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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BRENDAN MURDOCK,

Defendant and Appellant.

A132153

(San Francisco County  
Super. Ct. No. 213648)

Defendant Brendan Murdock appealed after a jury convicted him of first degree burglary and receipt of stolen property in connection with the taking of a laptop computer from a San Francisco dormitory. Defendant argues that the trial court erred in (1) denying his motion to suppress evidence discovered in connection with his detention after a police officer saw him holding a glass pipe and (2) admitting eyewitness identification evidence. We affirm.

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND

Shortly before 5 p.m. on August 31, 2010, a San Francisco Academy of Art student was alone in her Academy of Art dormitory apartment that she shared with two roommates. The woman was asleep on her bed in a room she shared with one of the roommates, after dozing off while playing video games. She woke up and saw defendant and another man, who were both strangers to her. Defendant was reaching for her cell phone, and the woman protested that “that’s my cell phone.” Defendant said he thought

it belonged to “Lauren” (the student’s roommate who shared her bedroom, and whose name appeared on the door to the apartment). After a brief exchange with defendant, the woman walked the two men to her door, and they left the apartment.

Later that day, the art student’s roommate returned home and noticed that her laptop computer and its charger as well as her cellular phone charger had been taken. She reported the loss to police. The woman who was in the apartment when the men were present provided a description to police, and did not note anything in particular about the speaking pattern of the man with whom she had conversed (later identified as defendant).

Four days after the laptop and other items were taken, an undercover San Francisco police officer saw defendant sitting on a curb speaking to another man and showing the man a laptop computer. After the officer detained defendant and conducted an investigation, he learned that the laptop appeared to belong to someone who recently had reported that her computer had been taken during a burglary, about two blocks away from where defendant was detained. Defendant was arrested.

Following his arrest, defendant spoke with police for almost an hour, and an audio recording of the interview was played for the jury.<sup>1</sup> Defendant acknowledged being present in the room when the computer was taken, but maintained that he did not have the intent to steal when he entered the building. The art student later selected defendant’s picture out of a photographic lineup, and she identified him in court at trial as the person with whom she had spoken inside her apartment.

A jury convicted defendant of first degree residential burglary (Pen. Code, § 459<sup>2</sup>—count 1) and receiving stolen property (§ 496, subd. (a)—count 2), and found true an allegation that someone other than an accomplice was present in the residence during the commission of the burglary (meaning that it was a violent felony, § 667.5,

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<sup>1</sup> Although the recording is not included in the record on appeal, we gather from defense counsel’s closing argument that defendant stuttered and manifested “verbal tics” during the interview.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise indicated.

subd. (c)(21)). The trial court sentenced defendant to four years in prison (the midterm for his first degree burglary conviction), and stayed a concurrent two-year sentence for the receiving stolen property count, pursuant to section 654. This timely appeal followed.

## II. DISCUSSION

### *A. Motion to Suppress.*

#### 1. Background

Before trial, defendant filed a motion to suppress (§ 1538.5), arguing that he was illegally detained. He sought suppression of evidence of (1) statements he made following his detention, (2) the laptop seized from his person, (3) any observations made by police after he was detained, and (4) the art student's identification of him.

The police officer who detained defendant testified at the hearing on the motion to suppress that shortly after midnight on September 4, 2010, he saw defendant sitting on the curb near the intersection of Geary and Jones Streets. The area “has high activity in both narcotics, drug usage, robberies and assaults,” according to the officer. The officer observed defendant about five feet away, showing a laptop computer to another man, and the officer also saw that defendant was holding in his hand a glass pipe, which was approximately three to four inches long. The officer could see the entire pipe. Based on his training and experience, the officer believed that the pipe “was for the purpose of smoking base [crack] cocaine.” The pipe was similar to “numerous types” that the officer had seen on people he had arrested in the past.

The police officer identified himself as law enforcement and started to approach defendant, at which point defendant stood up, walked into the street, and threw the pipe he had been holding, which caused it to break. The officer then detained defendant, “both for the defendant throwing the suspected crack pipe and for the laptop that he was showing to the other subject.” When asked what defendant did after he was detained, the officer responded, “Defendant told me he was on active felony probation out of San Francisco.” The officer confirmed with police dispatch that defendant was on probation, subject to a search condition.

Defendant told the police officer that he had purchased the laptop he was carrying from a friend, who in turn had received it from another friend. Defendant consented to the officer looking at the computer, and the officer was able to find contact information for a woman whom he learned had been the victim of a “hot prowling burglary” at a residence four days earlier. After the officer learned about the reported burglary, he placed defendant under arrest. He then searched defendant and found a charger for the laptop computer in his backpack. On cross-examination, the police officer testified that he did not examine the glass pipe that defendant had been holding to determine whether it had any residue, and he did not cite defendant for possessing a crack pipe. He also acknowledged that a glass pipe can be used to smoke marijuana.

The trial court denied the motion to suppress, stating: “I find from the evidence that the officer has 4 and a half years of experience. I believe everything he said. He is working down there in that neighborhood. He is familiar with it. It’s an area with a lot of crime, narcotics. I understand the crack pipes [*sic*] and drug paraphernalia are often found with narcotics. [¶] I am convinced [the] officer knew what he was talking about when he said he saw something that was readily apparent, something like I am demonstrating, an open palm holding what looked to him like it was a crack pipe. [¶] That is more than enough, in any [*sic*] opinion, to meet the burden, the standard of the burden of proof, to carry the burden on that.”

## 2. Analysis

Defendant renews his objection that the trial court should have granted his motion to suppress. “In ruling on a motion to suppress, the trial court finds the historical facts, then determines whether the applicable rule of law has been violated. ‘We review the court’s resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]’ [Citation.]” (*People v. Hernandez* (2008) 45 Cal.4th 295, 298-299 (*Hernandez*)). “The trial court’s ruling may be affirmed if it was correct on any theory, even if we conclude the court was

incorrect in its reasoning. [Citation.]” (*People v. Durant* (2012) 205 Cal.App.4th 57, 62.)

“The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are ‘unreasonable.’ [Citations.]” (*People v. Souza* (1994) 9 Cal.4th 224, 229 (*Souza*)). “ ‘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.’ [Citation.]” (*Hernandez, supra*, 45 Cal.4th at p. 299.) “Law enforcement officers may ‘draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that “might well elude an untrained person.” [Citations.]’ [Citation.]” (*Ibid.*)

Defendant argues that he was detained as the police officer “approached to ‘within five feet’ of” him, and that there was insufficient justification for detaining defendant at that time. “A seizure occurs whenever a police officer ‘by means of physical force or show of authority’ restrains the liberty of a person to walk away. [Citation.]” (*Souza, supra*, 9 Cal.4th at p. 229.) The police officer testified that he was five feet away from defendant when he observed defendant holding a glass pipe. The officer identified himself as law enforcement, at which point defendant stood up, walked into the street, and threw the pipe. According to the officer, it was only *after* these events occurred that the officer detained defendant. Defendant points to nothing in the record that would indicate that he was not free to leave before that point, i.e., when the officer was still five feet away. (Cf. *ibid.*) Defendant was detained only after he threw the pipe.

At the time defendant was detained, the officer could point to specific articulable facts that, considered in light of the totality of the circumstances, provided some objective manifestation that defendant may be involved in criminal activity. (*Hernandez, supra*, 45 Cal.4th at p. 299.) It may be true, as defendant argues, that it is not unlawful to possess a glass pipe for smoking marijuana (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897), and that the police officer never determined whether the pipe in question was in fact

a crack pipe, as opposed to a marijuana pipe. However, the defendant discarded the pipe upon the officer approaching and identifying himself, which indicates a consciousness of guilt. (*Souza, supra*, 9 Cal.4th at pp. 234-235.) The officer described the area where defendant was detained as having a high level of criminal activity, which also was an appropriate consideration in assessing whether the detention was reasonable. (*Id.* at p. 240.) The officer likewise was permitted to draw on his training and experience in suspecting that the pipe defendant was holding could be used for smoking crack cocaine. (*Hernandez, supra*, at p. 299.) Looking at “ ‘the whole picture,’ ” the detention met Fourth Amendment standards. (*Souza* at p. 235.)

Moreover, we agree with respondent that even if we assume *arguendo* that the detention of defendant was somehow improper, the officer learning of defendant’s valid probation search condition before he searched the laptop computer dissipated any taint that might flow from the detention. (*People v. Brendlin* (2008) 45 Cal.4th 262, 265, 269; *People v. Durant, supra*, 205 Cal.App.4th at p. 66.) The motion to suppress was properly denied.

### *B. Eyewitness Identification.*

#### 1. Background

Defendant filed a motion before trial seeking to exclude evidence of the viewing of the photographic lineup by the art student who was in the apartment during the burglary, as well as that same witness’s identification of defendant at the preliminary hearing, and to “preclude further courtroom identification.” Defendant argued that the out-of-court identification procedure violated his due process rights because it was unreliable, and that the prosecution could not show that any in-court identification would not be tainted by the improper photographic lineup.

At a hearing held pursuant to Evidence Code section 402 before jury selection, a police officer testified that the photographic lineup contained pictures of defendant and five other men. In the early morning hours of September 4, 2010 (the morning defendant was arrested, four days after the burglary), two officers took the photographic spread to the Art Academy dormitory to show to the art student who had been home at the time of

the burglary. The testifying officer acknowledged that he was aware that the witness had previously reported to police that she was unsure whether she could make a positive identification of a suspect. He also was aware that the witness had described the suspect as being a Hispanic male between 25 and 30 years old, whereas defendant was in his 40s and not Hispanic. Police selected photographs for the lineup that resembled defendant, as opposed to the original description provided to police.

Before showing the photographs to the art student, an officer first read “cold show instructions” to her,<sup>3</sup> and the witness appeared to understand those instructions. The witness also read the instruction form and signed it before examining the photographic lineup. The officer who read the instructions to the art student acknowledged on cross-examination that he told the witness before the identification that police had apprehended a suspect and that the laptop had been retrieved. The witness selected the photograph of defendant, stating, “ ‘This guy looks really familiar. He looks like the guy that I had a conversation with in my room.’ ”

Before ruling on defendant’s motion to exclude evidence of the photographic lineup, the trial court denied a separate motion to exclude the statements defendant made to police after his arrest, pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. The court noted that because defendant had acknowledged to police that he was in the apartment when the laptop was taken, any evidence of the photographic lineup would be “really kind of a cumulative.” After hearing brief argument on the relevance of the photographic lineup and any in-court identification, the trial court denied the motion to exclude such evidence, stating that “to my mind this whole issue [of the photographic lineup] really has kind of minor relevance. I am going to deny the motion, but it seems to me like it’s

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<sup>3</sup> The instructions were admitted into evidence at the pretrial hearing, but are not included in the record on appeal. The art student testified at trial that she was instructed that just because a police officer was showing her photographs, that should not influence her judgment in any way. She was further instructed that the person who committed the crime may or may not be in the photographs, and that she was under no obligation to identify anyone.

pretty minor because we have the defendant's statement that he was on the scene himself. I mean, so it's really not an issue."

At trial, the art student who was at home during the burglary identified defendant in court. She was asked on direct examination whether there was "any question in [her] mind that [defendant] was the person who was in [her] bedroom," and she answered, "No, there isn't." She also was questioned about the photographic identification procedure that took place four days after the burglary. Consistent with the evidence presented at the pretrial hearing, the student testified that she selected defendant's picture from a photographic lineup after reading and signing instructions that she understood.

The art student was asked on cross-examination about the conditions when she saw defendant in her dorm room, and she testified that it was "still fairly light out," her bed was close to a window, she did not have artificial lights on in the apartment, and she was wearing her contact lenses. No more than five minutes passed between the time she woke up and when she escorted the two men from her apartment, and her conversation with defendant lasted "closer to 30 seconds." When the art student was contacted four days after the burglary, police told her that someone had been identified as having her roommate's laptop. On redirect examination, she testified that police did not in any way suggest which photograph to select.

An expert in psychology and the study of eyewitness identification testified for the defense about the shortcomings in eyewitness identifications and the rates at which errors occur. She testified that when people first wake up, it takes a few minutes for their brains to process images well. The expert further testified that if a person is told that a suspect has been apprehended with evidence of criminal activity, the witness may be influenced by this information and make a selection based in part on a guess. On cross-examination, the expert was asked whether she would have more confidence in an eyewitness identification if the person who was identified admitted to being at the scene. The expert answered that "if they admit they were there, and the person identifies them, then they were probably there."

## 2. Analysis

Defendant argues that the trial court erred in denying his motion to exclude eyewitness identification evidence. “[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” (*Simmons v. United States* (1968) 390 U.S. 377, 384.) An accused bears the burden of showing that a challenged identification procedure was “unduly suggestive and unfair ‘as a demonstrable reality, not just speculation.’ [Citation.]” (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) “ ‘The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; 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 criminal at the time of the crime, the witness’s degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Finally, an in-court identification of an accused can only be tainted by a pretrial identification if the pretrial identification procedure was unduly suggestive, unnecessary, and unreliable under the totality of the circumstances. (*People v. Kennedy* (2005) 36 Cal.4th 595, 610, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Defendant does not claim that the lineup was suggestive because his picture stood out from the others, a claim this court would be unable to evaluate in any event, because the photographic lineup is not included in the record on appeal. (Cf. *People v. Cook*, *supra*, 40 Cal.4th at p. 1355.) Instead, defendant claims that the lineup procedure was suggestive because the witness was told that her roommate’s stolen laptop had been recovered, making it “highly likely” she would select someone from the lineup. To the

contrary, telling a witness that a suspect is in custody before showing a lineup is not impermissible. (*People v. Contreras* (1993) 17 Cal.App.4th 813, 820.) Because defendant has not established that the lineup was unduly suggestive, we need not analyze whether it was nevertheless reliable under the totality of the circumstances (*People v. Ochoa, supra*, 19 Cal.4th at p. 412), though we stress that the witness was with defendant for about five minutes during daylight hours, and she expressed a high degree of confidence in her identification at trial. Finally, defendant admitted to being in the apartment.

Even if we assume *arguendo* that the trial court somehow erred in admitting evidence of the photographic lineup, and in permitting the witness's in-court identification, defendant was not prejudiced, as he admitted to being in the art student's apartment when the laptop was taken. Indeed, defense counsel acknowledged during closing argument that defendant was present in the apartment. Counsel placed the blame for the burglary on defendant's companion, and argued that defendant reasonably believed that the companion knew one of the occupants of the apartment and had permission to take her laptop.

Defense counsel did contend that the art student was mistaken when she identified defendant as the man with whom she spoke, as opposed to the second man, and argued that the expert testimony regarding the likelihood of mistaken identity supported this theory. As the prosecution argued during rebuttal, however, even if defendant was the second person described by the art student as being present in the apartment, evidence nonetheless supported his guilt. The art student testified that the second man (with whom she did not speak) carried a backpack, and the prosecutor contended that the laptop must have been inside. The jury was instructed that it could convict defendant either as a perpetrator or as an aider and abettor. In other words, the evidence supported defendant's guilt beyond a reasonable doubt whether he was the person who spoke to the art student, or that man's companion. On this particular record, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Slutts*

(1968) 259 Cal.App.2d 886, 892 [error in admission of pretrial identification evidence evaluated under *Chapman*].)

III.  
DISPOSITION

The judgment is affirmed.

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Sepulveda, J.\*

We concur:

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Ruvolo, P.J.

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Reardon, J.

\* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.