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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.

NOEL GARCIA-SALBALSALSA,

Defendant and Appellant.

A137704

(Sonoma County  
Super. Ct. No. SCR605426)

**I.**

**INTRODUCTION**

After a jury trial, appellant Noel Garcia-Salbalsa was convicted of three counts of robbery of an inhabited dwelling in concert (Pen. Code, §§ 211, 213, subd. (a)(1)(A))<sup>1</sup>, three counts of false imprisonment (§ 236), and one count of grand theft (§ 487, subd. (a)). The jury also found true allegations that appellant personally used and was armed with a firearm during the offenses. (§§ 12022, subd. (a)(1); 12022.53, subd. (b).) On appeal, appellant argues the court committed prejudicial error and violated his due process rights when it admitted evidence of an unduly suggestive and unreliable in-field identification. Appellant also asserts the court abused its discretion by denying his motion to disclose juror identifying information to enable the defense to investigate

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<sup>1</sup> All statutory references are to the Penal Code.

whether it had a viable basis for a new trial motion based on jury misconduct. We reject these contentions and affirm the judgment.

## **II.**

### **FACTS AND PROCEDURAL HISTORY**

On July 22, 2011, at approximately 1:30 p.m., Ramiro Chavez<sup>2</sup>, Conrado Hernandez, and Jack Wilder were inside a residence on Park Tree Lane in Sonoma having lunch. Wilder had brought a large quantity of marijuana to the residence that day from Lake County. Suddenly, three or four Hispanic males stormed through the front door of the residence, each armed with a firearm. They demanded the three victims lie on the floor, and told them they would be shot and killed if they did not comply. While on the floor, the gunmen secured both Chavez and Hernandez by binding their wrists behind their back with zip ties. Wilder was bound with some type of leather or string. While the three victims were on the floor, the gunmen took items from the individual victims such as cash, keys, and a cell phone. They also took approximately 18 pounds of processed marijuana and \$30,000 in cash from an unlocked safe in the residence.

After the gunmen left the residence, the victims were able to free themselves. They ran out of the residence and observed an orange Volkswagen (VW) Beetle fleeing the scene, traveling toward Santa Rosa. The victims called 911; and approximately one-half hour later, the orange VW Beetle with paper Arizona license plates was stopped in Santa Rosa. The vehicle had two occupants—appellant was in the front passenger seat and Richard Martin Marin-Casillas was in the driver's seat. Also located in the vehicle was approximately 18 pounds of processed marijuana that Wilder testified was taken in the robbery, three loaded firearms, and zip ties that matched the zip ties used at the crime scene. As of the time of trial, the \$30,000 and the victims' personal property taken in the robbery had not been recovered.

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<sup>2</sup> During these proceedings Ramiro Chavez was referred to as both Ramiro Chavez and Ramiro Ochoa. We will refer to him as Chavez because he testified that is the name he regularly uses.

Shortly after the VW Beetle was stopped, the victims arrived together by private vehicle and an in-field identification was conducted. All three victims were able to identify appellant as being in the residence and participating in the robbery. Hernandez realized he had previously seen the driver of the VW Beetle. The man had been with Hernandez's cousin and had inquired about marijuana and marijuana sales. A piece of paper was found inside the VW Beetle that had Hernandez's name and telephone number on it.

At trial, appellant's defense was that the victims' testimony was not credible. Instead of being a theft, all of the men were involved in a marijuana sale that went awry. In rebuttal, the prosecutor argued, "Could it have been a drug deal gone bad? There's not really any evidence, but . . . even if this is a drug deal gone bad, we still have a robbery."

The jury returned guilty verdicts on every count and enhancement. Appellant was sentenced to serve 16 years in state prison. Appellant filed a timely notice of appeal.

### **III.**

#### **DISCUSSION**

##### **A. Motion to Suppress Victims' In-Field Identifications**

Appellant first contends the court erred by denying his motion to suppress the evidence of the victims' in-field identifications made shortly after the robbery. Appellant argues that the court violated his due process rights when it erroneously admitted the unduly suggestive and unreliable in-field identifications and, therefore, his conviction must be reversed.

The jury heard evidence that all three robbery victims identified appellant as one of the men who committed the robbery during an in-field show up which took place approximately an hour and a half after the robbery at the scene of the vehicle stop. Chavez testified that during the robbery, he saw the robbers' faces "for a little bit." The men did not wear masks. Two of the robbers were short, approximately five feet six inches tall, and stocky. The third man was approximately five feet nine inches tall. The robbers were all Latino, and they spoke in Spanish. The field show-up was performed

when the faces of the gunmen were “pretty fresh” in Chavez’s mind. Chavez identified appellant as one of the robbers.

Before the field show up, Hernandez described three individuals by race, approximate height and weight, vehicle, and clothing. Hernandez described one of the robbers as a Latino male wearing a red and white striped shirt. At the field show up, Hernandez immediately recognized the man in the red and white striped shirt, who was later identified as appellant.

Wilder testified that the robbers were all Mexican. They spoke in English and in Spanish. Wilder also recalled the stripes on the robbers’ shirts. At the field show-up the events were still “very fresh” in Wilder’s mind—only 45 minutes to an hour had passed since the robbery. Wilder identified appellant as one of the robbers.

In deciding whether appellant was subjected to an impermissibly suggestive and unreliable identification procedure, appellant bears the burden of establishing (1) that the procedure used was unduly suggestive and unnecessary, and (2) if so, that the identification by the witness was unreliable under the totality of the circumstances, taking into account such factors as the witness’s opportunity to view the perpetrator at the time of the crime, the witness’s degree of attention, the accuracy of the witness’s prior description of the suspects, the level of certainty the witness demonstrated at the show-up, and the time between the crime and the show-up. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412 (*Ochoa*)). The defendant must establish “unfairness as a demonstrable reality, not just speculation. [Citation.]” (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) “Where the defendant claims the pretrial identification was unnecessarily suggestive, he must show it gave rise to a very substantial likelihood of irreparable misidentification. [Citations.]” (*People v. Craig* (1978) 86 Cal.App.3d 905, 913 (*Craig*)).

While acknowledging that California courts have not found individual show-ups inherently unfair, appellant urges this court to join a number of out-of-state jurisdictions choosing to abolish in-field show-ups in light of psychological studies which conclude they are unduly suggestive and inherently unreliable. Despite these cases from other jurisdictions, our Supreme Court has consistently held a single person show up “ ‘is not

inherently unfair,' ” and consequently need not, absent unusual circumstances, be excluded from the presentation of evidence on due process grounds. (*Ochoa, supra*, 19 Cal.4th at p. 413, quoting *People v. Floyd* (1970) 1 Cal.3d 694, 714, overruled on another point in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36; *People v. Bauer* (1969) 1 Cal.3d 368, 374.) We are bound by the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant also argues the show-up here was totally unnecessary because there was no compelling reason to conduct a show up as opposed to waiting until a time when a lineup could be arranged. However, prompt identification of a suspect close to the time and place of the offense serves the legitimate purpose of quickly ruling out innocent suspects while the events are fresh in the witness’s mind. (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 38-39; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387.) Also, such identifications are likely to be more accurate than a belated formal identification procedure. (*People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219; *People v. Anthony* (1970) 7 Cal.App.3d 751, 764-765 (*Anthony*)). Therefore, courts have consistently found the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. (*Anthony*, at p. 765.)

Appellant also asserts that the manner in which the show-up was conducted in this case was unduly suggestive. He complains that multiple police officers and patrol cars were present during the show-up; one of those patrol cars was parked directly behind the orange VW Beetle, which was the same make, model and color described by the victims as the getaway car. Appellant and his companion were the sole Latino males in the vicinity. Additionally, before appellant was identified, he was taken out of the patrol car in handcuffs.

But the factors highlighted by appellant, while they may be suggestive, have not been found by the courts to require suppression of identification testimony. (See *In re Richard W.* (1979) 91 Cal.App.3d 960, 969–970 [no due process violation when witness identified suspect shortly after burglary while suspect was handcuffed and seated in the

back of a patrol car]; *People v. Savala* (1981) 116 Cal.App.3d 41, 49 [no due process violation where showup procedures were “factually similar” to those in *In re Richard W.*]; *Craig, supra*, 86 Cal.App.3d at p. 914 [defendants were inside a police car and officers stood around the car]; *Anthony, supra*, 7 Cal.App.3d at p. 764 [officers drove defendant and his companion to the scene of the robbery in a marked police vehicle, handcuffed, and asked the witness “ ‘which was the one that came in’ ” and committed the robbery]; *People v. Gomez* (1976) 63 Cal.App.3d 328, 335 [defendant stood outside a patrol car, was handcuffed and accompanied by two officers].)

In the present case, appellant has pointed to only one factor which could possibly make the in-field identification procedure unnecessarily suggestive. During the hearing on the suppression motion, Hernandez testified the police told him before the in-field show-up that they planned on arresting the suspects because “they found pistols and a large amount of marijuana in the car . . . .” It undoubtedly would have been preferable if the police had not discussed this incriminating evidence with Hernandez. However, this did not make Hernandez’s subsequent identification of appellant constitutionally infirm. Hernandez immediately recognized appellant as one of the robbers, not based upon anything the police told him, but based upon the distinctive red and white striped shirt he was wearing, which Hernandez had described to the police before he identified appellant at the in-field show-up. Even “[w]hen an eyewitness has been subjected to undue suggestion, the factfinder must nonetheless be allowed to hear and evaluate his identification testimony unless the ‘ ‘totality of the circumstances’ ’ suggests ‘ ‘a very substantial likelihood of irreparable misidentification.’ ’ [Citations.] No such likelihood appears here.” (*People v. Arias* (1996) 13 Cal.4th 92, 168.)

Additionally, appellant argues the identifications were unreliable because at different points in these proceedings the victims misidentified or failed to recognize appellant. However these matters go to the weight not the admissibility of this evidence. During closing argument, appellant’s trial counsel discussed the eyewitness identifications and pointed out inconsistencies and circumstances suggesting they were unreliable. Due process is not violated merely because identification evidence is not “the

most reliable” because “ ‘ “[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to . . . any suggestibility in the identification procedure . . . .” ’ [Citation.]” (*People v. Gordon* (1990) 50 Cal.3d 1223, 1243, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Short of a “ ‘substantial likelihood of irreparable misidentification’ . . . [identification] evidence is for the jury to weigh. . . . Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.” (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116.)

In conclusion, on this record, appellant did not meet his burden of demonstrating the show-up procedure was unduly suggestive and unnecessary or that it gave rise to a “very substantial likelihood of irreparable misidentification. [Citation.]” (*Craig, supra*, 86 Cal.App.3d at p. 913.) There was strong evidence corroborating the victims’ identifications which linked appellant to the crime committed on July 22, 2011. This evidence included appellant’s presence a short time after the crime in the orange VW Beetle that was described by the victims as the getaway car. Furthermore, the officers found indicia of the robbery in the VW Beetle when appellant was apprehended, including approximately 18 pounds of marijuana, several loaded firearms, and zip ties that were identical to those used to bind the victims. Appellant was also wearing the red and white striped shirt Hernandez had previously described to the police as being worn by one of the gunmen. This corroborating evidence gives independent reliability to the victims’ identifications. (See *Anthony, supra*, 7 Cal.App.3d at p. 765 [circumstantial evidence defendant was robber was “overwhelming”].) As in *People v. Sanders* (1990) 51 Cal.3d 471, “[a]lthough none of these items points unerringly towards defendant’s guilt, they constitute links in the chain of evidence against him and thus provide some corroboration of [the witness’s] identification of defendant as the guilty party.” (*Id.* at p. 506.)

## **B. Access to Juror Information**

Appellant next challenges the trial court's denial of his motion for access to personal juror identifying information which he sought in order to investigate potential juror misconduct.

After the jury returned its verdict, appellant filed a petition requesting the release of juror information. A supporting declaration was submitted from appellant's trial counsel indicating that after the verdict had been rendered, the jury foreman told counsel that he experimented with the zip ties provided to the jury as exhibits to see how easily they could be removed. Counsel indicated that further inquiry into possible juror misconduct was needed to support a motion for a new trial. This request was opposed by the prosecution, arguing "the juror conduct described in counsel's declaration is clearly within the scope of permissible jury examination of the evidence and thereby the defense fails to establish a prima facie showing of good cause." The trial court denied the motion because the defense failed to make a prima facie showing of good cause. The court found it was "merely supposition at this point."

Code of Civil Procedure section 206, subdivision (g), provides that after the jury in a criminal case is discharged, a defendant may petition the court for an order releasing information concerning the jurors' names, addresses, and telephone numbers for the purpose of preparing a motion for new trial. That statute references Code of Civil Procedure section 237, which provides, in part, that after records containing criminal jurors' personal identification information are ordered sealed at the conclusion of trial, any person may make a motion to obtain access to the sealed records, accompanied by a showing of good cause. (Code Civ. Proc., § 237, subd. (b); see *People v. Wilson* (1996) 43 Cal.App.4th 839, 852 (*Wilson*).

To demonstrate good cause, a defendant must make a sufficient showing " 'to support a reasonable belief that jury misconduct occurred . . . .' " (*People v. Jones* (1998) 17 Cal.4th 279, 317 (*Jones*)). The alleged misconduct must be " 'of such a character as is likely to have influenced the verdict improperly' [citation]." (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Good cause does not exist where the allegations of jury

misconduct are speculative (*Wilson, supra*, 43 Cal.App.4th at p. 852), and speculative allegations may not be used as grounds to initiate an unwarranted fishing expedition by parties hoping to uncover information to invalidate the jury's verdict. (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.) A trial court's order denying a request for personal juror identifying information is reviewed for abuse of discretion. (*Jones, supra*, 17 Cal.4th at p. 317.)

Indisputably, it is misconduct for the jury to conduct its own investigation outside the courtroom, including experiments which could be treated as evidence not presented at trial. (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1483 (*Vigil*); *People v. Castro* (1986) 184 Cal.App.3d 849, 852–854 (*Castro*)). But, not every jury experiment constitutes misconduct. “Improper experiments are those that allow the jury to discover *new* evidence by delving into areas not examined during trial. The distinction between proper and improper jury conduct turns on this difference. The jury may weigh and evaluate the evidence it has received. It is entitled to scrutinize that evidence, subjecting it to careful consideration by testing all reasonable inferences. It may reexamine the evidence in a slightly different context as long as that evaluation is within the ‘ “scope and purview of the evidence.” ’ [Citation.] What the jury cannot do is conduct a new investigation going beyond the evidence admitted.” (*People v. Collins* (2010) 49 Cal.4th 175, 249.)

Accordingly, a jury has the right to examine and test the evidence presented at trial in a form which might be construed as an “experiment” but which does not go beyond the scope of the evidence. (See *Castro, supra*, 184 Cal.App.3d at pp. 855.) The distinction between proper and improper experimentation by the jury “usually turns on whether the juror's investigation stayed within the parameters of admitted evidence or created new evidence, which the injured party had no opportunity to rebut or question.” (*Vigil, supra*, 191 Cal.App.4th at p. 1484.)

Here, the record contains no indication that the juror's experiment with the zip ties interjected any information outside the record which would expand upon the evidence presented at trial. After all, courts have repeatedly held that a litigant is not deprived of a

fair trial where a jury conducts an experiment with trial exhibits which merely tests the credibility of in-court testimony. For example, in *People v. Bogle* (1995) 41 Cal.App.4th 770, the defendant identified the lock each of his keys would open, but there was no evidence any of the keys could open a safe that was at issue. (*Id.* at p. 777.) During their deliberations, the jurors found that one of the keys opened the safe. (*Ibid.*) The Court of Appeal held this was not an improper experiment because it fell within an “area of inquiry” discussed at trial, namely, “the extent of the defendant’s access to the contents of the safe or whether the defendant was a credible witness.” (*Id.* at p. 779; see also *People v. Baldine* (2001) 94 Cal.App.4th 773, 778-780 [jury did not invade any new field by turning on a scanner to test the credibility of the defendant’s assertion that it did not work, even though the scanner was not tested during trial]; *People v. Cooper* (1979) 95 Cal.App.3d 844, 852, 854 [jury did not generate new evidence by reenacting the defendant’s throwing of a plastic bag to evaluate the credibility of a police officer’s testimony because it was a reenactment of a demonstration performed during trial].)

Consequently, the record supports the trial court’s conclusion that the juror misconduct claimed by appellant was founded on speculation and surmise, which are inadequate grounds for releasing confidential juror information. (*Wilson, supra*, 43 Cal.App.4th at p. 852.) Under these circumstances, the trial court did not abuse its discretion when it found an absence of good cause, and denied appellant’s motion for disclosure of the jurors’ personal identifying information.

#### **IV. DISPOSITION**

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.