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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TAUMU JAMES, Defendant and Appellant.	B230771 (Los Angeles County Super. Ct. No. KA085233 consolidated with No. KA086790)
In re TAUMU JAMES on Habeas Corpus.	B237448

APPEAL from a judgment of the Superior Court of Los Angeles County. Charlaine F. Olmedo, Mike Camacho, and Daniel J. Buckley, Judges. Modified and affirmed.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Petition denied.

Alex Coolman, under appointment by the Court of Appeal, for Defendant, Appellant, and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Taumu James appeals from the judgment entered following a jury trial in which he was convicted of six counts of first degree robbery, with personal gun use, acting in concert, and child victim findings. Defendant contends the trial court erred by admitting evidence of pretrial identifications by three victims who had found and viewed his photograph on the Internet, denying his pretrial motion for a "try-on lineup," and denying his motion for discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). He further contends insufficient evidence supports the robbery convictions pertaining to two children whose property was not taken. We affirm.

Defendant also petitions for a writ of habeas corpus, contending that the prosecutor's failure to obtain and disclose a letter sent by an unknown person or entity to the victims violated due process. We deny the petition for a writ of habeas corpus.

BACKGROUND

About 8:45 p.m. on November 23, 2008, five men entered a five-bedroom home on Trailside Drive in La Puente shared by Rafael and Felicitas Gonzalez, Rafael's daughters Brenda Barragan and Annette Saavedra, Rafael's son Walter Gonzalez, Felicitas's daughter Nancy Jardines, Annette's husband Jose Saavedra and their son, Jardines's twin toddler sons, and Barragan's nine-year-old daughter and six-year-old son. Barragan was in the garage sorting laundry when an African-American man wearing a ski mask entered the garage. She began shouting for help. The man placed his hand over her mouth and a gun against her head and ordered her to be quiet and walk into the house. She complied. The man led her into the living room, where she saw both of her children lying facedown on the floor. An unmasked African-American man was standing near her children, pointing a gun at them. He ordered Barragan to lie down on the floor next to them. She complied.

Rafael testified two masked men and one unmasked African-American man entered the living room and ordered him to lie on the floor. All three men had guns. Rafael lay on the floor and pretended to have fainted when they later tried to lift him.

One of the men stepped on his back. He heard Barragan screaming and then heard her enter the house with someone else.

Felicitas testified she was chasing after one of Jardines's sons when she encountered a masked African-American and an unmasked Hispanic man, both of whom held guns. The men pointed a gun at Felicitas's head and forced her to walk to Jardines's bedroom.

Jardines testified she was in the kitchen when five men, all carrying guns, entered the house. At least two of the men were wearing masks. Four of them were African-American and she thought one was Hispanic because he spoke Spanish. Jardines took one of her sons to her bedroom, and two of the African-American men—one masked and the other not—entered her bedroom. They had Felicitas with them and were pointing a gun at her back. They asked Jardines if she had phoned the police, and she told them she had not. The masked man took Jardines's telephone off the hook.

The two men then forced Felicitas and Jardines to walk into Felicitas's bedroom, where the safe was located. The masked man repeatedly told Felicitas to open the safe and fill a pillowcase with money from the safe. One of the robbers grabbed Barragan's son and brought him into Felicitas's bedroom. Barragan grabbed her daughter and followed, but one of the robbers forced Barragan and her daughter to lie down in the hallway outside the bedroom. One of the robbers pointed a gun at Barragan's son. Felicitas testified the robbers threatened to shoot the boy in the head if Felicitas did not open the safe. Felicitas opened the safe, which contained no money, only papers and some jewelry. The men took the jewelry and repeatedly asked where the money was. Jardines testified that they threatened to shoot Barragan's son if Jardines did not give them money. Jardines and Felicitas told them there was no money.

Saavedra testified that she and her husband were in their bedroom at the time the robbers invaded the home. She peeked through a window that looks into the home's interior and saw two African-American men wearing masks, an unmasked African-American man, and an unmasked Hispanic man, all of whom had guns. She heard one of

the men demand money. She called 911, but hung up when she heard one of the men walking toward her bedroom.

Walter emerged from his bedroom late in the incident. The robbers ordered him to lie on the floor, and he did so. The robbers expressed concern that Walter had phoned the police, then they left the house.

The robbers had taken Barragan's wallet from her bedroom, jewelry from the safe, two mobile phones owned by Rafael, Felicitas's mobile phone, and the keys to Felicitas's car.

Sheriff's deputies who responded to the robbery call were notified that personnel in a police helicopter had seen two African-American men run into the yard at 545 South Fifth Avenue, La Puente. A deputy detained codefendant Dion Hawkins as he walked north on Fifth Avenue at Proctor Avenue. Other deputies transported Barragan, Rafael, and Jardines, one at a time, to view Hawkins. Barragan identified Hawkins as the unmasked robber who had pointed a gun at her children as they lay on the living room floor. Rafael identified Hawkins as the unmasked robber who put a gun to his head. Jardines also identified Hawkins as one of the robbers. The next day, Barragan and Jardines identified Hawkins from a photographic array.

At 545 South Fifth Avenue deputies recovered a hooded sweatshirt, sweatpants, and gloves. Two houses south, at 555 South Fifth Avenue, they recovered a dark blue jumpsuit, a pair of gloves, and a black ski mask with a gun inside of it. The ski mask appeared to be a knit cap into which someone had cut two holes for eyes and one hole for the nose or mouth. Deputies found a third pair of gloves and a black "beanie" at Lomitas Avenue and Redburn Avenue, La Puente.

A police criminalist extracted DNA from 11 items of the recovered clothing, including from (1) the inside of the cap turned into a ski mask that had been found with a gun inside of it at 555 South Fifth Avenue, (2) the inside of the gloves found at the same address, and (3) the collar of the blue jumpsuit found at the same address. Dr. Paul Colman conducted the DNA analysis. He testified that the profile of the major

contributor to the DNA extracted from inside the ski mask that had been found at 555 South Fifth Avenue matched defendant. There was a 1 in 5.2 quintillion chance that the DNA could have come from another African-American man. Colman testified the DNA from the mask revealed a second, "very weak, very minor" contributor, who could not have been Hawkins. But Colman testified that Hawkins matched the profile of the major contributor to the DNA extracted from inside one of the gloves that had been recovered from 555 South Fifth Avenue. A second very minor profile on that glove did not match defendant. Colman further testified that the DNA extracted from the jumpsuit's collar exhibited a partial profile indicating two contributors, and he could not exclude Hawkins as one of the contributors.

On June 2, 2009, Detective Robert Chism returned to the victims' home to show them, one at a time, a photographic array containing defendant's photograph. Barragan and Saavedra each selected defendant's photograph. When Chism asked them how they recognized defendant, they told him that the family had received a letter informing them that someone named Taumu James was a suspect in their case, then Saavedra went onto the Internet, looked up defendant's name, and found his photograph. The letter did not tell them to go on the Internet, it was something they just did because, according to Barragan, they "wanted to be nosey." Barragan testified that she and Felicitas were present when Saavedra found the photograph, but Jardines was not. Saavedra testified that Barragan and Felicitas were present when she viewed the photograph on the Internet, and she believed Jardines was, as well. Chism testified he neither sent the letter nor knew of its existence before the victims told him about it.

Jardines also selected defendant's photograph from the array Chism showed her, and although she knew about the letter, she testified and told Chism that she had not seen defendant's photograph on the Internet at that time. She told Chism she recognized defendant's face, eyes, and mouth. She added, "He was standing in my face." She saw defendant's photograph on the Internet after making her pretrial identification. At trial,

she testified that everyone in the family viewed the photograph on the Internet together, but this was sometime after Chism showed them the photographic array.

Chism showed the photographic array to Felicitas on July 6, 2009, and she selected defendant's photograph, then told him about the letter and viewing defendant's photograph on the Internet with Saavedra. Chism testified that Felicitas said her selection of defendant's photograph was based solely upon seeing his photograph on the Internet. At trial, Felicitas denied making that statement and further denied that her selection of defendant's photograph was based solely upon seeing his photograph on the Internet.

At trial, only Jardines identified defendant as one of the robbers. She testified that defendant threatened everyone, demanded money, and demanded that they open the safe. He was close to her the entire time, at times just one foot away from her, and even though he was masked, the mask did not cover his mouth, nose, eyes, or the skin around his eyes. Saavedra and Felicitas merely identified defendant at trial as the person whose photograph they had selected in the photographic array.

Defense DNA expert Mehul Anjara had no criticisms of the processes used to collect or analyze the DNA, and he agreed that defendant's profile matched that of the major contributor of the DNA on the inside of the ski mask. But he opined that because the DNA from the mask contained a second profile, multiple people could have worn it at different times. Anjara further opined that defendant's DNA could have gotten onto the mask without him wearing it, for example by him salivating or perspiring on it.

The defense investigator testified that he interviewed Jardines about one month before the trial began. She told him that she received the letter naming defendant and viewed defendant's photograph on the Internet before Chism showed her the photographic array. Jardines denied making this statement.

Defense eyewitness identification expert Dr. Robert Shomer testified regarding the unreliability of eyewitness identification, and specifically identified the masking of the perpetrator's face, the use of guns, the participation of multiple perpetrators, stress, a difference in race between the perpetrator and the witness, and exposure to a photograph

of a suspect prior to an identification procedure as factors detrimental to the accuracy of an identification. In response to a hypothetical question based upon the testimony in this case regarding the victims' receipt of a letter naming the suspect, followed by their viewing of the suspect's photograph on the Internet, Shomer opined that no subsequent identification could be deemed valid.

Hawkins pleaded guilty before defendant's trial commenced. A jury convicted defendant of six counts of first degree robbery (pertaining to Rafael, Barragan, Felicitas, Jardines, and Barragan's daughter and son), with findings that defendant personally used a gun (Pen. Code, § 12022.53, subd. (b); all further statutory references pertain to the Penal Code unless otherwise specified) and acted in concert with two or more others (§ 213, subd. (a)(1)(A)) in the commission of each robbery. The jury also found that Barragan's son and daughter were under 14 years of age, and defendant knew or reasonably should have known this. (§ 667.9, subd. (a).) The jury acquitted defendant of kidnapping Barragan, and the trial court had previously dismissed a seventh robbery charge naming Walter Gonzalez as the victim. Defendant waived a jury trial on a section 667, subdivision (a)(1) enhancement allegation, which the court found true. The court sentenced defendant to 71 years in prison.

DISCUSSION

1. Admission of pretrial identification evidence

At the outset of the trial, defendant asked the court to exclude evidence that Jardines, Barragan, Saavedra, and Felicitas selected defendant's photograph from the photographic array on the ground that the identifications were "tainted" and deprived of any probative value through their viewing of defendant's photograph on the Internet. Defense counsel told the court that the victims "received a letter from Los Angeles County Probation indicating that Taumu James may be involved in the case that they are witnesses and/or victims on, and he may be released." After conferring with defendant, defense counsel added, "One person has said the probation department. One has said the Arizona Department of Corrections. But either way, there is a law enforcement agency

that has given notice to these individuals indicating that Mr. James is about to be released from the Arizona Department of Corrections, and he may be a suspect in their case." Counsel then explained, "There's independent actions by the individuals in the house to look up Mr. James on the Arizona Department of Corrections Web site. At that point they are able to obtain a picture." With respect to Jardines, counsel argued that her claim that she had not seen the photo on the Web site was not credible because she contradicted herself to the defense investigator and she lived in a small house with many family members. Defense counsel also argued that admitting the identifications would inform the jury that defendant had been in prison and require "a mini trial on this identification because if the identification comes in, not only does this other information come in, but then I have got to bring in an I.D. expert."

The prosecutor informed the court that he did not have a copy of the letter because the victims had never provided one to the detective or the prosecutor.

The trial court agreed that the witnesses should not refer to the Arizona Department of Corrections, but denied the motion to exclude evidence of their pretrial identifications of defendant. The court expressed doubt as to whether "it implicates a state action," "because it is a different state and totally independent of this investigation and these law enforcement officers." But even if sending the letter qualified as state action, the court did not "find it to be so impermissibly suggestive, because the witnesses themselves are the ones that went online to find the picture and to take a look at the individual. So I do think this really is a matter that goes to weight, not admissibility."

Defendant contends that the trial court erred by admitting evidence that Barragan, Saavedra, and Felicitas selected defendant's photograph from the array because such evidence was irrelevant. He further contends that the admission of this evidence violated due process because the pretrial identifications were the product of an unfairly suggestive identification procedure and there was no permissible inference the jury could draw from the evidence.

a. Due process claim

Due process requires that evidence of a pretrial identification "infected by improper police influence" be screened by a trial court and excluded if the court determines "there is 'a very substantial likelihood of irreparable misidentification,' [citation]." (*Perry v. New Hampshire* (2012) __ U.S. __, __ [132 S.Ct. 716, 720] (*Perry*).) "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." (*Ibid.*) But the introduction of purportedly unreliable identification evidence does not violate due process "when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." (*Id*. at p. 730.) "When no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." (*Id*. at p. 721.)

The record does not establish the existence of "police-arranged suggestive circumstances." The record indicates that the letter was sent by an unknown source that was not a part of the prosecution team, probably the state of Arizona, without any involvement by California law enforcement or the prosecution team. Chism testified he had nothing to do with the letter, and indeed only found out about it when the victims told him about it. Defense counsel's argument that the Los Angeles County Probation Department sent the letter is implausible, as the record demonstrates that defendant was not on probation during the relevant time period. At the time of the charged offenses he was on parole in California following prison terms for his 2002 and 2003 convictions. Thereafter, he was in prison in Arizona for a March 2009 conviction, and defense counsel specifically told the court that the letter stated that defendant was about to be released from an Arizona prison. Thus, Arizona was the probable source of the letter. In either

case, the record fails to show police-arranged suggestive circumstances because neither the state of Arizona nor the Los Angeles County Probation Department were part of the investigative or prosecutorial team in this case. "A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. . . . This deterrence rationale is inapposite in cases, like [defendant's], in which the police engaged in no improper conduct." (*Perry*, 132 S.Ct. at p. 726.)

Even if there were a basis for imputing responsibility for the letter to the investigative or prosecutorial team, everything that happened after the victims received the letter was a result of the victims' own initiative and actions. There was no evidence or suggestion that the letter included a photo of defendant or told the recipients they could see his photo on the Arizona corrections Web site or elsewhere on the Internet. Indeed, Barragan later testified that the letter did not tell her family to look up defendant online. Instead, they took the initiative "to be nosey" and searched for defendant's photo. "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." (*Colorado v. Connelly* (1986) 479 U.S. 157, 166 [107 S.Ct. 515].) As stated in *Perry*, defendant's constitutional protections lay in the jury instructions on evaluating eyewitness testimony and the prosecutor's burden of proof, and in the various means at defendant's disposal to attempt to persuade the jury that the evidence that Barragan, Saavedra, and Felicitas selected defendant's photo from the array should be discounted as unworthy of credit, as a result of these victims' conduct in seeking out and viewing his photo. (*Perry*, 132 S.Ct. at p. 723.)

The admission of evidence may violate due process if there is no permissible inference a jury may draw from the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1246; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) Defendant's contention that there were no permissible inferences to be drawn from the identification evidence in issue is wrong: The permissible inference to be drawn from the evidence was that Barragan,

Saavedra, and Felicitas recognized defendant's photograph in the array from seeing his photograph on the Internet. Although the relevance of such an inference was minimal, it was not impermissible, unlike an inference of a propensity to commit crimes, for example.

In addition, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Admission of the pretrial "identification" evidence did not render defendant's trial fundamentally unfair because the jury was repeatedly informed of the circumstances surrounding the selection of defendant's photograph in the array by Barragan, Saavedra, and Felicitas that made that "identification" worthless. These circumstances were set forth in the prosecutor's opening statement; defense counsel's opening statement; the testimony of Barragan, Saavedra, Felicitas, and Chism; Shomer's testimony; defense counsel's argument to jury; and the prosecutor's rebuttal argument. The jury indicated its awareness of the role of the letter, Internet search, and viewing of defendant's photograph online in a note it sent on the second day of its deliberations, in which it asked, "Was it ever stated in this case where (from whom) the letter (sent to the family), which identified Mr. James as a suspect?"

b. State law claim

We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.)

Arguably, the trial court should have excluded as irrelevant any evidence of identifications by Saavedra, Barragan, and Felicitas. But the court's erroneous admission of the evidence requires reversal only if it is reasonably probable defendant would have obtained a more favorable outcome had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Any error in admitting evidence of identifications of defendant by Saavedra, Barragan, and Felicitas was harmless, in light of the abundant evidence and argument fully informing the jury of the receipt of the letter, the conduct of Saavedra, Barragan, and Felicitas in response to the letter, and the role of the Internet photo in their identifications; Jardines's identification of defendant; and the DNA evidence showing the presence of DNA matching defendant's profile on the inside of a ski mask containing a gun found near the crime scene in the immediate wake of the crime. Although, as the defense DNA expert testified, defendant's DNA could have been placed on the cap on some other occasion and possibly even without him wearing it, acceptance of this theory would require the jury to discount a number of improbabilities: Defendant put his DNA on the inside of the mask at another time, but it was found close to crime scene in the immediate wake of the crime, with a gun inside of it and with other discarded clothing, including a pair of gloves bearing DNA that matched Dion Hawkins, who was arrested soon after the crimes a little farther north on the same street where the clothing was discarded and identified by three of the victims as one of the unmasked robbers. Alternatively, the jury could have concluded that defendant's DNA got on the mask when he wore it during the robberies, and defendant discarded the mask and the gun he used in the robberies as he fled from the crime scene with Hawkins. Given the absence of any evidentiary showing of alternative acts by defendant that would have placed his DNA on the inside of the mask, it is reasonably probable that the jury concluded defendant wore the mask during the robberies.

The admission of evidence of the pretrial selection of defendant's photograph in the array by Saavedra, Barragan, and Felicitas may have even benefitted defendant because, in conjunction with the defense investigator's testimony, it allowed him to cast doubt upon Jardines' identification on the theory that she must also have viewed defendant's photograph on the Internet. Had the trial court excluded the evidence of pretrial "identifications" by Saavedra, Barragan, and Felicitas, defendant would not have been able to fully develop this theory.

It is thus not reasonably probable that defendant would have obtained a more favorable result if the trial court had excluded the evidence in controversy.

2. Denial of request for a "try-on lineup"

Defendant represented himself through much of the pretrial phase, commencing on July 28, 2009. On September 2, 2009, he filed a motion requesting a "'try-on' lineup," in which he and five other similar men would wear black ski masks while being viewed by Jardines and "all complaining" witnesses. Judge Daniel Buckley initially addressed the motion the day it was filed. The prosecutor informed the court that although he had not seen the written DNA report, he had been informed that there was a DNA match on recovered evidence, and he thus believed identification would not be an issue. He further noted that in his experience, "it's at least four weeks before the sheriff's department will schedule a line-up, and that puts us past the trial date," which was then set for September 25, 2009. The court indicated it would delay ruling on the motion "until we know what the DNA results are." Defendant argued that the sole issue was identification: "Whether the People say there is DNA on some clothing recovered, the issue is the only evidence they're presenting is someone saying they were able to view me through a mask." Defendant agreed to waive time, with October 6, 2009 as day zero of 60.

On October 6, 2009, the prosecutor filed written opposition to the motion for a lineup, explaining that three of the robbers wore masks but codefendant Hawkins was not masked; shortly after the robbery personnel in a police helicopter saw two men running from the crime scene; deputies went to where the men were running and arrested Hawkins; deputies searching the area found "items of discarded clothing consistent with the clothing described by the robbery victims," including gloves and "a knit mask with a gun wrapped inside of it"; the victims identified Hawkins; DNA consistent with defendant was found on the mask; DNA consistent with Hawkins was found on coveralls and gloves; and "[a]ccording to the forensic expert, the likelihood that the DNA was [from] someone other than defendant James is one in 5.2 Quintillion." The prosecutor's opposition also explained that Jardines identified defendant from a photographic lineup,

saying she recognized his eyes and mouth, and "[o]ther evidence indicating that defendant James was involved in the robbery includes intercepted calls from a federal wiretap. Law enforcement officers were monitoring calls of various Main Street Mafia Crips, of which defendant James and Hawkins are members. Prior to the robbery, calls were intercepted between defendant Hawkins and defendant James and a third individual discussing a plan and casing of a location by these three and other individuals." The prosecutor thus argued, "The likelihood of a misidentification in this case does not exist. The DNA match of defendant James to the mask is substantial evidence of his participation. The item which contained defendant James' DNA was found with items containing defendant Hawkins' DNA. Defendant Hawkins, who was not wearing a mask, has been identified by multiple victims as being involved in the robbery."

Judge Buckley revisited defendant's motion on October 6, 2009. The court stated that it had reviewed the prosecutor's opposition to the motion, "which basically says the case against you is based on DNA, not on the identification. It's DNA." Defendant replied, "It's about DNA." The prosecutor explained, "A black knit mask, like a ski mask with holes for the eyes and mouth, which was recovered, which you've been requesting photographs of, Mr. James." Defendant replied, "Okay." The prosecutor continued, "There was DNA. Your DNA was taken off that mask." Defendant again replied, "Okay." The prosecutor further explained, "It was with items that had Mr. Hawkins' DNA on it that was [*sic*] recovered not far from the crime scene." Defendant responded, "I don't understand how that makes a DNA case. Somebody said that I done that. They seen me do something. That's what you're going to do at preliminary hearing? I don't see how does that make it a DNA case." (This discussion occurred two months after the preliminary hearing.) The prosecutor explained, "I don't have to present everything that I have at the preliminary hearing. So there's DNA tying you to the crime." Defendant replied, "Okay." The court then denied defendant's motion.

Citing his arguments regarding the admission of the identification evidence addressed above, defendant contends that the trial court "based its conclusion on an

inaccurate understanding of the case," and "[i]n light of the unusual problems with the identity evidence in this case," the court violated due process by denying his motion for a masked lineup.

As a preliminary matter, we note that the issue of whether a challenge to a denial of a request for a pretrial lineup must be raised by way of pretrial writ petition or may be raised on appeal is pending before the Supreme Court in *People v. Mena* (2009) 173 Cal.App.4th 1446, review granted August 26, 2009, S173973. We treat the issue as preserved for appellate review.

"[D]ue process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) "[W]hether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries" that are entrusted to the trial court's discretion. (*Ibid.*) The court should consider "not only . . . the benefits to be derived by the accused and the reasonableness of his request but also . . . the burden to be imposed on the prosecution, the police, the court and the witnesses." (*Ibid.*)

Defendant's claim is premised on a hindsight view of the case, based upon the evidence that was introduced at trial. But we must evaluate the propriety of the trial court's ruling "at the time it was made, . . . not by reference to evidence produced at a later date." (*People v. Welch* (1999) 20 Cal.4th 701, 739.) At the time the trial court ruled on the motion, defendant did not attempt to counter the prosecution's explanation of the nature of the evidence against defendant. Nor did he raise any coherent, let alone persuasive, argument to counter the prosecutor's argument that proof of his identity as one of the robbers was based principally on DNA. Notably, a little earlier in the hearing,

counsel for codefendant Hawkins had already informed the court that the prosecutor's case was based upon DNA.

Accordingly, the trial court did not abuse its discretion by accepting the prosecutor's persuasive and effectively unrebutted representation regarding the nature and quality of the prosecution's case against defendant, which established—for purposes of the propriety of the trial court's ruling on the motion—that eyewitness identification was not a material issue and that there was no reasonable likelihood of a mistaken identification that a lineup would tend to resolve.

3. Sufficiency of evidence regarding child victims' possession of property

Barragan's nine-year-old daughter and six-year-old son were named as robbery victims in counts 6 and 7, respectively, although nothing in the record indicated that any of their property was taken in the robbery. The jury was instructed on actual and constructive possession and heard defense counsel's argument that Barragan's daughter was not in possession of any property taken from the home. (Defendant did not argue a lack of possession with respect to Barragan's son.) Defendant contends that the evidence was insufficient to support his convictions of robbing Barragan's children because the children were in neither actual nor constructive possession of any of the property that was taken.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Robbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property. (§ 211; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Robbery is an offense against the person. (*People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369 (*Weddles*).) Any person who owns or who exercises direct physical control over, or who has constructive possession of, any property taken

may be a victim of a robbery if force or fear is applied to such person. (*People v. Scott* (2009) 45 Cal.4th 743, 749–750 (*Scott*).)

"Constructive possession does not require an absolute right of possession. 'For the purposes of robbery, it is enough that the person presently has some loose custody over the property, is currently exercising dominion over it, or at least may be said to represent or stand in the shoes of the true owner.'" (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 497.) "For constructive possession, courts have required that the alleged victim of a robbery have a 'special relationship' with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*Scott, supra*, 45 Cal.4th at p. 750.) "By requiring that the victim of a robbery have possession of the property taken, the Legislature has included as victims those persons who, because of their relationship to the property or its owner, have the right to resist the taking, and has excluded as victims those bystanders who have no greater interest in the property than any other member of the general population." (*Id.* at pp. 757–758.) Civil Code section 50 establishes the right to use "necessary force" to protect the "property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family." Several published cases have upheld convictions for robbing victims of property belonging to their family members against insufficiency of evidence claims. (*People v. Gordon* (1982) 136 Cal.App.3d 519 [parents robbed of marijuana belonging to their adult son]; *DeFrance*, 167 Cal.App.4th 486 [mother robbed of car owned by her adult son]; *Weddles, supra*, 184 Cal.App.4th 1365 [man robbed of his brother's money].)

"Two or more persons may be in joint constructive possession of a single item of personal property, and multiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken." (*Scott, supra*, 45 Cal.4th at p. 750.)

Under Civil Code section 50, Barragan's children had authority to protect Barragan's property, and thus had constructive possession of her wallet, which the robbers took. The children were not so young as to be either unaware of the robbery or

unable (if not held at gunpoint) to resist the taking of their mother's property, by, for example shouting or phoning for help, running away with the property, or hiding it. The children also arguably had possession of their grandparents' property for the same reason. And because multiple people may simultaneously possess a single item of personal property, Barragan's presence did not divest the children of their statutory authority to protect, or constructive possession of, Barragan's property. Defendant and his accomplices apparently considered it sufficiently necessary to overcome potential resistance by Barragan's children that they forced them to lie facedown on the floor and kept a gun pointed at them. "When two or more persons are in joint possession of a single item of personal property, the person attempting to unlawfully take such property must deal with all such individuals. All must be placed in fear or forced to unwillingly give up possession. To the extent that any threat may provoke resistance, and thus increase the possibility of actual physical injury, a threat accompanied by a taking of property from two victims' possession is even more likely to provoke resistance. [¶] We view the central element of the crime of robbery as the force or fear applied to the individual victim in order to deprive him of his property. Accordingly, if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper." (*People v. Ramos* (1982) 30 Cal.3d 553, 589, reversed in part on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446].)

We conclude that defendant's robbery convictions pertaining to Barragan's children were supported by both the law and substantial evidence.

4. Denial of *Pitchess* motion

While defendant was representing himself, he filed a *Pitchess* motion seeking information regarding complaints against Detectives Chism and Richardson pertaining to "racial prejudice, dishonesty, false arrest, the fabrication of charges and (or) evidence." Defendant's declaration in support of his motion stated that "detectives in this case did commit misconduct by fabricating reports and evidence, and also coerced witness [*sic*] into giving perjured testimony." The declaration continued, "The defendant[']s defense

in this case is that this is a case of mistaken identification due impart [*sic*] to coercion by the detectives in this case. . . . [T]he defense believes that without the constant pressuring of the victims the defendant would not have been identified in this case. At the time of this crime the victim Nancy Jardines never gave any description of the suspects, also the detectives interviewed the victim in this case several times over a seven month period and no description was given. Only after the victims received a letter informing them that the defendant had been involved in the robbery and all the victims in the residen[ce] except Nancy Jardines saw a picture of the defendant on the internet, that is when a description was given and he was positively identified. [¶] It is the defense[] theory that the identification came about do [*sic*] to illegal misconduct by the detectives. The defense plans to prove these detectives have knowledge and was [*sic*] indirectly responsible for the mysterious letter that was sent to the victim's residence and that the failure to collect or preserve this letter was done in bad faith to cover their misconduct."

Judge Mike Camacho denied defendant's motion, stating, "[I]t's insufficient. You haven't shown good cause to even have the hearing. Your motion is based entirely upon speculation as to police misconduct. You certainly have provided the court with no plausible factual scenario that there is any police misconduct. You simply concluded there must be police misconduct because of the identification issues and therefore you're entitled to this motion. So your motion is denied without prejudice for failure to establish good cause."

Defendant contends the trial court erred by denying his *Pitchess* motion because "[h]e alleged several acts of misconduct that were grounded in the facts of his case, including pressuring the witnesses to make a false identification, facilitating the mailing of the letter to the witnesses and failing to collect or preserve the letter in a bad faith effort to conceal their own involvement in its mailing."

To obtain *Pitchess* discovery of a police officer's personnel records and complaints against such officers, a defendant or petitioner must file a motion describing the type of records sought and showing, inter alia, the materiality of the information to the

subject of the pending action and good cause for disclosure. (Evid. Code, §§ 1043, 1045.) "To show good cause as required by section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*).) "Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct." (*Ibid*.) "The court then determines whether defendant's averments, '[v]iewed in conjunction with the police reports' and any other documents, suffice to 'establish a plausible factual foundation' for the alleged officer misconduct and to 'articulate a valid theory as to how the information sought might be admissible' at trial. [Citation.] . . . What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025.) "[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id.* at p. 1026.)

If the trial court grants the motion, it should only order disclosure of complaints or incidents directly relevant to the specific factual scenario asserted by the defendant. (*Warrick*, *supra*, 35 Cal.4th at pp. 1022, 1027 [defendant who asserted police falsely accused him of discarding controlled substance entitled to discover complaints of making false arrests, planting evidence, committing perjury, and falsifying police reports or probable cause, but not reports of using excessive force or exhibiting racial, gender or sexual orientation bias]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1220 [defendant who claimed officers coerced his confession entitled to discover only complaints alleging coercive interrogation techniques, not all excessive force complaints].)

Initially, we note that defendant's declaration failed to even attempt to show good cause for discovery of complaints relating to racial prejudice, dishonesty, or false arrest. At best, his declaration addressed a claim of fabrication of evidence.

Defendant's declaration did not present a specific and plausible factual scenario of officer misconduct. First, defendant made a conclusory assertion that Richardson and Chism fabricated reports and evidence, and also coerced a witness into giving perjured testimony, but failed to describe or specify any perjured testimony that the detectives had coerced or any report or evidence that they had fabricated. The only person who had testified in this case at the time the *Pitchess* motion was heard was Chism—the sole witness at the preliminary hearing, and the trial court could reasonably conclude that it was not plausible that Richardson had coerced Chism's testimony at the preliminary hearing. To the extent the claim of fabricated reports and evidence was supposed to refer to the "mysterious" letter from Arizona, defendant's declaration was both inadequate and internally inconsistent in that it asserted that the detectives were only "indirectly responsible for" the letter. Defendant failed to explain what the detectives did to make them "indirectly responsible" for a letter sent by the Arizona Department of Corrections or how their unspecified conduct constituted fabricating reports, fabricating evidence, or even misconduct. The trial court could also reasonably conclude that it was not plausible that the detectives bore any level of responsibility for causing the Arizona Department of Corrections to send the letter. Defendant's final assertion, that the detectives engaged in misconduct by failing "to collect or preserve" the letter so as to cover up their misconduct, is undermined by both (1) his failure to assert that the victims still had the letter and would have provided it to the detectives if they asked and (2) his prior failure to make a specific and plausible showing that the detectives engaged in misconduct by "indirectly" causing the letter to be mailed.

Defendant's claim that the detectives constantly pressured the victims is internally inconsistent with his assertion that they "interviewed the victim . . . several times over a seven month period" and also insufficient to establish coercion, as opposed to mere

tenacity. His claim that he would not have been identified without the detectives constantly pressuring the victims, their "illegal misconduct," and their indirect responsibility for "the mysterious letter" is internally inconsistent with his statement that Jardines had not seen defendant's photograph on the Internet.

Accordingly, we conclude the trial court did not abuse its discretion by denying defendant's *Pitchess* motion.

5. Calculation of presentence custody credits

Defendant contends, and the Attorney General aptly concedes, that defendant was entitled to three additional days of presentence custody credit. Accordingly, we modify the judgment to reflect an additional three days of credit.

6. Petition for a writ of habeas corpus

Defendant also filed a petition for a writ of habeas corpus that we agreed to consider with his appeal. The Attorney General filed an informal response to the petition, and defendant filed a reply to that response. The petition alleges that Chism and the prosecutor violated due process by failing to obtain and provide defendant with the letter sent to the victims. It alleges "that the Los Angeles County Sheriff's Department was the original source of the facts relayed in the letter," and that because the prosecutor has stated he does not know who sent the letter, he must have violated a duty to search for and disclose exculpatory information.

We evaluate defendant's petition "by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*People v. Duvall* (1995) 9 Cal.4th 464, 474–475.) If no prima facie case for relief is established, we summarily deny the petition.

Brady v. Maryland (1963) 373 U.S. 83, 87 [83 S.Ct. 1194] (*Brady*), established that due process requires the prosecution to disclose to the defense any and all potentially exculpatory evidence. The defendant must establish that the undisclosed information was both favorable to the defense and material, meaning that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have

been different. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433–434 [115 S.Ct. 1555] (*Kyles*).) Such a reasonable probability exists where the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Id.* at p. 435; *In re Williams* (1994) 7 Cal.4th 572, 611.) "'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 829, quoting *United States v. Agurs* (1976) 427 U.S. 97, 109–110 [96 S.Ct. 2392].)

A prosecutor's duty of disclosure extends to all evidence the prosecution team knowingly possesses or has the right to possess. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358.) The prosecution team includes both investigative and prosecutorial agencies and personnel. (*Ibid*.) An individual prosecutor is presumed to know of all information gathered in connection with the government's investigation. (*In re Brown* (1998) 17 Cal.4th 873, 879.)

Impeachment evidence, as well as exculpatory evidence, falls within the scope of *Brady*. (*United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375].)

Testimony in the appellate record, of which the petition for writ of habeas corpus requests judicial notice, established several facts regarding the nature of the letter and whether the investigative team was responsible for it or the victims' conduct after its receipt. At the preliminary hearing, Chism testified that Barragan, Saavedra, and Felicitas told him that they "had received information in the mail regarding Mr. James' pending arrest, and they had looked it up on the Arizona Department of Corrections Web site" and viewed a photograph of him. Chism did not tell the victims to go to the Web site and first learned they had done so on the day he showed them the photographic array containing defendant's photo. Chism testified that Jardines told him she had not seen the photograph on the Internet and the other victims had not discussed it with her. At trial, Chism testified that when he showed the photographic array containing defendant's photograph to Barragan, Saavedra, and Felicitas, they each told him they had received a letter, and

based upon the information in that letter, they looked defendant up on the Internet and found a photograph of him. Chism neither sent the letter nor knew of its existence before the victims told him about it. Chism also testified that Jardines said she had not seen defendant's photograph on the Internet.

Barragan testified at trial that the letter the family received indicated that someone named Taumu James was a suspect in the case involving them, and although the letter did not tell them to go on the Internet, some family members "wanted to be nosey," so Saavedra went onto the Internet to find a picture of Taumu James. Barragan and Felicitas were present when Saavedra found the photograph, but Jardines was not. Barragan further testified that Chism had not told them they would receive a letter and had not told them to go on the Internet to find a picture of James.

Jardines testified at trial that the letter the family received indicated that a person named Taumu James was a suspect in the case, and someone in the family went on the Internet, but Jardines did not view the photograph on the Internet until after Chism showed her the photographic array containing defendant's photo.

Saavedra testified at trial that a few days before Chism came to their house to show them a photographic array, someone in the family received a letter that indicated that someone named Taumu James might be a suspect in the case in which they were involved. Saavedra looked online and found a photograph of defendant. Barragan and Felicitas were with her at the time, and she believed Jardines was as well.

Felicitas testified that the family received a letter that indicated that someone named Taumu James was a suspect in the case in which they were involved. She and Saavedra went on the Internet and found a picture of Taumu James.

In addition to the testimony regarding the letter, the prosecutor informed the court in response to defendant's pretrial request for the letter, "He is requesting a letter that was mailed to the victims in this case, from the Department of Corrections of Arizona, which I do not have. I have no control over. It results [*sic*] to basically his case in Arizona, and I

don't believe I'm required to turn that over since I don't have possession of that letter to begin with."

In addition, as previously set forth, when defendant moved to exclude evidence of the victims' pretrial identification of defendant, defense counsel represented that one or more victims had stated that the letter was from the Arizona Department of Corrections and one had said it was from the Los Angeles County Probation Department. Defense counsel further represented the contents of the letter as "giv[ing] notice to these individuals indicating that Mr. James is about to be released from the Arizona Department of Corrections, and he may be a suspect in their case." Defense counsel then explained, "There's independent actions by the individuals in the house to look up Mr. James on the Arizona Department of Corrections Web site. At that point they are able to obtain a picture."

The petition fails to state a prima facie claim under *Brady* because the letter was neither material not potentially exculpatory. Testimony in the appellate record establishes that the letter merely told the victims that defendant was a suspect in the case and might be arrested. This information was not exculpatory. Testimony established that the letter did not instruct the victims to look for defendant's photograph on the Internet, and that they instead took the initiative and sought out his photograph. Their conduct and its effect or potential effect upon their ability to identify defendant before and at trial was fully explored through the testimony presented at trial. There is no reasonable probability that, had the prosecutor managed to obtain the letter and then disclosed it to the defense, the result of the trial would have been any different. Neither introduction of the letter in evidence nor additional testimony regarding it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles, supra*, 514 U.S. at p. 435.) Defendant argues that Jardines's identification testimony could have been impeached or even excluded if he had the letter because the letter "would have raised serious doubts about the notion that [Jardines], despite being informed about [defendant's] image at the same time as the other family members, chose to wait to view

that image." The petition does not allege that the letter included defendant's image or any information about his image, and the appellate record establishes that the letter did not tell them to look on the Internet; rather, some of the victims "wanted to be nosey" and made an independent decision to look defendant up online, where they found his photograph.

Thus, even if defendant could overcome the significant burden of establishing that the prosecution team knowingly possessed or had the right to possess the letter, his *Brady* claim would have no merit. Accordingly, we deny the writ petition.

DISPOSITION

The judgment is modified by increasing defendant's presentence credits by three days to a total of 621 days. As modified, the judgment is affirmed. The petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.