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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO MIRANDA CALDERON,

Defendant and Appellant.

D059666

(Super. Ct. No. SCE279404)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Jr., Judge. Judgment affirmed as modified.

A jury found Roberto Miranda Calderon guilty of three counts of assault with a semiautomatic firearm on Jorge Casteneda, Jeffrey Jensen and Javier Carrillo, robbery of Jensen and attempted murder of Carrillo. It also found true certain firearm enhancements and a great bodily injury enhancement. The trial court sentenced Calderon to a determinate term of 11 years, 4 months plus an indeterminate term of 25 years to life.

Calderon appeals, contending the trial court erred in (1) denying his motion to exclude the witnesses' photographic lineup identification, (2) excluding his proposed identification expert, (3) instructing the jury on attempted voluntary manslaughter, (4) excluding him from a future restitution hearing, (5) imposing a booking fee, and (6) determining the court security fee.

The Attorney General concedes, and we agree that the trial court erred when it imposed a court security fee of \$1,200, when the correct fee amount should have been \$200. (Pen. Code, § 1465.8, subd. (a).) We reject Calderon's remaining contentions and affirm the judgment as modified.

#### FACTUAL AND PROCEDURAL BACKGROUND

In March 2006, Jensen drove to his business where about 15 employees were waiting to get their paychecks from him. He had about \$10,000 in cash in his brief case. Casteneda got out of his truck when he saw Jensen arrive. A man, later identified as Calderon, approached Casteneda and asked if the boss had arrived. Calderon had band-aids on his face above his mouth but nothing else covering his face. At some point, Calderon grabbed Casteneda's shoulder, put a round metal object against his back, told him it was a hold-up, and that he would be killed if he ran. As they walked toward the office door, Calderon chambered a bullet in the gun and started running to Jensen's truck. As Calderon approached Jensen's truck, he bumped into Carrillo. Calderon opened the door to the truck, put the gun up to Jensen's head and told him, "Give me your money."

Calderon was holding a bandana to his face, but it fell off when he reached to grab Jensen's brief case. Calderon was at Jensen's truck for about two to three minutes and stood about two to three inches away from Jensen for about 10 seconds while the bandana was off. Jensen described the robber to law enforcement as about 25–30 years old, five feet seven to nine inches tall, 180 pounds, and Hispanic. Jensen said the suspect had band-aids on his upper lip, a tattoo on his right forearm and claimed he could recognize the robber if he saw him again.

After Calderon took the brief case, Carrillo threw a beer can at him. Calderon then turned and shot Carrillo in the stomach. Calderon did not have the bandana over his mouth when he shot Carrillo. Carrillo saw Calderon for about three or four seconds without the bandana and noticed that Calderon had band-aids over his mustache area. Carrillo claimed that Calderon's "eyes were imprinted in [his] mind, because [Calderon] was mad, angry." About a month after the robbery, Casteneda saw Calderon at a materials store and "recognized him right away" as the robber, stating that Calderon's face "just stayed with me." Carrillo also identified the man in a security video taken from the store as the shooter.

In January 2008, a photographic lineup was shown to Jensen and Carrillo. The men picked photograph number four, Calderon's photograph, as the robber. The bandana dropped by the robber at the scene was collected and tested for DNA. There was a mixture of DNA on the bandana, a major contributor and a minor contributor. The major contributor matched Calderon's DNA sample. Ultimately, Calderon was

arrested in December 2009 while attempting to cross the United States border. At trial, Jensen, Casteneda and Carrillo identified Calderon as the robber and Carrillo's shooter.

## DISCUSSION

### I. *Propriety of Admission of Identification Evidence*

#### A. Proceedings Below

Calderon moved to exclude the out-of-court identifications made by Jensen and Carrillo and any in-trial identification by these witnesses. Calderon argued that the 2008 photographic lineup conducted by police was unduly suggestive because his face in his photograph was larger than the other photographs, the mustaches of the persons in the other five photographs were thicker, and the background color of the other five photographs were different than the background color in his photograph. He asserted that the differences made his photograph stand out from the other photographs.

At a pretrial hearing on the motion, the trial court reviewed the photograph lineup shown to Jensen and Carrillo. Although the court did not immediately notice differences in the photographs, it found that defense counsel was correct that Calderon's face in his photograph, number four, was slightly larger than the faces in the other photographs, that the background of his photograph was different than the other photographs and that his facial tint was different than those in the other photographs. The court tentatively concluded that the differences were not sufficient to require the exclusion of the identifications, but deferred a decision until it heard evidence regarding the presentation of the photographic lineup to the witnesses.

Outside the presence of the jury, the trial court heard testimony from the detective that put together the photographic lineup and showed the photographs to Jensen. The detective stated that she admonished Jensen that the lineup may or may not include a photograph of the perpetrator. Jensen identified photograph number four, Calderon's photograph, as the person from the robbery. A Spanish-speaking officer conducted the showing of the photographic lineup to Carrillo and read him the same admonishment. Carrillo quickly identified photograph number four as the person who shot him.

At the hearing, Carrillo testified that he picked Calderon's photograph because "his face was impressed in my mind because he shot me from a close distance." As soon as he saw Calderon's photograph, "[he] knew that it was him." On the photographic lineup, Carrillo wrote, "sus sejas y sus ojos" ("his eyebrows and his eyes") and "# 4."

Jensen testified that he picked photograph number four because the robber was right in his face when he pulled the gun on him. Jensen identified Calderon's photograph "[r]ight away" and was 100 percent sure of his identification. After the testimony of the witnesses, the trial court reaffirmed its tentative ruling to allow the identifications to be admitted.

#### B. Analysis

Diego claims the trial court erred by admitting the photographic lineup identifications by Jensen and Carrillo because the lineup used to identify him was unduly suggestive. He asserts the subsequent in-court identification of him by these

witnesses should also have been excluded because it was tainted by the unreliable photographic lineup. He argues that these errors were prejudicial and violated his right to due process. We disagree.

"The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) We independently review a claim that an identification procedure is unduly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

We have examined the photographic lineup and conclude it was not unduly suggestive. All of the photographs in the lineup depicted Hispanic males of about the same age, with a medium build and closely cropped, dark colored hair, all of the same approximate skin tone, and each with some facial hair and similar facial expressions. All of the photographs are in color and were taken from the shoulder up against a blank,

neutral background. Calderon's photograph appears to be brighter, was taken against a beige background instead of a gray background, and was taken from a closer distance making his head appear slightly larger. However, California courts have found that photographic lineup pictures are not unduly suggestive where the defendant's photograph is unique in some minor detail. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [differences in background color and image size between photos not suggestive]; *People v. West* (1984) 154 Cal.App.3d 100, 105 [fact that the defendant's face was turned in a different direction than others depicted and his photograph had a yellow tint deemed not unduly suggestive]; *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 [defendant's picture had "increased depth of shading and sharpness of detail"].) Here, the individuals depicted in the photographs have a similar appearance. The minor variations in how the photographs were taken did not render the lineup unduly suggestive.

Even assuming the photographic lineup procedure was unduly suggestive, Jensen's and Carrillo's photographic identification of Calderon was nonetheless reliable under the totality of the circumstances. Based on our review of the record, the relevant factors do not support a finding of unreliability.

Jensen had about two to three minutes to observe Calderon, and had a close view of Calderon's face for about 10 seconds after the bandana fell. Given the circumstances, it can be assumed that Jensen had his attention focused on Calderon during the incident. Jensen's physical description of the robber immediately after the incident was similar to the description of Calderon contained in the probation report. Although about 22

months had elapsed from the time of the crime and the photographic lineup, Jensen identified Calderon's photograph "[r]ight away" and was 100 percent sure of his identification.

Similarly, despite the lapse in time between the incident and the lineup, Carrillo immediately recognized Calderon's photograph based on his eyes and eyebrows. Carrillo stated that because Calderon had shot him at close range, Calderon's face was "impressed" in his mind. Carrillo stood about seven or eight feet away from Calderon; there is no evidence that anything obstructed his view, and he had the opportunity to observe Calderon with the bandana and without the bandana.

Although there was a significant lapse of time between the incident and the photographic identification, we must balance this fact with the opportunity of the men to view Calderon during the incident, their degree of attention, the accuracy of any prior description, and the level of certainty they each demonstrated at the time of the photographic lineup. (*People v. Ochoa, supra*, 19 Cal.4th at p. 412.) Based on the totality of the circumstances, Calderon has not met his burden of showing that the photographic identification procedure was unreliable under federal constitutional standards. Accordingly, Calderon's contention that the identification procedure impermissibly tainted the witnesses' subsequent in-court identifications fails.

## II. *Exclusion of Expert Testimony*

Before trial, the People moved to exclude the proposed testimony of Dr. MacSpeiden, a defense expert on eyewitness identification. The trial court ultimately exercised its discretion to exclude the testimony because there was substantial

corroborating evidence supporting the eyewitness identification. Calderon asserts the exclusion of this testimony violated his due process rights to present a defense and to a fair trial. We reject his contention.

"Exclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability." (*People v. Jones* (2003) 30 Cal.4th 1084, 1112.) We review the trial court's decision to exclude an expert witness for abuse of discretion. (*People v. McDonald* (1984) 37 Cal.3d 351, 363, disapproved on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 923–924.)

Here, we cannot say the trial court abused its discretion in excluding the proffered expert testimony because the three eyewitnesses to the robbery and shooting substantially corroborated each other's identification of Calderon as the robber, which gave each identification independent reliability. (*People v. Jones, supra*, 30 Cal.4th at p. 1112.) Additionally, DNA evidence revealed that Calderon was the major contributor of DNA to the bandana used by the robber to cover his face and mouth. Although a problem was later discovered with some of the kits used to quantify the DNA, the problem did not involve the kits giving any false positive results. Accordingly, the trial court did not abuse its discretion when it excluded the defense expert on eyewitness identifications.

Calderon also argues that exclusion of the expert testimony violated his federal constitutional right to present a complete defense. His constitutional claim is premised on the trial court's supposed prejudicial error in excluding the expert testimony. Since

we have concluded there was no error, his constitutional claim also fails. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)

### III. *Attempted Voluntary Manslaughter Instruction*

#### A. Background

Without objection, the trial court instructed the jury on the lesser included offense of attempted voluntary manslaughter using the April 2010 version of CALCRIM No. 603. This instruction explained that "[a]n attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion." As relevant here, it further stated:

"In order for a sudden quarrel or heat of passion to reduce an attempted murder to attempted voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

"It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition *would have been provoked and how such a person would react in the same situation knowing the same facts.*" (Italics added.)

In April 2011, CALCRIM No. 603 was amended to delete the italicized language. The last sentence of the instruction then read, "In deciding whether the provocation was sufficient, consider whether a person of average disposition, *in the*

*same situation and knowing the same facts, would have reacted from passion rather than judgment.*" (Italics added.) The corollary instruction for voluntary manslaughter (CALCRIM No. 570) had been similarly amended in 2008. The proper articulation of the provocation standard is currently under review by our Supreme Court in *People v. Beltran*, review granted June 15, 2011, S192644.

## B. Analysis

Relying on *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), Calderon claims the trial court erred when it instructed that in deciding if he acted as the result of sufficient provocation, the jury could consider how a person of average disposition would have reacted in the same situation because the relevant question is whether the circumstances were sufficient to cause an ordinary, reasonable person to act from passion rather than judgment. He admits defense counsel did not raise this issue below, but claims no objection was necessary as the instruction violated his substantial rights. (Pen. Code, § 1259; *People v. Kelly* (2007) 42 Cal.4th 763, 791.) We shall assume without deciding, that the challenged instruction affected Calderon's substantial rights. Accordingly, we turn to the merits of his claim on appeal.

A defendant commits voluntary manslaughter, not murder, when the defendant unlawfully kills another person "upon a sudden quarrel or heat of passion." (Pen. Code, § 192, subd. (a).) "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . '[T]his heat of passion must

be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252–1253.)

In *Najera*, the prosecutor argued that the defendant's offense would be voluntary manslaughter only if "'a reasonable person [would] do what the defendant did'" in response to the particular provocation shown. (*Najera, supra*, 138 Cal.App.4th at p. 223, italics omitted.) Defense counsel failed to object to this, and on appeal, the defendant argued that this omission constituted ineffective assistance of counsel. The *Najera* court agreed that the prosecutor's argument was improper. As the court explained, "The focus is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant." (*Ibid.*) Stated differently, the average person need not have been provoked to kill, just to act rashly and without deliberation. (*Ibid.*)

CALCRIM No. 570 on voluntary manslaughter was subsequently modified based on this issue. A report to the Judicial Council of California from the Advisory Committee on Criminal Jury Instructions dated October 10, 2008, recommended the change "because of concern that the original draft [of CALCRIM No. 570] could raise doubt in a juror's mind about whether the state of mind required for voluntary

manslaughter was that an average person similarly situated would have been provoked to kill, or whether provocation resulting in passion rather than judgment was sufficient." The revision "clarified that the latter is required." The December 2008 revision of CALCRIM No. 570 also added a citation to *Najera* to the commentary accompanying the instruction. (<<http://www.courtinfo.ca.gov/jc/documents/reports/120908item5.pdf>> [as of December 19, 2012].)

As we indicated, our high court will resolve the issue regarding the proper articulation of the provocation standard. However, we do not believe that the outcome of this appeal is dependent on the resolution of this issue as, even assuming the instruction given incorrectly stated the standard for provocation, the assumed error was harmless.

Carrillo approached Calderon from the side and was about six feet away from him when he threw a nearly full can of beer toward Calderon's face. The beer can did not hit Calderon, but landed at his feet, splashing him. This evidence is plainly insufficient to cause an ordinary person of average disposition in the same situation and knowing the same facts to react from passion rather than judgment. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826–827 [evidence victim cursed, scratched, kicked and grabbed at defendant's shirt insufficient to require a voluntary manslaughter instruction]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [Calling defendant "a 'mother f[---]er' and [ . . . ] repeatedly asserting that if defendant had a weapon, he should take it out and use it [ . . . ] plainly were insufficient to cause an average person

to become so inflamed as to lose reason and judgment."]; *People v. Lee* (1999) 20 Cal.4th 47, 59–60 [mere fact of argument not sufficient provocation].)

Accordingly, even assuming the trial court erred in giving the challenged instruction, the assumed error was harmless under any standard since the alleged provocation was not sufficient to entitle Calderon to an attempted voluntary manslaughter instruction in the first instance.

#### IV. *Presence at Future Restitution Hearing*

##### A. Proceedings Below

At the sentencing hearing, the following exchange occurred:

"[THE COURT:] He is ordered to pay restitution to victim Javier Carrillo, in an amount to be determined by the court, and to be paid as provided by Penal Code section 2085.5. I suspect if we don't have an amount from the victim at this point, we probably will never get one. But if we do, if Mr. Carrillo, the man who was shot, was to come in and request restitution, does your client waive his right to be present at any such restitution, and allow the Public Defender's office to represent his interests at it, [defense counsel]?"

"[DEFENSE COUNSEL]: Your honor, may I have a second, please?"

"THE COURT: Go ahead and talk to him. To be present, he would have to be rolled up from where he is at, brought down here to court, and most people don't want that to happen.

"THE DEFENDANT: Whatever.

"THE COURT: I will take that as a waiver of his right to be present at his restitution hearing, if there is one, which I don't think there will be, anyway."

After this exchange, the trial court finished sentencing Calderon, instructed Calderon on his right to appeal and asked counsel if they had anything further. Both counsel indicated they had nothing further to discuss.

#### B. Analysis

Calderon argues that his purported waiver of the right to be present at a future restitution hearing was not knowing, voluntary and intelligent because he did not know the nature of the right he was abandoning or the consequences of abandoning such right. Thus, he asserts the sentencing minute order should be modified to indicate that he wishes to be present at any future hearing. We reject his contention.

A defendant has a statutory right to a hearing to dispute the determination of the amount of restitution. (Pen. Code, § 1202.4, subd. (f)(1).) Restitution hearings are considered a significant part of a criminal prosecution. (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1386.) Nonetheless, defendants may waive their right to be present at a critical stage of the proceedings. (*People v. Price* (1991) 1 Cal.4th 324, 405.) We determine, de novo, whether a waiver is voluntary. (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1660.)

Here, the trial court explained to Calderon that Carrillo had a right to request restitution, that Carrillo had not yet sought a particular amount of restitution, but could request restitution in the future. With this explanation, the trial court asked defense counsel whether Calderon waived his right to be present at a future restitution hearing and allow himself to be represented by counsel. These statements informed Calderon of the nature of the right he was abandoning (the right to be present at a future restitution

hearing where Carrillo would request a certain amount of restitution) and the consequences of such a decision (defense counsel would represent his interests). Although Calderon's "[w]hatever" statement to the court was equivocal, the trial court deemed it a waiver of his right to be present at the hearing. Calderon could have spoken up again if he disagreed or defense counsel could have objected. On this record, we conclude the waiver to be valid.

Even assuming error, we find no prejudice. Our Supreme Court has made it clear: "Defendant's absence, even without waiver, may be declared nonprejudicial in situations where his presence does not bear a 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.' [Citations.]" (*People v. Garrison* (1989) 47 Cal.3d 746, 782.) If a restitution hearing is scheduled, defense counsel will be present to protect Calderon's interests by challenging the restitution amount requested. Because Calderon would have no relevant input into the restitution determination, we fail to see how his exclusion amounts to prejudicial error because it is unlikely his absence would impact defense counsel's ability to defend against the restitution award.

#### V. *Booking Fee*

At sentencing, the trial court imposed a \$154 "criminal justice administration fee" or "booking fee" (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399-1400) under Government Code section 29550.1. (Undesignated statutory references are to the Government Code.) Calderon asserts the booking fee was improper because section 29550.2 applied and required the trial court to determine his ability to pay the fee;

however, there was no evidence presented regarding his ability to pay the fee or that the actual administrative cost was at least \$154. The Attorney General responds that Calderon forfeited this claim by failing to raise it below. In any event, it argues section 29550.1 contains no requirement that the court make a determination of ability to pay, and if there was such a requirement, the probation report provided sufficient evidence to support an implicit finding that Calderon had the ability to pay the \$154 fee.

There is a split of authority on the issue of whether the forfeiture doctrine applies in the context of challenges to the imposition of jail booking fees. (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [holding forfeiture doctrine applicable]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467–1468 [holding forfeiture doctrine applicable]; *People v. Pacheco, supra*, 187 Cal.App.4th at p. 1397 [holding the doctrine inapplicable].) The issue is currently pending review in the California Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 [whether failure to object to imposition of a jail booking fee under section 29550.2 forfeited a sufficiency of the evidence of ability to pay claim on appeal].) Without the Supreme Court's decision on the matter, we follow the precedents holding that challenges to sentencing decisions must be made in the trial court. (*People v. Hodges, supra*, at p. 1357; *People v. Gibson, supra*, at pp. 1467–1468.) The forfeiture rule applies because Calderon failed to object to imposition of the booking fee below.

#### DISPOSITION

The judgment is modified to strike the Penal Code section 1465.8 court security fee of \$1,200 and insert the correct fee amount of \$200. As so modified, the judgment

is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward it to the Department of Corrections and Rehabilitation.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.