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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS MARVIN LEWIS,

Defendant and Appellant.

B263802

(Los Angeles County  
Super. Ct. No. NA099610)

APPEAL from a judgment of the Superior Court of Los Angeles County. Halim Dhanidina, Judge. Affirmed.

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Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.  
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An information charged defendant Thomas Marvin Lewis with seven counts of robbery and alleged that he personally used a firearm during the robberies. (Pen. Code, §§ 211, 12022.53, subd. (b).)<sup>1</sup> It further alleged that defendant had two prior convictions, one of which is a strike. (§§ 667, subds. (a)(1) & (b)-(j), 1170.12; 667.5, subd. (b).) A jury convicted defendant of four of the robberies—counts 1, 2, 6, and 7—and acquitted him on counts 3 and 4. When the jurors could not reach a verdict on count 5, the court declared a mistrial on that count and later dismissed it. The jury found true the pertinent firearm allegations. In a bifurcated trial, the court found true the prior conviction and strike allegations, and then sentenced defendant to 33 years in prison.

Defendant appealed, and we appointed counsel to represent him. Counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, raising no issues on appeal and requesting that we independently review the record to determine if the lower court committed any error.

We directed appointed counsel to immediately send the record on this appeal and a copy of the opening brief to appellant and notified appellant that within 30 days from the date of the notice he could submit by brief or letter any grounds for appeal, contentions, or argument he wished us to consider. On January 25, 2016, defendant filed a supplemental brief raising numerous issues, which we address below. For the reasons that follow, we affirm the judgment.

### **FACTUAL SUMMARY**

#### *A. The Metro PCS Robberies (Counts 1 and 2).*

On January 24, 2014, Rubi Rivera and Sonia Zaragoza were working at a Metro PCS Store in Long Beach. At approximately 2:00 p.m., a tall Black man in his early 20's entered the store wearing a dark, hooded sweatshirt and a bandana or surgical mask over his mouth. The top of the back of his sweatshirt displayed a half-circle design

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

based on the United States flag. The man was not wearing gloves. He walked to the customer service counter with a gun in his right hand.

The man pointed the gun at Rivera and said something about the cash register. Frightened, Rivera ducked below the counter and got Zaragoza's attention. Zaragoza saw the man and the gun, backed away, and put her hands up. The man placed his left hand on the counter as he climbed over the top. He told Zaragoza to open the cash register, and she did. The man took about \$600, climbed back over the counter, and left. In-store surveillance cameras recorded the incident, and the recording was played at trial.

A criminalist who viewed the surveillance video lifted four latent prints from the part of the customer service counter the robber had touched. One of the prints matched defendant's left palm print.

In June 2014, detectives executed a search warrant at defendant's residence in Torrance. They found a hooded sweatshirt with the flag-like emblem matching the one worn by the Metro PCS robber.

On June 26, 2014, a detective met with Rivera and, after reading an admonishment to her, showed her a six-pack photo lineup. Although the robber was wearing a bandana or mask, Rivera remembered the man's eyes and upper part of his nose. She pointed to a picture of defendant and told the detective: "It kind of looks like this one." Rivera circled the number 5 under defendant's picture. Zaragoza was not able to identify anyone from the photo lineup.

At the preliminary hearing, Rivera said she was not sure that defendant was the robber. At trial, she said she chose the picture in the photo lineup that looked most like the man she saw that day, but was "[n]ot completely sure" defendant was the robber. Zaragoza did not identify defendant as the robber.

B. *The GameStop Robberies (Counts 6 and 7).*

On March 31, 2014, a woman entered a GameStop store in Lynwood shortly before the 8:00 p.m. closing time. The woman spoke with employee Denise Pecheco, looked around the store, and left. Assistant Manager Ruben Rangel noticed three men just outside the store, two of whom were wearing bandanas over their faces. Rangel pushed a silent alarm as the three men entered the store.

The tallest of the three men did not wear a bandana. He wore sweatpants and a gray hooded sweatshirt that covered his hair, “had really chapped lips,” and held what Rangel described as a “rusty . . . revolver type” gun. Rangel observed the man’s face as he pointed the gun at him and walked up “right next” to him. A second man, wearing a blue hooded sweatshirt and a “marijuana bandana,” went to the left while the third man went to the right and walked around the counter.

The tall man demanded money from the cash register. Inside the register, a GPS tracking device was hidden among the \$20 bills. Rangel and Pecheco opened the registers, and the man took about \$400 and the tracking device. The man with the marijuana bandana took Rangel to a backroom where Rangel put about 10 PlayStation consoles in a bag.

The tall man remained with Pecheco and demanded merchandise. Pecheco unlocked drawers behind the counter and put games and other merchandise in bags as the man held the gun against her neck and waist. The men left the store with the money, the tracking device, and bags of merchandise. A video recording of the incident was played at trial.

A Los Angeles County Sheriff’s deputy in a helicopter located the tracking device in a blue Honda Accord and followed the vehicle until it reached a house in Gardena. As the deputy shined a spotlight on the vehicle, three Black men and one Black woman exited the vehicle and ran inside the residence. No one else entered the residence. The deputy kept the spotlight on the residence as police on the ground arrived and established a perimeter around the house.

Upon an officer's commands, five people walked out of the house, and Deputy Robert Velez placed them in the back seats of patrol vehicles. Deputy Velez then searched the house and found no one inside. Inside the Honda Accord, police found several PlayStation consoles, video game remote controls, video games, currency, a gray hooded sweatshirt, and a loaded gun.

Meanwhile, back at the GameStop, two Los Angeles County Sheriff's deputies were meeting with Rangel and Pecheco. Rangel told one deputy that the man with the gun was 20 to 25 years old, about six feet two inches tall, thin, between 160 and 180 pounds, wearing sweatpants, and had chapped lips. Pecheco separately described him to the other officer in substantially the same way.

Deputy Nicholas Vallozzi drove Rangel and Pecheco from the GameStop to the Gardena residence for an in-field, or showup, identification. Rangel sat in the front passenger seat of the patrol car and Pecheco sat in the back, separated from the front by Plexiglas. Deputy Vallozzi admonished Rangel and Pecheco separately about the procedure and told them not to communicate with each other and not to listen to him when he spoke with the other. Deputy Vallozzi never told either Rangel or Pecheco the suspects from the robbery were caught, and never directed either of them to identify any specific individual.

When Deputy Vallozzi, Rangel, and Pecheco arrived at the Gardena residence, Deputy Velez pulled the suspects out of the patrol cars one at a time, instructing each suspect to face the car containing Pecheco and Rangel about 35 to 50 feet away. Deputy Velez was armed, and there were other officers in the area. As each suspect was presented, Deputy Vallozzi asked Rangel and Pecheco separately if they could identify the person. Pecheco was in a position to hear Rangel's answers, and Rangel heard Pecheco's answers. Rangel and Pecheco identified defendant as the tall, armed robber. They also identified the woman who left the store just before the three male robbers entered the store. Rangel identified another suspect as the man who wore the marijuana bandana.

Rangel and Pecheco later identified merchandise found in the Honda Accord as items taken from the store, the marijuana bandana as the one worn by one of the robbers, and the gun found in the car as the gun used in the robbery.

Edna Outlaw Dawson owned the Honda Accord and had let her granddaughter use it on the day of the GameStop robberies.<sup>2</sup> When she retrieved the car from the impound lot four days after the robberies, she found a wallet underneath a back seat. The wallet contained defendant's driver's license and other cards indicating the wallet belonged to defendant.

When defendant was booked, he was 6 feet 4 inches tall and weighed 215 pounds.

At trial, Rangel and Pecheco identified defendant in court as the tall man with the gun during the robberies.

## DISCUSSION

As noted above, defendant's counsel filed a brief pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436, stating that no arguable issues exist. Defendant makes numerous contentions in his supplemental brief, which we now address.

### I. *Delay in Arraignment*

Defendant contends that he was denied his constitutional right to be brought promptly before a magistrate for a judicial determination of probable cause. (See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 52; *Gerstein v. Pugh* (1975) 420 U.S. 103, 125; see also § 825, subd. (a)(1) [a person arrested without a warrant must be brought before a magistrate within 48 hours after arrest, excluding Sundays and holidays]; § 859b [unless time is waived or good cause shown, preliminary examination shall be held within 10 court days after arraignment].) The GameStop robberies and defendant's arrest occurred on March 31, 2014. The initial complaint, concerning the GameStop robberies, was filed on April 2. A complaint concerning the Metro PCS and other robberies was filed on July 11. According to our record, the next event that occurred in the case is the preliminary hearing regarding the GameStop robberies on

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<sup>2</sup> In the documents defendant submitted to this court after counsel filed the *Wende* brief, there is a note that Dawson is a "co[-]defendant[']s grandmother."

July 23, after which he was held to answer. The preliminary hearing regarding the other robberies took place in October. The gaps in time are not explained by our record.

Nevertheless, it does not appear that defendant raised these issues below, and they may not be raised for the first time on appeal. (*People v. Gillette* (1959) 171 Cal.App.2d 497, 505; *People v. Tennyson* (1954) 127 Cal.App.2d 243, 246.) Moreover, the United States Supreme Court has held that “a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. [Citations.]” (*Gerstein v. Pugh, supra*, 420 U.S. at p. 119.) When, as here, there is no showing that any undue delay caused defendant any prejudice or deprived him of a fair trial, the delay is not grounds for reversal. (See *People v. Combes* (1961) 56 Cal.2d 135, 142; *People v. Valenzuela* (1978) 86 Cal.App.3d 427, 431.)

## II. *Sufficiency of the Evidence*

Defendant points to a variety of weaknesses in the prosecution’s case, including: Officers did not request a DNA analysis, obtain fingerprints from the GameStop, or make a list of seized property; the video recording of the Metro PCS robberies does not show the face of the perpetrator; Rivera did not identify him at the preliminary hearing or during trial; Zaragoza said she did not know who robbed her; the fingerprint analyst testified that the palm print recovered from the Metro PCS counter could have been made by someone other than defendant; the hooded sweatshirt with the flag emblem found at his residence is a “com[m]ercially produce[d] sweatshirt”; his wallet, which was found in the Honda Accord after the GameStop robberies, “was not found at the scene of the crime”; the gun used during the Metro PCS robberies was not in evidence and the police found no firearms during the search of his home; the firearm found in the Honda Accord and allegedly used in the GameStop robberies was not found in his possession and did not have his fingerprints on it; and the evidence found at the Gardena residence did not implicate him because he did not have any connection with that residence.

The issue raised by these points is whether there is sufficient evidence in the record to support the verdicts. To answer this question, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Defendant’s contention that the fingerprint analyst testified that the palm print could have been someone else’s is based on defense counsel’s cross-examination of the analyst concerning a statement in her report that it was “practically impossible” that the print was from another source. Defense counsel asked whether that language left “some leeway for it to possibly be someone else,” the analyst answered, “It does.” On redirect, however, the analyst clarified that the “practically impossible” language must be put in reports because she has “not looked at everybody’s fingerprints in the world.” When asked whether she had “any doubt in [her] mind that that palm print was made by this defendant,” she answered, “No.” The analyst’s testimony, considered in its entirety, supports the jury’s verdict.

Although Zaragoza could not identify defendant and Rivera’s identification was weak, the evidence of the video recording showing where the robber placed his left palm on the counter, the testimony of the fingerprint analyst regarding the palm print match, and the recovery of a hooded sweatshirt with the flag-like emblem at defendant’s residence is sufficient to support the jury’s finding that defendant perpetrated the Metro PCS robberies.

There is also substantial evidence that defendant was the armed man in the GameStop robberies. The two victims, Rangel and Pecheco, identified him at the showup identification on the night of the robbery and at trial. The Honda Accord that was followed to the Gardena residence had the merchandise taken from the store. Three men and one woman got out of the Honda Accord and went into the Gardena residence and

five people—three men and two women—including defendant, came out. Defendant’s wallet was found in the Honda Accord. Such evidence is sufficient to support the jury’s conclusion that defendant was the armed perpetrator in the GameStop robberies.

### III. *In-field Identification*

Defendant also argues that the in-field showup identifications by Rangel and Pecheco were unduly suggestive because each heard the other’s identification. We disagree.

“An in-the-field showup . . . is generally an informal confrontation involving only the police, the victim and the suspect. One of its principal functions is a prompt determination of whether the correct person has been apprehended. [Citations.] Such knowledge is of overriding importance to law enforcement, the public and the criminal suspect himself. [Citation.]” (*People v. Dampier* (1984) 159 Cal.App.3d 709, 713.) Such “identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness’s mind, and because 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. [Citation.] The law permits the use of in-field identifications . . . so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387, italics omitted.) The defendant bears the “burden of demonstrating the identification procedure was unduly suggestive.” (*People v. Avila* (2009) 46 Cal.4th 680, 700.) Although the fact that Rangel and Pecheco could hear each other’s identification of the suspects is some evidence of suggestiveness, considering the totality of the circumstances, the in-field identifications were not unduly suggestive and, if they were, any error was harmless in light of other evidence supporting defendant’s guilt.

#### IV. *Other Contentions*

Defendant argues that a detective made a false police report because the report states that “a revolver was recovered during the investigation which appears to be different [from] the handgun” found in the Honda Accord when defendant was arrested. If there was any difference between the gun recovered from the car and the officer’s description of the gun in a police report, the discrepancy was appropriate fodder for cross-examination. It does not compel reversal of defendant’s conviction.

Defendant next argues that the police coerced the victims and told them to identify him in the six-pack lineup. The only victim who identified defendant in a photo lineup was Rivera, and there is nothing in the record to suggest that she was coerced. Defendant also contends that he is “being racially profiled,” and that this is a case of “fraud behind the badge.” Defendant does not provide any citations to legal authorities or the record, and we have not found support for his allegations in the record.

Next, defendant argues that a detective said that the same person committed all seven robberies with which he was charged; he was acquitted of three of the robberies; and, therefore, he “should be acquitted of them all.” Although the argument has a certain syllogistic elegance, it is flawed because the jury was not compelled to accept the initial premise; they could have reasonably concluded that defendant committed some of the charged robberies and not other charged robberies.

Finally, defendant “ask[s] for 1385.4 [d]ismissal of [s]triking special circumstances.” The Penal Code does not include a section 1385.4 and there was no allegation or finding as to any special circumstances.<sup>3</sup> Defendant may be referring to section 1385 and requesting that the prior strike finding be stricken pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504. Defendant requested the trial court exercise its discretion under section 1385 to do so, which the court implicitly declined. The decision is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th

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<sup>3</sup> In a criminal case, the phrase “special circumstances” usually refers to a fact in a murder case, the finding of which results in a sentence of death or life in prison without the possibility of parole. (§ 190.2, subd. (a).)

367, 374.) There was no error. As a juvenile, from March 2008 through 2010, defendant committed larceny (§ 484), burglary (§ 459), vandalism (§ 594, subd. (a)), two counts of grand theft (§ 487), and robbery (§ 211). As an adult, defendant was convicted in 2011 of being in possession of a firearm having been previously adjudicated a juvenile delinquent (former § 12021, subd. (e)), resisting arrest (§ 148, subd. (a)(1)), and, in the present case, four counts of armed robbery. The probation officer summarized his criminal history as follows: “The defendant has been given ample opportunities by the juvenile and adult court systems to remain crime free; to no avail. Incarceration as a juvenile and an adult, at the county level, has failed to dissuade his pattern of criminality. At this juncture, the defendant’s behavior is escalating in violence.” In light of this history, the court did not err in declining to strike the prior strike allegation.

V. *Conclusion*

We have reviewed the record on appeal, including the trial exhibits, and are satisfied that defendant’s counsel has fully complied with his responsibilities and that no arguable appellate issue exists. (*People v. Wende, supra*, 25 Cal.3d at p. 441.) We have also considered the contentions and arguments that defendant submitted and, for the reasons set forth above, reject them. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110.) Accordingly, we affirm the judgment.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.