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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HOWARD JEROME CALLIER,

Defendant and Appellant.

E052832

(Super.Ct.No. SWF029643)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik and Kelly L. Hansen, Judges. Affirmed with directions.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Howard Jerome Callier of first degree robbery within an inhabited dwelling house (count 1, Pen. Code, §§ 211, 212.5, subd. (a)),¹ burglary in an inhabited dwelling (count 2, § 459), and making a criminal threat (count 3, § 422). The jury also found true allegations that defendant personally used a dangerous weapon (a screwdriver) during the commission of the robbery and burglary. (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23).) In a bifurcated trial, the jury found true allegations that defendant had been previously convicted of four serious felonies for purposes of section 667.5, subdivision (a), and five serious and violent felonies for purposes of sections 667, subdivisions (c) and (e)(2)(A) and 1170.12, subdivision (c)(2). He was sentenced to a total determinate term of 25 years, plus an indeterminate term of 26 years to life in prison. The sentences on counts 2 and 3 were stayed pursuant to section 654.

Defendant contends: (1) the trial court erred and deprived him of due process in denying his motion for a pretrial lineup; (2) he was deprived of the right to effective assistance of counsel because his attorney failed to object to the admission of a showup identification and in-court identifications of defendant; (3) the court prejudicially erred in admitting evidence of certain prior offenses under Evidence Code section 1101, subdivision (b); and (4) the cumulative effect of the foregoing errors was prejudicial and

¹ All further statutory references are to the Penal Code unless otherwise indicated.

requires reversal.² For the reasons explained below, we reject these arguments and affirm the judgment.

Both parties agree that the abstract of judgment erroneously fails to indicate that the sentences on counts 2 and 3 are stayed pursuant to section 654. We will direct that an amended abstract of judgment be prepared to correct the clerical error.

II. SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. *Prosecution Evidence*

In the morning of November 19, 2009, David Moore was asleep in a recliner in his home. His mother, Elisa Moore, was upstairs asleep in her bedroom.³ The recliner is near a sliding glass door at the back of the house. Because of his sleep apnea, David had taken some medicine the night before to help him sleep.

At approximately 8:30 a.m., the sound of the blinds moving in front of the sliding glass door awakened David, and he saw a man enter the house. However, David was drowsy and exhausted, and he fell back asleep. The man woke David again by pulling on him from behind the recliner. The man then faced David, shook him, and pulled him up out of the recliner.

² Defendant filed a petition for habeas corpus in which he asserts he was deprived of his right to effective assistance of counsel. (*In re Callier*, case No. E054301.) Defendant moved to consolidate this appeal with the habeas petition. We denied the motion, but stated we would consider his habeas corpus petition with the appeal in this case for the sole purpose of determining whether an order to show cause should issue. We will resolve the habeas petition by separate order.

³ To avoid confusion, we will refer to David and Elisa Moore by their first names.

The intruder held a screwdriver to David's neck. David told him: "Please do not kill me, do not stab me, I am a disabled American veteran." The man told David: "As long as you give me your wallet, your jewelry, and your cash, I will not kill you and whoever else is in this house." He asked David if there were others in the house. Although David knew Elisa was upstairs, he said there was no one else in the house because he was afraid the man would go after Elisa.

David told the man he did not have a wallet, jewelry, or cash on him. The man told David to go get it. As David walked up the stairs, the man walked behind him with one hand on David's shoulder and the other pressing a sharp instrument into David's back. The man told David: "Do not eyeball me; keep looking ahead; do not stare at me."

David went into his bedroom. The man again told David he wanted David's jewelry and cash and would kill David if he did not get it. David gave the man his wallet, which held more than \$200. Sometimes David uses rubber bands to keep the wallet closed. He could not remember if the wallet was bound with rubber bands at the time he handed it to the man. He also gave the man some chain necklaces. The man threw the chains on the bed and asked what was in a sliding cabinet. David opened the cabinet, took from it "lots of jewelry," including military rings, and handed them to the man. The man put the items in his pocket.

As David handed the man the jewelry he knocked over a plaque, which made a noise that woke Elisa. Elisa and her two dogs came out of her bedroom. She saw the

man coming out of David's room. She stood about five feet away from him. The man had a screwdriver in his hand and Elisa thought he was a television technician.

David said: "Mom, it's a burglar." Elisa screamed. The intruder ran down the stairs. David and the dogs ran after him. By the time David got downstairs and to the back door, the man was gone.

Elisa called 911. She described the intruder as a "half [B]lack, half Hispanic" man, about 40 years old, wearing a blue shirt. David then talked to the dispatcher. He said the man "kept telling me not to look at him." He told the dispatcher the man stuck a screwdriver in his back and took his wallet and jewelry. David described him as a Black man, between 30 and 40 years old. He said he did not notice his shirt, but said he had a blue cap and appeared to be "stoned."

Deputy Daniel Torning responded to the Moore's house four minutes after the 911 call. David described the burglar to Deputy Torning as a Black male, 30 to 40 years old, five feet ten inches tall, 160 pounds, wearing a black or blue baseball cap, a light-colored shirt, and blue jeans. David did not tell Deputy Torning that the burglar had facial hair or a tattoo. Deputy Torning broadcasted the description to other deputies.

The Moore's backyard is adjacent to a park. This park is connected by bicycle trails to other parks in the area, including Rancho Park. Deputy Torning told deputies to go through the bike trails and parks.

Deputy Torning observed pry marks on the sliding glass door that could have been made with a screwdriver to unlock the door.

Corporal Richard Carroll heard Deputy Torning's broadcast and shortly afterward saw defendant riding a bicycle in a westerly direction less than one mile west of the Moore residence. Defendant was wearing a dark hat, a dark-colored shirt over a lighter, gray shirt, and blue jean pants. He had a goatee and mustache. He was not sweating and did not appear stoned.

Defendant consented to a search by Corporal Carroll, who found two wallets in defendant's pants pockets. A wallet in a rear pocket held items belonging to defendant. In the wallet found in defendant's front pocket there was an identification card and other items belonging to David. Corporal Carroll also recovered from defendant's pockets four necklaces and cases with rings inside. Tan leather gloves and a black plastic bag were in a rear pocket. A screwdriver was in a "cargo style" pocket on the side of a pant leg. Corporal Carroll placed the items from defendant's pockets on the sidewalk to be photographed.

Corporal Carroll contacted Deputy Torning and said he had detained someone about one-half mile away. Deputy Torning then drove David and Elisa to where defendant was detained for a showup identification. Along the way, he told them that deputies had found someone with David's property.

When they arrived, defendant was sitting on the ground wearing handcuffs. The items Corporal Carroll had recovered from defendant were lying on the sidewalk near defendant. Defendant was "walked up" toward the car and directed to turn around in a circle so David and Elisa could see him from all angles. David was wearing his bifocals.

The testimony regarding the showup was inconsistent. Deputy Torning testified that David and Elisa positively identified defendant as the man who was in their house. He said they were both in the car when they identified defendant, and that the car was more than 20 feet away from defendant at the time. David said the car was eight to ten feet away from defendant when he identified defendant. Although Deputy Torning testified that David never got out of the car and, in fact, tried “to scooch down in the car” because he was afraid, David testified that he got out of the car to make the identification from eight feet away. Elisa estimated that the suspect was approximately 35 to 38 feet away from the car. She testified that she did not see defendant because he “was too far” away. She also said she did not have her glasses with her at the time and was not “seeing too well.”

Defendant was arrested. At that time, defendant was 47 years old, five feet eight inches tall. According to Deputy Torning, defendant had a “[s]alt and pepper goatee.” He had tattoos on both sides of his neck and on his forearms.

Following defendant’s arrest and transportation to the police station, Deputy Torning talked with defendant. Defendant asked Deputy Torning to go back to Rancho Park to see if anyone was there. Approximately one hour later, Deputy Torning did so and found no one at the park. When defense counsel asked Deputy Torning whether he went back to Rancho Park the next morning at 7:00, Deputy Torning said he did not, but may have driven through there later in the morning.

At trial, David testified he was not wearing his bifocal glasses during the incident. He said he saw the man's face two or three times at a distance of between one foot and one and one-half feet away. He identified defendant in court as the person who was in his house "beyond a shadow of a doubt." Elisa also identified defendant in court—after putting her glasses on. She also testified that she had identified defendant at a previous court hearing.

Over defense objections, the prosecution introduced evidence, through live witnesses, that defendant was involved in the burglary of a residence in Perris in January 1992. The prosecution also introduced copies of abstracts of judgment of defendant's conviction for that burglary and of defendant's conviction in 2006 of a first degree burglary that occurred in 2004. This evidence will be discussed in more detail below.

B. Defense Evidence

Defendant testified to the following. On November 19, 2009, he left his house at 5:00 in the morning to go to an AM/PM store to "stand and get work." He was there until about 6:45 a.m. He did not get work that morning. He left the AM/PM store and went to an Alcoholics Anonymous class. The class met from 7:00 a.m. until 8:00 a.m. After the class, he went to Rancho Park to pick up cans and bottles to turn in for recycling. As he arrived at the park, he spoke with his wife by cellular telephone for approximately 15 minutes, between 8:15 a.m. and 8:30 a.m.

Defendant locked his bicycle to a tree and started walking around the park, picking up cans and putting them in a plastic bag. He found a screwdriver in a large trash can and put it in his pocket.

As he was walking back to his bicycle at approximately 8:45 a.m., he came upon “Terry,” a man he had met four and one-half months earlier. He did not know his last name. Terry is “way taller” than defendant, at six feet one or two inches. He is also heavier than defendant. He has a “full beard” that was “straight black, . . . no grays.” He wore blue jeans and a dark-colored cap with the logo of a basketball team.

Terry asked defendant if he had “an ID.” Defendant said he did, and asked Terry why he needed to know that. Terry told him he had some jewelry he was trying to get rid of, but pawn shops wanted to see identification and he had none. Defendant said he knew a place where he could take the jewelry.

Defendant asked Terry, ““Is this stuff okay?,”” and Terry told him, “yes . . . ‘I wouldn’t do that to you.’” Defendant believed that the items were not stolen.

Three women approached and started talking to Terry. Defendant began unlocking his bicycle and said he was getting ready to leave. Terry asked if defendant could take the jewelry to pawn it for him and said defendant could keep half of whatever he got for the jewelry. Defendant said he would. He told Terry he would meet him at the same place in the park the next morning at 7:00 and give him the money. Terry gave defendant a small black plastic bag. Defendant felt jewelry inside the bag, but did not look inside. He did not know there was a wallet in the bag.

Defendant got on his bicycle and rode away. He now had three bags with him: a white bag with cans in them; a large plastic black bag; and the black plastic bag with the items he received from Terry. The small black bag from Terry ripped and a couple of rings fell out. Defendant picked up the rings, then put them and the other items that were in the bag in his pocket. One of the items in the bag was a wallet bound with rubber bands. Defendant did not know it was a wallet; he thought it was a little bag for carrying jewelry.

He was riding his bicycle away from Rancho Park when he was stopped by a police officer and searched. He was wearing a zipped-up blue sweatshirt with a hoodie over a green shirt and a faded brown T-shirt. He also had a dark blue cap without a logo. He carried a pair of gloves in his back pocket, which he used for yard work or moving jobs.

When the officer took the items from his pockets, he told him he had received them from Terry at the park. After his arrest, he told police officers he was supposed to meet Terry at 7:00 the next morning and asked the officer to look for him at that time.

Defendant denied being inside the Moore residence.

The prosecutor questioned defendant about his prior convictions for first degree burglary in 1983, 1992, and 2004, and his first degree burglary and robbery conviction in 1988. Defendant admitted the four burglary convictions, but said he actually committed only two of the burglaries. He insisted he did not commit, and was not convicted of, robbery and never committed a burglary when someone was inside the residence.

III. DISCUSSION

A. *Denial of Motion for Pretrial Lineup*

Defendant filed a motion for a pretrial lineup pursuant to *Evans v. Superior Court* (1974) 11 Cal.3d 617 (*Evans*). According to defendant's motion, "911 dispatch logs" showed that "the police had another suspect in custody nearby who also matched the description [of the robber]." Based on this fact, defendant argued that "the police were uncertain early in the investigation who was exactly the correct person to hold. A lineup would certainly tend to resolve any ambiguity resulting from the suggestive show up identification made in this case."

The People opposed the motion. According to the opposition papers, Corporal Carroll saw a Black male adult riding a bicycle that fit the description of defendant; he searched defendant and found a wallet with David's identification and several items of jewelry; David and Elisa were taken to the location where defendant was detained; and "[t]he defendant was positively identified as the one who entered the Moore residence."⁴ The People argued there was no reasonable likelihood of mistaken identification because David and Elisa "positively identified him as the one who entered their home."

Following a hearing, the court denied the motion. The court found that although the motion was timely and identification was a material issue in the case, defendant had

⁴ By stating that both David and Elisa were taken to a showup identification and that defendant was positively identified as the burglar, the People's description of the facts seems to imply or suggest that *both* David and Elisa identified defendant as the burglar. Elisa, however, testified at trial that she was not able to identify defendant.

not met his burden of establishing a reasonable likelihood of mistaken identification. The court explained: “In this case the victims had an opportunity to see the perpetrator face-to-face in close proximity. They had an opportunity to not only see him close in proximity, but there wasn’t anything blocking their view of him at any time during the . . . alleged robbery. They describe the suspect to law enforcement officers. When [defendant] is stopped, he matches the description of that individual.”

The court was not persuaded by defendant’s argument that another person matching the description of the suspect was also detained. Defendant, the court stated, “had the victim’s property on him as well as the . . . instrument that was used to threaten the victims to turn over their property,” and the showup identification was within 15 minutes of the robbery.

Defendant contends the trial court erred in denying his request for a pretrial lineup. We reject the argument.⁵

In *Evans*, our state Supreme Court held that “due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate.” (*Evans*, *supra*, 11 Cal.3d at p. 625.) “The right to a lineup arises,” the court stated, “only when

⁵ The California Supreme Court is currently considering whether a criminal defendant forfeits his right to appeal the denial of a motion for a pretrial lineup by failing to seek immediate review of the ruling by filing a petition for writ of mandate. (See *People v. Mena (Joaquin)* (2009) 173 Cal.App.4th 1446, review granted Aug. 26, 2009, S173973.) Because we reject defendant’s argument on its merits, we do not address or decide whether he has forfeited the issue on appeal.

eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.” (*Ibid.*, fn. omitted.) There are thus three prima facie requirements to establishing a right to a lineup under *Evans*: (1) a timely request; (2) eyewitness identification is a material issue; and (3) there is a reasonable likelihood of a mistaken identification which a lineup would tend to resolve. (See *People v. Farnam* (2002) 28 Cal.4th 107, 184; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 560-561.) The trial court in this case denied defendant’s motion based on the third requirement—the only element disputed on appeal.

Whether a lineup is required in a particular case is a determination within the broad discretion of the trial judge. (*Evans, supra*, 11 Cal.3d at p. 625.)

We begin by noting that we review the correctness of a trial court’s ruling at the time it was made, not by reference to evidence produced at a later date. (*People v. Welch* (1999) 20 Cal.4th 701, 739; *People v. Panah* (2005) 35 Cal.4th 395, 434, fn. 10.) Here, with respect to the disputed issue, defendant relied entirely upon the unsworn factual assertion that 911 dispatch logs indicated that the police had another suspect in custody matching the description of the burglar. Yet defendant failed to produce any 911 dispatch log or other evidence in support of the motion.⁶ Nor does it appear from our

⁶ A dispatch log is included with defendant’s petition for habeas corpus. There is nothing in the log that suggests that the police ever had a second person in custody. It can be interpreted as indicating a comment by one officer (identified in the log as M030) that someone matching the suspect’s description was in Rancho Park. However, it further appears that the same officer subsequently determined that such person was not the person they were looking for. Finally, the log indicates that this determination was made and reported three minutes before another officer (presumably Corporal Carroll)

[footnote continued on next page]

record that there was any other evidence suggesting police uncertainty regarding the identification of defendant presented to the court. In the absence of such evidence, defendant failed to show there was a reasonable likelihood of mistaken identification. He was not, therefore, entitled to a lineup under *Evans*. (See *People v. Redd* (2010) 48 Cal.4th 691, 725.)

Even if we were to review the court's ruling in the light of the entire trial record, as defendant contends we should, we would find no error. Defendant was apprehended a short time after the burglary less than one mile away with David's wallet and jewelry in his pockets, as well as a screwdriver.⁷ During the crime, David was face to face with the burglar at least twice. He identified defendant at the showup identification and, at trial, identified him as the intruder "beyond a shadow of a doubt." Although Elisa did not identify defendant at the showup identification because she was without her glasses and could not see well, she identified him at a pretrial hearing and at trial.

Defendant points to David's and Elisa's "limited opportunity to observe the intruder," David's use of sleep medication and resulting grogginess, his failure to wear his bifocals during the crime, and various omissions and inconsistencies between his

[footnote continued from previous page]

made contact with defendant. In short, there is nothing in the dispatch log that supports the argument defendant made in his motion for a lineup.

⁷ Although the timing of the incident and defendant's apprehension were not specified precisely at trial, the dispatch log included with defendant's petition for writ of habeas corpus indicates that defendant was apprehended within 15 minutes after the 911 call began.

description of the burglar and defendant's appearance. He also asserts that the circumstances surrounding the showup identification were suggestive. Even if all such facts were presented to the trial court at the time of the motion, the proximity in time between the crime and defendant's apprehension, defendant's possession of a screwdriver and the items taken from David, and David's and Elisa's unequivocal identification of defendant, overwhelm any facts suggesting mistaken identity. Moreover, defendant's counsel had ample opportunity to, and did, bring out at trial the reasons jurors might be doubtful of David's and Elisa's identifications. (See, e.g., *People v. Sullivan, supra*, 151 Cal.App.4th at pp. 560-561.)

Defendant argues that the court erred by failing to weigh the burden of conducting a lineup against the benefit of a lineup to defendant. He relies on the statement in *Evans* that the question whether a defendant is entitled to a lineup "is one which must be arrived at after consideration not only of the benefits to be derived by the accused and the reasonableness of his request but also after considering the burden to be imposed on the prosecution, the police, the court and the witnesses." (*Evans, supra*, 11 Cal.3d at p. 625.) This does not mean that the trial court must weigh the benefits and burdens even when the defendant has failed to establish a prima facie showing of the right to a lineup. In *People v. Redd, supra*, 48 Cal.4th 691, for example, the trial court denied the defendant's motion for a lineup based on the ground that there did not exist a reasonable likelihood of mistaken identification and that the motion was untimely. (*Id.* at p. 723.) The Supreme Court's opinion does not indicate that the trial court engaged in the weighing of burdens

and benefits identified in *Evans*, nor that it needed to do so. As the court stated: “In the absence of a reasonable likelihood of a mistaken identification, defendant had no right under *Evans* . . . to a lineup.” (*People v. Redd, supra*, at p. 725; see also *People v. Sullivan, supra*, 151 Cal.App.4th at pp. 560-561.)

Defendant’s reliance on *People v. Underwood* (1983) 139 Cal.App.3d 906 [Fourth Dist., Div. Two] is misplaced. In that case, the trial court *granted* the defendant’s motion for a lineup. When the lineup was not timely performed, the court dismissed the case. (*Id.* at p. 909.) The People appealed and asserted that the trial court erred by ordering a lineup without considering the burden on the prosecution, the police, the court, and the witnesses. (*Id.* at p. 914.) The Court of Appeal agreed, and reversed. (*Id.* at pp. 915-916.) Significantly, the People did not dispute any of the prima facie requirements of the defendant’s motion: the timeliness of the motion, that identification was a material issue, or *the reasonable likelihood of mistaken identification*. (*Id.* at p. 914.) The issue, therefore, was whether the trial court was required to undertake the balancing described in *Evans* when the three prerequisites to the right to a lineup had been established. The court’s holding is not authority for the proposition asserted by defendant that the court must perform the balancing described by *Evans* even when the defendant fails to establish the threshold requirement that there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve.

Defendant argues that in ruling on the motion for a lineup the court improperly decided credibility and factual issues and thereby “usurped the jury’s function as trier of

fact.” The argument is meritless. Defendant requested a pretrial lineup which called for a determination of whether there was a reasonable likelihood of a mistaken identification based on the arguments presented. The court addressed that issue and made its ruling in the context of the motion before it. The court’s ruling in no way impeded or usurped the jury’s factfinding function.

For all the foregoing reasons, the court did not err in denying defendant’s motion for a lineup.

B. Right to Effective Assistance of Counsel

Defendant contends he was deprived of his right to effective assistance of counsel because his attorney failed to object to the admission into evidence of the showup identification or the in-court identifications. We disagree.

In order to prove that defendant had ineffective assistance of counsel, defendant has the burden of establishing that: (1) counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) To prove that counsel’s performance was deficient, defendant must affirmatively show counsel’s deficiency involved a crucial issue which cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Floyd* (1970) 1 Cal.3d 694, 709, disapproved on another point in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.)

To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) The defendant “must carry his burden of proving prejudice as a ‘demonstrable reality,’ not simply speculation as to the effect of the errors or omissions of counsel.” (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Defendant asserts that the circumstances surrounding the showup identification were unduly suggestive and the evidence of it was unreliable. Therefore, he contends, a motion to exclude such evidence would probably have been granted. Furthermore, he argues, his attorney should have objected to the in-court identifications of defendant because they were tainted by the unduly suggestive showup.

In arguing that the showup identification was unduly suggestive, defendant places significance on the testimony that Deputy Torning told David as they were on the way to the showup that deputies had caught someone with his property. As the People point out, however, it appears that this fact was not revealed to defense counsel until trial. Indeed, at the preliminary hearing Deputy Torning was asked whether he had told David and Elisa that their property, or any property, had been found on defendant, and he testified he did not. There is nothing in the record to suggest that defense counsel had any contrary information or evidence that might have supported a pretrial motion to suppress the showup identification.

Even if we assume that other circumstances surrounding the showup identification were suggestive and the failure to move to exclude such evidence fell below an objective standard of reasonableness, and we further assume that counsel should have objected to David's and Elisa's in-court identifications of defendant, we agree with the People that defendant has failed to establish prejudice under *Strickland*.

First, defendant has not established a reasonable probability that the trial court would have granted the motion or sustained the objections defendant says should have been made. Generally, a defendant has the burden of showing an unreliable identification procedure. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Our state Supreme Court has explained: “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.]” (*Ibid.*)

A “single person showup” is not inherently unfair. (*People v. Ochoa, supra*, 19 Cal.4th at p. 413; *People v. Johnson* (1989) 210 Cal.App.3d 316, 323.) Indeed, the procedure may be necessary in order “to exclude from consideration innocent persons so

that the police may continue the search for the suspect while it is reasonably likely he is still in the area.” (*People v. Johnson, supra*, at p. 323.) As one court stated, “the law favors field identification measures when in close proximity in time and place to the scene of the crime” because the potential unfairness in such measures is ““offset by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later.”” (*In re Richard W.* (1979) 91 Cal.App.3d 960, 970; accord, *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071.)

As for the reliability of David’s identification, David got a close look at the intruder when he was face to face with him at least twice during the robbery. The showup identification took place approximately 20 minutes thereafter. Although defendant points out that David was initially drowsy and exhausted when he was awakened by the intruder, there is nothing to suggest that he was not wide awake during the robbery itself or at the time of the showup identification.⁸

Defendant also points to the fact that Elisa and David were not separated during the showup identification, which could encourage a ““mutual reinforcement of opinion’ among the witnesses.” Although this might be true in some cases, it was not here.

Although David identified defendant at the showup, Elisa testified she did not; as she

⁸ Defendant also questions Elisa’s opportunity to view the intruder. However, Elisa testified that she did not identify defendant during the showup procedure. There was thus nothing to be gained from moving to exclude testimony that she identified defendant during the showup and no basis for a claim of ineffective assistance of counsel for not doing so.

explained, she was not wearing her glasses and was too far away to see the detained person. Therefore, David's identification could not have been influenced by Elisa's opinion.

We agree with defendant that there are circumstances that indicate suggestiveness and weigh against the reliability of David's showup identification. The property taken from defendant's pockets was on the sidewalk near defendant at the time of the showup; defendant's hands were behind his back, indicating he was handcuffed; and David's prior descriptions of the intruder were not complete or entirely accurate. Nevertheless, on balance, we conclude that defendant has failed to show a motion to exclude evidence of the showup identification probably would have been granted. Because the second step of defendant's argument—that the in-court identifications would have been excluded—is premised upon a tainted showup, he has failed to establish the reasonable probability of success as to that step as well.

The second reason why defendant has failed to establish prejudice is that even if we assume that the trial court would have agreed with him as to the showup and in-court identification evidence, he has failed to satisfy his burden that the result of the trial would have been different. David was robbed and threatened with a screwdriver; within minutes defendant was found a short distance away with a screwdriver and David's wallet and jewelry in his pockets. He generally, though not precisely, matched the description of the intruder given by David and Elisa. The defense—that defendant was collecting bottles and cans in the park, found a screwdriver, was given a bag of jewelry to

pawn which broke open as he rode away, and then put the items in his pockets without noticing that one of the items was a wallet—is highly implausible. Even without considering the evidence of defendant’s prior burglary convictions, we conclude it is unlikely that a different result would have been reached even if defense counsel had successfully made the motions and objections that defendant now asserts should have been made. We therefore reject defendant’s ineffective assistance claim.

C. Evidence of Defendant’s Prior Offenses

Defendant contends the court erred in allowing evidence of two of defendant’s prior offenses under Evidence Code section 1101, subdivision (b). We hold that there was no prejudicial error.

1. Background

Prior to trial, the prosecution moved in limine for admission of evidence of three prior incidents pursuant to Evidence Code section 1101, subdivision (b). The court allowed the prosecution to introduce evidence of two incidents: a 1992 burglary and a 2004 burglary. It did not permit evidence of an incident in which defendant allegedly looked through a woman’s purse while he was working for a moving company.

The 1992 burglary was described in the motion in limine as follows: “On January 8, 1992, Douglas McCaw was in his residence located on Oleander Avenue in Mead Valley, at approximately 10:30 [a.m]. At this time, Mr. McCaw looked towards Dawn Torres[’s] home, located at 21910 Oleander, and saw the Defendant approaching the house. Mr. McCaw knew that Ms. Torres was not at home, as she typically went to pick

up her children from school at approximately 10:30 [a.m.] each day. McCaw saw the Defendant approach the front of Ms. Torres'[s] home, looked in a window, knock[ed] on the door, and then proceeded towards the side of the house to the back of the Torres residence. At this point, McCaw called the police and stayed on the phone with them until police units finally arrived at the residence at approximately 11:00 a.m. After the home was cleared by Sheriff's Deputies, Dawn Torres went inside to find her home burglarized. Numerous items were out of place, and Ms. Torres['s] property was missing. While McCaw, Torres, and Deputies were in the backyard of her home talking, the Defendant looked over an adjacent wall, and was spotted by the Deputies and McCaw. The Defendant then ran from law enforcement. Finally, the Defendant was arrested a few blocks from Ms. Torres['s] home. When stopped, he was found in possession of approximately \$507 worth of Ms. Torres['s] property, which was identified by Ms. Torres at the scene. Defendant was arrested, charged, and convicted by a jury of a violation of Penal Code Section 459. He was sentenced on May 12, 1992 to 21 years in California State Prison. He was released to parole on September 15, 2002.”

At the hearing on the motion, the prosecutor added these additional facts regarding the 1992 burglary: defendant was seen with a black stick walking around the side of a house; he entered the house through a sliding glass door; and the deputies investigating the incident found “pry marks on the sliding door” similar to the marks found on the Moore's sliding glass door in the present case.

The People described the 2004 burglary (the second incident) as follows: “On December 15, 2004, defendant was one member of a three-man moving team working next door to 37846 Bear View Circle. Dawn Stenros left the 37846 address at approximately 4:20 p.m. Dawn waived [*sic*] goodbye to the defendant as she left. Her husband, Stephen Stenros came home shortly after and caught the defendant walking around the corner coming from behind his home. The defendant looked startled and began walking in the opposite direction. When Stephen entered his home [he] found the sliding glass door to his bedroom unlocked. There was an odor of cigarette smoke in his bedroom, which he thought was strange because nobody in his home smoke[d]. He also noticed that there were mud footprints on the carpet that had been cleaned 2 days prior. The defendant was arrested and they located several coins including 1 Susan B Anthony coin and 2 Native American Women dollars. Stephen stated that he had a change jar on a shelf next to the sliding glass door but was unsure what was missing because he drops change into the jar constantly.”

After argument from counsel, the court allowed the People to introduce evidence of the 1992 and 2004 incidents. The court explained: “[O]n each of those matters it does appear that we do have some commonality, some similarities. It also appears that we have certain intent, certain knowledge, certain common scheme, plans. The fact that he is there, absence of mistake.” Regarding the 1992 incident, the court acknowledged that it was “an old case. It’s 18 years old.” The court noted, however, that defendant was in prison between 1992 and 2002—just two years prior to the 2004 incident. The court

indicated that if he had not been in prison during that time and had no other intervening criminal history, it “might be a different story.”

The court further found that the probative value of the two incidents “is not substantially outweighed by the probability that such evidence would result in prejudicing the jury against the defendant or that it would create any substantial danger of confusing the issues or creating any substantial danger of under influence. I cannot find that evidence of those two matters would in any way uniquely tend to evoke any emotional bias against the defendant.”

The prosecutor informed the court that she planned to introduce the testimony of three witnesses regarding the 1992 incident and to introduce a certified copy of the conviction of the 2004 incident. Defense counsel objected to the use of witnesses regarding the 1992 incident on the ground that the testimony would be more prejudicial than probative. The court, however, stated that it would permit the testimony of “the basic evidence of what occurred” as long as it was “not overly time-consuming.”

At trial, the prosecution introduced the testimony of Dawn Torres, the victim of the 1992 burglary, a neighbor who observed the burglar, and the police officer who apprehended defendant immediately after the burglary. The neighbor testified that he saw a “stranger” knock on Torres’s door, look in a window, knock on the door again, then walk around to the back of Torres’s house. The stranger held in his hand “a small, like, walking stick.” The neighbor called 911.

The responding officer testified that he walked around to Torres's backyard and saw "pry marks" on the sliding glass door. While he waited for backup to arrive, Torres arrived. As the officer met with Torres outside the house, Torres saw someone looking over a fence on the side of the residence. The officer saw the chain link fence shake as if someone had just climbed over it. He drove around the street and saw a man matching the description given by Torres's neighbor. He chased after and apprehended the man. The man had jewelry and coins in his pockets. The officer identified defendant in court as the man he apprehended.

Torres testified that the jewelry and coins found on the man belonged to her. She also said that when she went inside the house she found that a video camera, a black leather jacket, and other items had been taken from different rooms in her house and laid out in a hallway.

Following the testimony from these witnesses, the court admonished the jurors as follows: "You are to consider that testimony . . . for the limited purpose of determining whether or not such acts which they attribute to [defendant] are evidence of any common plan or scheme or an intent or any lack of accident or lack of mistake or identity or knowledge that might or might not pertain to this particular case. But you could not use that evidence of this alleged 1992 incident to show or to establish that [defendant] had a propensity to commit or had a disposition to commit or was predisposed to commit any of the crimes that are alleged in the Information regarding these alleged acts of November a year ago, of 2009."

The court also admitted into evidence, over defense objection, copies of abstracts of judgment of defendant's conviction of the 1992 burglary and of a 2006 conviction for a first degree burglary that occurred in 2004. Information regarding defendant's sentence, prison commitment, and enhancements was redacted from the abstracts. No other evidence was offered regarding the 2006 conviction. The court again admonished the jury as to the limited purposes for which those documents could be considered.

2. Analysis

“Evidence Code section 1101, subdivision (b), permits the admission of other-crimes evidence against a defendant ‘when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.’ [Citation.] ‘[Evidence Code s]ection 1101 prohibits the admission of other-crimes evidence for the purpose of showing the defendant’s bad character or criminal propensity.’ [Citation.] As with other circumstantial evidence, its admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence or absence of some other rule requiring exclusion. [Citation.]” (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

“The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.” (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) ““The prejudice which exclusion of

evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.*”” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) We review the trial court’s resolution of these issues for abuse of discretion. (*People v. Kipp, supra*, at p. 369.)

Defendant contends the prior offense evidence had no probative value under Evidence Code section 1101, subdivision (b). Specifically, he argues that the evidence were not relevant to establish intent, a common plan or scheme, identity, or knowledge. He further argues that any probative value was substantially outweighed by its prejudicial effect.

On appeal, the People focus their argument regarding the 1992 burglary evidence on the “common plan” ground for admissibility under Evidence Code section 1101, subdivision (b). In discussing this basis for admissibility, our state Supreme Court has explained that “evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same

design or plan he or she used in committing the uncharged acts.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

There are enough similarities between the 1992 burglary and the facts in this case to support the court’s exercise of discretion in allowing the evidence. In both cases, there is evidence that defendant entered the house by prying open a sliding glass door at the back of the victim’s house. In both cases, the burglar entered the house in the morning during daylight hours. In the 1992 case, defendant took coins and jewelry from the Torres residence; in this case, defendant demanded that David give him his money and jewelry.

As the People acknowledge, the two cases differ in that no one was at home at the Torres residence in 1992, while the burglar in the present case broke into an occupied house. However, the similarity between the two events “need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) Here, the trial court could reasonably conclude that the similarity between the two events is sufficient to support the inference that defendant, as he did in 1992, pried open the Moore’s sliding glass door with the intent to steal money and jewelry.

The court could also reasonably conclude that the probative value of the evidence of the 1992 burglary was not substantially outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. Although three witnesses testified regarding the incident, the

testimony was brief—collectively, the testimony covers 16 pages of the reporter’s transcript, including cross-examination. None of the testimony was particularly inflammatory or likely to evoke an emotional bias against defendant. Nor was the evidence likely to confuse or mislead the jury. Finally, because the jury was informed that defendant was convicted of the 1992 burglary, there was little risk that the jury would convict him in the present case in order to punish him for the prior incident.

We therefore conclude that the trial court did not abuse its discretion in allowing the witnesses to testify regarding the 1992 burglary incident.

Under a separate heading, defendant devotes several pages of his opening brief to the argument that the abstracts of judgments regarding the 1992 and 2006 burglary convictions were improperly admitted. The People’s only response is the assertion that defendant’s argument was forfeited by failing to raise the argument below. The People are incorrect. Defense counsel argued against the admissibility of any evidence of the 1992 and 2004 burglaries, and specifically objected to the use of the abstract of judgment regarding the 2006 conviction under Evidence Code sections 1101 and 352. Indeed, defendant’s argument to the court regarding the objections arguably encompassed the abstract regarding the 1992 conviction as well. The argument has not been forfeited.

In the absence of any argument by the People on the merits regarding the use of the abstracts of judgment, the People have arguably conceded the issue. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Even if the argument is not conceded, we believe the court erred in allowing the abstracts into evidence. The bare abstracts provide no

evidence of the acts underlying the convictions and therefore offer nothing in the way of showing similarity between the facts in this case and the facts in the other cases.

The error, however, was harmless. The abstract of the 1992 judgment merely evidences the conviction that followed the 1992 burglary of the Torres residence. It was redacted to omit sentencing information and liability for enhancements. Indeed, as mentioned above, proof that defendant was convicted of the 1992 burglary potentially softened any inclination the jurors might have had to punish him for the prior burglary.

The abstract of the 2006 conviction was also redacted to show no more than the fact of defendant's conviction for burglary committed in 2004. The prosecutor did not mention either conviction during her initial closing statement, and addressed them in her rebuttal statement only briefly in the context of defendant's denials regarding his criminal record. She gave the prior convictions almost no significance and there is no reason to believe the jurors gave them any substantial weight. Based on our review of the entire record, there is no reasonable probability that defendant would have received a more favorable result at trial if the documents had been excluded. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) For the same reasons, the admission of the documents did not deprive defendant of a fair trial.

D. *Cumulative Effect of Errors*

Finally, defendant contends that even if the alleged errors are harmless if viewed in isolation, the cumulative effect of the errors is prejudicial. For the reasons set forth above, we find no error in the court's ruling on the pretrial motion for a lineup, no merit

to defendant's ineffective assistance claim, and no error in admitting evidence through live witnesses of the 1992 burglary. To the extent there is any merit to defendant's claims, it is in the contention that the abstracts of judgment should not have been admitted under Evidence Code section 1101, subdivision (b). (As explained above, any such error was harmless.) There is, therefore, no multiplicity of errors to aggregate and no cumulative prejudicial effect to consider. We therefore reject this argument.

E. Correction of Sentence in Abstract of Judgment

The People assert the abstract of judgment concerning defendant's indeterminate sentence should be corrected to reflect the sentence pronounced in court. Defendant agrees with this point.

At defendant's sentencing hearing, the court imposed a sentence on count 1 of 25 years to life, plus one year for the personal weapon finding, a sentence on count 2 of 25 years to life, plus one year for the personal weapon finding, and on count 3, a sentence of 25 years to life. The court ordered the sentences on counts 2 and 3 stayed pursuant to section 654. However, as the People point out, the abstract of judgment regarding defendant's indeterminate term includes checkmarks in the checkboxes for "CONSECUTIVE" with respect to the second and third counts and no checkmarks in the checkboxes for "654 STAY." The omission appears to be a clerical error.

An appellate court has the inherent power to correct any clerical errors in the abstract of judgment to reflect the true nature of the judgment or proceedings. (*People v.*

Mitchell (2001) 26 Cal.4th 181, 185; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1183.) Accordingly, we will direct the trial court to correct the error.

IV. DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect the fact that the sentences on counts 2 and 3 are stayed pursuant to section 654. The trial court is further directed to forward copies of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.