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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EDWARD C. LOPEZ,<br><br>Defendant and Appellant. | B265350<br><br>(Los Angeles County Super. Ct. No. BA425891) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Kennedy, Judge. Affirmed, as modified.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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Edward C. Lopez (defendant) appeals his two second degree robbery convictions. He argues that (1) his due process right to a fair trial was violated when the investigating police officer volunteered two statements alluding to defendant's prior interaction with police and a prior arrest, and (2) the trial court miscalculated his custody credits. Only defendant's second argument has merit. Accordingly, we affirm his convictions but order that the custody credits be corrected.

## FACTS AND PROCEDURAL BACKGROUND

### I. Facts

One afternoon in June 2014, 19-year-old Joseph Villareal (Joseph) and his 13-year-old cousin Patrick were riding their bikes in Grant Rea Park in the city of Montebello.[1]

As they walked their bikes by a gazebo where several people were gathered, one of those people—Jerry Raymond Mascorro (Mascorro)—approached Joseph and Patrick, and asked, "Is there a problem?" Although Joseph responded there was "no problem," Mascorro drew a pistol, pointed it at them, and ordered them to "empty [their] pockets." Two other men—defendant and his son, Edward Lopez, Jr. (Lopez, Jr.)—approached Joseph and Patrick from the gazebo and echoed the demand that Joseph and Patrick "give . . . everything [they] have." Defendant pushed Joseph down onto his knees, and either defendant or Lopez, Jr. punched Patrick in his ribs. From Joseph, the three men took a hat, a backpack, an iPod, a Samsung Galaxy cell phone, some money, and a bike; from Patrick, the three men took a green iPhone and a bike.

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1 Because Patrick is a minor, we refer to him by first name only and, for consistency, to Joseph by first name as well. We mean no disrespect.

Defendant instructed Mascorro and Lopez, Jr. to leave the park quickly, and they rode off on Joseph's and Patrick's bikes. Defendant then started walking behind Joseph and Patrick, pushing Joseph and telling both of them, "Get the fuck out of here," and "If you guys don't want to get shot, fuck, leave the park. Walk away, walk away."

Defendant split away from Joseph and Patrick, and got into an older model tan Chevy truck and drove away. Joseph memorized the license plate number of the truck, borrowed a cell phone, and called 911 to report the robbery.

The police ran the license plate number and learned that the truck was registered to defendant. The next day, police interviewed Joseph and Patrick and presented them with a six-person photospread containing an older photograph of defendant. During those interviews, Joseph did not identify defendant from the photospread, but Patrick picked defendant with the caveat that defendant's hair was now gray (not black, as depicted in the older photograph).

The next day, police went to the apartment where defendant's truck was registered. As they arrived, someone threw a green iPhone (later identified as Patrick's) out of the apartment's window. Inside the apartment, they found Lopez, Jr.

Police thereafter showed Joseph a six-person photospread containing a more recent photograph of defendant; Joseph picked defendant out of that photospread.

## II. Procedural Background

The People charged defendant with (1) the second degree robbery of Joseph (Pen. Code, § 211),[2] and (2) the second degree robbery of Patrick (*ibid.*).[3] The People further alleged that a principal (namely, Mascorro) was armed with a firearm in the course of these robberies (§ 12022, subd. (a)(1)); that defendant's 1985 conviction for kidnapping constituted a "strike" within the meaning of our Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)) as well as a prior serious felony (§ 667, subd. (a)); and that defendant had served six prior prison terms (§ 667.5, subd. (b)).

Both Joseph and Patrick identified defendant as one of the robbers at the preliminary hearing.

Both Joseph and Patrick identified defendant as one of the robbers at the trial.

The jury found defendant guilty of both robberies and found true the allegation that a principal was armed with a firearm. Defendant subsequently admitted his prior convictions.

The trial court sentenced defendant to 18 years in state prison. For the first robbery, the court imposed a 16-year sentence comprised of a base term of 10 years (the high-end term of five years, doubled due to the prior strike), plus one year for the firearm enhancement, plus five years for the prior serious

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

3 Mascorro and Lopez, Jr. were charged with the same crimes and convicted. They appealed separately, and we affirmed their convictions. (See *People v. Mascorro* (May 19, 2016, B262793) [nonpub. opn.].)

felony. For the second robbery, the court imposed a consecutive two-year sentence comprised of a base term of two years (one-third the midterm of three years, doubled due to the prior strike). The court struck the enhancements for all six prior prison terms. The court awarded defendant 402 days of custody credit, comprised of 359 actual days and 43 days of good time/work time credit.

Defendant filed a timely notice of appeal.

## DISCUSSION

### I. Evidentiary Error

Defendant argues that the investigating police officer made two comments suggesting that defendant had a criminal history, and that these comments violated federal due process and necessitate reversal of his convictions. We review this claim de novo. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 225, fn. 7.)

#### *A. Pertinent facts*

During the prosecutor's direct examination of the investigating police officer, she asked, "Why did you [go to the location to which the truck Joseph saw was registered]?" The officer answered, "I have had prior dealings with [defendant] and his son. I had knowledge that—" Defendant's counsel interrupted with a relevance objection. The trial court noted that "prior dealings doesn't mean he . . . has ever been arrested or charged with anything" and "could be talking to him; it could be detaining him; it could be anything." However, the court sustained the objection and subsequently struck the officer's answer and instructed the jury to disregard it.

Several minutes later, the prosecutor asked the officer whether the older photograph of defendant was the "only

photograph available to [him] at that time." The officer answered, "That was the only booking photograph available to me." Defendant's counsel objected to the answer as nonresponsive, and the trial court sustained the objection. No one asked that the officer's answer be stricken or that the jury be admonished to disregard it. However, the court told the officer outside the jury's presence that his answers about his prior dealings with defendant and his reference to a booking photo "intimat[ed] and suggest[ed] things for the jury to speculate about," and warned him to "stop it."

At no point did defendant move for a mistrial on the basis of these statements.

***B. Analysis***

As a threshold matter, we will assume that the investigating officer's statements that defendant had a booking photograph (which necessarily rests upon a prior arrest) and that the officer had had "prior dealings" with defendant were inadmissible. (E.g., *People v. Anderson* (1978) 20 Cal.3d 647, 650 [evidence of a defendant's "prior arrests is inadmissible"]; *People v. Williams* (2009) 170 Cal.App.4th 587, 609-610 [same].) However, the question defendant raises is whether their admission violates due process.

As relevant here, the erroneous admission of evidence can violate due process in one of two ways: (1) its admission can violate due process directly "if it makes the trial fundamentally unfair" (*People v. Partida* (2005) 37 Cal.4th 428, 439; *Holley v. Yarborough* (9th Cir. 2009) 568 F.3d 1091, 1101[4]); or (2) its

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4 This decision disagrees with an earlier Ninth Circuit decision cited by defendant, *McKinney v. Rees* (9th Cir. 1993) 993

admission can constitute an "incident" that warrants a mistrial, at least if the defendant's """chances of receiving a fair trial have been irreparably damaged."" [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 703 (*Edwards*); *People v. Ledesma* (2006) 39 Cal.4th 641, 683). Defendant never asked for a mistrial on this basis, so he has forfeited any mistrial claim. (*People v. Chatman* (2006) 38 Cal.4th 344, 368 [a "[d]efendant may not argue that the court should have granted a mistrial he did not request"].) Because the touchstone for either type of due process claim is whether the jury's exposure to the inadmissible evidence rendered the defendant's trial "fundamentally unfair," we will overlook defendant's forfeiture and examine the question as to both types of claims.

We conclude that the investigating officer's comments about having "prior dealings" with defendant and about defendant's booking photograph did not render defendant's trial fundamentally unfair. To begin, these comments did not suggest that defendant had been *convicted* of any prior offenses: The booking photo comment implied that defendant had been arrested, while the "prior dealings" comment implied even less (as the trial court observed). What is more, these comments were brief and isolated, taking up mere seconds within the context of a trial that lasted over a week. Brief and isolated references to prior arrests—or, indeed, prior convictions—do not render a trial fundamentally unfair. (*Edwards*, *supra*, 57 Cal.4th at p. 703 [so holding, as to prior arrest]; *People v. Valdez* (2004) 32 Cal.4th 73, 123 [so holding, as to mention of defendant being in jail]; *People v. Franklin* (2016) 248 Cal.App.4th 938, 955-956 [so holding, as to

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F.2d 1378, 1384. We choose to follow the Ninth Circuit decision that accords with California law on this point.

mention of prior criminal convictions]; *People v. Collins* (2010) 49 Cal.4th 175, 197-199 [so holding, as to mention of defendant being incarcerated]; *People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581 [so holding, as to mention of defendant's prior criminality].) The court also admonished the jury to disregard the "prior dealings" comment, and we generally presume that jurors heed such admonitions. (*People v. O'Malley* (2016) 62 Cal.4th 944, 999.) To be sure, there are some "exceptional case[s]" in which the inadmissible evidence may be deemed to be "'incurably prejudicial.'" (*Edwards*, at p. 703; *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935.) But those cases are "extremely close case[s]" that turn on the jury's evaluation of the credibility of competing witnesses. (*Allen*, at p. 935; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129 [calling for greater scrutiny where "'the inference of identity is weak'"].) As we explain next, this is not such a case.

Even if we assumed a due process violation, any such violation is harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Both Joseph and Patrick had ample time to see defendant during the robbery, and both victims repeatedly and consistently identified him as one of the three robbers—in photospreads, at the preliminary hearing, and at trial.

Defendant argues that Joseph's and Patrick's identifications were not immune from impeachment. Joseph and Patrick disagreed over what color shirt defendant was wearing during the robbery; Joseph initially said it was black, then said it was white, then said defendant changed his shirt, while Patrick said the shirt was a brown, Hawaiian shirt. Joseph and Patrick

incorrectly estimated defendant's height; Joseph said he was five feet four or five inches tall; Patrick said he was "five, five four, five five," and defendant was actually 4 feet 10 inches tall. And Joseph gave inconsistent statements about whether he saw defendant atop one of the park's hills after the robbery. Based on these inconsistencies, defendant asserts that it is possible that Joseph and Patrick confused the third robber with the person they later saw get into the truck.

We reject this argument for two reasons. First, defendant's assertion that Joseph and Patrick mistakenly identified him as he got into his truck is belied by the fact that the truck's registration led them to the apartment where Lopez, Jr. was staying and where Patrick's iPhone was tossed out of the window as they approached. Second, and more fundamentally, these variations in testimony do not cast into doubt either Joseph's or Patrick's unwavering identification of defendant as the "shorter," gray-haired man who was one of the three people who robbed them.

**II. Custody Credits**

Defendant contends that the trial court miscalculated his good time/work time credits, the People conceded this is error, and we agree. A defendant with a prior serious felony conviction accrues good conduct time credits equal to 15 percent of his actual days in custody. (§§ 2900.5, 2933.1 & 4019.) It is undisputed that defendant had 359 days of actual custody credit on the day he was sentenced; this entitles him to 53 days of good conduct credit, not the 43 days he was actually awarded.

**DISPOSITION**

The abstract of judgment is ordered amended to reflect that defendant has 412 days of custody credit, comprised of 359 days

of actual custody credit plus 53 days of good conduct credit. The clerk of the superior court is ordered to forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

HOFFSTADT

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.*

GOODMAN

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