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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

FRED GORE et al.,

Defendants and Appellants.

C067619

(Super. Ct. No. 09F02731)

Defendants Fred Gore and Brandon Hunter, along with Gore's 16-year-old brother, R.D., committed a string of burglaries in a two-week period in early 2009. Each time, they used a similar method and they used Hunter's distinctive Chrysler New Yorker as the getaway car. Police stopped the car on April 10, 2009, and found the three inside along with items stolen during some of their burglaries. A search of Gore and R.D.'s apartment uncovered numerous other stolen items.

The jury convicted Hunter of three counts of burglary and three counts of receiving stolen property. It convicted Gore of five counts of receiving stolen property.

Both defendants appeal. Hunter contends: (1) the trial court erred when it, and not the jury, determined people were present in two of the burglaries, thereby subjecting Hunter to a limit on the amount of work credit he may earn; (2) the court erred when it instructed the jury that R.D. was an accomplice as a matter of law and all of his testimony required corroboration; (3) insufficient evidence supports two of Hunter's burglary convictions; (4) insufficient evidence supports one of his receiving stolen property convictions; and (5) defense counsel rendered ineffective assistance when she chose not to move to exclude evidence of an allegedly prejudicial photo lineup.

Gore contends the trial court abused its discretion and violated his due process rights when it imposed consecutive subordinate sentences for separate items of stolen property that allegedly were not shown to have been received on separate occasions.

We disagree with each defendants' contentions, and we affirm the judgments.

#### FACTS AND PROCEDURAL HISTORY

The defendants and R.D. used a similar method to burgle homes. One of them would knock loudly on the door, and, if no one answered, would kick the door in. The others would then enter and take valuable property. We describe each burglary in chronological order.

##### *Greer burglary (count six, receipt of stolen property, against Gore and Hunter)*

Patrick and Sarah Greer lived on Natomas Boulevard in Sacramento. On March 29, 2009, they left their first-floor apartment at approximately 9:00 a.m. to go out for breakfast. As they left, they saw two men on the apartment stairs. One was African-American; the other looked Hispanic. Both were wearing sweatshirts with hoods (hoodies). Both were roughly five feet nine inches tall; one was heavier than the other. When the Greers returned from breakfast around 10:30 a.m., they noticed someone had kicked their apartment door open. A Vizio television was missing from their living room,

and a Samsung television and a jewelry box were missing from their bedroom. The next day, Sarah noticed her blue Jansport backpack with a UC Davis logo that contained her laptop was also missing.

On April 10, 2009, police asked the Greers to meet them to identify suspects who had been found in possession of their property. The police showed three males to the Greers, defendants Hunter and Gore, and R.D. According to the police, neither Sarah nor Patrick recognized Hunter. However, Sarah testified she was able to identify Hunter when the police showed him to her. Both Sarah and Patrick recognized R.D. as one of the individuals they saw that morning. Sarah was 80 percent sure, and Patrick was 60 percent sure, that R.D. was one of the males they saw. Sarah was not sure she recognized Gore, but Patrick was 90 percent sure that Gore was also one of the men he saw at the apartment.

At that same showup, Sarah identified her laptop and one of their televisions that had been recovered from the suspects. On June 16, 2009, she identified the Jansport backpack and the laptop computer that had been stolen from her home.

At trial, Sarah identified Hunter as one of the men she saw at her apartment complex the morning of the burglary. She testified she saw three suspects the night she met with police. She identified Hunter and Gore in trial as two of the people the police had shown her. She did not see the third person in court.

At trial, Patrick stated the police showed him three suspects. At that time, he recognized two of the three suspects. He identified Gore as one of the men he saw at the apartment complex the day of the burglary, and he identified Gore again at trial. He had identified another suspect the police showed him, a man smaller than Gore, but he did not see that person in the courtroom at trial.

*Rogers burglary (count seven, receipt of stolen property, against Gore only)*

Jeffrey Rogers lived in an apartment on Club Center Drive in Sacramento. On the morning of April 2, 2009, Rogers left his home and locked his door. When he returned

home around 3:30 p.m. with his son, he saw his front door had been forced open as if it had been kicked several times. There were footprints on the door.

When Rogers inspected his home, he realized two guns and a bed comforter were missing from his bedroom. He had kept one gun, a Remington 870 20-gauge shotgun, in his closet, and a second gun, a Kimber .45 ACP 1911-style handgun, under his mattress. The comforter had a bamboo pattern with green leaves. Other than seeing the dresser drawers in his and his children's bedrooms had been removed and tossed, Rogers did not notice anything else was missing.

On April 10, 2009, a police officer called Rogers. The officer told him police had searched a vehicle at a traffic stop and had found property belonging to him. Rogers had not realized that some of the property found by police had been stolen from his apartment. Police had recovered a 20-gauge shotgun; a box of 20-gauge shotgun shells; a bag with a Comcast logo on it holding paperwork, receipts and resumes; a silver and gray Sony Vaio laptop computer; and a comforter. Later, on June 16, 2009, Rogers retrieved most of his property from a property recovery room.

*Maddox burglary (count eight, receipt of stolen property, against Gore only)*

Sheila Maddox lived in an apartment on Mossy Bank Drive in Sacramento. On April 6, 2009, she left her home very early in the morning for her job and locked the door behind her. When she returned home that afternoon, a police officer was waiting for her. The officer warned her that her home had been burgled. The front door had been kicked in, and the door frame was knocked out.

Inside the apartment, Maddox discovered that a silver Compaq laptop, a Canon camcorder, her surround sound speaker system from her living room, and cell phones were missing. All of the jewelry she kept in her bedroom was missing, including gold bracelets, a pearl ring, and many silver and gold necklaces. She was also missing a Grant High School championship football ring inscribed with her husband's name, Clausell.

On June 16, 2009, at a police property recovery station, Maddox identified her Compaq laptop, her Canon camcorder, some bracelets and rings, and her husband's football ring.

*Givaudon burglary (count three, burglary, against both Gore and Hunter)*

On the morning of April 9, 2009, three burglaries happened in close succession. The first occurred at the duplex residence of James Givaudon on Urbana Way in Sacramento. He locked his doors and left his home that morning at approximately 10:00 to run an errand. When he returned about 20 minutes later, his neighbor informed him his home had just been burgled. Givaudon noticed his front door had been kicked in. There was a muddy footprint on it, and the door frame was broken. A Dinex flat screen television and an Envision computer monitor had been stolen from Givaudon's home.

At approximately 11:00 that same morning, Dorinda Brown was driving down Urbana Way. She saw a young African-American man holding electronics walking down a driveway in the front of a duplex. He was wearing a black hooded sweatshirt and was rushing a bit. He appeared to be between five feet four inches and five feet six inches tall, but it was difficult for Brown to guess the man's height walking down a driveway while she was driving. Brown became suspicious because there were no cars in the driveway and the man's arms were full of equipment. She watched the man walk down the driveway, go around a corner, and get into a vehicle. He threw the equipment into the backseat, and he got into the front passenger seat. A driver was already in the car. Brown began writing down the car's license plate number, and then she saw another African-American man, taller than the first man she had seen, jump out of nearby bushes and get into the car's backseat. This person, too, was holding electronic equipment. Brown gave the car's license plate number and a description of the car to the police. She described the car as a blue gray, older model, square-looking vehicle. She told the reporting officer it was a Chrysler New Yorker. Six days later, Brown circled a

photograph of the individual she had seen walking down Givaudon's driveway from a photo lineup.

*Allen burglary (counts one and two, burglary and receipt of stolen property, against Gore and Hunter)*

During the late morning of April 9, 2009, Kathleen Allen and her roommate, Marilyn Huffman, were asleep in their separate bedrooms. They were traveling nurses who worked nights, and they shared an apartment at the River Terrace Apartments on Capital Park Drive in Sacramento.<sup>1</sup> At approximately 11:00 a.m., Allen heard a loud banging on their door. Allen initially ignored it, but then she heard the door "busting through." Huffman also heard knocking and then a crash. Huffman looked up and saw an African-American male wearing a hoodie standing in her bedroom. She cursed at the man, and he turned and left. She called 911.

Allen got up when she heard the noise and went out to the living room. As she did, she saw a man coming from Huffman's room. He looked shocked to see her. She kicked at him and he pushed her back. He fell backwards, got up, and then ran out of the apartment. Allen described him as an African-American male standing between five feet eight inches and five feet 10 inches, and wearing a hoodie, shorts, and tennis shoes.

Allen ran after the man. She ran down the sidewalk, and came upon a neighbor, Trina Boyle, who told her the same thing had just happened to her. When Allen returned to her apartment, she noticed her laptop computer was missing.

Trina Boyle, Allen's neighbor, recounted that at approximately 11:00 a.m. on April 9, 2009, she was nursing her baby in the back room of her River Terrace apartment when she heard someone bang on her front door. Through the door's peephole, she saw a person wearing a hoodie. The man was about five feet nine inches tall and had darker

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<sup>1</sup> Allen's residence was approximately a four-minute drive from Givaudon's residence.

skin. It startled her enough to call the apartment manager's office, as the person was banging loudly and she did not recognize the face. The person continued knocking on the door so loud, Boyle grabbed a bat. She then saw through her patio doors a different person looking into her apartment. This man appeared to be Hispanic or mixed Hispanic/African-American, standing about five feet 10 inches tall, and wearing a hoodie. She was scared, so she called 911. While on the phone, she looked out her front door's peephole, and saw no one there. She looked at her patio door, and saw no one there. Then, she saw the same two men run by her patio door from the direction of Kathleen Allen's apartment. One of them was carrying something square and rectangular, like a silver DVD player.

John-Paul Greco, an employee of the River Terrace Apartments' management company, received Boyle's phone call to the apartment manager's office. He took a maintenance worker, Sanjeet Singh, with him to check on Boyle. On the way to Boyle's apartment, Greco saw three African-American males walking in the opposite direction. They were laughing and joking. One of them was carrying a white Apple laptop still connected to a power cord. Greco asked if they were all right. They said they were. After speaking with Boyle, Greco realized the individuals he had passed were likely the perpetrators.

On the day after the burglary, April 10, 2009, police officers took Kathleen Allen to a location to identify suspects. She was unable to identify any of three individuals the police showed her. She did, however, identify a laptop computer one of the officers brought to her as her missing laptop.

At trial, Greco identified Hunter as the man he saw on April 9, 2009, carrying the laptop. At that time, Hunter had been wearing a gray hooded sweatshirt, and had long Afro-type hair pulled back into a bun. Greco said one of the other males he saw that day with Hunter was wearing a blue sweatshirt with a hood that covered his head, but Greco

could see dreadlocks sticking out from the front of the hood. Greco had also identified Hunter in a photo lineup a week after the incident as the man he saw carrying the laptop.

*Franzoia burglary (counts four and five, burglary and receipt of stolen property, against Gore and Hunter)*

The third burglary the morning of April 9, 2009, happened at a home on Delcliff Circle in Sacramento. At approximately 11:30 a.m., Rebecca Franzoia was ironing in her kitchen. She and her daughter, Jillian, were preparing to leave for lunch when she noticed out her front window a car drive past, turn around, and park in front of her home. The car was an older, dark navy blue sedan with a vinyl top.

Jillian was also in the kitchen. She told her mom someone was coming to the door, and not to answer because they didn't know him and they would be late. Rebecca looked out and saw a young man approaching her front door, an African-American about five feet eight inches to five feet 10 inches tall with a short Afro and wearing a bulky jacket with a hooded sweatshirt underneath. The man rang the doorbell a couple of times, and he knocked. Then, the ringing became more aggressive and the knocking became much louder. Rebecca watched him walk back to his car and get in the backseat. Then three of the car's doors opened, and she saw the driver exit the car. The driver was much larger than the man who had knocked at the door, and had a darker complexion. Rebecca ran to Jillian and told her to set the alarm; they were going to have trouble.

They ran into Rebecca's bedroom. Rebecca tossed the phone to Jillian and told her to call 911. Then she dropped the shades in the room so they would not be seen. As she did that, she heard heavy pounding on the front door, and then the front door shattering. She and Jillian moved into an adjoining bathroom. Jillian sat on the floor with the phone, and Rebecca grabbed a shotgun and some shells from her closet. She opened a window to try to get the house alarm to activate. They heard people running all over the house and into the bedrooms. Finally, the house alarm started ringing. Jillian at

that point thought the phone had gone dead. Then the alarm company called and said it would dispatch the police.

Rebecca and Jillian came out of the room after they had heard sirens and the sirens had stopped. Rebecca saw their front door had been shattered. The navy blue sedan was gone. Inside the house, Rebecca saw that all of the electronics had been pulled out from their shelving unit, but none had been taken. Jillian was missing her Blackberry phone, two iPods, and a jewelry box.

Around midnight, the following day, April 10, 2009, Rebecca and Jillian went to the police station to attempt to identify suspects. Police officers showed Rebecca a photograph of the car in which the suspects had been arrested, and Rebecca identified the car as the one she had seen parked in front of her house prior to the burglary. Three males were brought out for them to view under a spotlight in the parking lot. They identified R.D. as the individual who had first rang their door bell and knocked on their door repeatedly. They could not identify the other two men. However, at trial, Rebecca stated Hunter and Gore had both been in the showup in the police station parking lot. Hunter's hair was in a ponytail that night, but at court it was cut close to his head. Gore's hair was a little bit longer at the showup than it was at trial.

On June 16, 2009, Rebecca and Jillian went to the police property recovery room. Jillian identified her Blackberry and one of her iPods that had been stolen.

#### *Arrest and investigation*

On April 10, 2009, police pulled over a Chrysler New Yorker. Hunter was driving the car. Gore was seated in the front passenger seat, and R.D. was in the rear passenger seat. Two gold bracelets, one silver necklace, one gold necklace, two silver rings, and a Grant High School football championship ring with the name Clausell engraved on the ring were found on R.D. Inside the car, officers found a white laptop, a silver and gray laptop, and a black flat screen television. As explained above, those items were identified that night by Kathleen Allen and Sarah and Patrick Greer, respectively.

Police officers obtained a set of keys from Gore after his arrest. They were able to open apartment number 14 at 2732 Rio Linda Boulevard with the keys. The apartment was a one-bedroom apartment. Inside the bedroom, officers found various mattresses on the floor. Men's clothing and shoes were on the mattresses and inside the closet. Officers found paperwork inside the bedroom with Gore's name on it. They found additional men's clothing and shoes in a closet off of the living room.

The officers also found a blue backpack and a manila envelope, each with paperwork inside belonging to Gore. The parties stipulated that numerous documents and cards with Gore's name on it, as well as additional documents not shown to the jury, were found in the apartment's bedroom and kitchen. Officers also found paperwork in the apartment relating to R.D., and additional paperwork with Jeffrey Rogers' name on it.

Officers found the following stolen items inside Gore's apartment: a computer monitor connected to the Givaudon burglary, Sarah Greer's blue Jansport backpack with a UC Davis logo; Jillian Franzoia's Blackberry cell phone and one of her iPods; Sheila Maddox's Compaq laptop and Canon camcorder; and Jeffrey Rogers' silver and gray Sony Vaio laptop, his 20-gauge shotgun with a box of 20-gauge shotgun shells, his Comcast black computer bag with paperwork, and his comforter with a bamboo pattern.

No fingerprints belonging to Gore, Hunter, or R.D. were found at any of the burglary locations.

*Other witnesses: R.D. and Kathryn Hunter*

R.D. is Gore's brother and Hunter's cousin. He was seated in the backseat of Hunter's blue Chrysler New Yorker when it was stopped on April 10, 2009. Interviewed after his arrest, R.D. told police he lived at 2727 Rio Linda Boulevard, apartment number 14, with Gore. He admitted stealing the silver laptop that was found with him in the car. He did so by kicking in an apartment door and taking it. After the break-in, he got back into the New Yorker. R.D. did not know where the television in the car came from. The officer asked R.D. about Gore and Hunter's involvement. R.D. told the officer "he didn't

want to snitch on his brother and his cousin.” R.D. said, “ ‘That’s all I want to say. I don’t want to snitch on them.’ ”

After his arrest, R.D. was taken to “Juvenile Hall.” He faced charges of stealing the laptop, the television, a shotgun, a computer monitor, and a cell phone. He admitted to stealing the laptop, and he agreed to pay restitution for the other items.

R.D. testified at trial in exchange for not being prosecuted on account of his testimony. R.D. asserted that in April 2009, he was not living with Gore, but was living with Gore’s girlfriend and her son at 2732 Rio Linda Boulevard, apartment number 14. He stated that at the time of his arrest, there was a white laptop and a television in the New Yorker. He had taken the laptop from an apartment. To get it, he kicked the door in and grabbed it off a living room table.

Evil, a friend of R.D.’s for a month, was with him at the time of the burglary. R.D. did not know Evil’s full name; Evil was the only name R.D. was given. R.D. picked Evil up in the New Yorker. They decided to burgle, so they went to an apartment complex. No one else was with them. He had grabbed the laptop on that occasion.

R.D.’s part in the burglaries was to kick in the door, run in, and retrieve items. He would knock first, and would continue knocking until a person came to the door. If someone opened the door, he would walk away. He testified Hunter and Gore were never with him when he committed burglaries. Only Evil accompanied him.

R.D. admitted at trial he also stole the television that was found in Hunter’s car. It was a “plasma” television he had stolen in similar fashion. Again, he was with Evil, and again he put the item in the New Yorker. This time, Evil had been driving. Evil would usually pick the place to burgle.

R.D. guessed he was approximately five feet 10 inches or five feet 11 inches tall. Gore was about one inch taller than him, and Hunter was about three or four inches taller than him. Evil was light-skinned like R.D., a little bit taller than R.D., and had green eyes and long hair. Hunter’s complexion was similar to R.D.’s, but Gore was darker. In

April 2009, R.D. wore his hair braided in cornrows. Gore wore his hair long in dreadlocks. Hunter wore his hair in a bun on the back of his head. Sometimes R.D. and Evil wore hoodies when they committed the burglaries. According to R.D., Gore wore jackets without hoods, and he did not wear hoodies.

R.D.'s account of his interview with the police officer after his arrest differed from the officer's account. R.D. testified that when he was interviewed, he told the officer he lived at the apartment with Gore's girlfriend, not with Gore. R.D. could not recall telling the officer he did not know who owned the television found in the car or that he took the silver laptop. He also did not recall being asked about Gore and Hunter's involvement in the burglaries or saying he did not want to snitch on them.

R.D. recognized various items that were found in his apartment, including laptops, a gun, and Gore's possessions and clothes.

Kathryn Hunter is defendant Hunter's mother. Police officers interviewed her on April 10, 2009, and searched her home. Kathryn told the officers defendant Hunter and his girlfriend lived with her. Kathryn also told the officers that Hunter had obtained the Chrysler New Yorker about one week earlier for \$800. Kathryn said that on April 9, 2009 (the morning of the Givaudon, Allen, and Franzoia burglaries), Hunter took her to a dentist appointment between 9:30 and 9:45 a.m., and he picked her up from that appointment around 1:30 p.m.

Officers also found paperwork in Kathryn's home relating to the blue Chrysler New Yorker, including a lien sale agreement.

At trial, Kathryn stated that in April 2009, she had seen Hunter with a car, but she did not know if he owned it. The car was purple to her and looked like a Cadillac with a wheel in the back. Kathryn denied the car depicted in People's exhibits 1, 2, and 3 was the car her son had been driving before his arrest because it was blue, not purple. The exhibits were photos identified by Rebecca Franzoia as depicting the car that parked in front of her home prior to the burglary.

*Procedural history*

The prosecutor charged Hunter and Gore with three counts of first degree burglary. (Pen. Code, § 459.)<sup>2</sup> In addition, the prosecutor charged Hunter with three counts of receiving stolen property, and Gore with five counts of receiving stolen property. (§ 496, subd. (a).) As to two of the burglary counts, the prosecutor alleged the victim was present during the offense. (§ 667.5, subd. (c)(21).)

The jury convicted Hunter as charged. It acquitted Gore on all three burglary counts, but found him guilty on all five counts of receiving stolen property.

The trial court sentenced Hunter to an aggregate prison term of nine years four months, calculated as follows: the upper term of six years on count one, the Allen burglary; plus two consecutive one-third the middle term of one year four months on the two remaining burglary counts; plus a consecutive, one-third the middle term of eight months on count six, receiving the Greers' stolen property. Sentences for the two remaining counts of receiving stolen property were stayed under section 654.

The trial court sentenced Gore to an aggregate prison term of four years eight months, calculated as follows: the middle term of two years on count two, receiving Allen's stolen property; and consecutive one-third the middle term of eight months on each of the remaining four counts of receiving stolen property.

DISCUSSION

I

*Hunter's Contentions*

A. *Factual Finding that Limited Hunter's Conduct Credits*

The trial court found that two of the homes Hunter burgled were occupied at the times of the burglaries. Based on these facts, the court found the two burglaries were

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<sup>2</sup> Undesignated references to sections are to the Penal Code.

violent felonies under section 667.5, subdivision (c)(21). This finding, in turn, triggered a 15 percent limit on work credits defendant could earn while incarcerated. (§ 2933.1, subd. (a).)

Hunter contends the trial court erred by making this factual finding. He asserts the finding was required under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455], and its progeny to be made by a jury, as the finding, by limiting his work credits, purportedly extended his sentence beyond the statutory maximum.

After briefing was completed in this case, our Supreme Court addressed, and rejected, Hunter's contention. In *People v. Lara* (2012) 54 Cal.4th 896, the high court concluded credit-limiting facts do not need to be formally pleaded and proved. Such a requirement exists "only as to facts that define the permissible range of sentencing for an offense by increasing the sentence, prescribing a minimum term or entirely precluding probation." (*Id.* at p. 906.)

The fact that defendant robbed two homes while they were occupied did not increase his sentence, prescribe a minimum term, or entirely preclude probation. (See § 462, subd. (a).) Accordingly, the trial court did not violate defendant's due process rights by making these factual findings without giving the questions to the jury to decide. (See *People v. Garcia* (2004) 121 Cal.App.4th 271, 274 [whether a defendant's current felony offenses were "violent" within the meaning of section § 667.5, and thus limited his credits under section 2933.1, was "part of the trial court's traditional sentencing function" rather than a question that had to be decided by the jury].)

**B. *Instruction that Witness was an Accomplice as a Matter of Law***

The trial court instructed the jury that R.D. was an accomplice as a matter of law if the jury concluded the crimes charged in this case were committed. The instructions also informed the jury it could not convict the defendants based on an accomplice's statement alone. It could use the accomplice's statement to convict only if the statement was supported by other evidence. (CALCRIM Nos. 301, 335.)

Hunter contends the trial court erred when it instructed the jury that R.D. was an accomplice as a matter of law and that the entirety of his testimony required corroboration. He claims the court erred because it was disputed whether R.D. was an accomplice due to his testifying he committed his burglaries in the company of a man known to him only as Evil, but not in the company of Hunter or Gore. Hunter also claims the court erred by giving the accomplice instruction because R.D.'s testimony, naming Evil as the sole accomplice, was favorable to Hunter, and the court's instruction that the jury could not rely on that testimony without supporting facts eliminated the benefit of this evidence as a defense, in violation of his due process rights.

We conclude the trial court did not err. The facts demonstrate R.D. was an accomplice as a matter of law, and Hunter suffered no constitutional harm from whatever effect the instructions had on his ability to utilize R.D.'s testimony for his defense.

A trial court must instruct sua sponte on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) "The instruction originates in the common law. As explained in *People v. Coffey* (1911) 161 Cal. 433, 438: '[I]t was, of course, recognized that evidence of an accomplice, coming from a tainted source, the witness being . . . a man usually testifying in the hope of favor or the expectation of immunity, was not entitled to the same consideration as the evidence of a clean man, free from infamy. Hence, it soon became the practice of the common law judges, in the wide latitude allowed to them in the instruction of their juries, to advise the latter that the testimony of an accomplice . . . was to be viewed with care, caution, and suspicion . . . .' " (*People v. Guiuan* (1998) 18 Cal.4th 558, 565.)

"An accomplice is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (§ 1111.) To be so chargeable, the witness must be a principal under section 31. That section defines principals as '[a]ll persons concerned in the

commission of a crime, whether . . . they directly commit the act constituting the offense, or aid and abet in its commission . . . .’ (§ 31.) An aider and abettor is one who acts with both knowledge of the perpetrator’s criminal purpose and the intent of encouraging or facilitating commission of the offense. . . .

“Whether a person is an accomplice within the meaning of section 1111 is a factual question for the jury to determine in all cases unless ‘“there is no dispute as to either the facts or the inferences to be drawn therefrom.” [Citation.]’ (*People v. Hayes* [(1999) 21 Cal.4th 1211,] 1271.) Thus, a trial court can determine ‘as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness’s criminal culpability are “clear and undisputed.” [Citations.]’ (*People v. Williams* (1997) 16 Cal.4th 635, 679.)” (*People v. Avila* (2006) 38 Cal.4th 491, 564-565.)

The evidence showed R.D. was an accomplice as a matter of law, and the trial court correctly instructed on the law of accomplices. The facts and the inferences drawn from them regarding R.D.’s criminal culpability are clear. Even though R.D. stated he burgled the homes in the company of someone named Evil instead of with Hunter and Gore, the undisputed evidence shows R.D. was liable for prosecution for the identical offenses for which Hunter and Gore faced prosecution. Regarding the Allen burglary (counts one and two), Kathleen Allen identified the white laptop found in the car with Hunter, Gore, and R.D. as her white Apple laptop. At trial, R.D. admitted to stealing the white laptop that was found with him in the car.

As to the Givaudon burglary (count three), Dorinda Brown, the witness who saw a person walk down James Givaudon’s driveway carrying electronic devices, described seeing three males get into the car that later was identified as Hunter’s New Yorker.

Regarding the Franzioia burglary (counts four and five), Rebecca and Jillian Franzioia identified R.D. at the police station on April 10 as the person who came up to their door and knocked on it immediately prior to the break-in. They later identified a Blackberry cell phone and an iPod that had been found at R.D. and Gore’s apartment as

items belonging to Jillian that had been stolen from their home on April 9. Rebecca Franzoia also identified Hunter's car as the car used in the burglary. At trial, Rebecca Franzoia identified Hunter and Gore as the other two men displayed in the April 10 showup.

As to receiving property stolen from the Greers (count six), Patrick Greer and his wife Sarah identified the silver and gray laptop and black flat screen television found in the car with R.D. at the time of his arrest as theirs. They identified R.D. as one of the individuals they saw at their apartment the morning they were burgled. Sarah identified Hunter as another of the men she saw that day, and Patrick identified Gore as one of the men he saw.

Regarding receiving property stolen from Jeffrey Rogers (count seven), Rogers testified he received a call from police on April 10 that some of his property had been recovered in a traffic stop that day. Police testified they recovered a silver and gray Sony Vaio laptop, a 20-gauge shotgun, 20-gauge shotgun shells, a computer bag containing paperwork bearing Rogers' name, and a comforter in R.D. and Gore's apartment.

Finally, as to receiving property stolen from Sheila Maddox (count eight), R.D., at the time of his arrest, had in his pocket the Grant High School football championship ring and other jewelry belonging to Maddox. Maddox's Compaq laptop and Canon camcorder were found at R.D. and Gore's apartment.

Based on this evidence, we conclude the trial court correctly informed the jury that, if it determined Hunter or Gore were guilty of any of the charged offenses, it would also have to find R.D. guilty of the same offense. He was an accessory in each of the charged crimes. The court was required to give the accessory instructions, and it correctly determined R.D. was an accessory as a matter of law.

We also reject Hunter's contention that the accomplice instructions violated his federal constitutional rights. Federal courts have rejected a due process challenge to the giving of accomplice instructions where the accomplice testified as a defense witness. In

*United States v. Tirouda* (9th Cir. 2005) 394 F.3d 683, the Ninth Circuit Court of Appeals held that a properly formulated accomplice instruction may be given no matter which side calls the accomplice to testify, as “[a]n accomplice’s testimony may be suspect, regardless of whether he testifies for the prosecution or the defense.” (*Id.* at p. 687.) Also, informing the jury that an accomplice’s testimony must be viewed with greater caution than other witnesses’ testimony did not violate the defendant’s federal constitutional due process rights. (*Id.* at pp. 687-688.) Hunter suffered no denial of his constitutional rights by the court instructing the jury to treat R.D.’s testimony, including the testimony favorable to Hunter, as suspect.

C. *Sufficiency of the Evidence for Hunter’s Convictions on Counts Three and Four*

Hunter contends insufficient evidence supports his conviction of burgling the Givaudon residence (count three) and the Franzoia residence (count four). He claims the witnesses to these crimes could describe only the car that was seen during the burglaries and identify it as the car Hunter was driving when he was arrested. They provided no other evidence identifying him as a participant in these particular crimes. We conclude sufficient evidence supports both convictions.

A person commits burglary when he “enters any house, room, apartment . . . or other building . . . with intent to commit grand or petit larceny or any felony . . . .” (§ 459.) “Evidence supporting a conviction for burglary may be based entirely upon circumstantial evidence. [Citations.] [¶] However, ‘[possession] alone of property stolen in a burglary is not of itself sufficient to sustain the possessor’s conviction of that burglary. There must be corroborating evidence of acts, conduct, or declarations of the accused tending to show his guilt.’ [Citation.]” (*In re D.M.G.* (1981) 120 Cal.App.3d 218, 227.)

“When, as here, a defendant is found in possession of property stolen in a burglary shortly after the burglary occurred, the corroborating evidence of the defendant’s acts,

conduct, or declarations tending to show his guilt need only be slight to sustain the burglary convictions. [Citations.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 176.) “ ‘[I]f possession of stolen goods soon after a burglary is unexplained or the attempted explanation [is] rejected by the jury, such alone is sufficient corroboration.’ [Citations.] The similarity of the commission of crimes is another circumstance of a corroborative nature. [Citations.]” (*People v. Robinson* (1960) 184 Cal.App.2d 69, 77.)

We conclude sufficient evidence supports Hunter’s conviction of the Givaudon and Franzoia burglaries. The burglaries happened on the same morning between approximately 10:00 and 11:30. The individuals who committed the burglaries were all seen in Hunter’s Chrysler New Yorker at the time of the crimes. Kathryn Hunter placed Hunter in the New Yorker during those hours. The burglaries were accomplished in the same way, with at least one person kicking in the door in each case. Three persons participated in each burglary. The modus operandi was similar, if not identical, to the other burglaries charged against the defendants and other victims’ property was found inside Hunter’s car when he was arrested. At the earlier Allen robbery committed in the same manner that morning, a witness, John-Paul Greco, identified one of the men he saw leaving the apartment as Hunter, who was carrying the white laptop found in Hunter’s car the next day. Sarah Greer had also identified Hunter as one of the men she saw at her apartment complex prior to the burglary.

Property taken during the Givaudon and Franzoia burglaries was found at Gore and R.D.’s apartment: a computer monitor connected to the Givaudon burglary and Jillian Franzoia’s Blackberry cell phone and one of her iPods. The jury could infer the trio stored their stolen goods at Gore and R.D.’s apartment.

In addition, R.D.’s statement to police after his arrest that he did not want to snitch on Gore or Hunter suggested their participation in the same crimes for which he was arrested, despite R.D.’s assertion at trial that he committed burglaries only with the unknown Evil and not with Gore and Hunter.

Taken together, these facts and circumstances constitute sufficient evidence in support of Hunter's conviction in the Givaudon and Franzoia burglaries.

D. *Sufficiency of the Evidence for Hunter's Conviction on Count Five*

Hunter contends insufficient evidence supports his conviction for receiving property stolen during the Franzoia burglary (count five). He asserts evidence that he was near where Jillian Franzoia's stolen Blackberry and iPod were found, or that he had access to that location is not, standing alone, sufficient to sustain a conviction for receiving stolen property. That evidence may not be sufficient standing alone, but when we consider it together with the other evidence of Hunter's culpability in the Franzoia burglary, we find sufficient evidence to support Hunter's conviction on count five.

To sustain a conviction under section 496, subdivision (a), for receiving stolen property, the evidence must establish (1) the property was stolen; (2) the defendant knew it was stolen; and (3) the defendant had possession of it. (*People v. Price* (1991) 1 Cal.4th 324, 464.) Whether the defendant knew the property was stolen is normally proved by an inference from circumstantial evidence. (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019.) Possession may be actual or constructive, and need not be exclusive. (*People v. Land* (1994) 30 Cal.App.4th 220, 223.) Physical possession is not required, but mere presence near the property is insufficient. "The necessary additional circumstances may, in some contexts, be rather slight. [Citations.]" (*Id.* at p. 225.)

The unique circumstances of this case provide the additional evidence necessary to support the jury's findings that Hunter possessed Jillian Franzoia's property and knew it was stolen. The evidence established Hunter, Gore, and R.D. were jointly involved in committing the string of burglaries. Hunter's car was the getaway car in each instance, and the stolen property was stored at Gore and R.D.'s apartment. Hunter's mother established Hunter was driving his car when the Franzoias were burglarized. Rebecca Franzoia identified Hunter's car as the car that parked in front of her home, and she saw three car doors open as she ran towards her daughter, telling her to set the alarm. She

identified R.D. as the person from Hunter's car that first knocked on her door. And Jillian's phone and one of her iPods were found in R.D. and Gore's apartment the next day.

These facts, in addition to those explained in the preceding section, provide sufficient evidence to sustain Hunter's conviction of receiving property stolen from the Franzoias.

E. *Ineffective Assistance of Counsel*

Hunter contends his trial counsel rendered ineffective assistance of counsel when she did not move to exclude evidence of a photo lineup given to witness John-Paul Greco. Greco identified Hunter in the lineup as the person he saw carrying a laptop. Hunter asserts the lineup was unduly suggestive because his photograph was the only one that met the description of a lighter African-American male with long hair pulled into a bun. Defense counsel argued at trial the lineup was suggestive because the other photos were highly distinctive in appearance from Hunter, but she did not move to exclude evidence from the lineup. Hunter claims counsel's failure to move to exclude the evidence constituted ineffective assistance. We disagree, as the lineup was not unduly suggestive.

To establish ineffective assistance, Hunter must show his trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability the result would have been different but for counsel's errors. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 698].) Hunter has not shown defective performance by counsel.

"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 . . . ." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) "If the answer to the first question

is ‘no,’ because we find that the challenged procedure was not unduly suggestive, our inquiry into the due process claim ends. [Citation.]” (*People v. Virgil* (2011) 51 Cal.4th 1210, 1256.)

“The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. (*People v. Ochoa* [(1998)] 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, supra*, 25 Cal.4th at pp. 989-990.)

The photo lineup was not unduly suggestive. The lineup depicted six African-American males. Two have lighter colored skin, three have slightly darker skin, and one has dark skin. All six have some amount of facial hair. Three have short hair or no hair, and three have longer hair. Hunter’s bun is not visible. Hunter and at least one other suspect appear to be wearing a white t-shirt. Nothing in the photo lineup caused Hunter to stand out in a way different from the others.

Because the photo lineup was not unduly suggestive, the determination by Hunter’s trial counsel not to move to exclude evidence of the photo lineup did not fall below an objective standard of reasonableness. A motion to exclude the evidence almost certainly would have failed. Counsel instead made the reasonable choice to raise the issue in closing argument. Counsel did not render ineffective assistance in doing so.

## II

### *Gore’s Contention*

#### *Consecutive Sentencing on Subordinate Counts*

Gore’s sole contention on appeal is the trial court abused its discretion when it imposed consecutive subordinate sentences for receiving separate items of different victims’ stolen property that were not shown to have been received or sold on separate occasions. The court did not abuse its discretion imposing consecutive sentences, as the

evidence in the record supported a factual inference Gore received the stolen items at separate times.

California courts have long held the receipt on one occasion of goods stolen from several owners constitutes a single offense of receiving stolen property. (*People v. Lyons* (1958) 50 Cal.2d 245, 275; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 461-462.) However, “where the receiving counts involve different property stolen from different victims at different times and where nothing in the record shows [the defendant] received the property on a single occasion, ‘the record reasonably supports the inference that [the defendant] received the various stolen goods at different times and in different transactions.’ [Citation.]” (*People v. Morelos* (2008) 168 Cal.App.4th 758, 763 (*Morelos*); see also *People v. Bullwinkle* (1980) 105 Cal.App.3d 82, 92, disapproved on another ground in *People v. Laiwa* (1983) 34 Cal.3d 711, 728.)

Nothing in the record shows when Gore received the stolen property, but there is no dispute the various items he obtained came from separate burglaries of different victims’ homes committed at different times.

Gore contends the holding in *Morelos* unlawfully reverses the burden of proof and requires him to prove he received stolen property only on one occasion in order to avoid multiple punishments. *Morelos* does nothing of the sort. The prosecution still must prove each element of the crime, but in the absence of direct evidence of separate occurrences of receiving, the trier of fact may under *Morelos* rely upon circumstantial evidence to determine the defendant received stolen property on separate occasions.

Here, the evidence showing Gore received property stolen from separate individuals at separate times is sufficient to sustain the consecutive sentences imposed on each of his convictions.

DISPOSITION

The judgments are affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.