Filed 2/2/17 P. v. Sanchez CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS OMAR SANCHEZ et al., Defendants and Appellants.	B263472 (Los Angeles County Super. Ct. No. BA425657)

APPEAL from a judgment of the Superior Court of Los Angeles County. C.H. Rehm, Jr., Judge. Affirmed, as modified.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Omar Sanchez.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant Jose Michael Juarez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury found Jose Michael Juarez (Juarez) and Carlos Omar Sanchez (Sanchez) guilty of robbery and found Juarez guilty of evading police. On appeal, Juarez and Sanchez argue that (1) the trial court erred in substituting in an alternate juror in the midst of deliberations without instructing the jury to disregard its prior deliberations, (2) their trial counsel was constitutionally ineffective for not moving to suppress the robbery victim's identification on due process grounds, (3) there was insufficient evidence to support their convictions, (4) the trial court erred in imposing a $20 DNA assessment; and, as to Juarez, (5) the trial court miscalculated his custody credits. Defendants' first three arguments lack merit;[1] the last two are well taken. Accordingly, we affirm their convictions but order that their sentences be modified.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In the early morning hours of May 30, 2014, Arnulfo Robles was riding his bicycle on a sidewalk in Whittier, California. A motorcycle drove up from behind and partially blocked Robles's path. There were two people on the motorcycle. The driver said, "Give me your phone." When Robles refused, the driver lifted up the back of his shirt to reveal a handgun, put his fingers around the gun's grip, and warned, "Don't make me." The passenger then added, "Hurry up and give him your phone." Robles obliged, handing the phone to the passenger. The motorcycle then sped away.

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1 Because defendants' arguments regarding their convictions are without merit, their cumulative error argument is also without merit. (*People v. Homick* (2012) 55 Cal.4th 816, 869.)

The entire encounter lasted about a minute. Although both the driver and passenger were wearing helmets, the helmets did not cover their eyes or noses, and they had stopped "almost directly" under a streetlight. Robles estimated that he looked at the driver's face for approximately 10 to 15 seconds and at the passenger's face for approximately four to six seconds. He could not tell what race they were. Robles said the driver was wearing a white shirt, blue jeans, and had on a black helmet. Robles said the passenger was wearing a gray sweater and had on a black helmet; Robles did not notice any writing on the sweater.

After the motorcycle pulled away, Robles continued to a friend's house and, once there, called 911. He reported the robbery and told the 911 operator that the passenger looked to be 12 or 13 years old based on his stature on the motorcycle. Robles also activated the "find my iPhone" function on his phone.

The police dispatcher broadcast a description of the motorcycle involved in the robbery, and a patrol car soon thereafter spotted a motorcycle matching that description. The officers in that car activated their lights and sirens. The motorcycle's driver then led them on a high-speed chase during which time the motorcycle jumped on and off various freeways, sped more than 90 miles per hour, ran red lights and signals, and crossed multiple lanes of traffic without looking. Both officers were able to see that the driver was wearing a light-colored shirt, blue jeans, and unlike Robles reported, a white helmet; they saw the passenger wearing a gray top and a black helmet.

Police helicopters assisted with the pursuit. The observer in the first helicopter saw the driver wearing a white shirt, blue pants, and like the officers but unlike Robles reported, a white helmet, and the passenger wearing "like a gray shirt" and a black

or dark-colored helmet. The observer in the second helicopter watched the motorcycle disappear under a freeway underpass and continue on with just the driver. Thereafter, the observer saw the driver leave the motorcycle and disappear into a neighborhood on foot.

Within five to ten minutes of losing sight of the motorcycle's occupants, police got word that Robles's iPhone was pinging from a house on South Concord Street. The house was just 1.4 miles from the location of the robbery. On a walkway right outside the house, police discovered an abandoned motorcycle and helmet. Less than 25 minutes later, several police officers entered the two-story house. The house was known to be inhabited by squatters, and police found seven men—all in their late teens, 20s, and 30s—inside. Juarez was hiding beneath insulation in the house's crawl-space attic, next to a bandana filled with live .38-caliber rounds. He was wearing black shorts and a black shirt. Sanchez was laying behind a couch on the first floor. He was wearing a gray sweatshirt with the letters "CALI" on the chest. Police found Robles's pinging iPhone in the second-floor bedroom; in the same bedroom, they recovered a pair of jeans and two shirts, one of which was a gray shirt with writing on the chest and left sleeve (in the same size as the gray sweatshirt with the letters "CALI"). Police also recovered a motorcycle helmet inside the house.

The police transported Robles in a police cruiser to a location two to three houses down from the house where they found his iPhone. They told Robles they had recovered his iPhone and brought him down "to look at who we caught . . . who we arrested." Police then marched Juarez, Sanchez, and at least two of the house's other occupants into the street, one at a time,

for approximately 30 seconds. Police did not ask any of those men to put on a helmet or to sit atop a motorcycle. Robles identified Juarez as the driver and Sanchez as the passenger. Robles did not identify Sanchez based on his face, but rather because he "recognized" "his body, his buil[d]" and recognized the gray shirt. Sanchez is five feet four inches tall. After Robles made his identifications, the police said, "Good job, thank you, things like that." Although Robles freely admitted that he was brought to the house "to identify or look at the people who had taken [his] phone" and was expecting to find the robbers, Robles explained that he was not going to "just identify anyone," and he did not identify any of the other people he was shown as being involved in the robbery.

II. Procedural Background

The People charged (1) Juarez and Sanchez with robbery (Pen. Code, § 211),[2] and (2) Juarez with evading a police officer (Veh. Code, § 2800.2, subd. (a)). The People further alleged that Juarez personally used a firearm (§ 12022.53, subd. (b)), and that a principal was armed with a firearm (§ 12022, subd. (a)(1)). The People additionally alleged that Juarez's 2006 conviction for assaulting a peace officer or firefighter with a deadly weapon other than a firearm (§ 245, subd. (c)) constituted a "strike" within the meaning of our Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)) and a prior "serious" felony (§ 667, subd. (a)). The People lastly alleged that this conviction as well as his 2011 conviction for resisting an executive officer (§ 69) also constituted prior prison terms (§ 667.5, subd. (b)).

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

Robles identified Juarez and Sanchez as the driver and passenger, respectively, at both the preliminary hearing and at trial.

The jury convicted both defendants of robbery, convicted Juarez of evading a police officer, and found true both of the firearm allegations regarding the robbery. In a bifurcated bench trial, the court found true the prior conviction allegations regarding Juarez.

The court sentenced Juarez to a 19-year prison sentence. Specifically, the court imposed 19 years for the robbery count, comprised of a four-year base sentence (two years, doubled because of Juarez's prior strike conviction) plus 10 years for use of the firearm plus five years for the prior "serious" felony. The court imposed a two-year concurrent sentence on the evading police count. The court sentenced Sanchez to five years of formal probation, including the time he had already served in jail.

Both defendants filed notices of appeal.

DISCUSSION

I. Instructional Error

The parties presented evidence for four days; the jury was instructed on the law and the parties made their closing arguments on the fifth day. The jury began to deliberate at 4:01 p.m. on that fifth day and deliberated for 27 minutes before breaking for the evening. The next morning, the trial court excused one of the jurors and substituted in one of the alternate jurors. When the court did so, the court instructed the jury to "[g]o back to the deliberation room and begin your deliberations." The jury deliberated for 17 minutes prior to lunch and 92 minutes after lunch before reaching its verdicts. Juarez and Sanchez argue that the court's failure to tell the jury that it

needed to disregard its deliberations occurring prior to the substitution violated their right to a 12-member jury under the California Constitution. Because this claim turns on the application of law to undisputed facts, our review is de novo. (*People v. Christman* (2014) 229 Cal.App.4th 810, 815.)

A trial court has the discretion under section 1089 to discharge a juror in the midst of deliberations and to have "an alternate . . . take a place in the jury box, . . . subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." To give effect to the California Constitution's guarantee that a criminal jury "shall consist of 12 persons" (Cal. Const., art. I, § 16) and to ensure the jury's verdict is a product of the deliberations of those "12 persons," a court may only exercise its power to substitute in an alternate juror if it "instruct[s] the jury to set aside and disregard all past deliberations and begin deliberating anew." (*People v. Collins* (1976) 17 Cal.3d 687, 694, overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19; *People v. Renteria* (2001) 93 Cal.App.4th 552, 558-559 (*Renteria*); accord, CALCRIM No. 3575 [so instructing].) A trial court does not satisfy this requirement by telling the jury to "'resume their deliberations starting over with the new trial juror'" (*People v. Martinez* (1984) 159 Cal.App.3d 661, 665 (*Martinez*), italics omitted); by telling the jury to start its deliberations "'from scratch so that [the alternate juror] has full benefit of everything that has gone on . . . up to the present time'" (*People v. Odle* (1988) 45 Cal.3d 386, 405); or by implicitly treating the prior jury's deliberations as effective by responding to the prior jury's request for a readback of testimony (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1030 (*Guillen*)).

Under these standards, the trial court's instruction in this case was deficient. The court told the jury to "begin [its] deliberations," but the jury had by that point already been in deliberations for 27 minutes. To be sure, as we discuss below, it is far from clear that the jury in that brief time did more than discharge its first duty to select a foreperson. But the jury had met to deliberate, and the trial court's failure to instruct the jury to "disregard" any prior deliberations was error. (Accord, *Martinez*, *supra*, 159 Cal.App.3d at p. 665.)

This error, however, does not always mandate reversal. (*Renteria*, *supra*, 93 Cal.App.4th at p. 559.) Instead, reversal is required only if it is reasonably probable that a "more favorable verdict would have been returned had the jury been properly instructed following the substitution." (*Martinez*, *supra*, 159 Cal.App.3d at p. 665, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) In assessing whether such a reasonable probability exists in this context, courts look to (1) "'whether the case is a close one,'" and (2) a "'compar[ison of] the time the jury spent deliberating before and after the substitution of the alternate juror.'" (*People v. Proctor* (1992) 4 Cal.4th 499, 537.) The two factors interact: Where a jury has convened for a sufficient period of time prior to the substitution for it to have deliberated on the merits and where it is a close case, courts have concluded that a different result is reasonably probable. (*Renteria*, at pp. 560-561 [jury deliberates for "some hours" prior to substitution, deliberates for "30 minutes" afterwards, and the case is "close"; reversal warranted]; *Martinez*, at pp. 665-666 [jury deliberates for two and one-quarter hours prior to substitution, deliberates for six days afterwards, and the case is "close"; reversal warranted].) Where the case is not close or the pre-

substitution deliberations are "minimal," courts have declined to hold that a different result is reasonably probable. (*Proctor*, at pp. 536-538 [jury deliberates for less than an hour prior to substitution, deliberates for two and one-half days afterwards, and "strong evidence" against the defendant; reversal not warranted]; *Guillen*, *supra*, 227 Cal.App.4th at pp. 1031-1032 [jury deliberates briefly prior to substitution, deliberates nine days afterwards, and strong evidence on lesser included offense on which guilty verdict was returned; reversal not warranted].)

Applying these factors, we conclude a different verdict is not reasonably probable in this case. As we discuss below when assessing the sufficiency of the evidence, the evidence in this case is far from overwhelming, but this is also not a "close case." More importantly, the jury in this case only met for 27 minutes prior to the substitution; this is a "minimal" amount of time, not enough for the jury to engage in any meaningful deliberation on the merits that it would need to be told to disregard. What is more, the jury then took a far greater amount of time—indeed, four times as long as its pre-substitution meeting—to deliberate once the alternate juror joined the jury. On these facts, the instructional error does not warrant reversal.

II. Ineffective Assistance of Counsel

Defendants contend that their trial counsel were constitutionally ineffective because they (1) did not seek to suppress evidence of Robles's identifications on the ground that the People failed to preserve evidence as to the identities of the other five people found in the South Concord Street house, and (2) did not seek to suppress all of Robles's identifications of defendants on the ground that the "showup" procedure was unconstitutionally suggestive.

To establish that counsel was constitutionally ineffective, a criminal defendant bears the burden of showing that (1) his "counsel's performance was deficient" because it """"fell below an objective standard of reasonableness . . . under prevailing professional norms,""""" and (2) "but for counsel's deficient performance," it is "reasonabl[y] probab[le]" that "the outcome of the proceeding would have been different." (*People v. Mickel* (2016) 2 Cal.5th 181, 198, quoting *People v. Lopez* (2008) 42 Cal.4th 960, 966.) Because courts must "presum[e] that counsel's actions fall within the broad range of reasonableness [and must] afford 'great deference to counsel's tactical decisions,'" and because the "record on appeal may not explain why counsel chose to act as he or she did," a defendant's burden of showing ineffective assistance is "'difficult to carry on direct appeal.'" (*Mickel*, at p. 198) Counsel's decision to forego a meritless objection is *not* deficient performance (*People v. Lucero* (2000) 23 Cal.4th 692, 732 ["'[c]ounsel may not be deemed incompetent for failure to make meritless objections'"]), so we begin by examining whether the objections defendants now say their counsel should have raised have merit. We review claims of ineffective assistance de novo. (*People v. Mayfield* (1993) 5 Cal.4th 142, 199.)

A. Failure to preserve evidence

Police officers filled out field identification cards on the five people other than Juarez and Sanchez found inside the South Concord Street house along with Robles's iPhone. At some point thereafter, they lost those cards. Defendants argue that this error makes it impossible for them to identify the other inhabitants of the South Concord Street house and to reconstruct the showup procedure at which Robles identified Juarez and

Sanchez, and violates due process because it constitutes either (1) the *suppression* of material evidence, in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), or (2) the *destruction* of material evidence, in violation of *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*).

The police's failure to preserve the field identification cards does not violate *Brady*. Under *Brady*, prosecutors have a duty not to suppress evidence that is favorable to the defense and material if that evidence is in their possession. (*People v. Masters* (2016) 62 Cal.4th 1019, 1066-1067.) Here, the field identification cards were *lost*; they were accordingly not in the possession of either the prosecutor or the investigating agency. This is fatal to any *Brady* claim. (*People v. Lucas* (2014) 60 Cal.4th 153, 221 (*Lucas*) ["[t]he constitutional due process rights of a defendant may be implicated when he or she is denied access to favorable evidence *in the prosecution's possession*," italics added], overruled on other grounds in *People v. Romero and Self* (2015) 62 Cal.4th 1; *People v. Whalen* (2013) 56 Cal.4th 1, 64 [*Brady* mandates disclosure of evidence in the prosecution team's "possession"].)[3]

The police's failure to preserve the field identification cards also does not violate *Trombetta*. *Trombetta* applies when the state "fail[s] to preserve evidence." (*Lucas*, *supra*, 60 Cal.4th at p. 221.) *Trombetta* and its follow-on case, *Arizona v. Youngblood* (1988) 488 U.S. 51, place two duties on police agencies with regard to preserving evidence: If the evidence has "apparent" "exculpatory value" and cannot be obtained "'by other reasonably

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[3] We accordingly have no occasion to decide whether the field identification cards are either favorable to the defense or material.

available means,'" its destruction violates due process; however, if the evidence might be useful to the defense but does not have "apparent" "exculpatory value," its destruction violates due process only if the police act in bad faith. (*People v. Carrasco* (2014) 59 Cal.4th 924, 961-962; *People v. DePriest* (2007) 42 Cal.4th 1, 41-42.) The names and contact information of the five other people inside the South Concord Street house does not have "apparent" "exculpatory value" because it is unclear whether reconstructing the showup with them would undermine or confirm Robles's positive identifications of Juarez and Sanchez. Moreover, there is no evidence that the police acted in bad faith in losing the field identification cards. Thus, defendants cannot meet the pertinent standards for relief under *Trombetta* and its progeny.

Defendants point us to two groups of cases, suggesting that they establish that the loss of the field identification cards is enough by itself to warrant suppression of all of Robles's identifications. First, they cite *People v. Ratliff* (1986) 41 Cal.3d 675 and *People v. Posten* (1980) 108 Cal.App.3d 633. To be sure, both of these cases indicate that the destruction of evidence relating to an out-of-court identification by itself warrants suppression of that identification. (*Ratliff*, at p. 690; *Posten*, at pp. 646-647.) But both of these cases cite *People v. Hitch* (1974) 12 Cal.3d 641 as support for their rule. (*Ratliff*, at p. 690; *Posten*, at p. 646.) Our Supreme Court has subsequently held that "*Hitch* . . . has not survived *Trombetta*." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1234.) Consequently, the *Hitch*-based rule in *Ratliff* and *Posten* is no longer good law. Second, defendants point us to three federal decisions that are at least 45 years old. (See *United States v. Augello* (2d Cir. 1971) 451 F.2d 1167;

United States v. Bryant (D.C. Cir. 1971) 448 F.2d 1182; *United States v. Heath* (9th Cir. 1958) 260 F.2d 623.) They do not apply the pertinent legal standard announced in *Trombetta* and are, for that reason alone, irrelevant.

B. Failure to move to suppress showup identification

A defendant's right to due process is violated when a court admits evidence of a witness's identification of that defendant if (1) """the identification procedure was unduly suggestive and unnecessary""" and, if so, (2) """the identification itself was [not otherwise] reliable under the totality of the circumstances."'" [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 556.) In assessing whether an identification procedure is unduly suggestive (the first step), courts ask whether the procedure "suggests . . . the identity of the person suspected by the police" "in advance of a witness's identification." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052, citing *People v. Hunt* (1977) 19 Cal.3d 888, 893; *People v. Ochoa* (1998) 19 Cal.4th 353, 413 (*Ochoa*) ["the state must, at the threshold, improperly suggest something to the witness"].) In assessing whether an identification is otherwise reliable (the second step), courts look to the "totality of the circumstances," including "[(1)] the opportunity of the witness to view the suspect at the time of the offense, [(2)] the witness's degree of attention at the time of the offense, [(3)] the accuracy of his or her prior description of the suspect, [(4)] the level of certainty demonstrated at the time of the identification, and [(5)] the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*).) The defendant bears the burden of satisfying both steps. (*Ibid.*)

In this case, the police employed a variation of a showup procedure by asking Robles to try to identify the driver and passenger of the motorcycle from the four to seven people found in the South Concord Street house and showed Robles those individuals one at a time rather than as a group at the same time. It is well settled that "'[t]he "single person showup" is not inherently unfair'" or suggestive. (*Ochoa*, *supra*, 19 Cal.4th at p. 413, quoting *People v. Floyd* (1970) 1 Cal.3d 694, 714; *People v. Medina* (1995) 11 Cal.4th 694, 753.) Although the police told Robles they were showing him the people from inside the South Concord Street house where his iPhone had been found and did not explicitly tell him that the robbery suspects may not be among the people he would be viewing, Robles distinguished among the people he was shown—identifying some and not identifying others—and there is no evidence indicating that the police told Robles whom to identify. (Accord, *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386-387 [ability of defendant to identify some persons but not others counsels against finding of unduly suggestive procedure].)

Defendants raise a number of further arguments, none of which has merit. First, they seem to suggest that showups are categorically suspect and inherently suggestive. For support, they cite cases expressing distrust of eyewitness testimony generally (e.g., *United States v. Wade* (1967) 388 U.S. 218, 228 [noting the "vagaries of eyewitness testimony"]) or showups specifically (e.g., *People v. Nation* (1980) 26 Cal.3d 169, 180). Although this precedent could be construed to wholly condemn showups as an investigative technique, courts have not read that precedent so broadly and instead have recognized "'the element of suggestiveness inherent in the ["showup"] procedure is offset by

the reliability of an identification made while the events are fresh in the witness's mind.'" (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359.)

Second, defendants assert that the showup in this case was itself suggestive. To begin, they point out that the police told Robles that his iPhone had been recovered and that they were bringing him to the South Concord Street location so he could "look at who we caught . . . who we arrested." The police also "thank[ed]" Robles after he identified two people and told him he did a "good job." This conduct, defendants argue, constituted "[s]uggestive comments or conduct that single out certain suspects or otherwise focus [the] witness's attention on a certain person." (*People v. Perkins* (1986) 184 Cal.App.3d 583, 588; *People v. Boyd* (1990) 222 Cal.App.3d 541, 574; accord, *People v. King* (1968) 266 Cal.App.2d 437, 464-466 [showing defendant a single photograph of defendant, then doing a showup of just the defendant presents "grave problems" about whether the identification procedure was suggestive]; *People v. Evans* (1952) 39 Cal.2d 242, 244-246, 252 [same procedure found to be suggestive]; *People v. Slutts* (1968) 259 Cal.App.2d 886, 891-892 [police drawing a beard on defendant's photograph in a six-pack to match the assailant's look; unduly suggestive].) Although the better practice would have been for the police to have told Robles that the robbers might not be among the persons he was to be shown, the showup procedure employed here was not unduly suggestive because the police showed Robles more than the number of persons involved in the crime; the police did not tell or otherwise intimate to Robles which persons he should select; and Robles did, in fact, select some suspects and not select others.

Further, Sanchez argues that Robles impermissibly selected him simply because he was the shortest person among the people shown and that this fact alone renders the showup suggestive. Sanchez is wrong factually and legally. He is incorrect factually because Robles relied upon Sanchez's clothing as well as his stature. Sanchez is incorrect legally because the "advantages of prompt identification or elimination of suspects through an in-field showup" excuse the need to have similar looking people available for comparison; the absence of similar looking people is consequently "not crucial to the legality of [an] in-field showup." (*People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049; cf. *People v. Carpenter* (1997) 15 Cal.4th 312, 366-367 [police-constructed lineup must avoid having the defendant "stand out"], superseded on other grounds by § 1054 et seq.; *Cunningham*, *supra*, 25 Cal.4th at pp. 989-990 [applying same rule to police-constructed photospread].)

III. Sufficiency of the Evidence

Defendants contend that there is insufficient evidence that they were the motorcycle driver and passenger who robbed Robles. In evaluating this claim, "'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. Covarrubias* (2016) 1 Cal.5th 838, 890.) In undertaking this task, the "'reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*Ibid.*)

Construing the evidence in the light most favorable to the verdict, there was sufficient evidence tying Juarez and Sanchez to the charged crimes. Robles identified Juarez and Sanchez at

the showup, at the preliminary hearing, and at trial. Because "[i]dentification of the defendant by a single witness may be sufficient to prove the defendant's identity as the perpetrator of a crime" (*People v. Boyer* (2006) 38 Cal.4th 412, 480), Robles's consistent and repeated identifications are themselves sufficient evidence. Beyond that, Juarez and Sanchez were found in the same house as the iPhone stolen from Robles; what is more, they were hiding—Juarez in the crawl-space attic and Sanchez behind a couch. The iPhone was found in the same room as the clothing Sanchez and Juarez had been seen wearing by Robles, by the police in the patrol car, and by the observer in the first helicopter. A motorcycle was found just outside the house, and two helmets were recovered—one by the motorcycle, a second in the house.

Defendants raise four challenges to the sufficiency of the evidence. First, they seem to suggest that there is insufficient evidence once Robles's identification testimony is excluded as the product of an unduly suggestive identification procedure. However, as discussed above, that evidence was properly admitted.

Second, defendants assert that Robles's identification, even if admitted, is inherently improbable. To be sure, a reviewing court may disregard a jury's implicit finding that a witness's testimony was believable if that testimony "'"is physically impossible or inherently improbable."'" (*People v. Prunty* (2015) 62 Cal.4th 59, 89; *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065-1066 [testimony may be disbelieved on appeal if it is "'"unbelievable *per se*"'" or "'"wholly unacceptable to reasonable minds"'"].) Robles's testimony was not so "impossible" or "improbable." Robles testified that he observed Juarez's face for 10 to 15 seconds and Sanchez's face for four to six seconds, and

did so by the light of a streetlamp; he explained that, although both were wearing helmets, their eyes and noses were not covered; and he picked the two of them out of a larger group of suspects he was shown. To be sure, Robles could not see Juarez's or Sanchez's faces from two to three houses away during the showup, but he identified Sanchez on the basis of his stature and clothing, and he subsequently and repeatedly identified both of them from within the relatively close confines of a courtroom.

Third, defendants argue that there is an "absence of evidence we would normally expect to find" (*People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839)—namely, no fingerprints on the motorcycle and no DNA matching either defendant on the helmet recovered near the motorcycle. Our task here is to evaluate the evidence that *was* presented to the jury, not the evidence that *was not*; as discussed above, the evidence that *was* presented was sufficient.

Lastly, and most forcefully, defendants assert that substantial evidence undercuts the persuasiveness of Robles's identifications. They cite: (1) the weakness of Robles's initial observation of his robbers (that is, for mere seconds while they were both wearing helmets); (2) the inadequacy of the showup procedure (that is, Robles viewed the persons from two or three houses away, the police did not require the suspects to sit on a motorcycle or wear a helmet, and the police did not require Robles to look at all seven of the house's occupants); (3) the strength of the defense's expert witness's testimony on the unreliability of eyewitness identifications; and, with respect to Sanchez's identification, (4) Robles's reliance on just Sanchez's stature and the inconsistencies regarding whether the

passenger's gray shirt had a hood, and whether the passenger was 12 or 13 years old or just short.

None of these arguments undermines the sufficiency of the evidence. Taking the arguments in reverse order, it is well established that inconsistencies in identification testimony do "not necessitate the jury's rejection of [the] identifications." (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) Nor is Robles's identification of Sanchez at the showup entitled to no weight because it was based on Sanchez's stature alone. Witnesses need not see a defendant's face in order to identify him because "'the identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing.' [Citation.]" (*Ibid.*; *In re Corey* (1964) 230 Cal.App.2d 813, 826 (*Corey*).) Robles testified that he identified Sanchez at the showup on the basis of his size and clothing; this was permissible. (Accord, *People v. Laird* (1924) 69 Cal.App. 511, 513-514 (*Laird*) [identification on the basis of stature and clothing adequate].) And although defendants' expert witness opined that the showup procedure in this case was problematic for a number of reasons, the jury was free to reject his opinion. (*People v. Brown* (2014) 59 Cal.4th 86, 101 [jury may disregard an expert's opinion]; § 1127b [same].)

Defendants' first and second arguments are, at bottom, disagreements with the manner in which the jury evaluated the reliability of Robles's identifications.[4] However, "[t]he strength or

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[4] Defendants also allude to one of the patrol officer's identification of Sanchez, but that officer did not positively identify Sanchez at trial. We accordingly do not factor any such identification into our evaluation of the sufficiency of the evidence.

weakness of the identification, the incompatibility of and discrepancies in the testimony, . . . the uncertainty of recollection, and the qualification of the identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses and are for the observation and consideration of the trier of fact." (*Corey*, *supra*, 230 Cal.App.2d at pp. 825-826; *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497; *Laird*, *supra*, 69 Cal.App. at pp. 513-514.) The trial court instructed the jury at length on the factors relevant to evaluating a witness's credibility as well as the factors relevant to assessing the reliability and believability of a witness's identification. Counsel could—and, at length, did—question Robles about his identifications and argued in closing why his testimony should be accepted or rejected. In such instances, the consideration of the evidence and evaluation of the ensuing arguments rests firmly in the jury's hands, and its verdict, once reviewed to ensure the jury was properly instructed and the witness's testimony was not inherently improbable, must stand. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1244 [so holding].)

IV. Sentencing Errors

A. DNA assessment

The trial court imposed a $20 DNA assessment on each defendant pursuant to Government Code section 76104.7. Defendants argue that this was error, and the People agree. So do we. The DNA assessment may be imposed when a "fine, penalty, or forfeiture [is] imposed" upon a defendant, but certain fines and penalties do not trigger imposition of the DNA assessment. (Gov. Code, § 76104.7.) The only other fines and penalties imposed upon defendants in this case were a $40 court operations assessment per count (under § 1465.8, subd. (a)(1)), a

$30 criminal conviction assessment per count (under Gov. Code, § 70373), and a $300 restitution fine (under § 1202.4, subd. (b)). But none of these assessments or fines triggers imposition of the DNA assessment. (*People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396 [court operations assessments do not trigger DNA assessment]; Gov. Code, § 70373, subd. (b) [criminal conviction assessments do not trigger DNA assessment]; Gov. Code, § 76104.7, subd. (c)(1) [restitution fines do not trigger DNA assessment]; *People v. Hawkins* (2012) 211 Cal.App.4th 194, 204 [so holding].) The DNA assessment for each defendant must be vacated.

B. Custody credits

Juarez argues that the trial court erred in granting him only 375 days of presentence custody credit, calculated as 327 days of actual custody credit plus 48 days of worktime credit. Because he stands convicted of a "violent felony," Juarez accrues worktime credit at a rate of 15 percent of his actual credit. (§ 2933.1, subd. (a).) Fifteen percent of 327 is 49, not 48. Juarez is accordingly entitled to 49 days of worktime credit, for a total of 376 days of presentence custody credit.

DISPOSITION

The judgment is modified by striking the $20 DNA assessment as part of Juarez's and Sanchez's sentences and by awarding Juarez 376 days of presentence custody credit. The clerk of the superior court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ