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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GLENN SAMUEL SUNKETT,

Defendant and Appellant.

A130086

(Mendocino County

Super. Ct. No. SCUKCR CR 09-89877)

Glenn Samuel Sunkett (appellant) was convicted, following a jury trial, of four counts of first degree robbery of an inhabited dwelling while acting in concert with at least two other persons; four counts of kidnapping; one count of first degree burglary; two counts of making a criminal threat; four counts of false imprisonment by violence; and one count of possession of a firearm by a felon. On appeal, he contends (1) the trial court erred when it denied defense counsel's belated motion to present expert testimony on eyewitness identification; (2) defense counsel was ineffective for failing to call an expert witness on eyewitness identification in a timely manner; (3) defense counsel was ineffective for failing to move to suppress an eyewitness's identification of appellant; (4) his rights to due process and a fair trial were violated when the trial court instructed the jury with CALCRIM No. 315, which permitted the jury to consider a witness's level of certainty when evaluating eyewitness identification; (5) his rights to due process and a fair trial were violated when the trial court instructed the jury with CALCRIM former No. 362, which he claims permitted the jury to infer consciousness of guilt from

appellant's false or misleading statements made during his trial testimony; and (6) the kidnapping convictions are not supported by substantial evidence.

In a petition for writ of habeas corpus (habeas petition), he raises numerous issues related to defense counsel's alleged incompetence.

We shall affirm the judgment and, in a separate order, shall deny the habeas petition.

### ***PROCEDURAL BACKGROUND***

Appellant was charged by information with four counts of first degree robbery of an inhabited dwelling while acting in concert with at least two other persons (Pen. Code, §§ 211, 212.5, 213, subd. (a)(1)(A)—counts one to four);<sup>1</sup> four counts of kidnapping (§ 207, subd. (a)—counts five to eight); one count of first degree burglary (§§ 459, 460, subd. (a)—count nine); two counts of making a criminal threat (§ 422—counts ten and eleven); four counts of false imprisonment by violence (§ 236—counts twelve to fifteen); and one count of possession of a firearm by a felon (§ 12021, subd. (a)—count sixteen). The information alleged, as to counts one through eight, that appellant had personally used a firearm in the commission of the crimes (§ 12022.53, subd. (b)), and, as to counts five through fifteen, that he had been armed with a firearm (§ 12022, subd. (a)(1)).

A jury convicted appellant of all charges and found true all allegations.

On October 15, 2010, the trial court denied appellant's motion for a new trial and habeas petition, and sentenced him to a total term of 63 years in state prison.

Also on October 15, 2010, appellant filed a notice of appeal. On October 25, 2010, appellant filed a habeas petition in this court in propria persona.

### ***FACTUAL BACKGROUND***

#### ***Prosecution Case***

##### ***1. The July 10, 2008, Incident—Victims' Testimony***

Michael Bennett testified that he owned a 45-acre property on North Highway One in Fort Bragg, Mendocino County, which included a 2,500 square foot house and some

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

outbuildings. He grew marijuana in an outbuilding on the property and had about 150 plants. He had a primary residence in Willits, but stayed at the Fort Bragg residence at times.

On the evening of July 10, 2008, Bennett came to the Fort Bragg residence, after an absence of four days. He had given permission to a friend, “Matt,” to enter the house in his absence. After stopping by the house earlier in the day on July 10, Bennett and his friend, Max Stover, drove up to the house sometime after 10:00 p.m. that night and parked in the driveway. As Bennett got out of his truck, someone grabbed him by his right arm. He turned and saw a Black man, who was taller than he was, holding his arm. That was all he clearly remembered before he was hit on the back of the head and went unconscious. He believed he was mostly unconscious after that, although he had a vague memory of being dragged on his stomach into his house while his hands were fastened behind his back and another memory of lying in his house feeling severe pressure on his back and shoulder, and of being lifted up before going unconscious again. Bennett was hospitalized for over a month after the attack. His face was severely injured and unrecognizable, and the left side of his head was “caved in.” His left shoulder was so severely injured that he had no use of his left arm for almost four months.

Bennett walked through his Fort Bragg property after he was released from the hospital. The marijuana plants were all gone from the outbuilding, marijuana was gone from the attic, and two pieces of expensive jewelry were also missing.

Three other witnesses who were present on the night of the attack on Bennett—Max Stover, Dusty Miller, and Matt Graves—also testified at trial regarding what happened that night.

Stover testified that he had known Bennett since high school, for about 40 years. He and Bennett had spent the evening of July 10, 2008, in Fort Bragg before returning to Bennett’s home about 11:00 or 11:30 p.m. Stover was driving Bennett’s truck and, after pulling into the driveway and getting out of the truck, Stover saw a gun pointed in his face. It was dark and he could not see who was pointing the gun, but he thought he saw two or three men near the truck. He was ordered to put his face against the glass of the

truck's rear window and, when he did so, he was handcuffed. A few minutes later, one of the men led Stover into the house. Inside the living room, he saw Matt Graves and Dusty Miller on one of the couches. There was a man with them who was tall, at least six feet. The man was silhouetted by light from the television and so Stover did not get a good look at him except in outline. He believed this man was wearing a full mask. Another man walked Stover into the living room and a third man may have walked in behind them. The men told Stover to sit on the couch and began asking questions. A few minutes later, two of the men went back outside and dragged Bennett into the living room. At some point, Bennett's hands were tied with zip ties.

While on the couch, Stover, who was still handcuffed, saw Graves and Miller's hands tied behind their backs with zip ties. The men asked if they knew where Bennett's money or valuables were, and they may have asked about marijuana too. Stover responded in the negative to these questions. The men asked Bennett questions too, but he was not coherent. The men had two guns between them, as Stover recalled. Stover kept his eyes on the floor and avoided looking at the men because he was scared for his life and did not want them to think he would be able to identify them later. At one point during the questioning, one of the men held a lit torch about three feet away and said to him and Graves that "they would burn our balls" if they did not tell what they knew. His tone was "conversational." That man was Black and he had facial hair—either a beard or just unshaven—and had a baseball cap on. He was about 5 feet 8 inches to 5 feet 11 inches tall. He was of medium build and was not wearing a mask. The man was wearing brownish camouflage pants and black boots. He was also wearing a gray and black hooded sweater or sweatshirt and black gloves, and was holding a silver revolver. The third man was stockier and wearing a half mask—like a "skiing neoprene cover"—and he was wearing a dark baseball cap. He was also wearing brownish camouflage pants<sup>2</sup> and black boots. He was holding a semiautomatic pistol.

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<sup>2</sup> At trial, Stover identified a pair of camouflage pants as looking like the pants two of the men were wearing.

At some point, the men took Stover, Graves, and Miller about 24 feet from the living room to a small spare room in the house, which was like a closet with a water heater. The men made them sit up on a platform and then put duct tape around their legs. Two of them took Graves outside briefly and also brought Bennett into the room. Bennett was still incoherent; the men poured water over his head and squirted water in his face, but he did not wake up. After asking more questions about where the “valuable stuff” was, one of the men stood in the doorway of the room for about 30 minutes while the other two left. Later, one of the men took \$200 from Stover’s pocket after asking if he had any money.

The men then locked them into the room. Stover could hear noise inside the house for a little while and then it got quiet. Stover, Graves, and Miller started trying to free themselves but then heard someone tell them not to move. After more time went by, Graves and Miller were able to free themselves and they got out of the room by kicking out a vent or plywood that was over a window. They then came around and let Stover out of the locked room. Miller used pruning shears to cut the chain between Stover’s handcuffs, which were black. They tried to clean up Bennett, who was bleeding from his head and nose and he was still incoherent. About 30 minutes later, Graves, Miller, and Bennett’s girlfriend, Kathy, who had come over, took Bennett to the hospital. Stover stayed at the house and cleaned up the blood that was on the floor and walls in a few spots. They did not call the police right away because of the marijuana on the property.

Miller testified that she had been best friends with Bennett’s daughter since middle school. On July 10, 2008, she went to Bennett’s house after work, at about 9:00 p.m., to get together with Matt Graves and cook dinner. Graves testified that he had known Bennett for about two years and had stayed at the house in Fort Bragg on occasion. He stayed overnight at the house on July 9 and, on the evening of July 10, Miller arrived at the house to get together and make dinner for him.

Miller and Graves described what happened next in similar terms. At about 11:00 p.m., they were in the kitchen cleaning up when a very tall Black man holding a gun came into the house. He was wearing an unzipped hoody sweatshirt and baseball

cap, a black shirt with the letters “FBI” on the front, army camouflage pants, a black belt, army-style lace-up boots, and mechanics’ gloves. He was holding a black semiautomatic gun, which he pointed at Miller and Graves. His hair was close shaven and he did not have facial hair. He had a well-defined jaw line and good features. He was at least six feet tall and weighed about 230 pounds. He told them to get on the ground, which they did, and also said he was there for a “bust” and that they would not be harmed if they followed directions.

Another man then came in with Stover. The second man was overweight, around 200 pounds, and his clothing was similar to that of the first man. He was about 5 feet 11 inches tall. He wore a camouflage mask that covered the lower half of his face and a shirt that said “FBI,” camouflage pants, and white gloves. He had slanted eyes and seemed very jittery. He was holding a silver revolver or snub-nose pistol pointed at Stover’s back. The first man told them to go into the living room, and they walked to the living room with Stover, with the two men behind them. Miller, Graves, and Stover sat on the couch. The first man stood in front of them and the second man left the room.

While Miller, Graves, and Stover were in the living room, a third man came in dragging Bennett, who appeared to be semi-conscious, by his arms. The third man weighed about 260 pounds and was clean shaven.<sup>3</sup> He also wore a black shirt that had “FBI” written on it, as well as camouflage pants, black boots, and mechanic’s gloves. The third man did not have a firearm. All three of the men were African-American. Both Miller and Graves identified a pair of pants at trial as looking just like the pants the men were wearing. Miller also identified two pairs of boots as looking like the boots the men were wearing and Graves identified a firearm as “very similar” to the one the first man was holding.

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<sup>3</sup> Miller thought the third man was shorter than the other two, maybe 5 feet 6 inches or less, while Graves described him as 6 feet 3 inches tall. Miller also testified that this man was wearing a camouflage mask and hat, while Graves testified that he was not wearing a hat or mask.

The men kept saying they were with the FBI and the first man said Bennett was in “real bad trouble,” that he had done something wrong, and that they had to either get money or kill Bennett. Miller and Graves said Bennett did not have any money. The first man also said he had been “sent from New York on a hit to eliminate Mr. Bennett.” He also asked where the “dope” was. The third man sat on a stool in front of them with a lit blow torch or barbecue-type lighter and said to Stover and Graves, “If you don’t tell me where the money is, somebody’s getting tortured tonight.” He specifically referred to blow-torching their testicles. Miller and Graves identified a torch at trial that appeared identical to the one used that night, except that Miller thought the one that night was a different color.

The men then tied Miller’s and Graves’s hands behind their backs with zip ties and bound Bennett’s hands with electrical cord. The first man, who seemed “in control of us and the whole operation,” asked them a lot of questions about where the money was, and they repeated that they did not know about any money. The men also asked later about marijuana, but seemed more interested in money.

After approximately 20 minutes, the men moved Miller, Graves, and Stover into a small closet-type room by the bathroom that was about five feet by ten feet in size, and had them sit on the edge of a platform. They then brought in Bennett, who was still semi-conscious, and he lay on the floor bleeding. The men started dumping water on Bennett’s head in an effort to revive him. When that did not work, they sprayed water in his face, which also did not work. Eventually, the men tied up all of their feet with tape, while continually asking where the money was. One of the men also took some money from Stover. The men then left the room, saying they would be back in 20 minutes, and locked the door behind them. When Miller and Graves tried to turn the fan off in the room because Bennett was cold and shivering, the men heard the movement and yelled to them to stop.

The victims waited another 10 or 15 minutes before Graves was able to move his hands to the front of his body; he then used scissors to cut himself and Miller free of the zip ties and to cut the duct tape off of all of their legs. Miller was able to pull a fan away

from the wall and she and Graves jumped out of the hole in the wall. They then went around and opened the closet door and let Stover out. Bennett looked “pretty bad” and they could not find a working phone. Graves therefore drove to the nearby house of Kathy, a girlfriend of Bennett’s, and from there called Bennett’s son, Jared. Miller examined Bennett for injuries and tried to keep him warm while they waited. After Kathy and Jared arrived, they decided to take Bennett to the hospital. They did not call the police because there was marijuana on the property. Miller later saw that her cell phone was missing from her purse. Graves saw that his cell phone was in the kitchen and had been broken and that \$300 had been taken from his wallet.<sup>4</sup> The house looked like it had been torn apart, with drawers open and things all over the floors.

## ***2. Miller and Graves’s Subsequent Identifications of Appellant***

Miller spoke briefly with police shortly after the incident. About a week later, in a more detailed interview, she described the three suspects to police. Then, a week after that, police showed her six or eight series of photographic lineups. She identified one of the photographs, saying it “might be” the first man who pointed a gun at her and Graves. Miller was later emailed a booking photo, which also appeared to be of the first man. She identified appellant at trial as that first man. She did not recognize him based on seeing photographs. When asked what it was about appellant that made her recognize him in the courtroom, Miller said, “It’s really why I came in today, to see him in person and see whether I did recognize him. And I’m just—on his appearance, his demeanor, it’s him.” She further explained, “[w]ith reference to the photographs again, I want to make it clear that part of the reason that I’m here today or that I wanted to come, besides having to come, is to see him, because I was not convinced with the photos, and I would never have said what I’ve said how certain I am just looking at those photos. They didn’t do much for me. In fact, it just made me more, like, I’m not sure. But being here today has made me pretty confident. I would say certain.” When counsel asked, “It’s not just

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<sup>4</sup> Graves also testified that the men said things indicating that they had previously stolen his passport, which had been sent to Bennett’s address in early May 2008 and which he had never received.

because he's seated at that table over there?" Miller responded, "No. It's just because it's him."

A week or two after the incident, Graves also met with law enforcement. He was shown several photographic lineups. In one lineup, he recognized a photograph of the first man who had come in and pointed a gun at him and Miller. At trial, he identified appellant as that man. He did not recognize appellant based on the photograph, but rather based on his facial features, including his eyes, which "are very, very distinct. I was being stared at by the defendant for several hours, and looking at him now, that's the individual. I can tell you 100 million percent. This isn't something I would forget."

Sergeant Greg Van Patten, a detective with the Mendocino County Sheriff's Office, testified that he met with Miller and Graves separately on July 16, 2008. Miller described the first intruder as a "really huge African American male" who was holding a semiautomatic gun. She said he was taller than 6 feet 1 inches and broad shouldered, with a square chin and dark skin. She also described the man as clean shaven. He was wearing a hat; the hair she could see was cut close to the scalp. He was wearing black lace-up military boots and woodland camouflage pants.

Graves described the first intruder as being approximately six feet tall, with a medium or beefy build; he was "the size of Barry Bonds." The man was clean shaven and holding a semiautomatic gun, either a nine-millimeter or a .45 caliber style. He was wearing baggy camouflage pants, a faded black T-shirt with "FBI" written on it and cheap-looking black boots.

Van Patten again met separately with Miller and Graves about a week later. He first showed Miller ten photographic lineups containing six photos each. One of the sixty photographs was of appellant, obtained from the California Department of Motor Vehicles database. Before showing her the photos, Van Patten admonished Miller that she was under no obligation to pick anyone out of the photos. She identified the photo of appellant as "possibly" being one of the three suspects. She also identified several other men in the lineup as possibly being one of the suspects. Van Patten then showed the 10 photographic lineups to Graves, after reading him the same admonition. Graves also

identified appellant as the first suspect who had confronted him and Miller in the kitchen. He did not identify any other possible suspects in the lineups.

In March 2009, shortly before appellant's trial was originally scheduled to begin, both Miller and Graves were out of the country for an extended period and Van Patten contacted them by email to ensure that they would be coming to the trial. Miller responded by email on March 31, 2009, stating that she was available and ready to testify. She also noted, regarding her prior identification of appellant as a suspect, "I only saw an old picture of the defendant and based on that picture I am NOT 100% sure it is him. Is the first time I will see a more recent image of him when I am on the witness stand?" Van Patten then emailed her the booking photo of appellant, taken on September 11, 2008, because it had been released publicly. He also admonished her: "Attached to this email is a booking photograph of the person whom [*sic*] was arrested, Glenn Samuel [*sic*] Sunkett, but don't be influenced by the photograph just because I am sending it to you. When it comes to testifying in court rely on your memory of the incident. After viewing the booking photograph feel free to email me with any questions or concerns." Van Patten also sent her photos of several items seized in a search of appellant's apartment. Later that day, Miller emailed a response, writing that a pair of pants and two pairs of boots looked like those worn by one or more of the suspects, but that two pairs of gloves did not. The next day, she emailed that a black jacket, a shirt, and pants shown in other photos looked familiar. Van Patten again emailed Miller on April 2, 2009, regarding trial timing. He also asked whether appellant's booking photo looked familiar, but she did not respond.

Van Patten attempted to send the same photographs of items seized from appellant's apartment to Graves in late March or early April 2009, but Graves never responded. A few weeks prior to trial, Van Patten showed Graves the photographs in person. Graves thought the pattern, although not the fabric, of some camouflage pants looked familiar. A flashlight, boots, and a butane lighter looked similar to those worn or used during the incident. He also thought that a gun seized from appellant's apartment

looked like the gun held by the first intruder. He remembered the gun as being either a nine-millimeter or a .45-caliber pistol.

### ***3. Additional Prosecution Evidence***

Sergeant Van Patten testified that, on July 11, 2008—the day after the incident at Bennett’s residence—an officer received information from a confidential source about a possible home-invasion robbery north of Fort Bragg. After briefly interviewing Miller, Van Patten and other sheriff’s deputies went to Bennett’s residence that evening to execute a search warrant. Stover was at the residence and was interviewed by another deputy. In searching the home, Van Patten observed, inter alia, a large extension cord, a broken cell phone, a roll of duct tape, a container of plastic zip ties, and some cut-apart handcuffs.

Mendocino County Sheriff’s Deputies also executed arrest and search warrants at appellant’s Oakland apartment early on the morning of September 11, 2008. Appellant was arrested and Aziza Washington, a young woman who was also in the apartment, was detained. When Washington asked an Oakland police officer who was present if she could get her purse from the bedroom, the officer retrieved the purse and found a black semiautomatic handgun inside.

In a second bedroom of the apartment, which appeared to be used as an office, deputies found a duffel bag containing a pair of woodland camouflage sweat pants, two pairs of black military-type boots, a roll of duct tape, a flashlight and spotlight, a pair of blue and white gloves, a brown butane torch or lighter, and a pair of pruning shears. In the attic, they found a pair of black tactical pants. A backpack in the living room contained a roll of duct tape, two small bags of marijuana, and three handcuff keys. Also in the living room, deputies found an electronic scale. The handcuff keys fit the cut-apart handcuffs that had been found earlier in Bennett’s residence.

Aziza Washington testified that she met appellant in June 2008, and their relationship was one of “casual intimacy.” In September 2008, she was asleep in the bedroom of appellant’s residence in the early morning when police arrived. Appellant was with her in the bed and her purse was on the floor in the bedroom. While she was

getting dressed in the bedroom, a police officer took her purse. She did not own or possess a firearm at that time; nor did she see a gun that day or put one in her purse. She acknowledged that an officer asked her at the police station whether a gun in her purse was hers; she had said no. She did not know how the gun got in her purse. She also acknowledged telling police that she had seen a black gun in appellant's apartment about a month earlier.

Employees from a number of Fort Bragg motels verified records showing that appellant had rented motel rooms in his own name on various occasions in the spring and summer of 2008, nearly always identifying himself with his California driver's license. The rentals occurred on April 9 to April 10 (Holiday Inn Express), April 25 to April 27 (Surf Motel and Gardens), May 1 to May 3 (Holiday Inn Express), May 23 to May 24 (Best Western Lodge), July 9 to July 10 (Beachcomber Motel), and July 10 (Ocean View Lodge). A clerk from the Beachcomber Motel remembered seeing three men, including a man she identified as appellant, check out shortly after noon on July 10. Another clerk testified that, although a tall, good looking, dark-skinned man named Glenn Sunkett checked into the Ocean View Lodge at around noon on July 10 for one night, he did not check out the following day.

Records from Hertz Corporation showed that appellant had rented five large vehicles in his own name between April and July 2008, including a Lincoln Navigator that he rented from July 9 to July 11.

Appellant owned a portable Covert Track GPS device in 2008. GPS records showed that the device had tracked a drive from Fort Bragg to a location two-tenths of a mile north of Bennett's house on April 26; a drive from appellant's apartment in Oakland to Fort Bragg on April 30 and May 1; and two drives past Bennett's house on May 24. The GPS records also showed a drive from Berkeley to Fort Bragg on the evening of July 9, during which the device moved north past Bennett's house before heading south again into Fort Bragg. Subsequently, on July 10, after the device moved to several locations in Fort Bragg, it was at Bennett's property from 11:11 p.m. to 1:20 a.m. The

device then moved to the Bay Area, eventually stopping at appellant's Oakland apartment at 4:24 a.m. on July 11.

Records from Bank of America and an Army/Navy surplus store located near appellant's apartment in Oakland showed that appellant had purchased three neoprene masks and a pair of camouflage pants from the store on July 9, 2008, using an ATM card. Other items sold by the store included black T-shirts with "FBI" written on the front, black military-style boots very similar to those worn by the suspects, and handcuffs.

### *Defense Case*

Linda Senteney, who testified as a fingerprint expert, examined the handgun found in appellant's bedroom for fingerprints. There were no usable prints on the gun, which was not surprising, since the textured surface of the grip would not retain fingerprints well. Nor was she able to obtain usable prints from the magazine and live rounds seized with the gun. Two usable prints were found on a jewelry box from Bennett's bedroom. One of the prints was Bennett's; the other was not appellant's.

Jamila Thomas testified that she had known appellant for about two years and that they were still "dating." On July 9, 2008, she went with appellant to Fort Bragg. He said it was going to be a business trip. When he picked her up at 9:00 or 9:30 p.m., appellant was driving a black Lincoln Navigator, which was a rental car, and was wearing jeans and a T-shirt. Appellant's facial appearance was the same then as it was at trial. Thomas had never seen him without a mustache and beard. He talked on the phone during the drive. Although he normally carried two phones, that night he had four phones with him; he also had a laptop computer. They arrived in Fort Bragg late that night and went to a hotel. Thomas waited in the car while appellant checked in. They went straight to the room and woke up the next day, July 10, between 9:00 and 10:00 a.m. Appellant left the room at 11:00 a.m. for about 30 to 45 minutes. When he came back, they packed their things and left the hotel; Thomas did not accompany appellant to the front desk to check out.

Thomas and appellant left the hotel in the Lincoln Navigator and went to a Denny's restaurant. Thomas went inside to order food while appellant stayed in the car

in the parking lot. She brought the food to the car and they stayed in the parking lot for about three hours. In the early afternoon, another car pulled into the lot and appellant went up to the car. There were three African-American men in the car, and appellant went back and forth between the two vehicles. Appellant was talking on the phone and texting during this time also. While at the restaurant, appellant seemed to get slightly angry. At one point, she saw him hand a credit card from his wallet to the driver of the other car. Between 4:00 and 4:30 p.m., they left the parking lot and appellant followed the three men to a nearby hotel. Appellant went into the front door of the hotel and was gone about 10 minutes. He then came out and handed something to the driver of the other car.

After that, appellant and Thomas drove to a beach area that was about 40 minutes away. They stayed there until it got dark and then, between 9:00 and 9:30 p.m., they headed back to the Bay Area. Appellant was on the phone for much of the drive. They met up with appellant's uncle between 11:45 p.m. and 12:30 a.m. at a gas station in West Oakland. They drove him to a friend's house in East Oakland and dropped him off. Thomas and appellant then went to Thomas's home in Richmond, arriving at about 1:00 a.m. Appellant was still up and using his computer when Thomas went to sleep at about 2:00 a.m.

On cross-examination, Thomas testified that she had talked with appellant about the case, including the police reports, many times since his arrest. She was in a relationship with him and she loved him. Thomas acknowledged that she did not tell anyone about her activities with appellant on July 10, 2008, until she called the defense investigator the month before trial. That was because she had not known earlier that that was the date of the alleged crime, even though she talked with appellant on the phone multiple times a day. Thomas also acknowledged that appellant had called her collect the previous morning and, before she even accepted the call, had quickly said, "Four cell phones." She took this comment as him reminding her to mention in her testimony the detail that he had four cell phones with him on their trip to Fort Bragg.

Also on cross-examination, Thomas testified that she had “only ever seen [appellant] with facial hair.” However, when shown two booking photos of appellant from September 11, 2008, she acknowledged that his facial hair was “pretty light.” She said he must have shaved since she had seen him the day before, on September 10.

Guy Sunkett (Guy), appellant’s uncle, testified that, on July 10, 2008, he borrowed a friend’s car to go see another friend at a club in Oakland.<sup>5</sup> The car broke down in Oakland and, after he ran into someone who had a cell phone, he used the phone to call appellant. It was 10:30 or 11:00 p.m. when he made the call. After about an hour, at midnight, appellant came to assist him. He was driving a Navigator and Jamila Thomas was with him. Guy also testified that in July 2008, appellant had more hair on his head than at trial and also had a beard and mustache. In fact, Guy had never seen appellant clean shaven; “[h]e’s just a hairy guy.”

On cross-examination, Guy acknowledged that, he had never told law enforcement about appellant coming to assist him that night. This was because he did not know what the charges were against appellant, did not think it was his business, and had no reason to say anything. He also acknowledged that he loves appellant very much.

William Kidd, chief investigator for the Mendocino County Public Defender’s Office, testified that, when he first met with appellant at the County Jail, appellant did not tell him any details about July 2008. In May 2009, the month before appellant’s trial, Kidd was asked to make contact with two witnesses: Jamila Thomas and Guy Sunkett.

As part of his investigation, Kidd purchased a pair of handcuffs at a military equipment store. The key to those handcuffs looked similar to those found in the search of appellant’s apartment. One of the keys from appellant’s apartment fit the handcuffs Kidd had purchased.

Appellant testified that he was operating several businesses at the time of his arrest, including a music recording and publishing company, a personalized perfume making company, and a tow truck business. His apartment was both his office and his

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<sup>5</sup> Guy remembered the date because it was a good friend’s birthday.

home. Appellant also worked in construction and was in the marijuana business. Many of the items found in his apartment during the police search were related to his various jobs. For example, he used the gloves, camouflage sweatpants, boots, duct tape, and a small butane torch in his construction work and towing business. Appellant had six cell phones at the time of his arrest; he used various cell phone services and also used various aliases when he registered the phones.

Appellant visited Fort Bragg frequently, starting in December 2007, to buy increasing amounts of marijuana from a supplier there. He initially transported the marijuana himself. Subsequently, he still brought the cash to the supplier himself, but he hired a “runner,” who had six employees, to transport the drugs to Oakland. Appellant purchased a GPS tracking device in late April 2008, which he used to track the marijuana he had purchased as his runners drove it to Oakland. He used large duffel bags to transport the marijuana, and he would put the GPS device in one of the bags before the transport.

Appellant arranged to pay \$75,000 to buy 30 pounds of marijuana from his supplier in Fort Bragg on July 10, 2008. He drove to Fort Bragg on the evening of July 9 with Jamila Thomas in a rented Lincoln Navigator. Before renting the vehicle, he went to an Army/Navy Surplus store to buy three masks and a pair of pants because he had been invited to a paintball event. Appellant and Thomas arrived in Fort Bragg at approximately midnight and checked into a hotel called the Beachcomber.

After checking out of the motel the next morning, appellant and Thomas went to McDonald’s, where appellant met with his runner and called his supplier. They then went to Denny’s, where his runner and his supplier’s runner were supposed to meet. In addition to his runner, his runner’s three employees were also present; they were all Black men. The supplier’s runner was delayed, and they waited in the parking lot for a long time. Eventually, appellant took his runner and the three other men to another motel, called the Ocean Point or something similar, where the men could wait for the supplier’s runner to bring the marijuana. Appellant and Thomas then headed back toward

the Bay Area, stopping at a beach along the way. He had left the GPS device in one of the bags he gave to his runner.

When appellant and Thomas were about an hour away from Oakland, his uncle called because the car he had been driving broke down and he needed a ride. Appellant picked his uncle up at a gas station and took him to a friend's house. Appellant then drove to Thomas's home, arriving at about 1:00 a.m. Before going to sleep, he checked the location of the GPS device on his computer. The next day he received the marijuana.

In July 2008, appellant had facial hair. He had never been clean shaven except once in 2002 or 2003.

When he was arrested on September 11, 2008, appellant did not have a gun in his apartment. He did not put a gun in Aziza Washington's purse and had never shown a gun to her. Although, after his arrest, appellant told police about his trips to Fort Bragg, he told them he went to buy only small amounts of marijuana and he never mentioned going there with Jamila Thomas. He also acknowledged telling Sergeant Van Patten he used a GPS device so he would not get lost in the woods. Regarding the items found in his apartment during the search, he said he used the barbecue lighter for his home grill and for construction work; the black tactical pants found there might have been left in the apartment by a previous tenant; and he got the handcuff keys from a friend's recording studio.

Appellant further testified that he was 6 feet 1 inches tall and his weight varied from 190 to 198 pounds. Appellant admitted that he had a 1991 or 1992 felony conviction for selling marijuana and cocaine base, a 1992 conviction for receiving stolen property, and a 2000 conviction for being a felon in possession of a firearm. He served eight years in federal prison on the firearm conviction and apparently was on federal probation at the time of trial.

### ***Rebuttal***

Sergeant Van Patten testified that tracking records for appellant's GPS device showed that the device had been at Michael Bennett's house on May 17, 2008, and in the late hours of July 10, 2008. Van Patten also testified that he had interviewed appellant

for over an hour shortly after his arrest. During that interview, he told appellant he was investigating a series of home invasion robberies in the Fort Bragg area and he had information that appellant had been in the area around the time of the robberies. Appellant said he had been to Fort Bragg on numerous occasions to buy small amounts of marijuana for personal use. He said he had gone there twice with a “guy,” but he never said he had gone there with a woman and never mentioned the name Jamila. Appellant also had denied owning any camouflage pants. Regarding his GPS device, appellant said he needed the device because the roads up in Mendocino County are winding and he did not want to get lost in the mountains.

On cross-examination, Van Patten acknowledged that there was no information showing that appellant’s GPS device stopped at Bennett’s house during its five or six trips past the property from late April 2008 to July 9, 2008.

***Surrebuttal***

Appellant testified that he had travelled to Fort Bragg once with a “guy.” After July 10, 2008, he continued to use his GPS device.

***DISCUSSION***

***I. Appellant’s Attempt to Present Expert Testimony on Eyewitness Identification***

***A. Trial Court Background***

At the conclusion of appellant’s direct testimony, defense counsel addressed the court as follows: “Your Honor, before trial there was some question between Mr. Sunkett and myself whether or not we would endeavor to try to retain the services of an expert witness with respect to eyewitness identification, especially cross-racial I.D. In the beginning when there was only a somewhat ambiguous I.D. by Mr. Graves of my client as being one of the perpetrators, initially I was not inclined as a tactical decision to put on an expert witness.

“Based upon information that has subsequently come before this jury, in light of Miss Miller’s I.D. of my client here in court, I am going to be requesting permission for [an Evidence Code section] 402 hearing to introduce the expert witness testimony relative to cross-racial I.D., the psychological factors that impact on identification. Certainly,

[the expert] would not render an opinion as to specifics in this case, but she would, in fact, since she is familiar with the research in these areas, would be able to provide assistance to the jury in evaluating the reliability of the particular eyewitness information in this case.” Counsel further stated that she was only able to determine the availability of the expert the previous night.

The prosecutor responded that the issue of eyewitness identification had been known to the defense since counsel took over the representation of appellant before trial. The prosecutor continued: “[T]here is no way I can proceed with an expert on cross-racial identification without, number one, doing some research for proper cross-examination and, number two, securing my own expert to provide at least consultation, if not expert testimony. So you’re talking about taking a trial out for weeks, because I don’t even know of such an expert in this area.” The prosecutor therefore objected to “this late discovery,” which was “not something new that’s arisen.” Defense counsel then said that she “had absolutely no idea that Miss Miller would even potentially identify my client in open court.”

The court denied the request, finding, first, that any issues related to eyewitness identification were not new and, second, that the jury had been told that the case would take approximately two weeks and they were already starting their third week of trial. In addition, the court noted that the jury would be instructed with CALCRIM No. 315, which refers to cross-racial eyewitness identification. The court further stated that if it granted the request, it would have to grant the prosecution a continuance so that it could locate an expert to provide rebuttal testimony or with whom the prosecution could at least consult in preparation for cross-examination. The court concluded: “Given the lateness of the hour and weighing the potential probative value of that evidence versus the evidence that has been presented, relevancy, et cetera, at this point I find that it’s late and I’m not going to permit it.”

**B. Trial Court's Refusal to Allow an Eyewitness Identification Expert to Testify**

Appellant contends the trial court abused its discretion and denied appellant due process, a fair trial, and the right to present a defense when it denied defense counsel's belated motion to present expert testimony on eyewitness identification.

Whether to allow expert identification testimony in a particular case is a matter within the trial court's discretion. (*People v. McDonald* (1984) 37 Cal.3d 351, 377 (*McDonald*), overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) "[S]uch evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*McDonald*, at p. 377, fn. omitted.)

In *McDonald*, the California Supreme Court found that the trial court's exclusion of the eyewitness identification testimony was an abuse of discretion because "no evidence linked the defendant to the crime, apart from eyewitness identification. The eyewitness testimony was equivocal; several witnesses testified that their view of the crime was partially blocked and obscured by rush-hour traffic; one eyewitness asserted that the defendant was definitely *not* the killer. The defendant also had a strong alibi defense. [The *McDonald* court] concluded that the eyewitness identifications were not corroborated by evidence that would lend them independent reliability." (*People v. Sanders* (1995) 11 Cal.4th 475, 509 (*Sanders*), discussing *McDonald, supra*, 37 Cal.3d at pp. 355-360.)

In *Sanders, supra*, 11 Cal.4th at page 509, on the other hand, our Supreme Court affirmed the trial court's exclusion of expert identification testimony, given that three of four eyewitnesses were unequivocal in their identification of the defendant, the offense took place in a lighted interior and the witnesses were in close proximity to the

perpetrators, two of the eyewitnesses were of the same race as the gunmen, the eyewitness evidence was corroborated by other independent evidence of the crime, and the defendant presented no alibi defense.

In the present case, as we shall explain, the trial court acted within its discretion in denying the motion to permit an identification expert to testify at trial.

First, as to the eyewitnesses, Graves expressed absolutely no doubt about his identification of appellant as the first intruder, during either the photo lineup or at trial. While Miller identified appellant in the photo lineup as “possibly” being the first intruder and did not respond to Van Patten regarding the booking photo he emailed to her, at trial she explained that she was not certain based on the photographs. Rather, she knew from seeing him in person at trial, based “on his appearance, his demeanor, it’s him.” Moreover, unlike the witnesses in *McDonald*, Graves and Miller spent some two hours in very close quarters with the first intruder, and had repeated verbal interactions with him. As Graves testified about his identification of appellant as the first intruder: “I was being stared at by the defendant for several hours, and looking at him now, that’s the individual. I can tell you 100 million percent. This isn’t something I would forget.” (See *Sanders*, *supra*, 11 Cal.4th at p. 509; *People v. Jones* (2003) 30 Cal.4th 1084, 1112 (*Jones*); compare *McDonald*, *supra*, 37 Cal.3d at pp. 355-360.) Also, Graves’s and Miller’s descriptions of the first intruder, offered soon after the crime took place and before they saw any photographs, were fairly accurate descriptions of appellant. Miller described him as taller than 6 feet 1 inches and broad shouldered, with a square chin and dark skin. Graves described him as being approximately six feet tall, with a medium or beefy build. Even Stover, who said he only saw the man who was initially with Graves and Miller in silhouette in front of the television, described that man as being tall, at least six feet.<sup>6</sup>

Second, although identification of appellant as the first intruder by Miller and Graves was plainly “a key element of the prosecution’s case,” their identification of appellant was “substantially corroborated by evidence giving it independent reliability.”

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<sup>6</sup> Appellant testified that he was 6 feet 1 inches tall and weighed between 190 and 198 pounds.

(*McDonald, supra*, 37 Cal.3d at p. 377; accord, *Jones, supra*, 30 Cal.4th at p. 1112.) A great deal of additional evidence beyond the eyewitness identifications connected appellant to the home invasion. This included evidence that a GPS device registered to appellant had tracked numerous drives from the East Bay to Fort Bragg in the spring and summer of 2008, including several drives by Bennett's residence, one of which occurred on the evening of July 9. On July 10, the night of the home invasion, the GPS records showed that the device was at Bennett's property for over two hours, after which it moved back to the Bay Area, eventually stopping at appellant's apartment in Oakland some three hours later. Also, records from various Fort Bragg motels showed that appellant had rented rooms on a number of occasions in the spring and summer of 2008. Notably, a clerk from the Beachcomber Motel remembered seeing three men, including appellant, check out of the motel shortly after noon on July 10.<sup>7</sup>

In addition, various items seized by police from appellant's apartment matched items the victims described as being used or worn by one or more of the intruders. These included a black semiautomatic handgun, camouflage sweat pants, two pairs of black military-style boots, gloves, a butane torch, duct tape, and keys that fit the handcuffs placed on Stover. There was also evidence that appellant had purchased three neoprene masks and a pair of camouflage pants from an Army/Navy surplus store near his apartment on July 9, 2008, the day before the home invasion took place. The store also sold several other items described by the victims as being worn or used by the intruders, including black T-shirts with "FBI" written on the front, black military-style boots, and handcuffs.

Third, while appellant did present an alibi defense, it was thoroughly implausible. Jamila Thomas and Guy Sunkett, the two primary defense witnesses, waited almost eight months until, on the eve of appellant's trial, they claimed to have been with him on the night the crimes were committed. In addition to their dubious testimony, appellant's

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<sup>7</sup> This contradicted the testimony of appellant and Jamila Thomas that they arrived in Fort Bragg on the night of July 9, spent the night at the Beachcomber, and checked out the next morning.

testimony was riddled with unlikely coincidences and inconsistencies. For example, he acknowledged buying the camouflage pants and masks the day before the home invasion, but claimed they were for a paintball party. He also insisted he had no knowledge of the gun found in his apartment, even though Washington had testified she did not put the gun in her purse and had told police she had seen a black gun in appellant's apartment a month earlier. As a whole, the defense testimony comes across as concocted to explain away each of the various items of prosecution evidence presented.

Finally, given the delays in the trial that would have been necessary if appellant's eyewitness expert testified, the court's concern over the timing of the request was also reasonable. (Cf. *People v. Samayoa* (1997) 15 Cal.4th 795, 840 [grant or denial of motion for continuance during trial “ ‘ “traditionally rests within the discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion” ’ ”].)

Under all of these circumstances, we defer to the trial court's conclusion that the potential probative value of the expert testimony in assisting the jury was outweighed by the prejudicial effect of the consumption of time at that late point in the trial, particularly in light of the strong corroborating evidence that was presented. (See *Jones, supra*, 30 Cal.4th at p. 1112; *Sanders, supra*, 11 Cal.4th at p. 510.) There was no abuse of discretion.

In any event, appellant cannot show prejudice. (See *Sanders, supra*, 11 Cal.4th at p. 510, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) In addition to the extensive corroborating evidence demonstrating guilt, the identification of appellant by two independent eyewitnesses, and appellant's extremely weak alibi defense, other factors show lack of prejudice. First, defense counsel thoroughly cross-examined Miller about the photo lineups she viewed, as well as the single booking photo of appellant and other photographs of evidence that Van Patten had emailed to her. She also cross-

examined Graves about the photographs he was shown of items seized from appellant's apartment after his arrest.

Second, in closing argument, counsel argued extensively about problems with the eyewitness identifications in this case, including the photo lineups and the photographs of items seized from appellant's apartment that were shown to both Graves and Miller after they were informed that appellant was the defendant in this case. She also described Miller's and Graves's identification of appellant as the first intruder as unreliable, arguing: "And the fact that two people, white people, want to identify my client, the one Black man in the room, as being one of the three Blacks there, that does not mean that that is a reliable identification of who committed the offense." She also described Graves's identification of appellant as being based only on his supposedly "standard Negroid features." Finally, the trial court instructed the jury with CALCRIM No. 315, which told the jury to consider numerous factors in evaluating eyewitness testimony, including, inter alia, whether the witness was under stress during the observation and whether the witness and the defendant were of different races.<sup>8</sup> Thus, it is not reasonably

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<sup>8</sup> The jury was instructed, pursuant to CALCRIM No. 315, as follows:

"You have heard eyewitness testimony identifying the defendant. As with any witness, you must decide whether an eyewitness gave truthful and accurate testimony.

"In evaluating identification testimony, consider the following questions:

"Did the witness know of have contact with the defendant before the event?

"How well could the witness see the perpetrator?

"What were the circumstances affecting the witness' ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?

"How closely was the witness paying attention?

"Was the witness under stress when he or she made the observation?

"Did the witness give a description and how does that description compare to the defendant?

"How much time passed between the event and the time when the witness identified the defendant?

"Was the witness asked to pick the perpetrator out of a group?

"Did the witness ever fail to identify the defendant?"

probable that a result more favorable to appellant would have resulted had the identification expert testified at trial. (See *Sanders, supra*, 11 Cal.4th at p. 510; *Watson, supra*, 46 Cal.2d at p. 836.)<sup>9</sup>

**C. Defense Counsel’s Belated Attempt to Call an Eyewitness Identification Expert**

Appellant further contends defense counsel was ineffective for failing to call an eyewitness identification expert witness in a timely manner.

To prove ineffective assistance of counsel, a defendant must show that “counsel’s representation fell below an objective standard of reasonableness . . . under prevailing professional norms.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*)). In addition, the defendant must affirmatively establish prejudice by showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.) “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Id.* at p. 697.)

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“Did the witness ever change his or her mind about the identification?”

“How certain was the witness when he or she made an identification?”

“Are the witness and the defendant of different races?”

“Was the witness able to identify other participants in this crime?”

“Was the witness able to identify the defendant in a photographic or physical lineup?”

“Were there any other circumstances affecting the witness’ ability to make an accurate identification?”

“The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.”

<sup>9</sup> With respect to appellant’s additional argument that the trial court’s exclusion of the expert testimony denied him due process, a fair trial, and the right to present a defense, we have already determined that there was no error in the exclusion of this evidence, much less prejudicial error. Hence, even assuming it is not forfeited due to the failure to raise it in the trial court, appellant’s constitutional claim also fails. (See *Sanders, supra*, 11 Cal.4th at p. 510, fn. 3.)

In the present case, counsel explained at the hearing on the motion for a new trial and habeas petition that she did not think that such an expert would be helpful to the defense or that the expense would be reasonable because she believed, based on experience, that such a witness “would likely be disregarded” by the jury in the circumstances of this case. She ultimately requested to call an expert on cross-racial identification “to appease” appellant, who had insisted that such a witness was necessary and whose family was willing to pay for it. The trial court found that “the method adopted by the public defender to attack the identification issue and whether to use an out-of-county cross-identification expert were tactical decisions which the court will not second-guess.”

In light of all of the circumstances, particularly counsel’s decision, based on experience, to focus on vigorous cross-examination, as well as on closing argument, to question the eyewitness identifications of appellant (see pt. I.B., *ante*), we cannot say that counsel’s initial decision not to call an identification expert to testify establishes incompetence. (See *Strickland, supra*, 466 U.S. at p. 688; see also *People v. Bolin* (1998) 18 Cal.4th 297, 334 [“Whether to call certain witnesses is . . . a matter of trial tactics, unless the decision results from unreasonable failure to investigate”].)

In addition, even assuming counsel’s failure to call an identification expert earlier in the trial constituted inadequate representation, appellant has not established that there is a reasonable probability that, but for this delayed request, the result of the trial would have been different. (*Strickland, supra*, 466 U.S. at p. 694.) As we have already discussed in part I.B., *ante*, the trial court did not abuse its discretion in denying the request because, inter alia, the eyewitness evidence was substantially corroborated by evidence giving it independent reliability. (See *Jones, supra*, 30 Cal.4th at p. 1112; *McDonald, supra*, 37 Cal.3d at p. 377.) Moreover, as also previously discussed (see pt. I.B., *ante*), even had the court abused its discretion, the additional evidence of guilt was overwhelming. Thus, no prejudice is shown. (See *Strickland, supra*, at p. 694.)

Accordingly, appellant’s ineffective assistance of counsel claim cannot succeed. (See *Strickland, supra*, 466 U.S. at p. 694.)

## **II. Defense Counsel's Failure to Move to Suppress Dusty Miller's Identification of Appellant**

Appellant contends defense counsel was ineffective for failing to move to suppress Miller's identification of appellant at trial based on an unnecessarily suggestive pretrial photographic identification procedure. (See *Strickland, supra*, 466 U.S. 668.)

### **A. Trial Court Background**

Approximately two weeks after the crimes took place, Miller viewed a photographic lineup and identified a photograph of appellant as "possibly" being one of the suspects. Sergeant Van Patten thereafter emailed to Miller, who was out of the country, a single booking photograph of appellant. He did so after Miller said that she was not 100 percent sure that the defendant in this case—appellant—was one of the intruders because she "only saw an old picture" of him in the prior photo lineup. She expressed concern that the first time she would see a more recent image of appellant was when she was on the witness stand. When Van Patten emailed the booking photo, he warned her not to be influenced by it and to rely on her memory of the incident when she testified at trial. At trial, Miller testified that she was certain that appellant was the first intruder. She said that she had not been convinced about this based on the photos she had seen and that her certainty was based on appellant's appearance and demeanor at trial.

### **B. Legal Analysis**

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*), citing *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107.) "[T]here must be a 'substantial

likelihood of irreparable misidentification’ under the ‘ “totality of the circumstances’ ” ’ to warrant reversal of a conviction on this ground. [Citation.]” (*Cunningham*, at p. 990.)

Here, respondent does not claim that the challenged identification procedure was not unduly suggestive. Instead, it argues that counsel was not incompetent since, even had she filed a motion to suppress Miller’s in-court identification of appellant, the motion would have been denied because the in-court identification was not impermissibly based on the suggestive identification procedure that was utilized. We agree.

The evidence presented at trial showed that Miller spent some two hours in Bennett’s house with the first intruder and had a prolonged opportunity to observe him. She also had numerous interactions with him. Miller’s description of the first intruder was fairly accurate and was similar to that of Graves.<sup>10</sup> In addition, although Miller testified at trial that she was not certain that appellant was the first intruder after identifying him in a photo lineup or after viewing the booking photo sent to her by Sergeant Van Patten, she expressed certainty in her identification of appellant as the first intruder at trial. As she explained, she was not convinced with the photos and it was “really why I came in today, to see him in person and see whether I did recognize him. And I’m just—on his appearance, his demeanor, it’s him.” At the hearing on the motion for a new trial and habeas petition, the court found the emailed booking photo “highly suggestive.” It also found, however, that Miller’s trial testimony was credible: “It was the in-court observation of the defendant’s demeanor and appearance that led her to her identification. [¶] The court found Miss Miller’s testimony to be credible.”<sup>11</sup>

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<sup>10</sup> In her initial description, Miller described the first intruder as “taller than six-[feet] one [inches],” with broad shoulders, a square chin, and dark skin, and clean shaven. Graves described him as six feet tall, with a medium or “beefy” build, clear skinned, and clean shaven. Appellant testified that he was 6 feet 1 inches tall and weighed 190 to 198 pounds. Although he claimed that he had not been clean shaven since 2003, Jamila Thomas acknowledged that, in his booking photo, taken after his September 2008 arrest, appellant’s facial hair was “pretty light.”

<sup>11</sup> The court made these findings in ruling that sufficient evidence was presented at trial to support the jury’s determination that appellant was one of the perpetrators.

In light of the various factors supporting reliability, we conclude that Miller’s identification of appellant as the first intruder was reliable under the totality of the circumstances, despite the suggestiveness of the second photo identification procedure. (See *Cunningham, supra*, 25 Cal.4th at p. 989.) Hence, it was reasonable for counsel to believe that a motion to suppress would not have been granted, and appellant has not shown that her failure to file such a motion constituted ineffective assistance of counsel. (See *Strickland, supra*, 466 U.S. at p. 688.)<sup>12</sup>

Moreover, we conclude that, regardless of the adequacy of counsel’s representation, appellant suffered no prejudice. Even without Miller’s identification of him as the first intruder, it is not reasonably probable that the result would have been different. (See *Strickland, supra*, 466 U.S. at p. 694.) Matthew Graves’s certainty—both during the photo lineup shortly after the offenses and at trial—that appellant was the first intruder, together with the strong corroborating evidence of guilt (see pt. I.B., *ante*), make it highly unlikely that counsel’s failure to file a motion to suppress affected the verdict.

### **III. Instruction with CALCRIM No. 315**

Appellant contends his rights to due process and a fair trial were violated when the trial court instructed with CALCRIM No. 315, which permitted the jury to consider a witness’s level of certainty when evaluating eyewitness identification.

First, we agree with respondent that this issue is forfeited due to appellant’s failure to object or request modification of the instruction in the trial court. (See *People v. Ward* (2005) 36 Cal.4th 186, 213-214 [court has no sua sponte obligation to modify or omit any factors, including certainty factor, listed in CALJIC No. 2.92, predecessor to CALCRIM No. 315].) Moreover, even were we to review this question (see *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172 [appellate court may review any instruction given

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<sup>12</sup> We observe again that counsel also thoroughly cross-examined Miller on her identification of appellant. She also cross-examined Van Patten about emailing appellant’s photograph to Miller, describing it as “a booking photo of the person whom [*sic*] was arrested.” (Cf. *People v. Gordon* (1990) 50 Cal.3d 1223, 1244, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 834.)

even if no objection was made thereto in trial court, “ ‘ “if the substantial rights of the defendant were affected” ’ ”]), we would find that it is without merit.

CALCRIM No. 315 instructs the jury that one of the questions to consider when evaluating identification testimony is: “How certain was the witness when he or she made an identification?”

In *People v. Wright* (1988) 45 Cal.3d 1126, 1141, our Supreme Court expressly approved a version of CALJIC No. 2.92 that told the jury to consider the degree of certainty in assessing the reliability of eyewitness identification evidence. (Accord, *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232.) Appellant argues that in recent years courts in other states have rejected the “outdated notion” that witness certainty is a valid factor for a jury to use in considering the reliability of eyewitness identification testimony. (See, e.g., *Brodes v. State* (Ga. 2005) 614 S.E.2d 766, 771 [witness certainty should not be included as a factor when instructing juries on deciding reliability of eyewitness identification “[i]n light of the scientifically-documented lack of correlation between a witness’s certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification, and the critical importance of accurate jury instructions”]; *Commonwealth v. Santoli* (Mass. 1997) 680 N.E.2d 1116, 1121 [same].) Without additional guidance from our own Supreme Court, however, we are bound by California precedent. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)<sup>13</sup>

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<sup>13</sup> We also observe that, even if erroneous, inclusion of the certainty factor in CALCRIM No. 315 would not require reversal, whether under the state or federal constitutional standard of error. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *Watson, supra*, 46 Cal.2d at p. 836.) First, this factor was just one of many non-exclusive factors that the jury was told it could consider in determining eyewitness reliability. Second, the certainty factor could cut against Miller’s identification, given that, in the initial photo lineup, she expressed uncertainty when identifying appellant as possibly being one of the suspects. Moreover, as previously discussed (see pts. I.B., II., *ante*), defense counsel thoroughly cross-examined Miller regarding her pretrial identification of appellant as the first intruder, and also argued in closing argument about the lack of reliability of both Miller’s and Graves’s identification testimony, particularly in light of the cross-racial nature of those identifications. (See *People v. Wright, supra*, 45 Cal.3d at

#### **IV. Instruction with CALCRIM No. 362**

Appellant contends his rights to due process and a fair trial were violated when the trial court instructed the jury with CALCRIM former No. 362, which he claims permitted the jury to infer consciousness of guilt from false or misleading statements he made during his trial testimony.

Over defense counsel's objection, the trial court instructed the jury with CALCRIM former No. 362, as follows: "If defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." CALCRIM No. 362 has since been modified to provide that the false or misleading statements at issue are only those made "before this trial." (CALCRIM No. 362 (2009 rev.) (2009-2010 ed.))

"On review, we examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.)

Appellant cites *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1248 (*Beyah*), in which the defendant argued that the trial court erred when it instructed the jury with CALCRIM former No. 362 because, inter alia, the court gave the instruction based on the defendant's trial testimony, which improperly singled out his testimony "as subject to heightened scrutiny and therefore has a chilling effect upon a defendant's choice to exercise his constitutional right to testify on his own behalf." The appellate court expressed doubt that the instruction was intended for use where the inference of

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p. 1143, fn. omitted [explanation of effect of any particular factor "is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate"].)

consciousness of guilt is based on “knowingly false or intentionally misleading statements in a defendant’s trial testimony.” (*Beyah*, at p. 1249.)

The court nonetheless concluded that the defendant had suffered no prejudice because California law allows a defendant’s false trial testimony to be considered in proper circumstances as evidence of consciousness of guilt. (*Beyah*, *supra*, 170 Cal.App.4th at p. 1249.) The court explained: “As applied to this case, CALCRIM [former] No. 362 did nothing more than state this principle, i.e., that if the jury concluded that defendant intentionally gave false or misleading testimony, it *may* infer that defendant is aware of his guilt and *may* consider that inference—along with other evidence—in determining defendant’s guilt. And although it might be said that the instruction singles out a defendant’s testimony as subject to heightened scrutiny compared to other witnesses, that is true only because the principle involved is uniquely applicable to the defendant. That is not, however, a legitimate ground for concluding that the instruction unconstitutionally burdened defendant’s choice to testify or resulted in any improper inference of guilt based on the jury’s evaluation of his testimony.” (*Id.* at p. 1250, fn. omitted.)

Here, unlike in *Beyah*, the instruction was not intended to apply to appellant’s trial testimony. Rather, the intended focus was on appellant’s pretrial statements to Sergeant Van Patten that he had traveled to Mendocino County to buy small amounts of marijuana for his personal use and that the purpose of the GPS device was to keep from getting lost in the mountains. He testified at trial that these statements were false. The prosecutor also discussed appellant’s lies to police during closing argument. Thus, in this case, it is unlikely that the jury mistakenly applied CALCRIM former No. 362 to appellant’s trial testimony.

In addition, to the extent the jury could have understood the instruction to be applicable to appellant’s false testimony during trial, we, like the court in *Beyah*, find no prejudice. CALCRIM former No. 362 was permissive, not mandatory, and allowed the jury to determine the weight that should be given to that evidence. It also explicitly provided that appellant’s false or misleading statements could not, alone, prove guilt.

(See *Beyah, supra*, 170 Cal.App.4th at p. 1250.) Because we conclude it is not “reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant’s guilt beyond a reasonable doubt,” appellant’s claim of constitutional error cannot succeed. (See *People v. Paysinger, supra*, 174 Cal.App.4th at p. 30.)

#### ***V. Substantial Evidence to Support the Kidnapping Convictions***

Appellant contends his four kidnapping convictions are not supported by substantial evidence.

“ “To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” ’ ’ ” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

Appellant was convicted of four counts of simple kidnapping, pursuant to section 207, subdivision a), which provides: “Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.”

“In order to establish a kidnapping under section 207, subdivision (a), the prosecution must prove ‘ “(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person’s consent; and (3) the movement of the person was for a substantial distance.” [Citation.]’ [Citation.]” (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1434 (*Arias*)). In determining whether the movement was for a substantial distance, “the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim’s foreseeable

attempts to escape and the attackers enhanced opportunity to commit additional crimes.” (*People v. Martinez* (1999) 20 Cal.4th 225, 237, fn. omitted, (*Martinez*.) Our Supreme Court emphasized that these contextual factors, “whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance.” (*Ibid.*)

In *Arias, supra*, 193 Cal.App.4th 1428, the court applied the contextual factors discussed in *Martinez*, holding that a rational trier of fact could have concluded that movement of the victim 15 feet from outside an apartment building to the inside of the victim’s apartment satisfied the asportation requirement. The court stated: “The movement of [the victim] increased his risk of harm in that he was moved from a public area to the seclusion of his apartment. Similarly, by scaring [the victim] into moving away from a public place, it was less likely defendant would have been detected if he had committed an additional crime. These factors support the asportation requirement for kidnapping. [Citations.]” (*Arias*, at p. 1435, citing *People v. Shadden* (2001) 93 Cal.App.4th 164, 168-169 [movement of victim nine feet to back of a store satisfied asportation requirement]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [movement of victim 40 to 50 feet from driveway that was “open to street view” to a camper that was hidden from view increased risk of harm to victim and satisfied asportation requirement].)

In the present case, appellant argues that the asportation requirement was not satisfied. At the hearing on appellant’s motion for a new trial and habeas petition, the trial court found, based on the totality of the circumstances, that the asportation requirement for the kidnapping counts had been satisfied, explaining: “The kidnapping was in furtherance of a robbery and gave the perpetrators of the robbery greater control over the victims and diminished the likelihood of interference by the victims. [¶] The movement itself was approximately 40 or 50 feet.<sup>[14]</sup> [¶] Nevertheless, given the serious

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<sup>14</sup> Apparently, the court was describing the movement of some of the victims from outside the house into the storage room when it estimated the distance at 40 to 50 feet, rather than the 24 feet Stover testified the victims were moved from the living room to the storage room. For purposes of this argument, we will assume the distance in question

head injury suffered by Bennett, securing of the victims' legs, in addition to their hands, and the removal of their cell phones, supports a reasonable inference that the change in environment increased the potential risk of harm to the victims. [¶] Further, it gave the suspects the ability to search the home unimpeded, engage in other criminal conduct, and increased [*sic*] their risk of detection.”

We agree with the trial court and conclude appellant's convictions for simple kidnapping are supported by substantial evidence. (See *People v. Valdez, supra*, 32 Cal.4th at p. 104.) By ultimately moving the four victims some 24 feet into a tiny storage room with no windows, binding their legs and locking them inside, the jury could reasonably infer that appellant made it more difficult for them to escape or sound an alarm, thereby increasing the risk that Bennett would suffer serious harm from his wounds while also decreasing appellant's risk of detection. It also gave appellant and the other intruders “[an] enhanced opportunity to commit additional crimes,” given that they no longer needed to watch over the victims. (*Martinez, supra*, 20 Cal.4th at p. 237, fn. omitted.) Hence, in light of these contextual factors, the evidence supported the jury's finding that the movement of the victims from the living room to the storage room satisfied the asportation requirement of section 207, subdivision (a). (See *Martinez*, at p. 237; *Arias, supra*, 193 Cal.App.4th at p. 1435.)

#### **VI. Habeas Petition**

In his habeas petition, appellant raises numerous contentions that were also raised in his habeas petition in the trial court, which was considered by the trial court in conjunction with the motion for a new trial. The primary claims concern ineffective assistance of counsel, based on defense counsel's alleged failure to (1) call an expert witness on cross-racial identification; (2) challenge Dusty Miller's courtroom identification of appellant due to the unduly suggestive pretrial identification procedure; (3) challenge the GPS evidence; (4) properly investigate the case and prepare witnesses; (5) file motions to suppress many of the items seized in the search of appellant's

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for all of the victims was the approximately 24 feet they were moved from the living room to the storage room.

apartment; and (6) challenge the sufficiency of the evidence to support the asportation element of the kidnapping convictions.

### ***A. Trial Court Background***

During the hearing on appellant's motion for a new trial and habeas petition, the following testimony was presented.

Sergeant Greg Van Patten testified regarding, inter alia, the booking photo of appellant that was emailed to Miller.

Defense investigator William Kidd testified that he first became involved in appellant's case in February or March 2009. Before the first trial setting conference, which was scheduled for approximately March 30, 2009, Kidd had reviewed many of the reports in the case, including information about the search warrants issued, although he never reviewed the actual search warrants themselves. He also interviewed some prosecution witnesses, went to Bennett's home to attempt to obtain a GPS reading, and verified the prosecution's GPS evidence. He did not investigate possible challenges to eyewitnesses' pretrial identifications of appellant.

Kidd met with appellant a few times in February and March 2009, but appellant did not mention any possible defense witnesses until May 2009, just before his second-scheduled trial. Kidd then spoke with all of those witnesses by telephone, except for potential witness Alan Gordon, who did not return his phone calls.

On June 19, 2009, after the trial had begun, appellant asked Kidd to request that defense counsel hire an identification expert. Kidd contacted Dr. Deborah Davis and learned what she would charge to be an expert witness. Appellant said he would pay the fees and Kidd began to arrange for Dr. Davis to participate in the trial.

After trial, Kidd interviewed a juror who said that the identification witnesses at trial were "big," apparently in terms of her evaluation of the case.

Defense attorney Linda Thompson testified that she was currently the Public Defender of Mendocino County and that, at the time of appellant's trial, she was the Assistant Public Defender. Thompson had worked as a defense attorney since she

became an attorney in 1985, and had tried violent felonies, including one death penalty case.

In this case, Thompson began representing appellant in mid-January 2009, following a period of representation by private attorneys. After reviewing the case file, she saw no bases for challenging the search warrants or for moving to suppress evidence seized from appellant's residence. When Thompson spoke with appellant in February 2009, he responded to her questions by saying, "They will be answered at some point in time." She then sent her investigator, Kidd, to meet with appellant to see if appellant would open up to him. Every time Thompson or Kidd met with appellant, they asked him to give them the names of any possible alibi witnesses. Although appellant called Thompson numerous times and sent her many letters, he did not give her any names and contact information until May 14, 2009.

Thompson believed the case was a circumstantial one and that there were questions about the identification of appellant as one of the intruders in that two of the victims could not identify anyone and only Graves had been sure of his identification of appellant after viewing the photo lineups. In addition, there were discrepancies between the physical descriptions the witnesses gave of the intruder and appellant's physical characteristics. She also knew that Graves and Miller were overseas shortly before trial and therefore demanded a speedy trial in the hope that they would not appear at trial.

Thompson received a letter from appellant, dated January 26, 2009, suggesting possible avenues of investigation, including, inter alia, verifying records of Bennett's injuries, interviewing all victims as to the accuracy of their statements in the police report, contacting Hertz Rental Car about the accuracy of the car rental agreements, visiting several of the motels to verify locations and distance and to interview desk clerks, verifying appellant's opening of the GPS account as well as getting an expert on GPS tracking systems and their accuracy, asking the Army/Navy store for descriptions of merchandise bought and the person who bought it, and getting a hand-writing expert to analyze all signed documents assumed to contain appellant's signature. Thompson did not believe this would be a good use of the defense's time and resources, given that

appellant had never denied being in the Fort Bragg area, renting the car, or going to the hotels. Thompson had asked appellant whether someone else could have used his debit card or driver's license or could have rented the rooms, but he had "indicated he was the one that did those things." Also, appellant never disputed the GPS evidence but, instead, thought it was critical to his defense because it showed the device being at a location different from where the evidence would show he was.

It was not until May 14, 2009, in a meeting with both Thompson and Kidd, that appellant offered "a very thorough statement . . . providing his defense, his side of the events and gave us the names of Jamila [Thomas] and his uncle [Guy Sunkett]," which he said would provide an alibi for the time of the offenses.

As to obtaining the services of an eyewitness identification expert witness, Thompson had used such witnesses in the past, but she did not believe an expert on cross-racial identification was needed. She believed that the taint of Miller's identification of appellant after viewing a single photograph and learning he had been arrested for the crimes, as well as the discrepancies between the descriptions and appellant, would be sufficient. She also had found that in trials in Mendocino County in which she had used expert witnesses, "juries have a tendency of disregarding that evidence." She did not believe that the expenditure of funds for an expert witness "who would likely be disregarded in light of this particular case" was necessary or appropriate, and she indicated this to appellant. Thompson believed that if Miller identified appellant at trial, "we'd have enough information to go after cross-examination to put her credibility into issue." For that reason, she also did not file a motion to suppress Miller's identification.

In early 2009, appellant told Thompson that Aziza Washington had a tape recording relevant to the case. The defense contacted Washington more than once to request a copy of the recording, but never received a copy of it until someone sent it to the District Attorney's office, which forwarded a copy to the defense. Kidd played the tape recording for appellant. Thompson learned of another possible defense witness, Alan Gordon, at some time before trial. She asked Gordon to contact her office, but he

never responded to that request. She believed Gordon appeared at her office during the “closing portions” of the trial; she did not meet with him.

Thompson acknowledged making a late request to call Dr. Deborah Davis as an expert on cross-racial identification. She did so because appellant “wanted that. Mr. Sunkett paid for it. And so I thought I, at that point, would make an effort to satisfy Mr. Sunkett’s wish. It’s not something I would have done. She was not on the witness list. I did it to appease Mr. Sunkett.”<sup>15</sup>

Regarding whether two dismissals of the complaint would bar a new complaint from being filed, Thompson testified that the case had been dismissed once, not twice. In addition, on one occasion, a duplicate complaint was filed and then stricken as wrongly filed.

Appellant testified that he had called the Public Defender’s office some 200 times and had written 14 to 15 letters to his attorney since he had been taken into custody. He never received a response to his letters. Thompson met with him only twice from the time she was appointed to represent him until the end of trial, other than briefly visiting him once or twice in the holding cell during trial. In the few times he talked to her, she never went over the elements of the offense or what the prosecution had to prove. She never discussed with him his role as a witness and the questions he would be asked when he testified. She did not go over the jury instructions with him ahead of time or seek his input on jury questionnaires.

Appellant encouraged Thompson to hire an expert in cross-racial identification, but she said she could win the case without one. Once she received discovery showing the tainted email correspondence from Sergeant Van Patten to a witness, she changed her mind and said they would need an identification expert. After Dusty Miller testified,

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<sup>15</sup> We find unpersuasive appellant’s claim that, in light of Thompson’s statement to the court during trial that Dr. Davis’s testimony would be “imperative” to the defense, she committed perjury when she told the court at the post-trial hearing that she had moved to call Dr. Davis solely to appease appellant.

Thompson said she could not afford to retain an identification expert, so appellant said he would pay.

During jury selection, Thompson showed appellant a fax she had received from Alan Gordon, in which he said he would be available for trial and gave a short description of what his testimony would be.

On cross-examination, appellant acknowledged that in none of the letters to counsel did he provide names of any possible defense witnesses other than Aziza Washington. He testified that he did, however, provide her with a list of alibi witnesses in numerous voice mails and mentioned them during court appearances. He also acknowledged that he first told Thompson about his alibi defense in May 2009, a week or two before his trial began. In his letters, appellant told Thompson that he wanted her to attack several items of prosecution evidence, including testimony of the witnesses as being inconsistent, the GPS evidence, evidence of items he purchased at the Army/Navy Surplus store, the severity of injuries Michael Bennett sustained, and the rental car agreements.

At the conclusion of the hearing, the trial court denied both the motion for a new trial and the habeas petition. In making its rulings, the court first summarized the evidence presented at trial and then found that there was sufficient evidence to support, *inter alia*, the kidnapping conviction. (See pt. V., *ante*.)

With respect to Miller's in-court identification, the court found no prejudice from her "highly suggestive" viewing of the single booking photo before trial. The court explained that it had found credible her testimony that it was not the photographs, but rather "the in-court observation of the defendant's demeanor and appearance that led her to her identification." The court stated that there was also significant corroborating evidence, including appellant's connection to the GPS device and its coordinates; the clothing, boots, and semiautomatic handgun found in his apartment; receipts from the Army/Navy store showing his purchase of camouflage clothing, as well as the availability at the store of handcuffs similar to those used on Max Stover; motel receipts showing

appellant was in the Fort Bragg area during the time of the home invasion; and appellant's testimony that he was in the area.

As to the ineffective assistance of counsel claims, the court noted that it was "familiar with Miss Thompson's work while she has been in Mendocino County and has observed her to be a diligent and well-prepared advocate. [¶] The court observed nothing during the actual trial that would suggest otherwise."

Specifically, regarding counsel's determination of how to address the witness identification issues, the court found: "Although reasonable attorneys may disagree, the method adopted by the public defender to attack the identification issue and whether to use an out-of-county cross-identification [*sic*] expert, were tactical decisions which the court will not second-guess."

Regarding preparation of alibi witnesses to testify, the court stated: "An alibi defense was presented through the testimony of the defendant and several independent witnesses. The independent witnesses seemed prepared to give testimony and did raise issues of credibility. [¶] Based on the verdicts by the jury, little or no weight [was] given to the defense witnesses[;] the court can find no fault in the jury's determination."

Regarding whether counsel adequately investigated additional defense witnesses who would have further corroborated his alibi defense, the court noted that counsel had explained the problems she had in identifying and making contact with defense witnesses and the court found her explanation to be credible. Moreover, in light of declarations from additional potential alibi witnesses that were submitted in support of appellant's motion for a new trial and habeas petition, the court did not believe that testimony by additional witnesses would have resulted in a more favorable verdict.

Regarding the GPS evidence, the court found that counsel had adequately investigated that evidence, having consulted with Mendocino County Information Services about the reliability of appellant's GPS device and the relevant coordinates. As the court stated: "The defense was alibi. [¶] Again, although reasonable attorneys may disagree, the decision to challenge [*sic*] the GPS device and the coordinates obtained from it was a tactical determination and will not be second-guessed by the court."

Regarding the various search warrants and affidavits in the case, the court found that no evidence was presented to rebut counsel's testimony that she did not see a basis for bring a motion to suppress evidence. Nor did the evidence show that a legal basis existed to move to set aside the information.

In light of these findings, the court concluded that appellant had failed to meet his burden of showing that counsel's conduct fell below professional standards and, further, that any of the alleged errors prejudicial.

### **B. *Legal Analysis***

We have already rejected two of the primary contentions raised in appellant's habeas petition in our discussion of his direct appeal, i.e., defense counsel's alleged ineffectiveness for failing to (1) call an expert witness on eyewitness identification in a timely manner (see pt. I.C., *ante*), and (2) move to suppress Dusty Miller's identification of appellant (see pt. II., *ante*). Counsel's testimony and the trial court's findings regarding counsel's credibility and lack of prejudice further support our conclusions on these issues.

Appellant also raises many alleged failures by counsel to properly investigate the case, including the failure to confer in a timely manner with appellant; meet with appellant's alibi witnesses or investigate their statements; contact potential alibi witnesses, Alan Gordon, who had bought three neoprene masks from the Army/Navy Surplus store before the crimes occurred, and Britney Flow, who allegedly was engaged in an extensive telephone conversation with appellant at the time of the offenses; investigate and locate a recorded phone message containing another person's confession to the crimes; investigate a coded letter a suspect sent to appellant; investigate the accuracy of the GPS coordinates and the underlying science; or review search warrants for a possible motion to suppress.<sup>16</sup>

The evidence presented at the hearing in the trial court on the motion for a new trial and habeas petition show that it was appellant who did not share his alibi defense

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<sup>16</sup> Appellant's claims of ineffective assistance of counsel encompass both attorney Thompson and investigator Kidd.

with Thompson or Kidd until shortly before trial and that Kidd spoke with Thomas and Guy Sunkett before trial. We have no reason to doubt the court's finding that both witnesses appeared well-prepared for their testimony. As to additional potential defense witnesses, the evidence further shows and the court found that Gordon did not respond to counsel's efforts to reach him and obtain his proposed trial testimony until the closing days of the trial. Moreover, appellant admitted at trial that he had bought three neoprene masks the day before the offenses took place. With respect to Flow, appellant included only a letter purportedly from Flow to support his claim that he had been talking on the phone with her at the time of the crimes. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [habeas petition must include copies of all reasonably available documentary evidence supporting a claim, including affidavits or declarations].) In addition, we agree with the trial court's conclusion that, had the additional witnesses testified at trial, it would not have resulted in a more favorable verdict. Hence, appellant can show neither ineffective assistance nor prejudice with respect to counsel's supposed failure to properly investigate potential defense witnesses. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)

As to the failure to investigate the alleged recorded confession, counsel testified that the defense had contacted Washington more than once to request a copy of the recording, but did not received a copy of it until the District Attorney's office forwarded a copy to the defense. A District Attorney's investigator who had listened to the recording stated that he "immediately recognized the female voice as Jamila Thomas and the male voice as Alan Gordon." The investigator also noted that during many of the recorded conversations at the jail appellant had with Washington, Gordon, and Thomas, they had referred to the preparation of "a recording that would clear [appellant's] name." Given this evidence, neither incompetence nor prejudice is shown. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.) Similarly, the alleged coded letter sent to appellant by a suspect is not convincing. Nothing in the text of the letter seems threatening, but appellant appears to have randomly circled letters in various words of the letter to spell out the following message: "Sorry U R gettin blame. Didnt know GPS was on car. Yo[u] snitch U die." Again, appellant cannot show that counsel was unreasonable in

failing to investigate this letter and, moreover, her lack of investigation clearly could not have prejudiced appellant. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)

Regarding appellant's claim that counsel failed to investigate the accuracy of the GPS coordinates and the underlying science, Thompson testified that she believed such an investigation would be a waste of defense time and resources, given that appellant admitted to being in Fort Bragg, renting the car, and going to the motels. Counsel also noted that appellant had never disputed the GPS evidence. Furthermore, the evidence showed and the trial court found that counsel had adequately investigated the accuracy of the GPS evidence. No ineffective assistance of counsel is shown. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)

Regarding the claim that counsel failed to review the search warrants for possible grounds for moving to suppress evidence found in appellant's apartment, first, appellant admitted that he had bought the items purchased with his debit card at the Army/Navy Surplus store. Second, counsel testified that she did review the search warrants and affidavits and saw no basis for challenging them, and the court found that no evidence was presented to rebut counsel's testimony; nor did the court discern evidence of any legal basis for challenging the search warrants. Although appellant claims that some of the search warrant materials were missing from the defense file that was sent to a private attorney post-trial, appellant's assertion does not prove that counsel did not have and review the documents before trial, nor does he offer any conceivable ground for challenging the search warrants. Again, appellant has failed to show that counsel was ineffective. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)

Similarly, appellant claims that counsel should have moved to suppress a number of items obtained during the search of his apartment on the ground that they were irrelevant to the offenses charged. For example, he argues that the black semiautomatic handgun seized by police "had no connection to [him] or the crimes alleged" and that "there was no evidence [he] ever possessed the firearm or even was aware of its existence." Contrary to appellant's argument, the gun plainly was relevant in that it matched witness descriptions of one of the guns used in the burglary and was found in

Aziza Washington's purse in his bedroom. Moreover, Washington testified that it was not her gun and she did not know how it got in her purse. She further acknowledged telling police she had seen a black gun in appellant's apartment about a month earlier.

Appellant argues that several other items seized from his apartment were also irrelevant, including gray and black duct tape, pruning shears, a digital postal scale, blue and white gardening gloves, blue and black flashlights, black tactical pants, camouflage sweat pants, two pairs of black boots, a brown barbecue lighter, and a black jacket. According to appellant, because some of these items did not precisely match the witnesses' descriptions, the jury could have drawn unfair inferences from their admission into evidence. First, most of these items were similar enough to those described by the victims of the offenses to make them relevant to the question of whether appellant was involved in the crimes. (See Evid. Code, §§ 210, 351.) In addition, even if one or two of the items, such as the postal scale, were not directly relevant, their impact was minimal and plainly not prejudicial. (See *Strickland, supra*, 466 U.S. at p. 694.)

Appellant also argues that counsel was ineffective for failing to bring a motion either before trial (§ 995) or at the close of the prosecution case-in-chief (§ 1118.1), based on insufficiency of the evidence to support the asportation element of the kidnapping charge. (See § 207, subd. (a).) According to appellant, the prosecution witnesses' testimony showed that "the movement of all the victims was between twenty-five and fifty feet inside the vicinity of the home." In light of our previous conclusion that there was substantial evidence supporting the kidnapping charges (see pt. V., *ante*), appellant cannot show that counsel was ineffective for failing to bring motions pursuant to section 995 or section 1118.1 as to these counts. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)

Appellant further contends he was improperly charged three times for the same incident. According to appellant, because these felony charges were dismissed twice before the final information was filed, any further prosecution was barred by section 1387 and counsel was ineffective for failing to challenge the third information. The record makes clear, however, that, for purposes of section 1387, the charges were dismissed

only once. Although a complaint filed in March 2009 (No. 09-89786) was also stricken because it was a duplicate of another document, that action did not implicate the “two dismissal” rule of section 1387. (See *Berardi v. Superior Court* (2008) 160 Cal.App.4th 210, 225 [“trial court's dismissal of the information on the nonstatutory ground that it was a ‘duplicate filing’ or duplicative accusatory pleading did *not* constitute one of the statutory grounds of dismissal that terminates an action within the meaning of section 1387”].) Hence, because appellant was not improperly charged three times for the same incident, this claim also fails. (See *Strickland, supra*, 466 U.S. at p. 688.)

Appellant points out a number of additional miscellaneous grounds allegedly showing counsel was ineffective, including her failures to (1) call his father as a character witness, (2) confer enough with him, (3) investigate the inhumane treatment of appellant in jail, (4) file a motion opposing forfeiture of his property, and (5) object to a falsified prosecution map presented during closing argument regarding the route of the GPS device. He also alleges counsel was ineffective for giving him inaccurate information regarding the time he was on his laptop computer on the night of the crimes. All of these claims are either irrelevant to the validity of the judgment or plainly do not reflect either incompetence on counsel’s part or prejudice. Hence, appellant does not demonstrate ineffective assistance of counsel as to these allegations either. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)

In conclusion, appellant’s habeas petition is without merit and cannot succeed.

*DISPOSITION*

The judgment is affirmed.<sup>17</sup>

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.

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<sup>17</sup> In a separate order, we also deny appellant's petition for writ of habeas corpus.