendant gave Martinez's daughter a black lunch bag, and Martinez became upset when she saw a woman's purse in the car because she believed it meant defendant was cheating on her.

At about the same time, two UCLA Police Department officers met with Bao. The officers were able to track the cell phone Bao left in her car to an address in La Puente. The officers contacted the Los Angeles County Sheriff's Department in La Puente and requested that one of their officers keep an eye on the white Civic while they drove to its location.

Defendant had parked the Civic near a restaurant where he planned to meet Martinez that night, but before the time came to meet, defendant called Martinez and asked her to pick him up on the street not far from the restaurant. A sheriff's deputy was parked across the street from the Civic, and defendant told Martinez he could not return to the vehicle with the police there because he had a DUI.

When the UCLA officers arrived in the vicinity, the sheriff's deputy left and the UCLA officers found a more secluded position from which they could covertly observe the Civic. Martinez drove defendant around the area a couple times that evening. Once she no longer saw patrol cars nearby, she dropped defendant off. Defendant got into the vehicle and drove off, and the UCLA officers apprehended him shortly thereafter.

The officers brought defendant to Bao's apartment building for a "field showup" later that night. As Bao stood on a landing, the officers illuminated defendant, who was standing on the sidewalk. Bao said she was "80 percent sure" defendant was the carjacker based on his "size" and his "height and shape . . . ."

When defendant was arrested, he had a full head of hair, a mustache, and a beard (that was partially grey or white). The booking officer recorded defendant's height as 5 feet 1 inches and his weight as 184 pounds, but the officer later estimated defendant's height to be 5 feet 5 to 5 feet 7. Defendant was 49 years old.

After defendant's arrest, the UCLA Police Department disseminated a crime alert flyer with a booking photo of defendant. Mario Barillas, a robbery detective for the Los Angeles Police Department, saw the flyer. Detective Barillas had been investigating the Subway and Gloria's Cafe incidents, and

he had repeatedly watched ("up to 100 times") surveillance video footage of those incidents.

After seeing the flyer, Detective Barillas believed defendant was the person who committed the robbery and attempted robbery he had been investigating. Detective Barillas obtained and executed a search warrant at defendant's home. During the search, Detective Barillas found the following in defendant's bedroom: a light-colored tan "checkered plaid" shirt, a dark T-shirt, a white bandanna with black print, a pair of white and a pair of dark tennis shoes, and a pair of blue jeans. The officer laid out the clothes on the floor and photographed them. One photo showed the checked shirt, bandanna, and jeans together (an ensemble resembling what the attempted robber of Gloria's Café was wearing); the other photo depicted the dark T-shirt, white tennis shoes, and jeans together (resembling what the Subway robber was wearing).

C. The Charges

The Los Angeles County District Attorney charged defendant in an information with carjacking Bao (Pen. Code,[2] § 215, subd. (a)) (count one), robbing Leyraud (§ 211) (count two), attempting to rob Gloria (§§ 211, 664) (count three), and falsely imprisoning Gutierrez, Rene, Villabeso, Avila, Mondragon, and Campos (§ 236) (counts four through nine). Defendant moved to sever the carjacking charge from the robbery and false imprisonment counts. The trial court denied the motion.

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[2] Undesignated statutory references that follow are to the Penal Code.

D. Additional Evidence at Trial

1. Evidence presented by the prosecution

After defendant was arrested, he called Martinez in the middle of the night, told her he had left a bag on a couch outside her house, and asked her to throw it away. Martinez found the bag beneath a seat cushion. It contained a green bandanna, a black BB handgun, and a pair of black gloves. The BB gun resembled a photo of a gun defendant had texted to Martinez on an earlier occasion. When he sent the photo, defendant wrote to Martinez, in Spanish, "Look how pretty it is. Anyone will give me 300 or even more. What do you think about my new girlfriend?"

Martinez called the police, and a sheriff's deputy came to retrieve the gun. Although the gun looked similar to the officer's "duty weapon," the officer realized it was a BB gun upon handling it. Not long thereafter, the police executed a search warrant at Martinez's residence. They took the bandana and gloves that had been in the bag Martinez found, a black beanie they found in the couch outside, and the black lunch bag defendant had given to Martinez's daughter. The lunch bag had a Torrance Memorial logo on it (the same logo as the bag in Bao's car when she was carjacked).

The police also took Martinez's cell phone, which contained photos defendant had sent her of himself. Two of the photos showed defendant wearing a white bandanna with black print. In one photo, defendant had a beard with brown and white or grey hair, but another photo showed him with a beard that was completely dark. Martinez explained defendant dyed his beard at her urging to look younger. Martinez said defendant was about 5 feet 5 inches tall, and he looked different at the time of his trial than when they were dating: during trial he was clean-shaven,

slimmer, and younger looking. Martinez said defendant's skin tone had always been "light." She said defendant told her he weighed 179 pounds when they began dating, and she thought he looked "overweight." Martinez said defendant had acne scars on his cheeks.

Law enforcement obtained records of defendant's cell phone use on the dates of the charged conduct. Records showed defendant used his cell phone before and after the Subway robbery near his home and the location of the Subway. On the night of the attempted robbery at Gloria's Cafe, defendant used his cell phone in that area from about 8:00 until 9:45, and then again at about 10:30 p.m. Records also showed he used his cell phone in the area of Bao's apartment about 20 minutes before the carjacking and then near Martinez's residence about one hour and 45 minutes later.

While defendant was in custody awaiting trial, he called Martinez and the call was recorded. On one call, defendant told Martinez it was "up to [her]" whether to testify or not and she "could hire an attorney" to ensure she would not have any problems if she did not testify. Defendant told Martinez she was "the only way [he could] get out" and she should "just say [she did not] remember" if asked about the gun.

As discussed in greater detail *post*, Detective Barillas was asked whether the clothes seized pursuant to the search warrant resembled the clothes worn by the perpetrator. Though the trial court sustained multiple defense objections, it allowed Detective Barillas to offer an opinion that the seized clothes did resemble the clothes worn by the perpetrator. On cross-examination, Detective Barillas also gave an answer indicating that, in his opinion, defendant was the perpetrator shown in the videos.

2. The defense case

The defense at trial was identity, i.e., that defendant was not the perpetrator of the carjacking, robbery, and false imprisonment crimes. None of the witnesses to the charged crimes identified defendant with certainty as the perpetrator at trial, nor had any of the witnesses been asked to identify defendant from a "six-pack" photospread after the incidents.

Defense counsel elicited testimony from the victims about how quickly the crimes transpired and how little they saw of the perpetrator's face. In each incident, the perpetrator was inside the restaurant for less than a minute. In the Subway robbery, Leyraud did not get a close look at the robber's nose, and Enciso saw the robber's face for "just a fraction of a second." The victims at Gloria's Cafe could see little of the offender's face because it was covered by the beanie and bandana.

Defendant did not testify, but defense counsel called several other witnesses during the defense case. Witness Manuel Garcia Zurita (Garcia) was sitting in his truck near Gloria's Cafe on the night of that incident. Shortly after 10:00 p.m., Garcia saw a man running towards him from the direction of the restaurant. Garcia said the man was wearing a "white T-shirt" and a "white cloth" over his face. The man was approximately 5 feet 5 inches tall and "a little chubby." Garcia said the man was bare-headed, his head was shaved, and he appeared to be "going bald." Garcia testified defendant was not the man he saw that night.[3]

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[3] Garcia acknowledged on cross-examination that he saw the man for "very little [time], maybe five to ten seconds," and "[t]here was very little light" in the area.

The defense also called Elizabeth Fernandez (Fernandez), the cousin with whom defendant was living at the time of the crimes. At about 9:00 p.m. on the night of the attempted robbery at Gloria's Cafe, Fernandez went outside her apartment to chat and smoke with neighbors who lived in the same complex. They were still outside around 10:00 p.m. when they heard police cars, helicopters, and people saying a robbery was "in process" at Gloria's Cafe. Fernandez said defendant came out of the apartment and asked them what was happening; he was talking on his cell phone at the time, and wearing "blue shorts and a light blue tank top." Fernandez said she was certain defendant was inside the apartment before she heard sirens because from where she was standing, she could see both entrances to their apartment complex.

Fernandez also testified that the family kept lots of their clothes—not simply defendant's—in the closet in his room, and that her son, who also lived in the apartment, was about 5 feet 6 inches and 230 pounds. Fernandez said many of the bandanas in the apartment were hers because she had used them when she was undergoing cancer treatment.[4]

Holly Holland (Holland), one of the neighbors Fernandez was talking to on the night of the incident at Gloria's Cafe, also testified for the defense. Holland said she saw defendant pop his head out the front door of Fernandez's apartment while she and Fernandez were chatting. Holland said defendant was wearing a tank top or T-shirt, shorts, and rubber "house shoes."

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[4] Fernandez admitted defendant also wore bandanas, and when shown a picture of the white and black bandana found in her apartment, she said she did not recognize it.

E. Verdict and Sentence

The jury found defendant guilty on all nine counts. Defendant admitted several prior convictions, including prior strike crimes, and recent periods of incarceration. The court sentenced him to an indeterminate term of 90 years to life in prison, plus a determinate term of two years and eight months.

II. DISCUSSION

Defendant contends the robbery-related convictions (counts two through nine) should be reversed because: (1) there was insufficient evidence defendant was the person who committed those crimes, (2) the prosecution committed misconduct by intentionally eliciting inadmissible lay opinion testimony from Detective Barillas that defendant resembled the robber shown in the crime videos and the clothes seized from defendant's closet resembled the clothes the robber was wearing, and (3) the robbery charges were improperly joined for trial with the carjacking charge.

None of these contentions is persuasive. First, without considering the portions of Detective Barillas's opinion testimony that were not stricken by the trial judge, there is substantial evidence supporting the jury's finding that defendant committed the charged robbery and attempted robbery. Second, the arguments for reversal based on prosecutorial misconduct are forfeited (the defense did not object on misconduct grounds in the trial court) and meritless in any event. And third, joinder of all the charges for trial was proper because we see no indication defendant was subjected to a substantial risk of prejudice or actual gross unfairness.

A. Substantial Evidence Supports Defendant's Convictions on the Robbery and False Imprisonment Counts

We apply settled principles in considering defendant's insufficient evidence claim. "'[W]e 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.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890 (*Covarrubias*); see also *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

Putting aside Detective Barillas's answers in response to questions seeking his lay opinion (discussed in greater detail *post*),[5] there was evidence on which a reasonable jury could find

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[5] Defendant's appellate briefing does not argue the trial court abused its discretion in admitting lay opinion testimony from Detective Barillas that then prejudicially affected the jury's verdict. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Davis* (2008) 168 Cal.App.4th 617, 632.) Instead, defendant raises the issue of Detective Barillas's testimony only in connection with his assertions that we should not consider the testimony in assessing the sufficiency of the evidence and we should hold the prosecution committed misconduct in eliciting the testimony and relying on it during closing argument. For simplicity of analysis, we do not rely on the testimony in

defendant was the perpetrator of the Subway robbery and the Gloria's Cafe attempted robbery. The absence of eyewitness identifications was not dispositive because there was substantial circumstantial evidence on which the jury could rely to find defendant was the culprit. (*People v. Barnum* (1957) 147 Cal.App.2d 803, 805 [identity of perpetrator may be established entirely by circumstantial evidence].) Jurors could reasonably determine the identity of the perpetrator by, among other things, viewing the surveillance video footage themselves, viewing photographs of defendant around the time of the crimes (and, of course, viewing defendant in court), considering the similarities of the clothing recovered by Detective Barillas to the clothing worn by the perpetrator depicted in the surveillance videos, considering Martinez's testimony and the recovery of defendant's

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assessing the sufficiency of the evidence. But this analytical decision should not be understood as an implicit judgment that the trial court erred in making evidentiary rulings during Detective Barillas's testimony. To the contrary, the court would have been within its discretion to rule Detective Barillas could offer an opinion that the items of clothing he seized (with which he was personally familiar) resembled the clothing worn by the perpetrator(s) shown in the surveillance videos. (See *People v. Leon* (2015) 61 Cal.4th 569, 601 (*Leon*) [a lay witness may offer identification opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony—including when the witness's perception comes from *post*-crime contacts with the defendant].) To the de minimis extent the officer was permitted to opine defendant resembled the person shown in the Subway and Gloria's Cafe videos, the testimony would have had at most a negligible impact on the jury's verdict.

beanie and black BB gun on her property, reviewing defendant's cell phone records, listening to defendant's jail calls with Martinez, and evaluating the physical descriptions provided by the crime victims.

While the defense offered evidence tending to show defendant was not the person who committed the crimes, "[t]he strength or weakness of the identification and the discrepancies in th[e] testimony . . . were matters solely for the observation and consideration of the jury in the first instance," for "[a]lthough there may have been some uncertainties, there was no inherent improbability" in the evidence supporting defendant's guilt. (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 497.) Thus, the fact that some victims described the perpetrator as shorter, or taller, or heavier, or younger, or darker complected than defendant bore merely upon jurors' assessment of the witnesses' credibility and what weight they should accord the testimony. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 800, abrogated on another ground by *People v. Scott* (2015) 61 Cal.4th 363 [jurors could conclude beyond a reasonable doubt defendant committed the crime even though the victim described the perpetrator as approximately four inches shorter, 65 pounds lighter, and having different facial hair than the defendant].) The defense emphasized discrepancies and weaknesses in the identification evidence to the jury, but jurors ultimately rejected the conclusion defendant was not the person who committed the crimes "in favor of other reasonable inferences" (*People v. Marquez* (2000) 78 Cal.App.4th 1302, 1307).[6] That was entirely appropriate.

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[6] Furthermore, the victims' descriptions of the perpetrator's appearance were not that far off considering how quickly events

B. The Prosecution Did Not Commit Misconduct, Prejudicial or Otherwise, in Questioning Detective Barillas

Defendant contends the prosecution committed misconduct by eliciting and relying on inadmissible opinion testimony from Detective Barillas. Specifically, defendant asserts the prosecution engaged in three species of misconduct: asking Detective Barillas whether defendant "had committed the robberies or the retrieved clothing 'resembled' the clothing worn by the suspects"; failing to "admonish or control" Detective Barillas to prevent him from offering lay opinion testimony; and relying on Detective Barillas's opinion testimony during closing argument.

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transpired. They described defendant as being in his forties. He was 49 years old at the time. They estimated his height as between 5 feet 1 and 5 feet 8. According to Martinez, defendant was approximately 5 feet 5 inches tall. Victims said defendant was heavyset, and Leyraud and Enciso both observed he had acne scars. Those descriptions were consistent with Martinez's account of defendant's appearance at the time of the crimes. Campos said the man who attempted to rob Gloria's Cafe had darker skin than defendant, but Martinez testified that defendant's skin color at the time of trial appeared lighter than in photographs showing his complexion around the time of the crimes. One of the UCLA police officers also testified defendant appeared "much paler" at the time of trial than when he was arrested. Martinez's testimony that defendant dyed his facial hair would explain why his hair was dark at the time of the Subway robbery but flecked with gray when he was arrested two weeks later.

1. Additional background

The vast majority of Detective Barillas testimony that defendant challenges involves his characterization of the clothing he found in defendant's closet. In describing why he retrieved and photographed particular items, Detective Barillas stated they were "similar to" apparel defendant wore during the robberies. Defense counsel objected, and the court admonished the prosecutor to let the witness simply describe the clothing found without asking *why* he focused on particular items.

The prosecution then asked further questions concerning why Detective Barillas took certain clothing into evidence. Defense counsel made further objections, which the court often sustained—several times with an instruction that any testimony uttered before the objection was stricken.

Defendant also identifies one instance in which (without objection) Detective Barillas opined defendant himself was the person depicted in the Subway and Gloria's Cafe surveillance videos. That testimony was given in response to a question on cross-examination. Defense counsel asked Detective Barillas why he did not show "six-pack" photospreads to the crime victims and the detective answered, "We knew it was [defendant], we had evidence to prove it was him, and I was absolutely sure it was him in the video." (Defense counsel did not move to strike this answer.)

During closing argument, the prosecution stated Detective Barillas and his partner determined after watching the Subway and Gloria's Cafe surveillance videos that the same person committed both crimes based on seeing the "[s]ame facial hair, same gait, same build, same jeans . . . same black cap and . . . same black gun." The prosecution remarked the officers

had recovered items that "corroborate[d]" Detective Barillas's "suspicions" that defendant committed the crimes: "[T]hey found clothing that matched the videos . . . even the same outfit" worn by the perpetrator.

2. Analysis

A prosecutor who intentionally elicits inadmissible testimony can be found to have committed misconduct. (*People v. Trinh* (2014) 59 Cal.4th 216, 248 (*Trinh*).) Such intentional questioning violates the United States Constitution if it is "'"of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]" (*Covarrubias*, *supra*, 1 Cal.5th at p. 894.)

Counsel for defendant at trial did not object to those portions of the prosecution's closing argument now asserted to be error. Defense counsel also did not object *on misconduct grounds* during the examination of Detective Barillas. Defendant's misconduct claims are therefore forfeited.[7] (*People v. Winbush* (2017) 2 Cal.5th 402, 482; *Covarrubias*, *supra*, 1 Cal.5th at pp. 893-894 [claim forfeited because the defendant "did not object on

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[7] Defendant's contention that objecting would have been futile is meritless. The trial court sustained multiple defense objections to the prosecution's questions of Detective Barillas covering similar ground. (*People v. Linton* (2013) 56 Cal.4th 1146, 1206.)

the specific ground of prosecutorial misconduct that he now asserts on appeal"]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1043.)

The misconduct arguments also fail on the merits. As to the prosecution's questioning of Detective Barillas, our Supreme Court's observation in a 2006 case is equally applicable here: "[W]e question whether this issue is properly considered one of misconduct. 'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct. Defendant's real argument is that the evidence was inadmissible.' [Citation.] Although the prosecutor in this case certainly asked the questions intentionally, nothing in the record suggests [s]he sought to present evidence [s]he knew was inadmissible . . . ." (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.)

For reasons already noted *ante*, the clothing opinion testimony defendant identifies as inadmissible was in fact within the discretion-marked bounds of permissible lay opinion testimony. It was obvious to the jury that Detective Barillas was not present at the scene of the crime for either the Subway robbery or the Gloria's Cafe attempted robbery. Thus, all of his answers concerning the similarity of the clothes seized during execution of the search warrant to the clothes worn by the (attempted) robber would have been understood as an opinion that the clothing he seized from defendant's closet was similar to the clothing worn by the perpetrator depicted in the surveillance videos. The trial court would be within its discretion to conclude that sort of an opinion is not precluded by the rules for lay

opinion testimony.[8] (Evid. Code, § 800; *Leon*, *supra*, 61 Cal.4th at p. 601.)

Further, to the extent the jury heard inadmissible testimony, it is a general rule that "there is no prejudice where an objection is made and sustained." (*Trinh*, *supra*, 59 Cal.4th at p. 249.) Here, the trial court sustained the bulk of defendant's objections to the complained-of testimony and struck a number of Detective Barillas's responses. Furthermore, the court instructed the jury before and after the presentation of evidence that if the court sustained an objection, the jury was required to "ignore the question" and not to "guess what the [witness's] answer might have been . . . ." The court also instructed the jury that in considering opinion evidence, it was "not required to accept those opinions as true or correct" but could "give the opinions whatever weight [jurors thought] appropriate," factoring in considerations such as "the extent of the witness's opportunity to perceive the matters on which his or her opinion is based . . . and the facts or information on which the witness relied in forming that opinion." In addition, the jury saw the same evidence on which Detective Barillas based his opinion, and there is no reason to believe jurors credited the officer's testimony without independently evaluating that evidence for themselves. (See *Leon*, *supra*, 61 Cal.4th at p. 601 ["Moreover, because the surveillance video was

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[8] Detective Barillas's testimony that he was "absolutely sure it was [defendant] in the video" was at least arguably inadmissible because his opinion lacked a proper foundation in personal knowledge. But that testimony was given in response to a question not from the prosecution but from the defense, and it was responsive to the question asked.

played for the jury, jurors could make up their own minds about whether the person shown was defendant"]; *People v. Larkins* (2011) 199 Cal.App.4th 1059, 1068 ["Moreover, the jurors were able to test the [lay witness's] opinion that defendant was the person in the . . . videos" because jurors were shown some of those same videos].)

In light of the court's rulings sustaining defense objections, the court's instructions to the jury, and the jury's ability to review the evidence from which Detective Barillas derived his opinions, there is no basis to conclude the jury relied on inadmissible testimony, or argument by the prosecution concerning such testimony, in reaching its verdict. (See *Trinh*, *supra*, 59 Cal.4th at p. 249 ["the consequences of the improper questions fell far short of 'infect[ing] the trial with such unfairness as to render the subsequent conviction a denial of due process' [citation], and there is no reasonable probability they influenced the verdict [citation]"].)

C. The Trial Court Did Not Err in Denying Defendant's Motion for Severance

1. Severance principles

"Section 954 provides that 'two or more different offenses' may be charged in the same pleading if the offenses are either 'connected together in their commission' or 'of the same class.' This 'statute permits the joinder of different offenses, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission, for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant.' [Citation.]" (*People v. Armstrong* (2016) 1 Cal.5th 432, 455

(*Armstrong*); see also § 954 [providing courts discretion, "in the interests of justice and for good cause shown," to order that counts joined in an accusatory pleading be tried separately].) "Because it ordinarily promotes efficiency, joinder is the preferred course of action." (*People v. Scott* (2011) 52 Cal.4th 452, 469 (*Scott*).) Our review of the trial court's decision not to sever the carjacking count from the other charges against defendant requires us to engage in a three-step process.

We initially consider whether the statutory joinder requirements were satisfied, i.e., whether the joined counts involved charges of the same class or whether the crimes were connected together in their commission. (*Armstrong*, *supra*, 1 Cal.5th at p. 455; *People v. Soper* (2009) 45 Cal.4th 759, 771 (*Soper*).) Offenses are "of the same class" if they "'possess common characteristics or attributes.'" (*People v. Landry* (2016) 2 Cal.5th 52, 76, citation omitted (*Landry*).)

If statutory joinder was proper, there is no error unless "prejudice is clearly shown." (*Scott*, *supra*, 52 Cal.4th at p. 469.) We initially consider whether defendant established—at the time the court made its pre-trial ruling—that "there [was] a substantial danger of prejudice requiring that the charges be separately tried." (*Soper*, *supra*, 45 Cal.4th at p. 773; accord, *Armstrong*, *supra*, 1 Cal.5th at pp. 455-456.) In assessing the potential for prejudice, "[w]e . . . consider whether evidence of each of the offenses would be cross-admissible in 'hypothetical separate trials.' [Citation.]" (*Armstrong*, *supra*, at p. 456.) "If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Soper*, *supra*, at pp. 774-775.)

The *absence* of cross-admissibility, however, is not similarly dispositive. (*Soper*, *supra*, 45 Cal.4th at p. 775.) Instead, where the evidence is not cross-admissible, "we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citations.]" (*Ibid.*) In a noncapital case like this one, that requires an assessment of "(1) whether some of the charges are particularly likely to inflame the jury against the defendant[, and] (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges . . . ." (*Ibid.*)

Finally, if joinder was proper and there was no sufficient showing of prejudice at the time the trial court ruled, we "'still must determine whether, in the end [and in light of the evidence as presented at trial], the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]' [Citations.]" (*Soper*, *supra*, 45 Cal.4th at p. 783; accord, *People v. Arias* (1996) 13 Cal.4th 92, 127 ["Even if the ruling was correct when made, we must reverse if [a] defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process"].)

When undertaking the first two stages of our inquiry (concerning statutory joinder and any indications of "spill-over" prejudice when the trial court ruled), we apply the abuse of discretion standard of review. (*Armstrong*, *supra*, 1 Cal.5th at pp. 455-456; *Soper*, *supra*, 45 Cal.4th at p. 774.) As stated by our Supreme Court, a trial court's ruling will be found to have been "a prejudicial abuse of discretion only if that ruling '"""""falls

outside the bounds of reason."""""" [Citation.]" (*Soper*, *supra*, at p. 774.)

2. Procedural background

Prior to trial, defendant moved to sever the carjacking charge from the robbery-related counts on the ground that the only connection between the charges was "that the People think it's the same person, [i.e., defendant], who committed *all* of the crimes." (Emphasis in original.) Defendant contended trying all of the counts together would prejudice him because the jury would view the evidence, cumulatively, as providing "one strong case" for defendant's guilt on all of the charges and because the jury's findings on the robbery-related counts would have a "'spillover'" effect on the carjacking charge which, according to defendant, had "weak" evidentiary support but the potential for a longer sentence compared to the robbery-related crimes.

The district attorney opposed severance, asserting joinder was appropriate because evidence pertaining to the charges was cross-admissible. The prosecution intended to show the perpetrator carried a black handgun and was wearing a black knit cap during all of the crimes. The prosecution also argued "everything in [the] case stem[med] from the carjacking incident" because a "crime alert" picture of defendant disseminated after his carjacking arrest was what led law enforcement to believe he had committed the robberies. The district attorney also disputed defendant's contention that the evidence supporting the carjacking charge was weak.

In denying defendant's motion to sever, the trial court concluded evidence of the charges would be cross-admissible and joinder would not subject defendant to "undue prejudice" because

"the jury [could] understand the limitations of evidence and the correct implications."

3. Analysis

Joinder of the charges in this case satisfied section 954 because carjacking, robbery, and other "'assaultive crimes against the person'" are "of the same class." (*People v. Capistrano* (2014) 59 Cal.4th 830, 848 (*Capistrano*).) We therefore turn to considering whether defendant showed a substantial risk of prejudice at the time the trial court denied severance or actual gross unfairness at trial.

Regardless of whether both categories of crimes were cross-admissible, defendant did not establish a possibility of prejudice sufficient to require severance. The robbery and carjacking offenses were reasonably similar in nature—in each case, the perpetrator brandished a gun to commit the crime without physically harming any of the victims. Thus, the evidence in support of some charges was not likely to inflame the jury to the defendant's prejudice on other charges. (See *Landry*, *supra*, 2 Cal.5th at p. 78 ["The fact that evidence of two violent crimes might lead a jury to infer that a defendant is violent does not establish that any of the charges were unusually likely to inflame the jury"]; *Capistrano*, *supra*, 59 Cal.4th at p. 850 [severance not warranted on basis of inflammatory effect where evidence of one crime "was not more inflammatory than the other crimes"]; *Soper*, *supra*, 45 Cal.4th at p. 780 [no likelihood evidence would unduly inflame the jury where the crimes were "similar in nature and equally egregious"].)

Defendant contends joining the robbery-related charges to the carjacking charge subjected him to prejudicial "spillover"

because the evidence supporting the robbery-related charges was weak. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 172-173 [court may abuse discretion in refusing to sever where "a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges"].) But defendant never made this argument to the trial court when seeking severance. Rather, he argued the risk of "spillover" prejudice was shown by weak evidentiary support for the carjacking count—not the robbery-related counts. Defendant cannot show the trial court abused its discretion by failing to rule in his favor on a theory he never raised. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1048-1049 [because review of the denial of a motion to sever "must be decided on the basis of the facts known and the showing made at the time of the motion," a moving defendant's failure to raise an argument for severance in the trial court precludes him from subsequently arguing error on that basis].)

Having determined the trial court committed no error when it denied defendant's motion for severance, we finally assess "'whether events *after* the court's ruling demonstrate that joinder actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.' [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 129.) We will reverse a judgment for gross unfairness "only if it is reasonably probable that the jury was influenced by the joinder in its verdict of guilt." (*Id.* at pp. 129-130.)

The record reveals no gross unfairness to defendant in the joinder of the carjacking and robbery-related charges. "Appellate courts have found '"no prejudicial effect from joinder when the

evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials.'" [Citation.]" (*Soper*, *supra*, 45 Cal.4th at p. 784.) Here, the evidence supporting the robbery-related counts, on one hand, and the carjacking count, on the other, was straightforward and distinct, and "independently ample" evidence (*ibid.*) was presented to support defendant's convictions on each set of charges.

Even though no eyewitness identified defendant at trial as the perpetrator of the Subway or Gloria's Cafe robbery offenses, the evidence connecting defendant to those crimes was not weak. In each case, surveillance video evidence allowed the jury to compare defendant to the man recorded committing the crimes, including by comparing what the offender was wearing to clothing recovered from defendant's closet. Defendant was clean-shaven and leaner at the time of trial than when the crimes were committed, but jurors could compare the video footage to photographs and descriptions of defendant showing his appearance around the time of the crimes. Under the circumstances, eyewitness identifications were by no means necessary for jurors to identify defendant as the perpetrator.

In addition, the court instructed the jury that each count charged was "a separate crime" to be considered "separately" by them. Nothing in the record indicates the jury failed to follow those instructions. (See *People v. Merriman* (2014) 60 Cal.4th 1, 48-49 [absent contrary showing, jury presumed to follow instructions to consider each count separately].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, J.*

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