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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TOBIAS JEROME GUINN et al.,

Defendants and Appellants.

D058985

(Super. Ct. No. SCD221495)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed as modified.

An information charged defendants Tobias Guinn and Lamont Stewart with numerous counts of armed robbery (Pen. Code,<sup>1</sup> § 211) in connection with robberies of a number of convenience stores in El Cajon and La Mesa, California. The jury found Guinn and Lamont guilty of two robberies they committed together (counts 5 and 6),

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

found Guinn guilty of one other robbery he committed alone (count 2), and found Stewart guilty of four other robberies (counts 7, 8, 10 and 11).<sup>2</sup>

In a bifurcated proceeding, Guinn admitted allegations he had suffered a prior serious felony conviction (§ 667, subd. (a)), and a prior conviction under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court sentenced Guinn to a total term of 35 years 8 months in prison. The court sentenced Stewart to a total term of 34 years 8 months in prison that included a consecutive five-year prison term because he suffered a prior serious felony conviction (§ 667, subd. (a)).

On appeal, Guinn contends the court abused its discretion when it denied his motion for new trial on counts 2, 5 and 6, and joins in the arguments made by Stewart in his appeal. Stewart contends his conviction should be reversed because his counsel was ineffective by not moving to suppress the photographic lineup and not viewing the videos of the robberies prior to trial. Stewart also argues there was sentencing error because the five-year prison term for the prior serious felony conviction was improper, and there is clerical error in the abstract of judgment.

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<sup>2</sup> On the remaining counts, the jury acquitted Guinn of participating in the robberies charged in counts 10 and 11, and were unable to reach verdicts on count 8 as to Guinn or on counts 1, 3, 4, and 9 as to Stewart. The court declared a mistrial as to those counts and ultimately dismissed them.

I  
FACTS

A The Offenses

*Count 2*

On May 7, 2009, around 1:30 a.m., Mr. Ali was working at a 7-Eleven store in La Mesa, California, when a masked man wearing a dark, hooded jacket and dark gloves entered the store. The man's forehead was uncovered and Ali could tell he was African-American. The man pointed a small, dark gun at Ali and demanded he open the register. Ali opened the register and gave cash to the man, who grabbed it and then walked backwards out of the store. A video of the robbery was played for the jury. The video depicted the robber wearing a black and white "hoodie" sweatshirt and a dark glove. When police later searched Guinn's residence, a detective who was investigating the series of robberies found a black and white striped sweatshirt with a symbol on the left breast that she "immediately recognized . . . as being distinctively similar to the . . . sweatshirt that I saw in the surveillance video of the robbery [charged in count 2]."

*Count 5*

On May 28, 2009, around 1:00 a.m., Mr. Boughton was working at a 7-Eleven store on 1021 West Washington Street in El Cajon, California, when three African-American men wearing masks entered the store. One of the men pointed a small, dark gun at Boughton and demanded the cash from the register. The man with the gun was wearing a dark, hooded jacket, black gloves and a mask, and he sounded African-American when he spoke to Boughton. Boughton was able to tell that the second man,

wearing a white T-shirt and with something covering his head, was also African-American and had a graying goatee. This second man told Boughton to put everything from the register into a pillow case the man was carrying, and Boughton complied. The men also grabbed Newport cigarettes and Swisher Sweet cigars. The men then ordered Boughton to the back of the store. A customer came in and startled the men, who fled from the store but, as they left, they grabbed balloons and some flowers with Teddy bears on them. A video of the robbery was played for the jury.

*Count 6*

About 45 minutes after the robbers left Boughton's store, a nearby 7-Eleven store, located at 1102 East Washington Street in El Cajon, California, was also robbed. Mr. Roddy, an employee of the El Cajon store, was working when he observed three men wearing masks enter the store parking lot. Roddy pushed the panic button and tried to call 911 as two of the men entered the store. One of the men, wearing dark clothes, gloves and a mask, pointed a small caliber gun at Roddy and ordered him to open the cash register.<sup>3</sup> The second man was wearing dark pants, a white T-shirt, and gloves. The men took the money from the cash register and put it in a bag. They also grabbed lighters, stamps, and flowers with Teddy bears on them. When they left, Roddy saw them run toward a white van parked nearby. A video of the robbery was played for the jury.

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<sup>3</sup> At trial, the prosecution introduced a black, .22 caliber gun as Exhibit 6, and introduced testimony tying Exhibit 6 to Guinn. Roddy testified the gun used by the robber looked similar to Exhibit 6.

Between 2:00 and 3:00 a.m., El Cajon Police Officer Davenport received a dispatch that three African-American males and a white minivan were involved in the East Washington Street 7-Eleven robbery. As he drove there, he observed a white van parked between the 1000 and 1100 blocks of Leslie Avenue in El Cajon, within 40 yards of the East Washington Street 7-Eleven. Davenport observed an African-American male, wearing a white T-shirt and dark pants and carrying a white bag, walking quickly away from the van and into an apartment complex. Davenport parked his car and walked to the van. The engine hood on the van was still hot. He looked inside the windows of the van and observed roses with bears on them similar to ones reportedly taken during the 7-Eleven robbery. Davenport impounded the van. After leaving the scene, Davenport went to the site of the West Washington Street 7-Eleven robbery and viewed a video of the robbery. Davenport recognized the man he had seen walking away from the van as one of the robbers on the video.

Evidence technicians searched the van and found Newport Cigarettes, two packs of fake roses wrapped in cellophane with Teddy bears on them, and a black, hooded sweatshirt. The van was processed for fingerprints and Guinn's prints were found on the inside and outside of the van.

*Count 7*

On May 31, 2009, just after midnight, Mr. Nikam was working at a 7-Eleven store in El Cajon, California, when a masked gunman wearing a purple, hooded sweatshirt and black gloves entered the store. The man pointed a small black gun at Nikam and ordered

him to open the cash register. Nikam eventually complied and the man grabbed the cash and then left the store. A video of the robbery was played for the jury.

After the robber walked outside, he took off his mask and looked back inside. Nikam, who was 15 to 20 feet from the robber at that time, saw that the robber was African-American, with short hair and a salt-and-pepper goatee, and some kind of "dreadlocks" on the cheeks of his face. At trial, Nikam identified Stewart as the robber.

*Count 8*

On June 6, 2009, around 12:30 a.m., Mr. Momon was working at a 7-Eleven store in La Mesa, California, when two African-American men wearing masks, dark hoodies, and white surgical gloves entered the store. One of the men, holding a small black gun,<sup>4</sup> ordered Momon to open the cash registers. Momon complied and, while he was giving up the money from the register, one of the men grabbed some Newport cigarettes and Swisher Sweet cigars and put them in a bag. The men then left the store. A surveillance video was shown to the jury, and a detective testified Stewart's physical appearance matched one of the robbers shown in the video.

*Count 10*

On June 20, 2009, around 1:30 a.m., Mr. Patni was working at a 7-Eleven store in El Cajon, California, when it was robbed. The video, which was played for the jury, showed two masked men (who appeared to be African-American) entering the store. One

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<sup>4</sup> At trial, Momon testified the gun used by the robber looked similar to Exhibit 6.

of the men, carrying a small gun,<sup>5</sup> was wearing a white and green striped, long-sleeved shirt, gloves, and dark pants with the pant legs rolled up. The gunman took the cash. The second man, wearing all dark clothing, grabbed Newport cigarettes from behind the register.

*Count 11*

About 30 minutes before Mr. Patni was robbed, Mr. Boughton was again the victim of a robbery while working at the 7-Eleven store on 1021 West Washington Street in El Cajon, California. Around 1:00 a.m., two African-American men, whose faces were covered by "do-rags," confronted Boughton. One of the men was armed with a handgun. The gunman stuck the gun in Boughton's face and, when Boughton said, "Not again," the gunman responded, "yes, again. Let's get it done." Boughton recognized the gunman's voice as belonging to the same white-shirted person he had heard during the first robbery. The gunman was wearing pants with distinctive high cuffs and gloves.<sup>6</sup> While the second man went behind the counter taking the cash from the register, as well as taking Newport cigarettes and Swisher Sweet cigars, the gunman demanded "big money" and ordered Boughton to the back room. Boughton, fearing for his life, fled.

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<sup>5</sup> The gun used by the robber looked similar to Exhibit 6.

<sup>6</sup> Shortly after this robbery, police arrested Stewart and seized a pair of gloves from him. The gloves looked like those worn by the gunman in the final robbery.

## B. The Arrest of Guinn and Stewart

After the robbers left his store, Boughton realized the robbers had taken his cell phone. Using the cell phone information, police were able to find the location of the suspects. El Cajon Police Officer Becker, who had obtained a description of the suspects from Boughton, went to the location of the stolen cell phone and saw three African-American men, two of whom matched the descriptions given by Boughton, walking on the sidewalk in the 900 block of Leslie Avenue in El Cajon. The men were Stewart, Guinn, and a man named Mr. Collins.

Becker and his partner, Officer Stanley, got out of their police car and ordered the three men to the ground. Stewart and Collins complied, but Guinn fled. Becker chased Guinn until he finally submitted. After handcuffing Guinn, Becker traced the path he had taken and found a "do-rag," numerous \$1 bills, and a \$2 bill.<sup>7</sup>

Police recovered Boughton's cell phone near where Stewart was arrested. During the search of Stewart, police also found a pack of Newport cigarettes, a "wad" of cash, and a pair of blue and white batting gloves.

A crowd gathered on the street and watched police arrest Stewart and Guinn. Among the crowd were Guinn's wife (Teala Burton) and Ms. Blackmon. Burton, Blackmon and others eventually returned to Guinn's apartment at 1000 Leslie Street, and Burton urged the occupants to pack up evidence and take it away because police were coming.

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<sup>7</sup> Becker believed the \$2 bill was significant because a \$2 bill was taken from one of the 7-Eleven stores.

Police obtained search warrants for the apartments of the three arrestees, all of whom lived near the 1000 block of Leslie Street. Detective Rothrock, who was investigating the series of robberies, was at the El Cajon Police Department several hours after Guinn and Stewart were arrested when she heard a radio report that several people were leaving Guinn's apartment carrying backpacks. Rothrock, concerned these people were carrying away evidence, went to the scene where police detained several people leaving Guinn's apartment carrying bags. One of the people detained, Blackmon, was carrying a backpack. Police searched the backpack and found the .22 caliber handgun (Exhibit 6) similar to the gun used in some of the robberies. Blackmon testified at trial that the gun belonged to Guinn and she had been told by Guinn's wife to put it in the backpack. Blackmon's backpack also contained white and black batting gloves, five sealed boxes of Newport cigarettes, 11 boxes of Swisher Sweet cigars, and a medical card for "Antonio Smith," an alias of Guinn.<sup>8</sup> The backpacks carried by the other detainees, who were related to Guinn's wife, contained boxes of Newport cigarettes. A search of Guinn's apartment, where Stewart was temporarily residing, also found a T-shirt that appeared to the same as one worn by one of the robbers of the May 31 robbery, and also found gloves that had the same color, pattern, brand and style as gloves worn by one of the robbers in the May 31 robbery.

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<sup>8</sup> Guinn testified for the limited purpose of denying that "Antonio Smith" is an alias he uses.

### C. Defense Evidence

#### *For Guinn's Defense*

Mr. Hawkins, a friend of Guinn, testified he owned the white van impounded by police and that Guinn often rode in it. However, Hawkins had not allowed anyone to drive it that night. The van had overheated around midnight on May 28 and he parked it on the street to let it cool down.

#### *For Stewart's Defense*

Mr. Boxx, a cousin of Guinn's wife, was living with them in May 2009. Many people were living there at that time. He saw Blackmon remove the .22 gun from her backpack and she bragged about doing robberies on three occasions.<sup>9</sup> She had large quantities of Newport cigarettes and Swisher Sweet cigars and sold them on the street, and she wore clothing belonging to Guinn.

## II

### GUINN'S APPEAL

Guinn moved for a new trial, arguing the evidence was insufficient to identify him as a perpetrator of the robberies charged in counts 2, 5 and 6. The trial court denied the motion, and Guinn contends this ruling was an abuse of discretion.

#### *The Motion for New Trial*

After Guinn was convicted on counts 2, 5 and 6, he moved for a new trial contending there was insufficient evidence proving his identity as one of the robbers in

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<sup>9</sup> Police witnesses who viewed the videos testified none of the four persons carrying backpacks, including Blackmon, matched the descriptions of the persons involved in the charged robberies.

those three crimes and there was newly discovered evidence he was not one of the persons who committed those crimes. The court held a hearing at which it heard the new evidence proffered by the defense.<sup>10</sup> The court denied the motion for new trial.

### *Legal Standards*

Under section 1181, a defendant may seek an order granting a new trial based on insufficiency of the evidence to support the verdict. When ruling on the motion, the trial court must independently weigh the evidence. (*People v. Serrato* (1973) 9 Cal.3d 753, 761, overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) The defendant is first entitled to a decision by the jury, and then independently by the judge, who must consider the sufficiency of the evidence, weigh the conflicts and inconsistencies, and evaluate the credibility of witnesses. In making this determination the court must use its own judgment and does not rely merely on the jury's conclusions. (*People v. Navarro* (1946) 74 Cal.App.2d 544, 554.) The trial court's ruling, however,

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<sup>10</sup> The new evidence included information from Guinn's mother, from Mr. Donely (Guinn's friend and roommate), and from Mr. Shields. Guinn's mother testified she reviewed the videos of the May 7 robbery (count 2), and the May 28 robberies (counts 5 and 6), and testified none of the robbers resembled her son. Donely testified on direct that (1) he could not identify Guinn in the videos, and (2) when he was living with Guinn, others living with Guinn (including Blackmon and Shields) would wear Guinn's clothing. However, Donely admitted on cross-examination that he could not be certain one of the robbers depicted in the videos was not Guinn, and acknowledged that he was close to Guinn's mother and had visited Guinn in jail. Shields, another friend and roommate of Guinn, testified he had pleaded guilty to three convenience store robberies he committed in May 2009 and that his accomplice in those robberies was Blackmon. Shields was living with Guinn during that period. Shields claimed that he was the robber depicted in the video of the May 7 robbery, and that he had viewed the videos of the other robberies and had not seen anyone he thought was either Guinn or Stewart. He admitted on cross-examination that he was upset Blackmon was "not doing any time." His guilty pleas to three other robberies were apparently for crimes unrelated to any of the crimes for which Guinn had been convicted.

must be "guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Quoting *People v. Robarge* (1953) 41 Cal.2d 628, 633.]" (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption it properly exercised that discretion. (*People v. Davis, supra*, 10 Cal.4th at p. 524.) Our review of the ruling is constrained by the recognition that, "[b]ecause of the trial court's unique position to perform these duties an appellate court will not set aside such rulings except where it clearly appears the trial court abused its broad discretion." (*People v. Price* (1992) 4 Cal.App.4th 1272, 1275.)

#### *Analysis*

Guinn argues the trial court abused its discretion when it denied the new trial motion because the perpetrator of the May 7 robbery, and the perpetrators of the May 28 robberies, all wore masks. Guinn argues neither the victims nor the videos could conclusively demonstrate Guinn was involved in these crimes.

However, identity is a question of fact that must be affirmed if substantial evidence supports the trier of fact's determination. (*People v. Westbrook* (1976) 57 Cal.App.3d 260, 262.) There was circumstantial evidence tying Guinn to the May 28 robberies, because (1) clothes and gloves found by police at Guinn's residence resembled those worn by one of the robbers, (2) the gun employed during those robberies looked

like the gun belonging to Guinn that police found when they searched Blackmon, (3) Guinn's wife (after seeing Guinn had been arrested) went with Blackmon back to Guinn's apartment and asked Blackmon to remove the gun, (4) items identical to those stolen during the May 28 robbery were found in a van (on which Guinn's fingerprints were found) parked outside of Guinn's apartment building within hours of the robberies, and (5) when police confronted Guinn on June 20, he tried to escape and tried to dispose of items that might have connected him to other robberies. Finally, both the jury and the trial court viewed the videos of the May 28 robberies and were able to assess whether the person dressed in Guinn's clothes and carrying his gun was of a height and build consistent with Guinn's height and build. The same evidence applied with equal force to the May 7 robbery: similar clothing; similar weapon; height and build of robber similar to Guinn; flight showing consciousness of guilt.

Moreover, because a trier of fact could conclude Guinn was a participant in the May 28 robberies, the fact that a *similar modus operandi* was employed by the perpetrator of the May 7 robbery (robber held up 7-Eleven convenience store; robber struck at approximately the same time of night; robber concealed his identity using similar items of clothing; robber used similar gun), and this modus operandi was employed in the *same geographic area* as the May 28 robbery, permitted an inference Guinn was involved in the May 7 robbery. (See *People v. Miller* (1990) 50 Cal.3d 954, 989 ["[T]he likelihood of a particular group of geographically proximate crimes being unrelated diminishes as those crimes are found to share more and more common

characteristics. When, as here, those characteristics combine to suggest a common modus operandi, their collective significance may be substantial."].)

Guinn argues that denying his motion for a new trial was an abuse of discretion because all of the evidence tying him to the crimes was equally susceptible to an exculpatory interpretation: defense witnesses explained how his fingerprints were on the van with the stolen merchandise, and also testified people living at his apartment borrowed his clothes and (presumably) his weapon.<sup>11</sup> However, the fact circumstantial evidence is susceptible to an interpretation that would be exculpatory is not sufficient for an appellate court to disturb the decision of the trial court on the new trial motion. (Cf. *People v. Farnam* (2002) 28 Cal.4th 107, 143.) We cannot conclude the trial court, after independently assessing the sufficiency of the evidence as a trier of fact, manifestly abused its discretion when it denied Guinn's motion for a new trial.

### III

#### STEWART'S CHALLENGE TO THE CONVICTIONS

Stewart contends he was denied effective assistance of counsel because counsel (1) did not challenge a photographic lineup as unduly suggestive and (2) did not review the surveillance videos prior to trial.

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<sup>11</sup> He also notes his new trial motion was supported by his friend's confession (at least to the May 7 robbery) and by his mother's testimony. However, the trial court observed (when considering that evidence) these witnesses had "a substantial interest in this case," in an apparent reference to their bias. Moreover, the friend's "confession" made no reference to how he came into possession of Guinn's gun, and the trial court was not required to credit the friend's explanation of why he waited years before coming forward with his "confession."

### A. Governing Law

To establish ineffective assistance of counsel, Stewart bears the burden of showing both that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and that it is reasonably probable the verdict would have been more favorable to him absent counsel's error. (See, e.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) "In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] . . . Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' " (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In an appropriate case, we may resolve an ineffectiveness claim on the ground of lack of prejudice without determining whether counsel's performance was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

## B. Absence of Challenge to Photographic Lineup

### *Background*

Stewart was charged in count 7 with the May 31, 2009, robbery. Mr. Nikam, who was working at the 7-Eleven store when it was robbed, testified that after the robber left the store and walked outside, the robber took off his mask and looked back inside.

Nikam saw the robber's face: he was African-American, with short hair and a salt-and-pepper goatee, and some kind of "dreadlocks" on the cheeks of his face. The sheriff's deputy who responded to the call obtained a description of the robber from Nikam, who described the robber as a black male in his early 40's, with a flat or depressed nose, matted deadlocks, a salt-and-pepper goatee, and stubble. Two days later, a detective obtained a description of the robber from Nikam, whose description revised the age estimate of the robber to between 35 and 40 years old (rather than 40-45 years old) and the description of hair as short hair (rather than long hair or deadlocks). Nikam also told the detective the robber's facial hair was a mixture of gray and black facial hair.

When Stewart was arrested three weeks later, the detective took Stewart's photograph and placed it and five others in a photographic lineup. Nikam was shown a photographic lineup by police and identified Stewart as the robber.

On cross-examination, the detective conceded Stewart's photograph was the only picture depicting a man with a salt and pepper goatee. The detective also conceded there were no dreadlocks on the pictures in the lineup. On cross-examination, Nikam testified he told the first officer the robber had dreadlocks on his cheeks, and the person he

identified on the photographic lineup did not have these cheek dreadlocks. Nikam also identified Stewart at trial as the robber, even though Stewart was then clean shaven.

*Analysis*

Stewart's counsel did not move to suppress the photographic lineup as unduly suggestive, and Stewart argues this deprived him of effective assistance of counsel. However, the record contains no express explanation of why Stewart's counsel elected not to challenge the identification procedure, and Stewart has not filed a habeas corpus petition supplying an explanation. The courts "have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Stewart contends the matter can be resolved on appeal because there simply could be no rational tactical reason for not challenging the identification procedure. However, the record here suggests counsel may have had a legitimate tactical reason for allowing an arguably suggestive identification procedure to be heard by the jury: it dovetailed with the defense's overall theme that police had no direct evidence of who perpetrated a series of robberies and were attempting to blame Stewart for those crimes by arraying the evidence to fit their opinion that Stewart was involved. During closing argument, Stewart's counsel's emphasized that the prosecution's case relied "primarily, perhaps

exclusively, [on] circumstantial evidence" and "on the opinions of the officers . . . about identity, size, shape, weight, [and] color, from the videos," and argued that police had approximately 20 unsolved robberies, which created "a lot of open case files . . . involving robberies that were cluttering up the desks of detectives . . ." The defense argued that, after police arrested Stewart and Guinn for the June 20 robberies:

" 'they began to look back at those other robberies because now they have at least some suspects . . .' and so they want to get these open, empty files off their desks . . . . [¶] So they started going back to those other robberies . . . and *they went back with a purpose, with an intent, with a motive, and that was to see if they could tie these guys . . . to those other robberies. That was their intent. That was their purpose. That was what they were doing. . . .*" (Italics added.)

Stewart's counsel argued the clothing worn by the robbers and the loot found by police was not forensically tied to Stewart and could well have been worn by or deposited by any number of people who had access to Guinn's apartment. Stewart's counsel argued the other inculpatory testimony either lacked credibility or did not show Stewart was any more likely to have been involved than other persons whom the police did not charge. In reiterating his theme that police formed the belief Stewart was involved in the other robberies and sought to array the evidence to fit their opinion that he was involved, the defense then capped its closing argument by bringing out and displaying the blow-up exhibit of the photographic lineup and pointing out the procedure used to elicit Nikam's identification of Stewart was a suggestive procedure, and was used by police to insure that Nikam (the only person to have seen Stewart's face) *picked the suspect police had arrested and selected as their perpetrator:*

"Mr. Nikam is the only witness . . . who claims to have actually been able to identify Mr. Stewart as a robber, and he gave the description when he was first contacted by law enforcement [saying] *the guy had something like dreadlocks*. . . . [Nikam] said something about . . . *a salt-and-pepper-beard and dreadlocks*. [¶] Now, [Nikam] was then interviewed . . . *after Mr. Stewart had already been arrested*, and another officer went to talk to him, and . . . that officer [showed Nikam the photographic lineup] and according to Mr. Nikam, he identified Photograph No 2, which is Mr. Stewart, as the person he saw who was the robber. [¶] . . . [¶]

"And when I asked about the previous description of dreadlocks, [Nikam] said '. . . the officer [Officer Medina] must have misunderstood me.' Officer Medina . . . was not a new officer. He might have been ten years or more on the service . . . and I think it may have been Detective Baber who vouched for [Officer Medina, saying] 'Yeah, I know him. He's a good officer. I've worked with him a lot.

"So what faith can you put in this identification? Well, Mr. Nikam, even after he saw the photograph here in court, . . . still said, 'Well, the guy had something down his cheeks. He's got something going down his cheeks,' and even here in court, he stuck to that. Even in court, he stuck to the fact that he had some kind of strands or some kind of something going down his cheeks, and even that does not appear in this photograph.

"And the other thing is—and I pointed this out to the officer . . . what good is a photo[graphic] lineup if they don't look alike? Of what possible use is a photo[graphic] lineup unless they all look alike? Because otherwise, it is incredibly suggestive. *It suggests to the witness that this particular person is the one. 'That's the one you need to pick out for us,' and that's what happened here*. . . . [T]here was only one person in this group [who] has a salt-and-pepper beard, only one . . . Mr. Stewart. [¶] *That was as if the officers came up to Mr. Nikam and said 'Here's your—here's the guy who robbed you. He's right there. All you [have] to do is say that's him, and then we're off to the races.'* . . . And that's what happened here." (Italics added.)

Because we presume counsel exercised reasonable professional judgment in making significant trial decisions (*People v. Holt, supra*, 15 Cal.4th at p. 703) and accord

great deference to counsel's tactical decisions (*People v. Frye, supra*, 18 Cal.4th at pp. 979-980), and the record on appeal does not affirmatively disclose Stewart's counsel had no rational tactical purpose for permitting the suggestive line-up to remain in evidence but instead suggests counsel affirmatively employed the evidence to buttress the defense's narrative, we are not persuaded by Stewart's claim that his counsel was ineffective by not challenging the photographic line-up.

### C. The Videos

Stewart also contends he was denied effective representation by counsel because his attorney did not review the videos of the robberies until after trial. He claims that, if his counsel had viewed them before the end of trial, he would have called witnesses who would have given exonerating evidence.

#### *Background*

The jury convicted Guinn and Stewart of the robberies committed on May 28, 2009 (counts 5 and 6), and convicted Stewart of the robbery committed on June 6, 2009 (count 8).<sup>12</sup> For each of those robberies, a video of the robberies was played for the jury during trial.

In Stewart's original motion for new trial, he asserted the evidence was insufficient to support the verdicts on those counts. In a supplemental motion for new trial, Stewart (joined by Guinn) argued there was newly discovered evidence warranting a new trial. Among the "newly discovered evidence" was that several witnesses were not shown the

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<sup>12</sup> The jury was unable to reach a verdict as to Guinn's involvement in the June 6 robbery (count 8), and a mistrial was declared and the court ultimately dismissed that count as against Guinn.

store videos to determine if they could identify anyone in those videos. These witnesses were Shaleigh Smith (Guinn's mother), Mr. Boxx, Mr. Donely (Guinn's friend and roommate), Burton (Guinn's wife), and Mr. Shields. To buttress the claim that the evidence was "newly discovered," the defense investigator working for Stewart filed a declaration averring Stewart's counsel had not received copies of copies of the video "from all of the charged robberies," only obtained a CD of the videos "played at trial" after trial was completed, and therefore had not shown the videos to the new witnesses.

The defense called several witnesses at the hearing on new trial motion.<sup>13</sup> At the hearing, the investigator testified there were three videos she obtained after trial, which she then showed to Guinn's mother, to Donely, to Boxx, and to Guinn's wife. However, on cross-examination, the investigator admitted she was unaware whether Stewart's counsel had all of the videos "when we were in trial," and that she was aware of the identities of all of the identified witnesses. The parties agreed all of the videos were actually played during trial.

Guinn's mother testified she reviewed the videos of the May 28 robberies (counts 5 and 6), and testified none of the robbers resembled her son, but one of the three robbers resembled Shields. She admitted on cross-examination that she had been present during

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<sup>13</sup> The defense did not call either Mr. Boxx or Guinn's wife. The prosecution agreed to stipulate that Guinn's wife, if called, would state she saw the videos and Guinn was not depicted. However, the prosecutor declined to stipulate that Guinn's wife would identify Shields as the perpetrator of the May 7 robbery because Guinn's wife would not be subject to cross-examination, and the prosecutor stated, "I very much wanted to get evidence from her, because I believe she should be charged as an aider and abettor, and accessory after the fact . . . [b]ecause . . . she gave the stuff that was worn in the robbery and the gun to be muled out . . . ."

all of the trial proceedings and had seen the videos played at that time, and had asked the defense attorneys to call her (as well as Donely) as a witness but had been "shot down." She also admitted Mr. Boxx sat through "most of the trial with [her]" and was present when at least some of the videos were played, but could not recall whether he testified that Guinn was not in the video.

Donely testified on direct that (1) he could not identify Guinn in the videos of the May 28 robberies, and (2) when he was living with Guinn, others living with Guinn (including Blackmon and Shields) would wear Guinn's clothing. However, Donely admitted on cross-examination that one of the men on the videos could "possibly" be Stewart. He also conceded he could not be certain that one of the robbers depicted in the videos was not Guinn, and acknowledged he was very close to Guinn's mother and had visited Guinn in jail.

Shields, another friend and roommate of Guinn, testified he had pleaded guilty to three convenience store robberies he committed in May 2009 and that his accomplice in those robberies was Catherine Blackmon. He was living with Guinn during that period. He claimed he was the robber depicted in the video of the May 7 robbery, and that he had viewed the videos of the other robberies and had not seen anyone he thought was either Guinn or Stewart. He admitted on cross-examination that he was upset Blackmon was "not doing any time." His guilty pleas to three other robberies were apparently for crimes unrelated to any of those for which Stewart had been convicted.

### *Analysis*

Based on this record, Stewart argues his attorney did not review the videos of the May 28, 2009, robberies until after trial, and he was therefore denied effective representation of counsel.<sup>14</sup> However, there was no declaration by Stewart's counsel that *he* did not "review" those videos before the end of trial; to the contrary, the record clearly demonstrated that, at a minimum, Stewart's counsel saw the videos well before the end of trial.<sup>15</sup>

Stewart's claim of ineffective assistance of counsel is, at best, a claim that his counsel (having seen the videos) nevertheless chose not to call witnesses who would have given exonerating evidence. However, a reviewing court will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses counsel had no rational tactical purpose for his act or omission (*People v. Frye, supra*, 18 Cal.4th at p. 980), and we must not "'second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed

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<sup>14</sup> The investigator noted three videos were obtained by her "after trial." However, when describing these late-obtained videos, one of them filmed the May 7 robbery. That video is irrelevant to our analysis because Stewart was not charged with that robbery, and therefore any alleged acts or omissions by Stewart's counsel regarding that video appears to be harmless.

<sup>15</sup> A video of the robbery charged in count 5 was played for the jury on July 6, 2010, a video of the robbery charged in count 6 was played for the jury on July 8, 2010, and the defense did not begin its case until July 13, 2010. Moreover, because we must presume (absent an affirmative showing to the contrary) that counsel rendered adequate assistance and exercised reasonable professional judgment in representing his client (cf. *People v. Holt, supra*, 15 Cal.4th at p. 703), the fact that neither counsel objected to the videos when they were played strongly suggests copies *had* been timely supplied to counsel.

reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' " (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) Importantly, whether to call certain witnesses is ordinarily "a matter of trial tactics." (*People v. Bolin* (1998) 18 Cal.4th 297, 334 [challenge regarding counsel's failure to call defense experts]; accord, *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 ["The decisions whether to waive opening statement and whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess"].) The decision whether to call Guinn's mother, wife, and friends may well have had legitimate tactical reasons,<sup>16</sup> and we will not second-guess those decisions under the guise of an ineffective assistance of counsel claim.

#### IV

#### THE SENTENCING ISSUES

##### A. The Prior Serious Felony Conviction Term

Stewart's sentence included a five-year prison term for his alleged prior serious felony conviction (§ 667, subd. (a)). He asserts this was improper because there was neither an admission by Stewart of the truth of the section 667, subdivision (a), allegation nor a bench trial at which the court adjudicated the truth of that allegation.

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<sup>16</sup> For example, calling Guinn's wife may have been disastrous if, to avoid liability as an aider and abettor and/or as an accessory after the fact, she invoked the Fifth Amendment. The decision not to call Donely may have been a legitimate one because, although he would have expressed the opinion his friend (Guinn) was *not* in the video, he conceded Stewart *was* possibly in the video. Finally, as to Guinn's mother, counsel made an affirmative decision not to call her to express an opinion about the video *despite her requests to the contrary*, which shows an affirmative tactical decision was made concerning her testimony.

### *Background*

Prior to trial, defendants moved to bifurcate the jury's consideration of the substantive charges from its consideration of the alleged prior convictions and to have a trial on those allegations only if the jury found defendants guilty of any of the substantive charges. The trial court granted the motion. After the court learned the jury had reached verdicts but before the verdicts were announced, the court noted disposition of the prior conviction allegations remained outstanding. The court first addressed Guinn's position, and Guinn agreed to admit he suffered the prior convictions alleged in the information. The court gave the so-called "*Boykin-Tahl*"<sup>17</sup> advisements of a defendant's rights regarding jury trial, self-incrimination, and witness confrontation, and Guinn agreed to waive those rights and to admit the truth of the prior conviction allegations.

The court then addressed Stewart's position and asked if he likewise wished to waive jury trial on the prior conviction allegations and to have the court decide the allegations without a jury. Stewart agreed to waive jury on the prior conviction and prior strike allegations. The defendants also agreed to waive time for the court's determination of the prior conviction allegations until the date for sentencing.

In advance of the sentencing hearing, Stewart filed a combined sentencing memorandum and "*Romero*"<sup>18</sup> motion. In that memorandum, Stewart admitted he "was

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<sup>17</sup> *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

<sup>18</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

convicted of a PC 211-robbery,"<sup>19</sup> but argues the prior offense was of ancient vintage, yielded no prison term, and should be dismissed under *Romero*. He argued for a total sentence of 24 years, which included a five-year term for the "serious felony prior." The probation report's recommended sentence included a five-year term for the "serious felony prior," noting Stewart "has the added admitted allegation of a Serious Felony Prior per PC667(a)(1)/668/1192.7(c), as to case CR143164, which adds five years to the total recommended determinate prison term." Stewart raised no objection to these recitations in the probation report.

At sentencing, the court granted Stewart's *Romero* motion, and imposed a sentence that included a five-year term for the "serious felony prior." Stewart raised no objection to that five-year term below.

#### *Analysis*

Stewart contends that when the fact of a previous conviction is charged in the accusatory pleading, section 1158 requires the court to find whether or not the defendant suffered such prior conviction, and when the record contains no statement expressly finding the allegation to be true, the effect of the silence is the same as a finding of "not true." However, the statute does not specify the precise words a court must use to find the allegation true. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440.)

This issue is controlled by *People v. Chambers* (2002) 104 Cal.App.4th 1047.

There, the defendant contended the trial court erred when it imposed a prison term for a

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<sup>19</sup> Stewart's sentencing memorandum stated the section 211 conviction was in 1993, but the actual conviction for violating section 211 was in case number CR143164. That case was filed in 1993, but his guilty plea and conviction was in 1994.

firearm use enhancement because it was not preceded by an express finding whether the firearm use allegation was true. The *Chambers* court, rejecting the argument, stated:

"The contention is without merit. The premise thereto is that the trial court's failure to make an express finding constitutes a 'silent' record, which operates as a finding that the special allegation is not true. This premise is consistent with California Supreme Court law on silent records. . . . Here the record is not 'silent' as *the oral pronouncement of judgment 'speaks' to impliedly affirm the truth of the use of a firearm allegation.* [¶] The controlling authority is *People v. Clair* (1992) 2 Cal.4th 629 . . . . In *Clair* the defendant was charged with murder and two counts of burglary. The information alleged that he had been previously convicted of a serious felony. The murder and burglary charges were tried to a jury, which returned guilty verdicts. The defendant waived jury on the prior serious felony allegation and consented to trial by the court. The trial court did not expressly find that the prior allegation was true, but it imposed a five-year prison term for the prior serious felony conviction. Our Supreme Court rejected the contention 'that the sentence on the serious-felony enhancement must be set aside because no finding on the underlying prior-conviction appears.' (*Id.*, at p. 691, fn. 17.) Our Supreme Court reasoned: 'At sentencing, the court impliedly—but sufficiently—rendered a finding of true as to the allegation when it imposed an enhancement *expressly* for the underlying prior conviction.' (*Ibid.*)" (*People v. Chambers, supra*, at pp. 1050-1051.)

Here, as in both *Clair* and *Chambers*, the trial court impliedly but sufficiently found true the prior serious felony conviction allegation when it imposed a five-year prison term based on that allegation. The trial court *also* impliedly found true the prior serious felony conviction allegation when it granted Stewart's *Romero* motion, because the same prior felony was the predicate for the strike allegation, and there would have been nothing to dismiss under *Romero* if the court had not already implicitly found Stewart *had* suffered that conviction.

B. The Abstract of Judgment

Stewart contends his abstract of judgment must be corrected because it incorrectly reflects that a section 12022.53 allegation was attached to his conviction on count 8, and it must be amended to reflect that a section 12022, subdivision (a)(1), allegation was found true as to his conviction on count 8. The People concede, and we agree, the enhancing allegation appended to count 8 and found true by the jury was under section 12022, subdivision (a)(1), but the abstract incorrectly reflects a section 12022.53 enhancement was attached to his conviction on count 8, and the abstract must therefore be modified.

DISPOSITION

The court shall modify the abstract of judgment to reflect a section 12022, subdivision (a)(1), allegation was found true as to Stewart's conviction on count 8 and, as so modified, the judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.