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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re D.M., a Person Coming Under the
Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

D.M.,

Defendant and Appellant.

A131153

**(Solano County
Super. Ct. No. J39830)**

In these proceedings under Welfare and Institutions Code section 602, D.M. appeals from a jurisdictional order that found he committed a robbery in violation of Penal Code section 211. He contends: (1) the court erred in denying his motion to suppress the identification of D.M. as the robber, on the ground that the police unconstitutionally detained him without a reasonable suspicion that he had committed a crime; (2) the court erred in denying his suppression motion because the in-field identification procedure was unduly suggestive and violated his due process rights; (3) a booking photograph shown to the victim at the jurisdictional hearing should have been suppressed; and (4) the evidence was insufficient to sustain the robbery allegation. We will affirm the order.

I. FACTS AND PROCEDURAL HISTORY

A juvenile wardship petition filed on July 22, 2010, alleged that D.M. committed a robbery of Soufiani Chami on July 20, 2010. (Pen. Code, § 211.) The petition also alleged an enhancement for personal use of a firearm. (Pen. Code, § 12022.53, subd. (b).)

D.M. sought suppression of the evidence that Chami identified him as the robber, on two grounds: his initial detention was unconstitutional, and the in-field identification by Chami was unconstitutional. The matter proceeded to a combined suppression hearing and contested jurisdictional hearing that commenced on November 12, 2010.

A. *Jurisdictional and Suppression Hearing*

The juvenile court considered the evidence, including the following, before ruling on D.M.'s motions and the delinquency petition.

1. *The Robbery*

Victim Chami testified that he was riding his bicycle home from work around 10:00 p.m. on July 20, 2010, when a man suddenly pushed him off the bicycle and he fell to the ground. When Chami got up, he saw that the man was pointing a gun at him and was accompanied by another man.

Chami was “face-to-face” with the man who pointed the gun at him, no more than a foot away. The gunman was wearing a hat, had tiny eyes, was African-American and was of average height and weight. He was wearing large jeans, a jacket, and sneakers, and “most [of] the colors he was wearing [were] dark colors.” The man pointed the gun at Chami’s body, moving the gun in a circular motion in a threatening way.¹

The gunman looked in Chami’s jacket, searched Chami’s pockets, and took Chami’s phone and backpack. Chami believed he would be shot if he resisted. The gun

¹ At the hearing, Chami was asked if he recognized anyone in the courtroom to be the person who knocked him off his bicycle. Chami said he did not. Defense counsel moved for a dismissal, and the court deferred its decision. Later in the hearing, Chami identified a photograph taken of D.M. shortly after the incident as depicting the gunman who robbed him. In the photograph, D.M. was not wearing glasses and had a hat, like the robber; at the hearing, D.M. wore glasses and had no hat.

was “big” and “frightening,” and the gunman kept it a foot or less away from Chami’s body.

The robbery took about two minutes, at which point the robbers left the scene around Essex and 40th Street. Chami followed them and asked for his phone back. The second man asked the gunman to return the phone, but the gunman told Chami to leave or he was going to shoot him. Chami fled on his bicycle, borrowed a phone from someone on the street, and called the police.

2. Chami’s 911 Call

Chami’s call to 911 was received at approximately 10:17 p.m., reporting a robbery at 43rd and Essex Streets. Chami described his assailants as two African-American males wearing dark-colored (gray or black) clothing including a jacket, pants, and hat; the gunman was the shorter of the two and had small eyes. Dispatch advised officers that the suspects had fled eastbound on 43rd Street.

3. Officer Duff’s Interview of Chami

Officer Ryan Duff of the Emeryville Police Department was dispatched to the robbery scene at 43rd and Essex Streets. At 43rd and San Pablo Streets nearby, Duff contacted Chami, who described the two suspects and pointed where they went. Chami told Duff they were two “black males,” between 18 and 25 years old, wearing dark clothing and hats, and one was armed with a handgun. Duff broadcast an updated description and reported that the suspects were traveling eastbound on 43rd Street toward Adeline.

4. Officer Mayorga’s Detention of the Suspects

Meanwhile, Emeryville Police Officer Edward Mayorga searched for suspects fitting the description contained in the dispatch call he received at 10:17 p.m. He recalled that the dispatch mentioned “two black males” who had robbed a victim at gunpoint and were wearing dark clothing; one of the subjects had small eyes. Mayorga testified that the area near Market Street is a high crime area and, after robbing someone, suspects in many instances run eastbound through Adeline Street. He drove eastbound on 40th Street to Market Street and made a northbound turn onto Market.

At 10:21 p.m., about four minutes after the initial report of the robbery, Officer Mayorga reported three possible suspects in the 4500 block of Market Street. Specifically, he observed three African-American males standing at the corner of 45th and Market. This location was just about four blocks away, or three-tenths of a mile, from the scene of the robbery; it would take 4-10 minutes to walk there.

Although Officer Mayorga had driven in the general direction in which the robbers were reportedly travelling, he observed no vehicular traffic in the four minutes since the initial report of the robbery, and the only suspects he observed were the three black males at the corner of 45th and Market. In fact, Officer Mayorga did not see any other individual in the area.

The suspects met the description supplied by dispatch, in that they were black males wearing dark clothing, including dark jeans. All three of them looked at Officer Mayorga. When the officer started to turn his marked patrol vehicle around to approach them, one of the group (A.C.) started to “walk away briskly.” Officer Mayorga testified: “due to them being in the area, fitting the description and one of them turning as soon as I drove by, he started walking away from me, prior experience tells me that that subject might be possibly trying to avoid me due to the fact that he might have committed a crime.”

Believing from the information he had received from dispatch that a gun was involved in the robbery, Officer Mayorga conducted a “high-risk stop,” by which he got out of his police vehicle, drew his firearm, and ordered the three suspects to the ground. The suspects complied. About 15-20 seconds later, other officers arrived and handcuffed them.

The three suspects were identified as E.C., A.C., and appellant D.M.

5. Officer Duff's Transportation of Chami for an In-Field Identification

Hearing Officer Mayorga's broadcast that he had possible suspects at 45th and Market, Officer Duff (who had been interviewing Chami) placed Chami in his patrol car and drove to Mayorga's location for an in-field identification.

Chami recalled that the officer told him that Chami would “have to come to see these guilty guys” to determine if he could identify them, or that Officer Duff’s colleagues were “trying to find the guilty guy.”² Officer Duff testified, however, that he did not discuss with Chami at that point what was going to happen next. Moreover, Duff testified, at no time before Chami’s identification of D.M. did Duff refer to the suspects as “guilty,” and he would never say such a thing because it could taint the identification.

6. *Chami’s Identification of D.M. as the Robber*

When Officer Duff and Chami arrived at Officer Mayorga’s location, Chami was in the backseat of Duff’s patrol vehicle and the suspects were across the street. Officer Mayorga and other officers were in the process of conducting a “high risk stop” of the suspects, and Duff got out of his car to assist. After the suspects were handcuffed, Duff returned to his patrol vehicle.

² On direct examination, Chami testified: “Q. . . . What happened next? [¶] A. Then the policeman came and he told me what happened. I explained to him what’s happened to me and then he was waiting for his colleagues to identify suspects and then he received my call that I have to come to see these guilty guys.” . . . Q. Mr. Chami, you didn’t hear that call [from Duff’s colleagues]? [¶] A. No, I didn’t, but the policeman told me, well, like let’s go and see if you can identify the suspects because his colleagues – his colleagues were, like, doing – trying to find this guilty guy. [¶] Q. So is it your testimony the officer said – that you left the place where you were with the officer because there were some suspects that the police had? [¶] A. Yeah.”

Chami further testified on cross-examination: “Q. You testified last Friday the police officer told you we have the guilty person. Come go and I.D. them. [¶] A. I have to come identify the people, yes. [¶] Q. And that’s what they told you, right? [¶] A. Yes. Can I say more? [¶] THE COURT: Go ahead. [¶] [CHAMI]: The policeman said we caught these people. Doesn’t mean that all of them did this because there were three. So doesn’t mean that all of them did the incidents, so I have to identify the person, yeah. Q. But initially you said that – you testified Friday the officer told you – okay. He spoke to you two times, right? The first time was at the scene where the robbery occurred, correct? [¶] A. Not far from where the robbery occurred, yeah. [¶] Q. And at that time you had not identified anyone, correct? [¶] A. Yeah. [¶] Q. And you testified last Friday that the officer, during that time, he told you I’m going to go take you to see the people? [¶] A. Exactly, yes. [¶] Q. And you also testified that he said we have the guilty people? [¶] A. Yes. [¶] Q. I want you to come go I.D. them. Is that correct? [¶] A. Exactly, yes.” At that point the prosecutor objected and defense counsel said, “I’ll withdraw the question,” but the record is unclear what was withdrawn.

Officer Duff opened the door to his vehicle, intending to explain to Chami the process of an in-field identification and give the standard admonishment. Before Duff could do so, Chami said to Duff, “that’s him.” Chami seemed excited, “like he was in a hurry” to tell the officer. Duff did not know which suspect Chami was talking about, because there were three of them. He told Chami to “hold on” because he had not admonished him.

Officer Duff admonished Chami, to the effect that the suspects were not necessarily the robbers just because the police had stopped them. The officer added that it was important for Chami to tell the officer if he did not recognize the suspects, because he did not want to arrest the wrong person, and he should also tell the officer if he was not sure about the identification. Duff asked Chami whether he understood what he told him, and Chami said he did.

The officers then conducted an in-field identification, in an area illuminated with overhead street lights. Each of the three suspects, all of whom were handcuffed, was placed in a separate police car. Chami remained in Officer Duff’s car, with Duff standing nearby. One at a time, each suspect was taken out of the police car in which he was held, and a “spotlight” was shined on him, in accordance with customary police practice, to enhance Chami’s view. Chami testified that, when he was identifying the suspects, he could see their faces clearly because of the spotlight.

The officers brought out A.C. and E.C. and illuminated their faces, but Chami did not identify either of them as a perpetrator. As soon as the officers brought out D.M. and shone the light on him, however, Chami immediately said, “that’s him.” Chami clarified that D.M. was the robber who had the gun.

Chami’s recollection of the identification is in accord. By Chami’s account, the officer asked if he could identify any of the suspects, and Chami said he recognized the “guy who robbed me, who mugged me with the gun.” The officer then told Chami, “you have to make sure.” Chami elaborated: “[The officer] told me that you have to make sure. We cannot like – you have to be sure and we don’t want to, like, make anyone who

is innocent guilty. And that's – that's something I agree about and I don't want to make anyone guilty.”

Chami was sure of his identification of D.M. as the robber, because the robber's face was still fresh in his mind at the time.³ By contrast, Chami did not identify another of the suspects as the other assailant, because he was only 50 percent sure.

The identification of D.M. was reported at about 10:26 p.m., less than 10 minutes after the 911 call. D.M. was then arrested. E.C. and A.C. were interviewed at the scene and released. They and D.M. all indicated that A.C. had joined E.C. and D.M. near where Officer Mayorga spotted them.⁴

7. Chami's Confirmation of His Identification of D.M.

Officer Duff recommenced his interview of Chami at 10:40 p.m. At this point, Chami told Duff that on his way home from work, he was accosted by two black men, one of whom pointed a gun at him. The gunman was shorter than Officer Duff (who is about 5'9”), so the gunman would be approximately 5'7” or 5'8”. The gunman had small eyes and was wearing dark colors -- black pants, a jacket and “maybe [a] gray like dark color” hat. Chami saw the gunman's face and could recognize him again. The transcript of the interview continues in part: “OFFICER DUFF: . . . Now, we stopped a few

³ Chami later explained: “[T]he police officer told me, are you sure? Like – and it is police officer wanted to make – to make – and to make sure what I am saying is true. And he told me that this situation is that – I mean he's – he was trying to say that we cannot account anyone innocent as guilty which is a bad situation that can happen to anyone. So he said that you have to be sure in this situation. I said, yes, I'm sure that this is the guy.”

⁴ E.C. made the following written statement: “Today me and [D.M.] got on the “57” bus at Eastmont. We got dropped off at 40th St. and Market St. We walked straight to 44th St. (west of Market) to meet up with a female friend. We hung out at her house for about 5-10 minutes. We then walked to 46th St. & Market St. to meet up with “Ant.” We were waiting for the bus and the police stopped us. I don't know the friend[']s address on 44th St.” A.C. made the following written statement: “I just stepped out of the house about to go to the store. I saw two of my friends and walked to them . . . They were standing there waiting for the bus. We began to talk about girls. They police came and got on us.” When asked, “Did they show you anything?” A.C. responded, “I know for sure they don't have any guns. All we talked about was girls.”

gentlemen on Market Street, on 45 and Market and I drove you over there.

[¶] [CHAMI]: Yeah. [¶] OFFICER DUFF: And explained to you these may or may not be the people, right? Did you recognize any of the people that we stopped?

[¶] [CHAMI]: Yes, I saw the people handcuffed. These people I recognized immediately, the one who is trying to shoot me who had the gun. I can say (inaudible).

[¶] OFFICER DUFF: You're sure that was him, okay. We went ahead and arrested that gentleman for the robbery. . . .”

8. *Further Identification of D.M. at the Hearing*

At the hearing, Chami was shown two photographs of D.M. taken after he was arrested. Chami was unable to identify a photograph of D.M.'s profile, but he was able to identify a frontal photograph of D.M. as a photograph of the person who robbed him, because he recognized the robber's eyes. Chami explained that the frontal photograph showed “the face more than the other.” In this photograph, D.M. was wearing a hat, a black jacket, and large jean pants covering his sneakers. Chami also identified D.M.'s pants as the pants worn by the robber, because they were large at the bottom and “touch[ed] the ground.”

Also at the hearing, Officer Duff identified D.M. as the person identified by Chami at the lineup. Officer Mayorga identified D.M. in court and testified that D.M. was 5'8” or 5'9.” A police report indicated that D.M. was 5'11”.

9. *The Court's Rulings on D.M.'s Suppression Motions*

The trial court heard oral argument on the suppression motions and denied the motions during the defense case, both as to the lawfulness of the detention and the lawfulness of the in-field investigation.

As to the lawfulness of the detention, the court explained: “I think [the] parties are generally in agreement that the general description was two African-American males, dark clothing. [¶] I'm cognizant of the fact that the time was 10:10 at night. There was testimony the lighting was regular street lighting. He was in a patrol car that was on the opposite side of the street from where the minor and the two other individuals were. [¶] The other factors, however, that weigh into this decision are the proximity of the

individuals to the position of the incident, the time that is elapsed between the incident and where they are seen at the bus stop. [¶] The fact – not the fact – the testimony was from Officer Mayorga there were no other individual or individuals in the area. And he did testify that one of the individuals, on seeing the vehicle turn, began to walk – I think the term that was used was walk briskly away from the scene. [¶] All of these indicators are that the detention is proper in this particular situation. And the motion will be denied.”

As to the lawfulness of the in-field identification, the court found that Chami’s testimony regarding Officer Duff’s statements before arriving at the identification scene was “muddled,” but Officer Duff admonished Chami before he made his final identification of D.M. Furthermore, Chami did not identify the first suspect shown to him, but “instantaneously” identified D.M. as the gunman.

10. *Jurisdictional Order*

After considering the rest of the evidence and hearing the arguments of counsel, the juvenile court sustained the Welfare and Institutions Code section 602 petition on December 17, 2010. The case was transferred to Solano County, where D.M. resides, for disposition.

B. *Dispositional Hearing*

On January 28, 2011, after a contested dispositional hearing, the court adjudged D.M. a ward of the court and committed him to a youth facility.

This appeal followed.

II. DISCUSSION

D.M. contends: (1) he was unconstitutionally detained without a reasonable suspicion that he committed a crime; (2) the in-field identification procedure violated his due process rights because it was highly suggestive; (3) the booking photograph that was shown to Chami at the jurisdictional hearing should have been suppressed; and (4) the evidence was insufficient to sustain the petition. We address each contention in turn.

A. *Constitutionality of the Detention*

D.M. argues that the court erred in denying his motion to suppress because his detention by Officer Mayorga was not supported by a reasonable suspicion that he had been involved in criminal activity. On appeal from the denial of a motion to suppress, we review the court's factual findings for substantial evidence and decide de novo whether, on those facts, the requisite legal standard was met. (*People v. Parson* (2008) 44 Cal.4th 332, 345.) We resolve all factual conflicts in the manner most favorable to the disposition on the suppression motion. (*People v. Woods* (1999) 21 Cal.4th 668, 673.)

1. *The Detention*

An encounter between a police officer and a citizen does not trigger Fourth Amendment scrutiny unless the officer, by means of physical force or a show of authority, has in some way restrained the citizen's liberty. (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) A citizen is detained (or "seized") by police if he is physically held or submits to a display of authority that would indicate to a reasonable person he is not free to leave. (*California v. Hodari D.* (1991) 499 U.S. 621, 625-626; *People v. Harris* (1986) 184 Cal.App.3d 1319, 1321.)

Here, there is no dispute that D.M. and his two companions were seized or detained when Officer Mayorga conducted a "high-risk stop," by which he drew his gun and ordered them to the ground and they complied.

2. *Reasonable Suspicion*

For a detention to be lawful under the Fourth Amendment, the officer must be able to point to specific and articulable facts that, giving due weight to the reasonable inferences the officer may draw from those facts in light of experience, reasonably warrant the intrusion. (See generally *Terry v. Ohio* (1968) 392 U.S. 1, 21; *People v. Souza* (1994) 9 Cal.4th 224, 230 (*Souza*)). In particular, an officer may stop and detain a person for questioning or limited investigation if the officer has a "reasonable suspicion," based on specific and articulable facts, that some activity relating to crime has taken place or is occurring or is about to occur, and the person he intends to stop or detain is involved in that activity. (*United States v. Sokolow* (1989) 490 U.S. 1, 7-8; *Souza, supra*,

9 Cal.4th at p. 231 [“A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity”].)

By the time Officer Mayorga detained D.M. and his two companions, he was aware of several articulable facts, to which the officer testified at the hearing and the juvenile court noted in its decision: (1) D.M. and his companions were located within a few minutes’ walk of the scene of the robbery; (2) they were found in that location just a few minutes after the crime and the report from dispatch; (3) they matched the description of the perpetrators, in that they were African-American males; (4) they matched the description of the perpetrators, in that they were wearing dark clothing; (5) they were the only individuals Officer Mayorga encountered in searching for the robbery suspects; and (6) when they spotted Officer Mayorga approaching in his marked police vehicle, one of them walked briskly away.

Under the totality of the circumstances, Officer Mayorga had a reasonable suspicion that D.M. and his companions were involved in a crime. A reasonable suspicion may arise if an individual matches a general description given by an eyewitness where, as here, the individual is found in the vicinity of recent criminal activity. (*People v. McCluskey* (1981) 125 Cal.App.3d 220, 226 [reasonable suspicion to stop vehicle traveling from area of robbery reported minutes earlier, where the officer thought the passenger, a 20-year old Mexican male with dark hair and a dark jacket, matched description of robber as 19-21 year old Mexican male with brown hair and blue jacket].) Other factors, such as the absence of other potential perpetrators in the area and actions that appear calculated to evade police contact, buttress the conclusion of a reasonable suspicion. (*People v. Conway* (1994) 25 Cal.App.4th 385, 389-390 [even though he had no description of the burglary suspect, police officer had reasonable suspicion sufficient to stop the defendant’s car at 3:00 a.m. driving from direction of the house that was burglarized two minutes earlier, where no one else was observed in the area]; *People v. Lloyd* (1992) 4 Cal.App.4th 724, 733-734 [reasonable suspicion to detain suspect found

at 4:00 a.m. next to a business in which a silent alarm had been triggered, and who began to walk away when the officers approached].)

D.M.'s arguments to the contrary are unavailing. He contends that walking away from the police cannot, as a matter of law, give rise to the particularized suspicion of criminality required to justify detention, citing *People v. Aldridge* (1984) 35 Cal.3d 473, 479, and *People v. Bower* (1979) 24 Cal.3d 638, 647-648. Our Supreme Court in *Souza*, however, reviewed *Aldridge* and *Bower* and held just the opposite. As *Souza* concluded, *Aldridge* is “not pertinent authority” on this point any longer, because (*Aldridge*) was decided under the California Constitution rather than the federal Constitution. (*Souza*, *supra*, 9 Cal.4th at pp. 232-233.) And, notwithstanding *Bower*, an individual's flight can be an important contributing factor to a conclusion of reasonable suspicion: “[E]ven though a person's flight from approaching police officers may stem from an innocent desire to avoid police contact, flight from police is a proper consideration – and indeed can be a key factor – in determining whether in a particular case the police have sufficient cause to detain.” (*Souza*, *supra*, 9 Cal.4th at p. 235.)

Where, as here, the evasive behavior occurs in connection with other articulable facts, it contributes to the circumstances establishing reasonable suspicion sufficient to detain individuals for investigation. (*Souza*, *supra*, 9 Cal.4th at pp. 240-241 [officer had reasonable suspicion of criminal activity upon observing two people near a parked car very late at night, talking to people inside the vehicle, in an area known for criminal activity, and members of the group fled when the officer shone a light on the car]; see generally *Illinois v. Wardlow* (2000) 528 U.S. 119, 123-125 [defendant's sudden unprovoked flight from police in a high-crime area created a reasonable suspicion justifying a detention].

D.M. also notes that it was A.C., not D.M., who walked briskly away as Officer Mayorga approached. Nonetheless, the evasive action of one of the three members of the group reasonably contributed to the officer's suspicion that at least two members of the group – which included both D.M. and A.C. – had been involved in criminal activity. Combined with the temporal and geographic proximity of the individuals to the robbery,

the identity of their race, gender, and general attire to those of the robbers, and the absence of any other individuals in the area, the evasive action of one of the individuals was sufficient to permit Officer Mayorga to stop the group to determine whether it included the perpetrators. “The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal” (*In re Tony C.* (1978) 21 Cal.3d 888, 894 (*Tony C.*.)

In his reply brief, D.M. argues that it is insignificant that Officer Mayorga encountered no one else when he looked for suspects, because he drove in a northeasterly direction from the robbery site, and he might have encountered others if he had taken a different route. Officer Mayorga testified, however, that he drove in the general direction *that the perpetrators were reportedly heading*. The fact that Officer Mayorga encountered no other possible suspect, therefore, is indeed significant. And while D.M. speculates that the “youths who robbed Chami took refuge inside a house, bar, store, or restaurant,” the point is not whether it was possible that D.M. and his companions were not the robbers, but whether there was a reasonable suspicion that they were.

D.M. also argues that his detention was impermissibly premised on a generic description based on race. The cases on which he relies for this proposition, however, are distinguishable.

For example, in *Tony C.*, *supra*, 21 Cal.3d 888, at page 896, a highway patrol officer stopped two black youths walking on the sidewalk in the middle of the day because, the day before, he had “learned informally that several burglaries had been reported” in the area and “‘three male blacks’ were being sought.” Nothing in the youths’ behavior suggested they might be involved in criminal activity. (*Id.* at pp. 897-898.) Here, by contrast, the detention was not based on the mere fact that the suspects matched a vague description of black males of unspecified age who supposedly committed crimes at least a day earlier, but on the fact that D.M. and his companions were wearing the type of clothing worn by the perpetrators of a robbery that had occurred

just *minutes* earlier at a location just minutes away, and one of the group walked off briskly as Officer Mayorga approached.

In *People v. Hester* (2004) 119 Cal.App.4th 376, the police stopped a vehicle containing four black males, one of whom was a purported East Side Crip gang member, along with two other vehicles driving alongside, in response to a report of a shooting earlier in the evening by persons suspected to be East Side Crip members. (*Id.* at p. 383-384; 388, 392.) Here, by contrast, the suspects were detained just four blocks from a robbery that occurred a few *minutes* earlier, based on the victim's description of the robber's clothing as well as their race, the fact that no other persons were seen in the area, *and* one of the group walked briskly away when the officer approached.

In *People v. Durazo* (2004) 124 Cal.App.4th 728, a college student claimed that "Mexican gang members" threatened to come to his apartment the next morning, but refused to provide further information. (*Id.* at p. 732.) *Four days later*, an officer stopped a car with two young Hispanic-looking males because they both looked in the direction of the student's apartment building as they drove past and appeared careful to obey all traffic laws so as not to be pulled over. (*Id.* at pp. 732-733.) Here, by contrast, the detention did not occur four days after a threatened crime, but minutes after an actual crime; the victim actually saw his assailants and gave a description of their clothing as well as their race, which the suspects matched; and one of the group acted evasively as Officer Mayorga approached.

Lastly, D.M.'s reliance on *People v. Perrusquia* (2007) 150 Cal.App.4th 228 is misplaced. There, the defendant was sitting in an idling car in the parking lot of a 7-Eleven store in an area where such stores had been robbed by an African-American or Hispanic male in his late 20s. When officers drew near, he got out of the car and walked away, ignoring their orders to stop. The officers pursued and detained him, even though they had no information that a crime had been committed at that particular location. (*Id.* at p. 231.) Here, by contrast, Officer Mayorga had just received information about a robbery four blocks from where he encountered D.M. and his cohorts, who matched a general description of the two perpetrators of the crime. In the totality of the

circumstances, including those factors specific to D.M., Officer Mayorga had a reasonable suspicion sufficient to detain D.M.

D.M. fails to establish error in the denial of the motion to suppress and, more particularly, fails to demonstrate that the detention of D.M. was unlawful.

B. *In-Field Identification*

D.M. argues that Chami's in-field identification of D.M. minutes after the crime violated his due process rights because it was unduly suggestive and unreliable.⁵ To decide this question, 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. Kennedy* (2005) 36 Cal.4th 595, 608 (*Kennedy*), disapproved on another ground, *People v. Williams* (2010) 49 Cal.4th 405, 458-459.) The burden is on the defendant to show that the identification procedure was unreliable. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

1. *Not Unduly Suggestive and Unnecessary*

D.M. insists the in-field procedure was unduly suggestive for several reasons, none of which we find persuasive.

First, D.M. argues, Officer Duff suggested to Chami before the in-field identification that he was going to view individuals who were "guilty." D.M. cites Chami's agreement with defense counsel that Duff told him, "[w]e have the guilty

⁵ D.M. also argues that the in-field identification is subject to suppression as the fruit of a poisonous tree, because it was obtained as a result of an unconstitutional detention. His argument is without merit because, as explained *ante*, the detention was not unconstitutional.

people,” and “I want you to [go] I.D. them,” and Chami’s testimony that Duff said he had to “come see these guilty guys.”

Officer Duff testified, however, that he never told Chami he was going to show him anyone who was “guilty.” It was therefore for the juvenile court to evaluate the testimony and demeanor of the witnesses and make a determination of their credibility in this regard. The juvenile court expressly weighed the evidence on this point and, at least implicitly, concluded that the evidence was insufficient to find that Officer Duff made the statements Chami said he made before the identification.⁶ We defer to the juvenile court’s credibility determinations, and, in any event, view the evidence in the light most favorable to the prosecution. (See *Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578.)⁷

Next, D.M. notes that Chami watched Officer Duff assist Officer Mayorga in handcuffing the three youths at the scene before the identification. He argues that the fact

⁶ The court stated: “So as to the issue of . . . whether or not Officer Duff had stated that they had guilty parties, what the . . . victim testified to . . . on that point actually is, to be blunt, muddled. . . . [G]iven what he said on direct and then given what he said on cross, it’s not definitive to me exactly what was said. [¶] Officer Duff has testified that he admonished him prior to his identification that, you know, he had properly identified the individuals involved and that he gave him the standard admonition before identification.”

⁷ There being sufficient evidence to accept the trial court’s credibility determination, Chami’s testimony about what Duff said before they went to the scene of the in-field identification is not a basis for finding that the identification procedure was unduly suggestive. But even if it could be, the *totality* of Chami’s testimony is reasonably susceptible to the inference that, despite what he claims Duff said before they went to the scene, the officer made statements *at* the scene that removed any suggestive taint from Chami’s mind. Chami testified that Officer Duff told him he had to be sure the identification was correct because they did not want to implicate anyone who was innocent, and Chami emphasized that he would not want to implicate anyone who was innocent and, in fact, did not identify anyone without being absolutely sure they were involved.

they were not only handcuffed, but observed in the process of being handcuffed, suggested their guilt.⁸

D.M. is incorrect. The “mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification.” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 (*Carlos M.*); see *In re Richard W.* (1979) 91 Cal.App.3d 960, 969-970 (*Richard W.*) [fact that suspects were “handcuffed inside a police car with officers standing around” outside hotel where robbery had just occurred did not render in-field identification procedure impermissibly suggestive].)

D.M.’s attempts to explain away *Carlos M.* and *Richard W.* are baseless. He argues that the quoted statement in *Carlos M.* was mere dictum, because the defense against the rape charge in that case was consent rather than mistaken identity. Not so. While the court in *Carlos M.* did express doubts in a footnote that a defendant could complain of an unfair lineup when at trial he admitted identity and claimed consent, the court nonetheless expressly and squarely decided the issue of the suggestiveness of the identification process. The court stated: “We rest our decision on the ground that the single-person lineup identification procedure was not unfair in this case.” (*Carlos M.*, *supra*, 220 Cal.App.3d at p. 386, fn. 8, italics added.)

Equally wrong is D.M.’s assertion that *Richard W.* is distinguishable because, although the suspect was handcuffed, the handcuffs were not discussed in the opinion. To the contrary, the court in *Richard W.* stated in its analysis: “Richard argues the in-field identification was too suggestive in that it exhibited only the minor and his companion while *handcuffed* inside a police car with officers standing around. . . . Other cases have similarly held that in-field identification when the suspect was in the back of a patrol car or *handcuffed* are admissible. [Citations.]” (*Richard W.*, *supra*, 91 Cal.App.3d at pp. 969-970, italics added.)

⁸ D.M. does not adequately explain why being handcuffed is more suggestive than having handcuffs on; in either event, the conclusion would be that police officers had placed handcuffs on him. He suggests in his reply brief that the act of handcuffing him made him appear to be a “dangerous animal,” but he points to absolutely nothing in the record to support that assertion.

D.M. also points out that neither *Carlos M.* nor *Richard W.* mentions *United States v. Wade* (1967) 388 U.S. 218 (*Wade*), claiming that the Supreme Court in *Wade* stated: “‘It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police,’ than the situation of an individual displayed in handcuffs.” (See *Wade, supra*, 388 U.S. at p. 234.) In actuality, the Supreme Court in *Wade* was describing the situation in *Stovall v. Denno* (1967) 388 U.S. 293, in which a witness was presented with a lone suspect who was not just handcuffed, but “handcuffed to police officers.” (*Wade, supra*, 388 U.S. at p. 234, italics added.) Moreover, while D.M. speculates that the absence of *Wade* from the opinions in *Carlos M.* and *Richard W.* is attributable to poor briefing, a more likely reason is that *Wade* had nothing to do with the issues in those cases. *Wade* involved whether the *Sixth* Amendment required assistance of counsel during a police line-up, not whether the handcuffing of an individual in the field violated due process under the *Fifth* Amendment. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1163 [*Wade* inapposite to whether the defendant was denied a fair trial (due to loss of photographs shown during identification process) on due process grounds].) Neither *Wade* nor any other case cited by D.M. compels the conclusion that the handcuffing of D.M. and his companions was unduly suggestive and unnecessary.

Nonetheless, D.M. contends that the suggestiveness arising from the handcuffing of D.M. and his companions is shown by the following testimony of Chami: “When I saw the police handcuff these people, I recognize immediately the one who . . . had the gun.” But Chami did not state that he recognized D.M. as the gunman *because* D.M. was being handcuffed. He stated that, *at the time* he saw all three of the individuals being handcuffed, he recognized “the one” who was the gunman. If anything, this indicates that the handcuffing of the suspects was *not* unduly suggestive: if it had been unduly suggestive, Chami would have recognized two of them as the two perpetrators; instead, he identified just D.M.

Next, D.M. complains that removing the suspects from the police cars, spotlighting them with flashlights, and flanking them with police officers was unduly

suggestive. He cites no California authority for this point, resorting instead to cases from other states and two cases decided by federal trial courts, *Bratcher v. McCray* (W.D.N.Y. 2006) 419 F.Supp.2d 352, 359 [single person show-up unduly suggestive because *made to four witnesses simultaneously*, one of whom blurted out “that’s him” and suspect was flanked by police officers and removed from police car], and *Brisco v. Phillips* (E.D.N.Y. 2005) 376 F.Supp.2d 306, 315 [show-up suggestive where the defendant was shown to the victim while he was surrounded by three uniformed policemen *and* was told “to hold a wet pair of maroon shorts that fit the distinctive description of the perpetrator’s clothing that the victim gave the police”]. None of these cases is persuasive.

Under the circumstances of this case, illuminating the faces of the suspects as they were presented to Chami for viewing did not suggest that the police thought D.M. or his companions were guilty. It simply suggested that they thought Chami would get a better look at the individuals – and be able to decide more accurately whether or not any of them was involved in the robbery – if their faces were visible notwithstanding the hour of 10:00 p.m. Certainly the illumination of their faces would provide Chami a better view from his vantage point in the back seat of a police car across the street.

Indeed, in testimony that D.M. overlooks, Officer Mayorga made this point during the hearing. Initially, he testified that the officers used the spotlight in order to give Chami a better view: “Q. Why was a spotlight shined on them? [¶] A. Because sometimes it makes it easier for a person in the backseat of the car. The reason we put the victim in the back of the car for the field I.D. so they don’t get identified and nobody sees who the actual victim is initially at the scene. We put the spotlight on them so – because sometimes if they’re in the backseat of the car through the screen, they light up the spotlight helps, you know – it illuminates the area so they can see better. [¶] Q. And the person who’s spotlight is placed on, I assume that they are – they’re pretty well lit up. Would that be fair to say? [¶] A. Yes.” Officer Mayorga subsequently offered another reason for spotlighting the suspects, in that it showed Chami precisely which individual he was being asked about: “Q. Okay. With regard to the spotlighting of the suspects, is that a customary practice or is that something that’s rare? [¶] A. It’s customary.

[¶] Q. Why? [¶] A. Due to the fact that a lot of the times if there's anybody – they want to make sure they know who they're looking at, you know, as opposed to if they say, well, look at the person out in front of you. I mean somebody could be looking everywhere. Basically the spotlight is used to illuminate the area and show who may or may not be the possible suspect.”

Lastly, D.M. argues that a less suggestive procedure would have been to display each of the youths in a separate line-up. But that is not the question. The question is whether the procedure that *was* used was *unduly* suggestive and unnecessary.

Under the totality of the circumstances, the in-field identification procedure was not unduly suggestive and unnecessary. The handcuffing, spotlighting, and presence of police officers – in isolation or taken together – did not unduly suggest to Chami that one or more of D.M.'s group had to be involved in the robbery, particularly in light of the rest we know about the identification process. When Chami spontaneously blurted out, “that's him,” before Officer Duff had the chance to give Chami the standard admonition, Officer Duff told him to “hold on” and proceeded to admonish him that the suspects' detention did not mean they were necessarily the individuals who robbed him and it was important for Chami to tell the officer if he did not recognize the suspects so he would not arrest the wrong person. Chami indicated that he understood what the officer told him. Chami further confirmed that Duff said he had to make sure the identification was correct because they did not want to implicate anyone who was innocent, he insisted that he would never want to implicate an innocent person, and he only identified D.M. because he was *sure*, after taking the admonition to heart, that D.M. was the robber.

Because D.M. fails to establish that the identification procedures were unduly suggestive or unnecessary, he fails to establish reversible error on this ground.

2. *Reliability*

Even if the identification procedure had been unduly suggestive and unnecessary, it would not be unlawful because the identification itself was nevertheless reliable under the totality of the circumstances. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116 [suggestive police identification procedures not unlawful unless they create a “very

substantial likelihood of irreparable misidentification”] (*Manson*).) In making this determination, we take into account such factors as: (1) the opportunity of the witness to view the suspect at the time of the offense, (2) the witness’s degree of attention at the time of the offense, (3) the accuracy of his or her prior description of the suspect, (4) the level of certainty demonstrated at the time of the identification, and (5) the lapse of time between the offense and the identification. (*Manson, supra*, 432 U.S. at pp. 114-115; *Kennedy, supra*, 36 Cal.4th at p. 608.)

In their totality, these factors point decidedly to the reliability of the identification. First, Chami had an opportunity to view the robber at the time of the offense, testifying that they were face-to-face and only about a foot apart. Although it was night and Chami acknowledged there was “[n]ot too much” light in the area, there was no evidence that the lighting was so poor that he could not get a good look at the perpetrator from a foot away.

Second, Chami’s attention was focused on the robber at the time of the offense. Again, he testified that he and the robber were face-to-face. As D.M. urges, Chami was understandably scared and confused, but there is no indication that Chami’s attention was diverted or that he was so distraught as to render him incapable of capturing a reasonably accurate mental image of his assailant. After all, Chami was sufficiently composed to note several details about the robber and the robber’s clothing, and even followed the robbers to ask for his phone back.

Third, Chami’s prior descriptions of the robber were consistent and reasonably accurate. Before the in-field identification, Chami described the robber as male, African-American, 18-25 years old, about 5’7” or 5’8”, and wearing dark pants, a dark jacket, sneakers, and a hat. As it turned out, D.M. was a male, African-American, a little less than 18 years old, about 5’11”, and wearing blue pants, a jacket, sneakers, and a hat.

D.M. emphasizes minor differences between Chami’s description and D.M.’s actual attributes, but his arguments are unconvincing in light of the record. Although D.M. wore blue jeans (with stains), Chami explained that blue pants look dark at night and, when shown D.M.’s actual jeans at the hearing, recognized them by the size of the bottom of the legs and described them as “blue, *dark, black*.” Although the police report

described D.M. as 5'11", Chami attributed his estimate of 5'7" or 5'8" to the fact that "I didn't have a tape measure to tell the [robber,] please stand up, turn and I can measure you." His estimate that the assailant was just a bit shorter than Officer Duff, rather than about two inches taller, is equally insubstantial under the circumstances – and was given *after* he had already identified D.M. in the field. Although D.M.'s hat was red rather than gray or black, there was no evidence at the hearing that it was of a hue that would not have *appeared* dark at night. And while D.M. was under 18 years of age instead of between the ages of 18 and 25, there was no evidence that D.M. did not *look* 18-25. These discrepancies are not shown by the record to render Chami's descriptions inaccurate.⁹

D.M. also notes that Chami claimed the robber had small eyes, and he insists his eyes are not small. But the record contains no evidence from the hearing that D.M. (who had donned glasses) had eyes that Chami could not reasonably characterize as "small"; to the contrary, however D.M.'s eyes might be characterized, there was something about them that allowed Chami to identify D.M.'s photograph at the hearing.

Fourth, Chami was certain of his identification of D.M. He immediately identified D.M., exclaiming "that's him" as soon as D.M. came into view. While at that point the suspects were illuminated only by overhead streetlights, Chami also identified D.M. *after* each suspect was presented to him with their faces illuminated. Moreover, the fact that Chami did not identify the first two individuals, but *did* identify D.M. because he was sure D.M. was the robber, suggests both the caution Chami employed in the identification process and his certainty in identifying D.M.

⁹ In his reply brief, D.M. argues that "Chami's description of the robbers as wearing dark clothes was so generic as to prove nothing. If he'd described the robbers as clad in Pepto-Bismol pink, and the suspects matched, that would have been another matter." D.M.'s suggestion – that identification of a robbery suspect as wearing dark clothing is inherently useless – would be good news indeed for all robbers who favor dark clothing over splashier attire. We decline to hold that a victim's identification of his assailant cannot be reliable unless he wore pink.

Fifth, and perhaps most importantly, only minutes had elapsed between the time of the offense and the time of the identification. As Chami testified at the hearing, the perpetrator's image was fresh in Chami's mind when he identified D.M. as the robber.

In the totality of the circumstances, Chami's identification of D.M. as the robber was reliable. D.M. fails to establish error in the court's refusal to suppress the in-field identification.¹⁰

C. *Booking Photograph*

D.M. contends his arrest was the fruit of an unconstitutional detention and identification, and that the court should have suppressed his booking photographs on that basis. Because his detention and identification were not unconstitutional, he fails to demonstrate error in the fact that the booking photographs were not suppressed.¹¹

D. *Sufficiency of the Evidence of Robbery*

D.M. contends the evidence did not establish that he perpetrated the charged robbery, because there was insufficient evidence that he was the gunman. He argues that the in-field identification was not credible, particularly in light of Chami's inability to identify D.M. in the courtroom, and Chami's identification of a photograph as the person he identified on the night of the robbery was insignificant. He adds that there was no other evidence of D.M.'s personal involvement in the robbery.

¹⁰ D.M. claims that *Cossel v. Miller* (7th Cir. 2000) 229 F.3d 649, *Young v. Herring* (5th Cir. 1990) 917 F.2d 858, and *Thigpen v. Cory* (6th Cir. 1986) 804 F.2d 893 all held that a witness's inconsistent responses in identification proceedings undermine the reliability of an identification. All of those cases involved factors that are not present in this case. (*Cossel, supra*, 229 F.3d at p. 656 ["extraordinarily long period of time" (three years) had elapsed between the crime and the identification of the defendant]; *Young, supra*, 917 F.2d at p. 864 [robber's face was covered, witness thought he had brown hair while defendant had gray hair, and four or five weeks had passed between the time of the crime and the identification]; *Thigpen, supra*, 804 F.2d at p. 897 [witness barely looked at the robber, and the identification was not made until two months after the crime].)

¹¹ We also note that, at the hearing, defense counsel stipulated that a photograph could be shown to the witness and the witness could be asked if the person in the photograph was involved in the incident. It is not clear from the record if this photograph is the subject of D.M.'s argument; if it is, his argument is waived.

Substantial evidence supported the finding that D.M. committed the charged offense of robbery. There is no dispute that Chami was the victim of a robbery, and the evidence was sufficient for a reasonable trier of fact to conclude that D.M. was, in fact, the perpetrator. Although Chami did not identify D.M. at the hearing, he remained sure of his in-field identification and confirmed that a photograph of D.M. was a photograph of the robber. His in-field identification occurred just minutes after the robbery, and, as the juvenile court found, the identification was spontaneous and was confirmed by Chami after Officer Duff's admonition to make sure it was correct.

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.