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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RODDRICK BAZEMORE,

Defendant and Appellant.

A132865

(Solano County
Super. Ct. No. FCR253307)

Roddrick Bazemore appeals from convictions of four counts of robbery and two counts of attempted robbery. He contends that he was prejudiced by consolidation of the cases against him, which arose from four separate incidents; that the pretrial identification procedures used were unduly suggestive; and that there was insufficient evidence to support one of the robbery counts.¹ We affirm.

STATEMENT OF THE CASE

On January 20, 2009, a consolidated information was filed with the Solano County Superior Court, charging appellant with four counts of second degree robbery (Pen. Code, § 211)² and two counts of attempted second degree robbery (§§ 664/211): robbery of Sally’s Beauty Supply (R.M.) on January 24, 2008 (count 1); attempted robbery of Tommy Bahamas (S.K.) on January 30, 2008 (count 2); attempted robbery of Tommy

¹ During the pendency of this appeal, appellant has additionally filed two petitions for writ of habeas corpus raising claims of ineffective assistance of counsel.

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

Bahamas (C.C.) on January 30, 2008 (count 3); robbery of Entenmann's Bakery (N.C.) on February 26, 2008 (count 4); robbery of Entenmann's (C.C.) on February 26, 2008 (count 5); and robbery of Fallas (E.M.) on March 4, 2008 (count 6).³ It was further alleged that appellant had suffered two prior robbery convictions within the meaning of section 1170.12, subdivisions (a) through (d), section 667, subdivision (b) through (i), and section 667, subdivision (a)(1).⁴

Appellant was arraigned on January 20, 2009, and entered a plea of not guilty.

On January 28, 2010, appellant moved to sever the two attempted robbery counts from the robbery counts. This motion was denied on February 2, the first day of jury trial. On February 9, the jury found appellant guilty of all the charged offenses; the next day, it found the two prior conviction allegations true.

Appellant filed a motion to dismiss the prior strike convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. He also filed a motion for new trial, based on new information provided by the prosecutor's office that appellant claimed would allow him to bolster the third party culpability argument he tried to make at trial.⁵ The new trial motion was denied on May 9, 2011.

On July 17, the court struck one of the priors as to counts 1, 2, 3 and 6, but denied the motion to strike as to counts 4 and 5.⁶ The court then sentenced appellant to a total prison term of 25 years to life, plus 30 years.⁷

³ Counts 1, 2, 3 and 6 were originally charged in case No. SCR253307; counts 4 and 5 were originally charged in Solano County Superior Court case No. FCR253372.

⁴ An amended consolidated information was filed on September 9, 2010, adding enhancement allegations based on two federal convictions. These enhancement allegations were subsequently stricken by the prosecution on February 10, 2011.

⁵ The prosecutor had become aware of three robbery cases involving a different suspect which bore some similarity to the robberies of which appellant was convicted.

⁶ The court explained that appellant was 54 and a half years old and had an "exemplary" record during his more than three years of presentence incarceration, acting as a mentor to others in the jail and battling substance abuse, and earning highly laudatory letters of support from the director of the jail's treatment program. On the

Appellant filed a timely notice of appeal on July 31, 2011.

Appellant, in propria persona, subsequently filed two petitions for writ of habeas corpus, the first on July 25, 2012 (case No. A136042) and the second on October 15, 2012 (case No. A136805), which we ordered to be considered with the appeal.

STATEMENT OF FACTS

Sally's Beauty Supply (count 1)

On January 24, 2008, Rosa Martinez was working at the register at Sally's Beauty Supply in Fairfield. At about 6:45 p.m., a man Martinez identified at trial as appellant came into the store. He was wearing a black beanie, black sweatshirt and black jeans, he was clean-shaven and he had a Band-Aid on the upper part of his cheek. The man told Martinez he was looking around and waiting for his wife to come in, walked around for about 10 minutes, then left. Ten or 15 minutes later, he returned, grabbed a brush, came to the register and told Martinez to "stay calm," he was there to rob her. She opened the register and asked "how he wanted [her] to put the money," and he grabbed the money and walked out of the store.

Martinez testified that the store was well lit. When the man first came in, she was talking to him from about six feet away. The second time, she was at the register and he came to the opposite side; initially, they were looking straight at each other, and she thought he was just a customer. As soon as he said he was there to rob her, she looked

other hand, appellant's more than 30-year history of committing felonies made it "hard" to view him as "outside the scheme of the three strikes law."

⁷ The court sentenced appellant as a three-striker on counts 4 and 5, imposing for each of these counts the indeterminate term of 25 years to life plus 10 years for the two section 667, subdivision (a)(1) priors, with the sentences on these two counts to run concurrently. On the other counts, as to which the court had stricken one of the prior convictions, the court sentenced appellant as a two-striker: On each of counts 2 and 3, the court imposed aggravated terms of three years, doubled to six years because of the strike, concurrent with each other but consecutive to the indeterminate term; on each of counts 1 and 6, the court imposed one year (one third of the midterm), doubled to two years because of the strike, consecutive to each other and to the other terms imposed. Finally, the court imposed an additional term of 10 years for the two prior conviction enhancements.

down and did not look at him again. At this point she was afraid, thinking he might have a weapon or hurt her. The man did not threaten her or mention a weapon. The amount taken from the register was \$370. In addition to describing the clothes he was wearing, Martinez told the police the man was five foot nine inches tall and about 40 years old.

Subsequently, on March 6, the police showed Martinez a single photograph of appellant and she recognized him as the person who robbed her. Martinez recognized that this was a surveillance photograph; as will be explained, it was taken from a surveillance video of a different robbery in which appellant was a suspect. On cross-examination, Martinez acknowledged that when shown the surveillance photograph, she recognized the person's build; asked to acknowledge that she did not recognize the person's face, she testified that she did not remember whether she did or did not. Martinez subsequently identified appellant in a photographic lineup on March 12 and a live lineup on March 27. The forms Martinez signed at these identifications contained admonishments including that the person might or might not be included in the lineup.

Fairfield Detective Steven Trojanowski, who conducted the live lineup, testified that in March 2008, appellant was 51 years old, about six feet tall, and weighed about 210 pounds. At trial, Martinez testified that the hat in exhibit No. 23, which had been seized in a search of appellant's home, was a similar color to the beanie the robber was wearing, but did not look like the beanie because the beanie did not have a bill.

Tommy Bahamas (counts 2 & 3)

On January 30, 2008, Sean Kerwin and Christine Corsello were working in a Tommy Bahamas clothing outlet store in Vacaville. At about 8:45 p.m., shortly before closing time, while Kerwin and Corsello were both at the cash registers, a man both identified at trial as appellant entered the store. The man was wearing a heavy black windbreaker-type jacket, had a Band-Aid under one of his eyes, and smelled heavily of marijuana. He asked whether the clothes were the "spring selection" and Kerwin began his routine answer about clothing in the outlet coming from the retail store. Appellant interrupted, saying he did not care, this was "an armed robbery." Corsello testified that appellant leaned forward, hands on the countertop, and said "I just want to let you know I

have a gun. Open your register and give me your money.” Corsello told appellant that the registers were closed and her keys were in the back. Appellant said they would go to the back. Corsello stumbled over a box as she turned. She had tried to trip the alarm and appellant said, “You pressed the alarm,” and left the store.

Kerwin testified that appellant was in the store for five to ten minutes; Corsello indicated it was a shorter time. Until appellant said he was there to rob him, Kerwin had thought appellant was just a customer, but once appellant stated his intention, Kerwin became afraid. He thought appellant said he had a gun, but he did not see one. Kerwin testified that it was easy for him to see appellant; the store lighting was bright, appellant was no more than three or four feet away from him, and they were facing each other. Corsello testified that appellant was two to three feet away; she made eye contact with him and he kept looking at both her and Kerwin. During the incident, Corsello was “very” afraid that she, Kerwin, or one of the people in the store was going to be injured. She described the robber to the police as about five feet nine inches but commented at trial that she was a bad judge of height. She testified that he did not look like the store’s usual patron, who would be older and heavier.

Corsello testified that on the night of the incident she talked to her regional manager and risk management contact and obtained pictures taken by the surveillance camera, including the two in exhibit No. 20. She gave some of the pictures to the police. On March 13, the police showed Corsello a photographic lineup and she was not able to identify anyone “a hundred percent,” going back and forth between numbers one and three. When the officer asked which she was more inclined to pick, she chose number one. Appellant’s photograph was number three. At a subsequent live line up on March 27, she identified appellant. Corsello read and followed the instructions at each of the lineups. Officer Polen testified that appellant was the only person who was in both the live lineup and the photographic lineup Corsello viewed.

Kerwin testified that some time after the robbery, he was shown a still photograph taken from the store’s surveillance video. A week or two after this, he was shown a photographic lineup at the police station and identified appellant’s photograph. Kerwin

also attended a live lineup, where he identified someone other than appellant. Kerwin testified that he was nervous and afraid the people in the lineup could see him, although he was told they could not; he felt intimidated, and he rushed his identification so he could leave.

Vacaville Police Officer Chris Polen testified that a couple of weeks after the live lineup, he contacted Kerwin and showed him a still photo of the lineup he had seen. Kerwin identified appellant, explaining that he made his selection through a process of elimination. Polen did not have any of the other witnesses come to the police department after the photographic lineup and live lineup. He testified that shortly after the robbery, Kerwin said he had started carrying a golf club as a result of what had happened, and Kerwin said after the live lineup that he was scared and intimidated.

Officer Polen explained that he received a video of the attempted robbery, and still photographs from the video, from a loss prevention agent. He circulated the still photos to other agencies in the county, then received a call from Detective Trojanowski of the Fairfield Police Department, who said he had identified appellant as a potential suspect in the case. Polen gave Trojanowski the information he had about the Tommy Bahamas case and a subsequent Vacaville robbery at Fallas Paredes. After appellant was arrested on March 12, Polen used his booking photograph to create a photographic lineup.

In late February or March 2008, Detective Steven Trojanowski searched appellant's home and seized a black leather jacket, a suede jacket, a solid black neck tie, a checkered men's shirt and a "billed beanie type cap" from appellant's bedroom. He seized these items because in the surveillance photograph from the Tommy Bahamas attempted robbery, appellant was wearing a black beanie type hat with a bill, checkered shirt, black tie and black jacket. Trojanowski was aware that the victim in the Sally's robbery had described the robber wearing a black sweatshirt and black jeans. He did not find a black hooded sweatshirt. Although there were a lot of black pants and, he believed, black jeans, there was "nothing descriptive enough to take as evidence." Corsello testified that the hat in exhibit No. 23 looked similar to the one appellant was wearing during the attempted robbery.

The surveillance video of the attempted robbery at Tommy Bahamas was played for the jury.

Entenmann's Bakery (count 4)

On February 26, 2008, Natalie Caballero and Carol Crane were working at Entenmann's Bakery in Fairfield. At about five minutes before 7:00 p.m., just before closing time, a man both identified at trial as appellant came in and asked if they had hamburger buns. Caballero testified that he was clean-cut, wearing a dark baseball cap or other hat with a bill, and had a Band-Aid on his face. The hat was similar to exhibit No. 23. Crane testified that she saw the man's face clearly, paying attention to it because she noticed the Band-Aid. Caballero walked over and showed him where the buns were, and he selected some. Caballero went to the register and started to ring up the purchase as appellant stood across from her. When the register drawer opened, appellant leaned over, pushed Caballero aside and took the money, about \$166, from the register. Appellant said something to the effect that he was going to rob her. Caballero tried to push the drawer closed to get appellant's hands out of it, and appellant said, "Don't trip," then looked at Crane, said he had a gun, took the money and bag of buns, and left. Caballero testified that during the incident she was afraid appellant might have a gun and she might be hurt. Crane testified that she did not feel fear but was angry. When appellant said he was going to rob them, Crane was going to call 911, but as she started going to the back room, Caballero told her not to. Asked if she intended to call 911 absent Caballero's admonition, Crane stated that she intended to take a bar that was nearby and "beat the hell out of him for what he was doing to us. He violated us." Crane testified that appellant was trying to take the money against her will, that she was threatened, and that he was trying to intimidate her.

When Crane called 911 after appellant left the store, she described him as an African American male wearing black clothing. She at first said he had a Band-Aid above his eye, then said it was below his eye. Crane, who is nearsighted, acknowledged that she was not wearing her glasses at the time of the robbery, but testified that while she could not see small details from a distance, she needed her glasses mostly for driving; she

was able to identify the person sitting next to the prosecutor from the witness stand without her glasses. Caballero told the police that the robber looked about 30 years old.

Caballero remembered someone coming to show her photographs sometime after the robbery, but did not remember whether it was one photograph or five or six; when shown the surveillance photograph (exhibit No. 24) and photographic lineup (exhibit No. 11) at trial, she did not remember seeing the former but thought she remembered the latter and recognized her signature on it. She subsequently attended a live lineup and identified appellant. Crane also did not remember whether she was shown the single surveillance photograph. She remembered being shown a photographic lineup and saw her signature on exhibit 1No. 3. She remembered being able to identify someone in the photographic lineup and in a live lineup.

Detective Trojanowski testified that he showed the surveillance photograph he had received from Vacaville to the witnesses in the Entenmann's and Sally's robberies on March 6, 2008. When he learned appellant's name as a possible suspect, he prepared a photographic lineup including appellant's photograph and five others with similar physical characteristics. He showed this lineup to Caballero and Crane, separately, on March 12, after reading each the admonishment on the lineup forms and ascertaining that they understood it. Caballero and Crane each said that number two "looks like" the robber but she was not a hundred percent sure, and that number two "could be" the person who committed the robbery.

Fallas Paredes (count 6)

On the evening of March 4, 2008, Teresa Jackson and Elaine Marinucci were working at Fallas Paredes in Vacaville. A man came in whom Marinucci identified at trial as appellant. Jackson described the man as African American, about five feet eight or nine inches tall, weighing in "the two hundreds," wearing a sweater and a black beanie. Marinucci testified that the man was in his 40s or 50s and was wearing a dark knit beanie and blue or black athletic pants, and a gray tee shirt, and he had a key ring around his neck.

Marinucci was at the register when appellant entered the store. Jackson greeted him and testified that he said he was looking for his wife. Jackson went to the back of the store and appellant came to the counter and asked for change for the pay phone. Marinucci thought this was “funny” because he already had two dimes and a nickel, but asked her for quarters. She had an “inner feeling” that “just didn’t feel right.” She opened the register to give him the change, and he reached over the counter and grabbed money from the register. She put her hand on his hand and he reached over with his hand in his pocket and told her, “Chill, man. I have a gun.” She let go, not wanting to risk getting shot if he had a gun. She thought he could have a gun because he kept one hand in his pocket and she saw a “big bulge.” He told her not to call the police and ran out the door. Jackson came out of the office to see the man leaving the store with money in his hand.

Jackson was in the back during the robbery and was not in fear until after it happened. She told the police the man was 35 or 40 years old, and that his face was shaved, possibly with “little specks coming in” but nothing around his mouth.

Marinucci recognized exhibit No. 15 as the photo lineup she was shown by the police. She testified that she identified appellant in the lineup, although exhibit No. 15 bears no mark indicating an identification. She identified appellant in a live lineup a few days later.

Jackson first testified that she did not remember being shown a series of photographs, then, when shown the photographic lineup in exhibit No. 17, testified that she saw it but did not remember being able to identify anyone. She testified that if she had identified anyone, she was being honest. She attended a live lineup, which she remembered because she did not want to do it. She explained to the police, as she had when shown the photographs, that she did not know exactly what the robber looked like, having only greeted him while rushing to get her job done and go home. Following instructions that directed her to put a question mark on the lineup form if she saw someone similar to the robber but she was not positively sure, she put a question mark on number 2.

Officer Polen, who created the photographic lineup in exhibit No. 17 using appellant's March 12 booking photo, testified that appellant's photo was in the number three position. When Officer Polen showed the lineup to Jackson on March 13, she went back and forth between numbers one and three, but settled on number three. Polen testified that he always asked witnesses if they understood the admonitions he gave before showing a lineup, and would not show a lineup if the witness did not understand the admonitions. Jackson was "pretty confident" about her selection, but asked to view a live lineup to be sure of her identification, and attended the lineup on March 27.

Toward the beginning of Jackson's testimony, the prosecutor commented that she kept looking to the prosecutor's left and asked why. Jackson said she was "just looking around" and "just nervous." Jackson acknowledged that she had been subpoenaed to appear in court the preceding Tuesday, but did not appear that day, Wednesday or Thursday; then she received a call telling her she might get in trouble if she did not come.

Defense

Mitchell Eisen, Ph. D., testified as an expert on eyewitness identification, memory and suggestibility. He testified that, according to the research, in traumatic situations, stress overwhelms coping mechanisms and people tend to focus on key elements of the event, limiting the information taken in. Longer exposure to a person will generally increase the chance of a witness being able to differentiate the person from others later. Reports given closer in time to the event tend to be more complete and accurate, both because the information is "fresher" and because such reports are less influenced by post-event information from seeing pictures, talking with others and imagining the event.

According to Eisen, it is well understood that when given an identification task such as a lineup, a person will assume the police know something and the suspect is likely there. This is why a standard admonishment is given directing the witness not to assume the guilty party is present, but the admonishment will not necessarily outweigh the assumption. Often, witnesses who do not immediately recognize anyone in a lineup will stick with the task, comparing the options and choosing the one who most closely matches their memory, even if the actual perpetrator is not among the choices. Research

has also demonstrated that a person's memory for a face cannot be tested more than once without the potential for that exposure to influence future identifications: Once a witness has been exposed to a person's face, that face will be familiar to the witness and the witness may pick it in a subsequent identification simply for that reason. Additionally, the officer conducting the identification procedure may inadvertently give cues to the witness. More errors in identification occur where the witness is of a different race than the perpetrator.

Eisen further testified that research demonstrates people tend to stick with their initial identification in future ones, striving for consistency and searching for the previously identified person. The identified person becomes the face of the perpetrator in the witness's mind, overriding the witness's memory of the actual event. Where the initial identification was mistaken, the witness may confuse the identified face with the face of the actual perpetrator. A person's confidence in his or her identification is not related to accuracy, and people tend to become more certain about their identifications over time regardless of whether the identifications were accurate and even if the initial identification was tentative. Also, over time the witness may be exposed to information that is interpreted as confirming the identification, such as learning someone else identified the same person. Research shows that a person's confidence in his or her identification can be artificially boosted or undermined by giving feedback indicating the choice was correct or incorrect.

DISCUSSION

I.

Appellant contends the trial court abused its discretion in consolidating trial of the four incidents in this case. In appellant's view, the attempted robbery at Tommy Bahamas was a much stronger case against him than the other three incidents. The attempted robbery was captured on a surveillance video, depicting the perpetrator wearing clothing that matched clothing later seized from appellant's bedroom. By contrast, appellant was connected to the three robberies solely by eyewitness testimony which appellant characterizes as "not particularly strong." Appellant argues that

consolidation was prejudicial because it allowed the three weaker cases to be bolstered by the stronger case, and because appellant was prosecuted for several offenses rather than a single one. Additionally, appellant urges that because all the incidents were “garden variety” robberies of commercial businesses, with no distinctive features, evidence of the incidents would not have been cross-admissible on issues of identity or modus operandi if they had been tried separately, and that little economy was gained by trying the cases together.

As indicated above, appellant was initially charged in two separate cases, one concerning the attempted robberies at Tommy Bahamas and the robberies of Sally’s and Fallas (case No. SCR253307) and the other concerning the robbery of Entenmann’s (case No. FCR253732). Prior to the preliminary hearing, the prosecution moved to consolidate the two cases. In opposition, appellant argued that consolidation would be prejudicial and improper because it was unlikely any evidence would be cross-admissible, trying multiple cases based only on eyewitness testimony together would bolster relatively weak individual cases, and the evidence from one robbery had nothing to do with the others. The motion to consolidate was denied, the court expressing particular concern about the fact that different witnesses described the suspect having a Band Aid in different places on his face, which the court felt could easily confuse the jury, and prejudice appellant, because of the “difficulty of keeping that sort of significant factor related to eyewitness testimony separated from one case to the next.”

After the prosecution filed the information in case No. SCR253307, appellant moved to sever the counts of attempted robbery (Tommy Bahamas) from the counts of robbery (Sally’s and Fallas). He argued that evidence would not be cross-admissible on the question of identity because the incidents were not sufficiently similar in terms of description of the suspect or method used and there was no common physical evidence; the stronger evidence of the attempted robbery, which included the surveillance video and clothing seized from appellant’s home, would bolster the robbery cases, which depended only on imperfect eyewitness testimony; and the similarity of the charges and number of witnesses created a danger of juror confusion.

The prosecution countered that there was cross-admissible evidence in that appellant was identified as a suspect through evidence from both the Fairfield and Vacaville incidents and the Sally's and Tommy Bahamas incidents both involved an unarmed suspect with a Band Aid on his face engaging the employees in small talk before demanding money from the register, and that while the Tommy Bahamas evidence may have been stronger, the other cases were not weak. The prosecution also sought reconsideration of the order denying consolidation with the Entenmann's robbery charges, for the same reasons it opposed the motion to sever.

The court denied the motion to sever, finding a "high likelihood of cross-admissibility of at least some evidence" and "numerous similarities common to these events," including "similar descriptions of the suspect and how the suspect acted during the events, proximity and time among all three of the events, similarities in time of day. None of the crimes is particularly more inflammatory than any other. There are other features such as the Band-Aid which is common to two out of those three cases." The court noted that there were at least two common police witnesses, and no "gross difference in the relative strength of any one crime, event, or count over any of the others." Although it recognized that the surveillance photographs would be of significance to the trier of fact, the court found they would not cause the level of disproportionate weight that would make it unfair to proceed in a single trial.

The court made similar findings regarding the motion to consolidate: "We have similar descriptions of the suspect and how the suspect acted in all four cases. We have the band-aid on the face, somewhere on the face, appearing in three out of four of the cases. We have similar descriptions of . . . how the suspect acted and how the suspect in each of the four events committed the actual robbery." Finding a "high likelihood" of cross-admissibility of evidence among the four cases, and noting the presumption in favor of consolidation absent a showing of undue prejudice to the defendant, the court granted the motion to consolidate.

Just before the beginning of the trial, appellant again moved to sever the two attempted robbery counts. In addition to previously raised points, appellant maintained

that in order to make his strongest argument that the identifications in the Sally’s and Entenmann’s cases were tainted—because the witnesses were shown the surveillance photograph from the Tommy Bahamas case—the defense would have to concede that the photograph was appellant, which would ensure a guilty verdict on the Tommy Bahamas counts in a joint trial.

In denying appellant’s motion to sever the attempted robbery counts, the court (a different judge this time) stated that the surveillance video was “strong evidence” but was “somewhat offset” by Kerwin’s “equivocations” about who came into the Tommy Bahamas store and Corsello’s having picked two photographs from the lineup. The court also felt the other cases were not weak, as all involved eye witnesses who were physically close to the suspect and identified appellant. The court stated there were “some common characteristics” and “[t]here conceivably is cross-admissibility, at least as to the Band-Aid, the gun, or lack thereof.” It continued, “And as to the issue of identity, we could argue a little bit more about whether or not those are signature characteristics or not. . . . [¶] But in terms of common plan or scheme or intent, you know, less of a signature quality is required for those kinds of—that kind of evidence to be crossly admissible.” Finally, the court noted that the severance motion “should have been raised sooner,” when the video “became of knowledge to both sides.”

“Under section 954, ‘[a]n accusatory pleading’ may charge ‘two or more different offenses of the same class of crimes or offenses, under separate counts.’ ” (*People v. Elliott* (2012) 53 Cal.4th 535, 551.) “The law favors the joinder of counts because such a course of action promotes efficiency. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.)” (*People v. Myles* (2012) 53 Cal.4th 1181, 1200.) Accordingly, “[t]he burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” (*People v. Soper* (2009) 45 Cal.4th 759, 773 (*Soper*)). “A trial court has discretion to order that properly joined charges be tried separately (§ 954), but there must be a ‘clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant’s severance motion’ (*People v. Mendoza* (2000) 24 Cal.4th 130, 160). In assessing a claimed abuse

of discretion, we assess the trial court's ruling by considering the record then before the court. (*Soper, supra*, at p. 774; *People v. Avila* (2006) 38 Cal.4th 491, 575.)” (*People v. Myles, supra*, 53 Cal.4th at p.1200.)

In exercising its discretion to order separate trials, “a trial court should consider (1) whether the evidence relating to the various charges would be cross-admissible in separate trials, (2) whether some of the charges are unusually likely to inflame the jury against the defendant, (3) whether a weak case has been joined with a strong case or with another weak case, and (4) whether one of the charges is a capital offense or the joinder of the charges converts the matter into a capital case. (*People v. Cook* (2006) 39 Cal.4th 566, 581.)” (*People v. Elliott, supra*, 53 Cal.4th at p. 551.) “If the evidence underlying each of the joined charges would have been cross-admissible under Evidence Code section 1101 had they been prosecuted in separate trials, ‘that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court’s refusal to sever properly joined charges.’ (*Soper, supra*, 45 Cal.4th at p. 775; see *People v. Vines* (2011) 51 Cal.4th 830, 855.)” (*People v. Myles, supra*, 53 Cal.4th at pp. 1200-1201.)

However, “lack of cross-admissibility is not dispositive of whether the court abused its discretion in denying severance. (§ 954.1; *People v. Thomas* (2011) 52 Cal.4th 336, 350 [‘When two crimes of the same class are joined, cross-admissibility is not required.’].)” (*People v. Myles, supra*, 53 Cal.4th at p. 1201.) Even if the evidence would not have been cross-admissible, the reviewing court must determine “ ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of defendant’s guilt of each set of offenses.’ (*People v. Bean* (1988) 46 Cal.3d 919, 938; see *People v. Thomas, supra*, 52 Cal.4th at p. 350.)” (*People v. Myles, supra*, at p. 1201.) After consideration of all the factors bearing on joinder, the court must “ ‘balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.” [Citation.]’ ” (*Ibid.*, quoting *People v. Thomas* (2012) 53 Cal.4th 771, 798-799.)

Appellant devotes substantial argument to his claim that the evidence of the

separate robberies and attempted robbery would not have been cross-admissible. Evidence that a defendant committed other crimes may be admissible when relevant to prove a fact such as motive, opportunity, intent or identity (Evid. Code, § 1101, subd. (b)), but only when the offenses are sufficiently similar to prove the fact at issue. “The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Miller* [(1990)] 50 Cal.3d 954, 987.) ‘The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.’ (1 McCormick [on Evidence (4th ed. 1992)] § 190, pp. 801-803.)” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) “The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense.” (*People v. Balcom* (1994) 7 Cal.4th 414, 425.)

A lesser degree of similarity is required where the uncharged offenses are used to establish the existence of a common design or plan: For this purpose, “the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) Other crimes evidence is admissible to show a common design or plan, however, “only to prove that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant’s intent or identity as to the charged offense.” (*Ibid.*) Where it is undisputed that the charged offense was committed by someone, and the only question is whether the defendant was the perpetrator, evidence sufficient to demonstrate a common plan but not distinctive enough to establish identity generally would not be admissible because it would be cumulative and unduly prejudicial. (*Id.* at p. 406.)

Appellant urges that the offenses with which he was charged were “garden variety type robberies,” none involving common features that were sufficiently distinctive to make them admissible. This characterization downplays the overall similarities between

the incidents: All occurred in a relatively small geographical area, within less than six weeks of each other, at similar times of day, perpetrated by a man wearing dark clothing and a beanie or billed cap who engaged in small talk with an employee, then came to the register, gave the impression or stated he was armed but in fact was not, and, when the register was opened, grabbed the money and left. In three of the four incidents, the perpetrator was described as having a Band-Aid on his upper cheek (although Crane initially told the 911 operator the Band-Aid was above his eye, then said it was below his eye).

We need not determine whether the evidence would have been cross-admissible because, as indicated above, even if it was not, the lack of cross-admissibility would not necessarily mean the trial court abused its discretion in denying severance. (*People v. Myles, supra*, 53 Cal.4th at p. 1201.) Here, consideration of the other factors bearing on severance demonstrates that it did not.

Two of the remaining factors clearly militate in favor of consolidation. None of the charges was likely to unusually inflame the jury against the defendant (*People v. Myles, supra*, 53 Cal.4th at p. 1202), as the charged offenses were of the same type, with similar facts and no egregious circumstances in any of the four incidents. And none of the charges involved a capital offense. (*Ibid.*) The only real question is whether the joint trial permitted weak charges to be bolstered by strong ones.

This is the heart of appellant's argument—that the attempted robbery counts were supported by strong evidence in the form of the surveillance video and clothing seized from his home, while the robbery charges were weak because they rested purely on eyewitness testimony that appellant challenges as tainted and unreliable. The trial court disagreed, finding that although the video was strong evidence, the cases based solely on eyewitness testimony were not weak because the witnesses were close to appellant during the incidents and identified him on multiple occasions.

We find no abuse of discretion. As will be discussed in the following section of this opinion, appellant's challenges to the eyewitness testimony are unavailing. All of the witnesses were in close contact with the perpetrator during the incidents. All but one

(one of the two witnesses in the Fallas robbery) identified appellant at trial. All the witnesses in the Sally's, Entenmann's and Fallas robberies identified appellant in both the photographic and the live lineups. The only witnesses who did not identify appellant in one of the two pretrial identification procedures were the witnesses in the Tommy Bahamas attempted robbery (the incident captured on video), one of whom picked a different person in the photographic lineup (but identified appellant in the live lineup) and the other of whom picked someone different at the live lineup (but identified appellant in the photographic lineup and in a still photograph of the live lineup). The defense at trial tried to undermine the credibility of these identifications; the various factors bearing on the witnesses' ability to accurately perceive and remember the events, and the opportunities for mistakes, were pointed out on cross-examination, through expert testimony and in argument. We find no reason to believe the jury would not have credited the eyewitness testimony if it had not also had the benefit of the surveillance video and clothing from the Tommy Bahamas case. "[T]he benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried. (E.g., *Zafiro v. United States* (1993) 506 U.S. 534, 540 ["[D]efendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"]; accord, [*State v.*] *Richards* [(Mont. 1995)] 906 P.2d 222, 227.)" (*Soper, supra*, 45 Cal.4th at p. 781.)

Finally, we must consider the benefits to the state from jointly trying these cases. (*People v. Myles, supra*, 53 Cal.4th at p. 1201.) In addition to the case-specific benefits that accrue when there is an overlap in the evidence pertaining to the joined counts (*Soper, supra*, 45 Cal.4th at p. 783), such benefits include conserving judicial resources and public funds: "A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." (*People v. Bean*[, *supra*,] 46 Cal.3d [at pp.] 939-940;

Soper, supra, 45 Cal.4th at pp. 781-783.) “Manifestly, severance of properly joined charges denies the state the substantial benefits of efficiency and conservation of resources otherwise afforded by section 954.” (*Soper, supra*, 45 Cal.4th at p. 782.)

Appellant relies upon *People v. Earle* (2009) 172 Cal.App.4th 372 (*Earle*) to argue these benefits are minimal in the present case. *Earle* found a prejudicial abuse of discretion in the refusal to sever two “entirely distinct and dissimilar” cases with “no apparent historical connection to one another,” one a very strong (indeed, “tacitly conceded”) misdemeanor indecent exposure case and the other a “considerably stronger” felony sexual assault. (*Id.* at p. 378.) The indecent exposure occurred in broad daylight, the victim recorded the perpetrator’s license plate, which belonged to the defendant’s car, and the victim identified the defendant from a properly conducted photographic lineup. (*Ibid.*) The sexual assault, on the other hand, happened at night in a car lit only by overhead parking lot lights, the victim’s description of her assailant differed markedly from the defendant’s appearance,⁸ there were discrepancies regarding the victim’s description of the car involved in the incident and the defendant’s car, and the defendant was “a world-class competitor in the sport of ‘submission grappling,’ ” yet during the incident, the victim was able to break her assailant’s grasp and escape from the vehicle in which he was trying to subdue her. (*Earle, supra*, 172 Cal.App.4th at pp. 378-379.) Although the indecent exposure was not relevant to any issue in the trial of the assault, the prosecutor explicitly asked the jury to convict the defendant of the assault based on his commission of the unrelated indecent exposure, likening the latter to DNA evidence and “ ‘modus operandi’ ” despite the absence of any evidence that a person who engages

⁸ The victim described her assailant as looking Mexican, with “light brown skin resembling her own,” whereas the defendant was described by a police officer as “white,” had a “pallid, European appearance” in photographs, and apparently looked European to the victim of the indecent exposure, as indicated by the photographs in a lineup resulting from her description; she described the assailant as “skinny” while the defendant had an “athletic build”; and the victim did not describe notable physical characteristics of the defendant, including “a deeply furrowed brow and protruding, possibly damaged ears” and “an unmistakably athletic bull neck.” (*Earle, supra*, 172 Cal.App.4th at pp. 378-379.)

in indecent exposure has a propensity or predisposition to commit a sexual assault. (*Id.* at pp. 379, 398-400.)

Considering the many significant weaknesses in the assault case—which the court took pains to detail at great length—and the bias against the defendant likely instilled in the jury by the virtually conceded indecent exposure and the prosecutor’s “pervasive reliance upon it” (*Earle, supra*, 172 Cal.App.4th at pp. 401-407, 409), as well as the absence of any overlap in evidence or witnesses, the *Earle* majority held that the “systemic economies” of joint trial could not “counterbalance the very substantial risk that evidence of the indecent exposure played a dispositive role in the verdict on the assault charge.” (*Id.* at p. 408.)

The present case involves nothing like the extreme disparity in strength between the cases for which severance was sought in *Earle*: As we have said, while the evidence in the Tommy Bahamas case was strengthened by the surveillance video and seized clothing, the eyewitness testimony in the other cases was still strong. Nor does the present case present the risk of irrelevant emotional bias that drove the court’s analysis in *Earle*. Even the *Earle* court highlighted the systemic benefits resulting from a joint trial, stressing their importance although finding them overcome, in that case, by the defendant’s right to a fair trial, without the jury hearing otherwise inadmissible and inflammatory evidence. (*Earle, supra*, 172 Cal.App.4th at pp. 408-409.) Here, there is no comparable risk of prejudice to outweigh the benefits of a joint trial.

II.

Prior to trial, appellant moved to exclude in-court identifications by Martinez, Crane, Caballero and Kerwin on the grounds that identification by these witnesses had been tainted by unduly suggestive pretrial identification procedures. The trial court denied the motion, finding that appellant failed to meet his burden of showing that the procedures were unduly suggestive and unnecessary or that the ultimate identification was not reliable.

Appellant now argues that his constitutional rights to due process and a fair trial were violated by the use of impermissibly suggestive pretrial identification procedures.

His claim is based on the facts that the witnesses in the Sally's and Entenmann's robberies were shown a surveillance photograph of the suspect in the Tommy Bahamas robbery before they identified appellant in photo and live lineups; that appellant was the only subject included in both the photographic lineups and live lineups; and that one of the victims in the Tommy Bahamas attempted robbery identified someone other than appellant in the live lineup, then later identified appellant in a photograph of the live lineup after being requested to come to the police station.

We apply the independent standard of review to a trial court's determination that a pretrial identification procedure was not unduly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) "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. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107, 114; *Neil v. Biggers* (1972) 409 U.S. 188, 199-200; *People v. Ochoa* [(1998)] 19 Cal.4th 353, 412; *People v. Johnson* (1992) 3 Cal.4th 1183, 1216; *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.) [¶] The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. (*People v. Ochoa, supra*, 19 Cal.4th 353, 412; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) "The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him." (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.)" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.)

Appellant argues that it is likely Martinez, the witness in the Sally's robbery, identified appellant at the lineups not because she recognized him from the incident but

because his face was familiar from the surveillance photograph the police showed her. He emphasizes that Martinez recognized the photo was from a surveillance camera, that she recognized the subject's build but not his face, and that the photograph depicts a man with a mustache while at the time of the robbery Martinez described the suspect as clean shaven.

Courts have noted the danger that a witness who first identifies a suspect from photographs may base a subsequent identification on the memory of the photograph rather than of the incident itself. (*Simmons v. United States* (1968) 390 U.S. 377, 383.) Use of a single photograph for identification is particularly problematic because of the suggestion it conveys to the witness that the police believe the person in the photograph is the suspect. (*People v. Contreras* (1993) 17 Cal.App.4th 813, 820; see, *Simmons, supra*, 390 U.S. at p. 383; *Manson v. Brathwaite, supra*, 432 U.S. at pp. 107-109.)

But photographic identifications play a critical role in criminal investigations. As *Simmons* explained, “[d]espite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method’s potential for error.” (*Simmons v. United States, supra*, 390 U.S. at p. 384.) Identifications based on a single photograph may play a necessary and valid role in an investigation, and the fact that a witness first identified the defendant from a single photograph does not necessarily impermissibly taint a subsequent identification. (*People v. Johnson* (2010) 183 Cal.App.4th 253, 273; *Wilson v. Superior Court* (1977) 70 Cal.App.3d 751, 757; *People v. Greene* (1973) 34 Cal.App.3d 622, 644-645.) “[E]ach case must be considered on its own facts, and . . . convictions 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, supra*, 390 U.S. at p. 384.)

People v. Johnson is particularly apt. There, police were investigating a series of robberies or attempted robberies of gas stations in the Sacramento area. Still photographs taken from the video surveillance recording of one of these incidents were shown to the victim of an uncharged incident, and she recognized the subject in the photographs as the person who attempted to rob her. (*People v. Johnson, supra*, 183 Cal.App.4th at p. 271.) She subsequently identified the defendant in a live lineup. (*Ibid.*) Rejecting the contention that use of the photographs before the live lineup improperly tainted the witness’s identification, the court first noted that because the photographs were not part of the record, it did not know exactly what they depicted and therefore could not determine what prejudicial effect they could have had on the subsequent identification. (*Id.* at pp. 272-273.) The court then stated, “We certainly cannot say the procedure was unnecessary. A police sergeant from a different jurisdiction asked Mar to view the photos based on the similarity in the crimes and in order to solve the crime against Mar.” (*Id.* at p. 273.)

In the present case, Vallejo Police Officer Polen circulated the surveillance photograph from the attempted robbery at Tommy Bahamas to other agencies, and Fairfield Police Officer Trojanowski showed the photograph to victims of robberies that occurred in his jurisdiction. There is nothing inherently suggestive about the photograph: It simply depicts a man walking into a clothing store, with the store door part way open behind him. Given the background of the photograph, it could not have been used in a photographic lineup because other photographs would necessarily have had different backgrounds.⁹ There was nothing unreasonable about Officer Trojanowski attempting to

⁹ Officer Trojanowski testified that in preparing a photographic lineup, he tries to make the photographs as similar as possible in terms of factors such as age, race, skin tone and background. ~(RT 290)~ When he prepared the photographic lineup he used in this case, he did not use the surveillance photograph because the background would have been different from other photos. ~(RT 290)~

determine whether the attempted robbery suspect seen in the surveillance photograph was the same person responsible for the Fairfield robberies.

Appellant emphasizes that Martinez recognized the photograph she was shown as a surveillance photograph. But this in itself is not suggestive. The purpose of a surveillance camera aimed at a store's door is to capture images of persons entering and leaving the store; any customer visiting the store would be so documented. Appellant's description of Martinez having testified that she recognized the build of the person in the surveillance photograph but not his face overstates the testimony. Martinez testified that she recognized the person's build and that she did not remember whether she recognized his face or did not recognize it. Martinez did describe appellant to the police as clean-shaven while the surveillance photograph shows a man with a mustache, but this discrepancy is not sufficient to conclude the surveillance photograph was unduly suggestive. The other discrepancies that appellant notes are that Martinez described the suspect as five foot nine inches tall and about 40 years old, while appellant was "about" six feet tall and 51 years old. Neither of these is so far off as to undermine the reliability of the identification. Rather, these were the kind of factors the jury was instructed to consider in determining the credibility of eyewitness testimony. (CALCRIM No. 315¹⁰;

¹⁰ CALCRIM No. 315 provides:

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

"In evaluating identification testimony, consider the following questions:

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

"How well could the witness see the perpetrator?

"What were the circumstances affecting the witness's 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?

see *Wilson v. Superior Court, supra*, 70 Cal.App.3d at p. 757 [discrepancy between witness estimate of height (five feet six inches) and actual height (six feet two inches) “may cast doubt on the victim’s credibility and the defense can rightly draw a jury’s attention to them”].)

Martinez had ample opportunity to observe appellant at the time of the robbery. She testified that the store was well lit, and she talked to him first from about six feet away and then, upon his return, from across the counter at the register. Although she looked down once she realized a robbery was underway, she and appellant initially were looking straight at each other. There is no basis for us to conclude her identifications from the photographic lineup, live lineup and at trial were not reliable.

With respect to the witnesses in the Entenmann’s robbery, Caballero and Crane, appellant notes that neither was able to positively identify the suspect from the photographic lineup, indicating only that appellant “could be” the robber but they were “not a hundred percent sure”; that appellant was the only person included in both the photographic and live lineup, and that all the subjects in the live lineup were wearing jail jump suits. He further points to Cabellero’s description of the suspect as about 30 years old, 20 years younger than appellant’s actual age; her testimony that she did not realize appellant was bald until she saw him at the live lineup; and the facts that Crane was not wearing her glasses at the time of the robbery and told the 911 operator first that the Band Aid on the suspect’s face was above his eye, then that it was below his eye.

“Did the witness ever fail to identify the defendant?

“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 the crime?

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

“Were there any other circumstances affecting the witness’s 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.”

Again, the discrepancies to which appellant points were factors for the jury's consideration, and the defense emphasized these and other similar points on cross-examination and in closing argument. "[T]he fact that defendant alone appeared in both a photo lineup and a subsequent live lineup does not per se violate due process." (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) A defendant bears the burden of showing that an identification procedure was unduly suggestive and unfair "as a demonstrable reality, not just speculation." (*People v. DeSantis, supra*, 2 Cal.4th at p. 1222.) As indicated above, due process is violated "only if the identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" (*People v. Cook*, at p. 1355, quoting *Simmons v. United States, supra*, 390 U.S. at p. 384.)

In arguing that the subsequent identifications were tainted by the witnesses first being shown the surveillance photograph, appellant attempts to distinguish *People v. Hernandez* (1988) 204 Cal.App.3d 639 (*Hernandez*), a case rejecting such a challenge. In *Hernandez*, the witness was first shown a photographic lineup that did not include the defendant's photograph and did not identify anyone. He was later shown another photographic lineup and stated that the defendant's photograph looked "more like" the burglar than any of the others. The detective, informed that the burglar was wearing a cap, showed the witness a single photograph of the defendant wearing a hat. The witness still did not make a positive identification because " 'he had his hands up in front of his face and [the witness] couldn't get a good look at his face.' " (*Id.* at pp. 644-645.) The witness identified the defendant at trial. (*Id.* at p. 653.)

Upholding the trial court's denial of the motion to suppress the in-court identification as the product of an unfair pretrial identification procedure, *Hernandez* noted that the police did not initiate the identification procedure by showing a single photograph but showed it only after the witness pointed to the defendant's photograph in a lineup as most resembling the burglar, and that even with the single photograph, the identification was only tentative, "indicating that the showing of the single photo of defendant had no effect." (*Hernandez, supra*, 204 Cal.App.3d at pp. 653-654.)

Appellant argues that the present case is different because the police used the single photograph at the beginning of the identification procedure, and the witnesses' subsequent identifications were not tentative. While the distinctions appellant notes are accurate, they do not undermine our conclusion that appellant has not demonstrated that the use of the single photograph in this case was unduly suggestive or the subsequent identifications were unreliable.

III.

Finally, appellant contends there was insufficient evidence to support the robbery conviction involving Carol Crane because Crane testified that she was angry, not afraid, during the robbery, and there was no evidence any property was taken from her by use of force or fear.

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) The “fear” element may be either “fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family” or “fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.” (§ 212.) “To establish a robbery was committed by means of fear, the prosecution ‘must present evidence “. . . that the victim was in fact afraid, and that such fear allowed the crime to be accomplished.” ’” (*People v. Morehead* (2011) 191 Cal.App.4th 765, 772, quoting *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698.) “ ‘Although the victim need not explicitly testify that he or she was afraid in order to show the use of fear to facilitate the taking [citations], there must be evidence from which it can be inferred that the victim was in fact afraid, and that such fear allowed the crime to be accomplished. [Citations.]’ (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709, fn. 2.)” (*People v. Davison* (1995) 32 Cal.App.4th 206, 212.)

“ ‘Fear’ may be inferred from the circumstances despite even superficially contrary testimony of the victim.” (*People v. Iniguez* (1994) 7 Cal.4th 847, 857 [rape victim “froze” during incident and robbery in the facts that the victim acquiesced

promptly and gave up the money, actions people generally would not take absent fear of bodily injury if they refuse. The court explained, “In spite of the bravado of the merchant in declaring that he was not much afraid, we are inclined to believe he meant he was not afraid of receiving bodily harm so long as he complied with the demands of the robber.” (*Id.* at p. 485.) Similarly, in *People v. Renteria* (1964) 61 Cal.2d 497, 498, a liquor store clerk who was robbed at gunpoint while his employer was in the store testified that he did not “have any fear of” the robber. The court concluded there was sufficient evidence of fear, finding it unreasonable to suppose the clerk would have given the employer’s money to a stranger if he had not feared injury to himself or his employer would result from refusing and interpreting the clerk’s “ ‘bravado’ ” testimony as meaning he was not afraid because he believed no harm would occur if he complied with the robber. (*Id.* at p. 499.)

Appellant attempts to distinguish these cases, arguing that there is no evidence Crane acted in any way afraid or took any actions in response to the perpetrator’s demands, and that Crane testified she did not follow through with calling 911 because Caballero told her to stop. We are not persuaded. Crane realized a robbery was occurring when she saw appellant push Cabellero aside at the cash register and appellant told Crane he had a gun. Crane’s testimony about her anger displayed the same sort of bravado discussed in *Renteria* and *Borra*. Caballero’s description of telling Crane not to call 911 made clear that she did this because she was afraid; it is only reasonable that Crane responded as she did because she shared this fear. Had Crane been motivated solely by anger, there would have been no reason for her not to take action to summon law enforcement. Despite her contrary assertion, the evidence supports the jury’s conclusion that the robbery of Crane was accomplished by means of fear.¹¹

¹¹ The two habeas corpus petitions considered, but not consolidated, with the appeal are denied in a separate order.

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.