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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.

VALEN ANDREW JONES,

Defendant and Appellant.

E053201

(Super.Ct.No. RIF144277)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

Barbara A. Smith, 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, Senior Assistant Attorney General, and Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

In January and February 2007, there was a series of robberies of stores in the Riverside-San Bernardino area. Each robbery was committed by three African-American men. Their faces were covered; two wore bandannas, and the third generally wore a distinctive “Scream” mask. Thus, even though there was security video footage of each robbery, the men’s identities could not be determined from the videos alone.

After the last such robbery, on February 13, 2007, the robbers’ getaway car crashed during a police pursuit. Two of the robbers were captured; the third robber escaped, but further investigation revealed that he was defendant Valen Andrew Jones. Ultimately, defendant pleaded guilty to the February 13 robbery. His cohorts pleaded guilty to that and to five earlier robberies.

In this case, defendant was charged with 11 counts of robbery (Pen. Code, § 211) and 10 counts of forcible false imprisonment (Pen. Code, § 236), all arising out of the first five robberies. The prosecution introduced evidence of the sixth and final robbery, to which defendant had already pleaded guilty, as evidence of identity.

The jury hung on all counts relating to one of the charged robberies; it found defendant guilty on all counts relating to the remainder (a total of nine counts of robbery and three counts of forcible false imprisonment). In connection with each count, the jury found that a principal was armed with a firearm. (Pen. Code, § 12022, subd. (a)(1).)

Defendant was sentenced to 17 years 8 months, plus the usual fines and fees.

Defendant now contends that the trial court erred by:

1. Denying defendant’s motion to strike evidence of the final robbery.

2. Finding that defendant was presumptively ineligible for probation.
3. Sentencing defendant based on a stale probation report.

We will hold that the trial court did not err by admitting evidence of the final robbery. Because the final robbery was similar, in many respects, to the charged robberies, it was relevant and, indeed, crucial evidence of defendant's identity as one of the participants in the charged robberies.

We will also hold that the trial court did err by finding that defendant was presumptively ineligible for probation and by failing to obtain a supplemental probation report but that these errors were harmless. Hence, we will affirm.

I

FACTUAL BACKGROUND

Surveillance video of each robbery was played for the jury. To the extent that the videos contradict the witnesses' recollections, we rely on the videos.

A chart summarizing the robbers' attire in each of the robberies is attached (Appendix A, *post*, p. 26).

A. *January 30: Moreno Valley Hollywood Video Robbery.*

On January 30, 2007, three African-American men robbed a Hollywood Video in Moreno Valley.

They arrived around 11:30 p.m., about half an hour before closing time. Two robbers came in, one right behind the other; a few moments later, a third robber came in.¹ One employee and one customer were present. The robbers told everybody to get down on the floor.

Robber One and Robber Two were wearing dark fabric objects (described as handkerchiefs, T-shirts, or ski masks) over their faces.

Robber One was wearing a dark hoodie and dark jeans. He went behind the counter and took money from the register.

Robber Two was wearing dark clothing and a white baseball cap. He was armed with a shotgun that resembled Exhibit 21. He took a wallet from the customer.

Robber Three was wearing a light multicolored hoodie and light pants. The witnesses did not see his face, and the video does not show whether he was wearing a mask or not.

The whole robbery was over in about 45 seconds.

B. *February 7: Riverside Blockbuster Video Robbery.*

On February 7, 2007, three African-American men robbed a Blockbuster Video in Riverside.

¹ In each robbery, we call the robbers “Robber One,” “Robber Two,” and “Robber Three,” based on the order in which they entered, except that, if Robber One and Robber Two entered together, we call the one with the firearm “Robber Two.”

They arrived shortly before closing time (though witnesses disagreed as to when closing time was). Two robbers came in together; a third followed.

Both Robber One and Robber Two were wearing light-colored cloths or bandannas over their faces. Robber One was wearing a dark hoodie and dark pants. Robber Two was wearing a dark fur-lined hoodie and dark pants. He was armed with a sawed-off shotgun just like Exhibit 21.

Robber Three was wearing a light multicolored hoodie (indistinguishable from the one worn in the previous robbery) over a white shirt and dark pants. Robber Three was also wearing a “Scream” mask (as featured in the movie of the same name). The mask had an outer layer of clear plastic, and fake blood dripped down under this layer.

Two employees and four customers (including a three-year-old child) were present. The robbers made everyone get down on the floor. All three robbers went behind the counter. They took money from the registers. One of them pulled out cash register drawers and threw them on the floor. Robber Three took a wallet from a customer.

One of the robbers told an employee to open the safe, but the employee explained that he could not, because the safe was on a 10-minute delay. The robbers did not demand any games or game consoles.

The video did not have a time stamp. However, assuming it played back in real time, the whole robbery took about two minutes.

C. *February 11: Riverside Circle K Robbery.*²

On February 11, 2007, three African-American men robbed a Circle K in Riverside.

They arrived around 11:40 p.m. The first two robbers came in together; the third came in more slowly behind them. Two employees and one customer were present.³

Robber One was wearing a dark hoodie and dark jeans. His face was covered by a dark printed bandanna. He jumped the counter and took money from the registers. However, he did not pull out any cash register drawers. The robbers asked an employee to open the safe, but he said he could not.

Robber Two was wearing a dark hoodie and dark jeans with bleached or faded areas over the front of the thighs. He had a light printed bandanna over his face.

² The prosecution also presented evidence that on February 10, 2007, three men robbed a GameStop in Riverside. The jury hung on all counts related to this robbery, and those counts were eventually dismissed.

There were significant differences between this robbery and all of the other robberies. Among other things, all three robbers came in together, witnesses did not mention seeing either a light multicolored hoodie or a Scream mask, and most witnesses believed that two of the robbers had guns. One witness was “certain” that there were four robbers and that one of them was White.

A police officer testified that he viewed a security video of this robbery, but it was of poor quality. It was not played at trial. Thus, there was no way to check the accuracy of witnesses’ recollections.

³ Two additional customers were in the back of the store; they did not interact with the robbers, and they left before the police arrived.

Robber Two was armed with a rifle that resembled Exhibit 21. He made the customer get down on the floor and took the customer's wallet.

Robber Three was wearing a black hoodie over a red shirt and light blue pants. He was also wearing a red (or blood-dripping) Scream mask. He took the employees' wallets. He also took some cigars and cartons of cigarettes.

The whole robbery took about 45 seconds.

D. *February 12: Moreno Valley GameStop Robbery.*

On February 12, 2007, three African-American men robbed a GameStop in Moreno Valley.

They arrived at about 8:50 p.m., "a few minutes before closing." Two of them came in together; a third came in slightly later. Two of the robbers wore masks or bandannas; either Robber One or Robber Three wore a Scream mask.⁴

Robber One wore a dark hoodie and dark pants. Robber Two wore a dark hoodie and dark jeans with faded thighs. He was armed with a short rifle, the same size and color as Exhibit 21. Robber Three was wearing the same light multicolored hoodie as before, with light-colored pants.

Two employees were present. The only customer present was a young boy, about 10 years old. The robbers indicated, by gesturing, that he should leave, and he did.

⁴ In the video, Robber Two appears to be wearing a light bandanna. It is not possible to tell whether it is Robber One or Robber Three who is wearing the Scream mask.

Robbers One and Two went behind the counter. Robber One told an employee to lie on the floor, then took money from the registers. He did not take out the cash drawers. The store had a safe, but the robbers did not ask anyone to open it.

The robbers demanded Xbox 360's; an employee led Robbers Two and Three to the stockroom, where the robbers took some Xbox 360's.

The whole robbery took about 45 seconds.

E. *February 13: Rialto GameStop Robbery.*

On February 13, 2007, three African-American men robbed a GameStop in Rialto. They arrived a little after 8:00 p.m. Two employees were present.

Robber One was wearing a dark hoodie, dark pants, and a dark printed bandanna.

Robber Two was wearing a dark hoodie, dark jeans with faded thighs, and a light-colored bandanna.

Robber Three was wearing the light multicolored hoodie over a red shirt and light-colored pants. He was also wearing a blood-dripping *Scream* mask.

Robber One jumped the counter and took money from the registers. He also told an employee to lock the front door.

Robber Two had a shotgun just like Exhibit 21. He told an employee to get on the floor.

Two of the robbers made an employee unlock the stockroom. They took some Xbox 360's. They then shut the stockroom door, leaving the employees inside. The employees could hear the robbers arguing about whether they should have done that.

Then the robbers made the employees open the door again and come out. An employee unlocked the front door so the robbers could leave. The whole robbery took about three minutes.

After the robbers left, the employees called 911. A police officer spotted a Chrysler Pacifica that seemed to match a description given in the 911 call. He pursued it. The Pacifica jumped a curb and hit a house. Three men got out and fled in different directions.

The officer chased one man and arrested him. He turned out to be Delray Andrews. A black hoodie was found about 25 yards from where Andrews was apprehended.

Another officer stopped an African-American man nearby, because he was breathing heavily and wearing only a tank top on a cold night. He turned out to be Samuel Mahan. Mahan was wearing dark jeans with faded thighs.

The driver escaped. However, he left his shoes at the scene of the crash.

Inside the Pacifica, the police found a loaded sawed-off shotgun (Exhibit 21), a blood-dripping Scream mask, a light multicolored hoodie like the one Robber Three was wearing in most of the videos, and several Xbox 360's.

Sometime previously, defendant had crashed his car. Accordingly, his mother had rented a car for him — a Chrysler Pacifica.

On February 13, 2007, defendant called his mother and told her he had been carjacked and the Pacifica had been stolen. She called 911. He then showed up at her house dirty and shoeless. She asked him to wait and to talk to the police, but he left.

The police were unable to locate defendant at his home or through his family and friends. About six months after the robberies, they found him at an apartment complex in Rialto. He tried to escape out a back window, but they apprehended and arrested him.

Before trial, defendant pleaded guilty to the final robbery. Andrews and Mahan eventually pleaded guilty to all six robberies.

Detective Richard Wheeler testified as an expert on robberies. In his opinion, the same three men committed all six robberies. According to Detective Wheeler, robbers who work in a group avoid adding or changing group members.

Detective Wheeler admitted that it is common for robbers to strike a business near closing time, because the business is likely to have more money and fewer customers. He also admitted that it is not uncommon for robbers to wear masks or to dress in black.

Two defense witnesses testified that, throughout February 2007, defendant was recording music with them. They did this every day, “minus maybe a day or two” They typically finished sometime between 7:00 and 11:00 p.m. Sometimes defendant and one of the witnesses would hang out together afterward. They lost all the music because their computer got a virus, and the hard drive “was wiped in the fixing process.” They turned down an investigator’s offer to try to recover the data.

II

THE ADMISSION OF EVIDENCE OF THE FINAL ROBBERY TO SHOW IDENTITY

Defendant contends that the trial court erred by denying his motion to strike evidence of the final robbery.

A. *Additional Factual and Procedural Background.*

In a trial brief, defense counsel objected to evidence of the final robbery, arguing that it was not sufficiently similar to the charged robberies to be admissible under Evidence Code section 1101. The trial court admitted the evidence to show identity.

During the trial, defense counsel filed a written motion to strike evidence of the final robbery “as lacking relevance and being overly prejudicial and in violation of Evidence Code section 1101” He argued that the evidence actually presented by the People in their case in chief fell short of showing sufficient similarity. After hearing argument, the trial court denied the motion to strike.

B. *Analysis.*

““Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes [Citation.] Evidence of uncharged crimes is admissible to prove identity . . . only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity

[Citation.]” [Citation.]’ [Citation.]” (*People v. Thomas* (2011) 52 Cal.4th 336, 354, fn. omitted.)

““For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] “The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.” [Citation.] The inference of identity, however, ‘need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.’ [Citation.] Moreover, ‘the likelihood of a particular group of geographically proximate crimes being unrelated diminishes as those crimes are found to share more and more common characteristics.’ [Citation.]” (*People v. Lynch* (2010) 50 Cal.4th 693, 736.)

““ . . . “There is an additional requirement for the admissibility of evidence of uncharged crimes: 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. [Citation.] On appeal, a trial court’s resolution of these issues is reviewed for abuse of discretion. [Citation.] A court abuses its discretion when its ruling ‘falls outside the bounds of reason.’ [Citation.]” [Citation.]’ [Citations.]” (*People v. Thomas, supra*, 52 Cal.4th at pp. 354-355, fn. omitted.)

Defendant concedes that, on the record that was before the trial court at the time, it did not err in denying his motion in limine. He argues, however, that it should have granted his subsequent motion to strike, because, based on the record as it was actually developed at trial, the final robbery was not sufficiently similar to the charged robberies.

Actually, the similarities were overwhelming. All but one of the robberies were of video or video game stores. They were committed shortly before closing time. There was a team of three African-American male robbers. Robber One (presumably defendant) and Robber Two entered the store together; Robber Three entered shortly thereafter. They ordered people in the store to get down on the floor. In both the February 12 robbery and the final robbery, they took Xboxes.

Robber One wore a dark hoodie, dark pants, and a dark bandanna or similar cloth mask. He went right to the cash registers and took money from them. In both the February 11 robbery and the final robbery, he jumped over the counter.

Robber Two wore a dark hoodie and dark pants. In the February 11 and 12 robberies, as well as in the final robbery, he wore jeans with faded thighs. He wore a bandanna or similar cloth mask, usually (including in the final robbery) light colored. Robber Two was the only robber who carried a weapon. Some witnesses described it as a shotgun and others as a rifle, but they all agreed that it resembled Exhibit 21.

Robber Three wore the light multicolored hoodie in all but one robbery; likewise, he wore light pants in all but one robbery. In both the February 11 robbery and the final robbery, he wore a red shirt that stuck out under the hoodie. Most strikingly, in four out

of the five robberies, including the final robbery, he wore the blood-dripping Scream mask.

Last, but not least, Mahan and Andrews *admitted* committing all of the robberies. Hence, we can be confident that Mahan was always Robber Two, and Andrews was always Robber Three. From the fact that defendant was admittedly Robber One in at least the final robbery, it is at least a “rational inference” (*People v. Thomas, supra*, 52 Cal.4th at p. 354) that he was Robber One in all of the robberies.

Defendant argues that — as Detective Wheeler admitted — it is not uncommon for robbers to wear masks or dark clothing or to arrive at a business shortly before closing time. Defendant also argues that other robberies have been known to involve Scream masks.⁵ He does not cite any, however, that involved all three factors. This combination of factors makes the robberies more distinctive than any single factor possibly can. And there were additional similar factors. For example, there may have been other robberies involving Scream masks, but how many involved *blood-dripping* Scream masks?

Next, defendant argues that, even if there were similarities with respect to Robber Two (Mahan) and Robber Three (Andrews), there were not enough similarities with respect to Robber One to support the inference that he was always defendant. This is a red herring. The very fact that the final robbery, involving Mahan and Andrews, also

⁵ The use of Scream masks in robberies or other crimes, while not unheard of, is not common. A search of published California cases did not reveal even a single instance.

involved defendant supports the inference that the series of similar charged robberies that they also committed similarly involved defendant.

For example, in *People v. Haston* (1968) 69 Cal.2d 233, the defendant and one Donald McDowell were charged with three separate robberies. (*Id.* at pp. 237-238.) McDowell pleaded guilty. (*Id.* at p. 238.) Evidence was introduced that the defendant had committed two uncharged robberies with McDowell. (*Id.* at pp. 239-243.) The Supreme Court found that a number of similarities between the charged and uncharged robberies were not sufficiently distinctive. (*Id.* at p. 248.) However, it then held: “It appears . . . that a common mark additional to those above considered is involved in this case. That mark, which seems to have been accorded little significance by the parties hereto, is the very presence of Donald McDowell as one of the perpetrators of both the charged and uncharged offenses. It is clear that McDowell’s presence, unlike the other features common to the charged and uncharged offenses, is a mark whose distinctive nature tends to differentiate those offenses from other armed robberies. There is only one Donald McDowell, and his conjunction with defendant in earlier robberies, together with his admitted participation in the robberies charged, supports the inference that defendant and not some other person was his accomplice in those charged offenses. It thus appears that evidence of the uncharged offenses has *some* probative value on the issue of identity.” (*Id.* at p. 249, fn. omitted.)

Similarly, in *People v. Robinson* (1995) 31 Cal.App.4th 494, a witness testified to seeing the defendant and one Ny Brown commit the charged arson of a residence. (*Id.* at

p. 498.) Over the defendant's objection, the same witness was allowed to testify that she had also seen the defendant and Ny Brown commit an uncharged arson of a car. (*Id.* at p. 503.) The appellate court observed: "Although there was nothing particularly distinctive about either the subject arson or the earlier car arson, the trial court properly admitted this car arson evidence . . . because the two arsons shared 'a mark whose distinctive nature tends to differentiate those offenses from other' arsons. [Citations.] That 'mark' was Ny Brown 'and his conjunction with defendant in [the] earlier arson . . . [which] supports the inference that defendant and not some other person was his accomplice in [the] charged offense[.]' [Citation.]" (*Ibid.*)

Defendant relies on *People v. Felix* (1993) 14 Cal.App.4th 997. There, defendants Felix and Pedrico were both charged with the robbery of four victims at a supermarket. (*Id.* at pp. 1000-1001.) Evidence was introduced that they had both pleaded guilty to a prior robbery of a restaurant. (*Id.* at p. 1002.) The prosecutor *conceded* that the charged and uncharged robberies "bore no distinctive marks in common . . . other than the association of the two defendants. No details of the prior crime were put before the court, and the court relied on no distinctive features in ruling it admissible." (*Id.* at p. 1005.) The court held that, in the absence of an admission by either defendant that he committed the charged crime, and in the absence of "other marks of similarity," the uncharged robbery was not admissible to show identity. (*Id.* at p. 1006.)

Here, of course, we have both of the facts that were lacking in *Felix*. Mahan and Andrews admitted the charged *and* uncharged robberies. Moreover, there were ample

additional similarities between the charged and uncharged crimes. This is sufficient to support the inference that Robber One was always defendant.

Arguably, this inference would be defeated if Robber One varied from crime to crime in *unalterable* respects — for example, if he was African-American in one crime and Caucasian in another. However, if he varied only in *alterable* respects, while the inference would be weaker, it would still be supported. Actually, Robber One varied very little. Sometimes his bandanna was light; sometimes it was dark. Sometimes he jumped the counter; sometimes he did not. These trivial differences, however, did not defeat the inference — *arising from the fact that he committed the crimes with Mahan and Andrews* — that defendant was Robber One. The robberies themselves were “like a signature.” There did not have to be additional “signature” similarities regarding Robber One.

Defendant argues, however, that there were dissimilarities between the final robbery and the charged February 10 GameStop robbery. This is another red herring. The jury hung on all counts related to the February 10 robbery; those counts were eventually dismissed. Even though the final robbery was somewhat dissimilar to the February 10 robbery, it was still relevant to prove that defendant committed all of the *other* robberies to which it *was* similar.

Defendant also notes that there were discrepancies between some of the witnesses’ descriptions. At the risk of repeating ourselves, we note that this is, yet again, a red herring. These discrepancies were demonstrably due to the fallibility of eyewitnesses’

perceptions and memory. They can be all but eliminated by the simple expedient of disregarding the eyewitness testimony whenever it is belied by the videos.

Finally, defendant argues that there were dissimilarities between the final robbery and the four robberies of which he was found guilty. For example, in the final robbery, defendant had an employee lock the front door; also, the robbers briefly shut employees into a stockroom.⁶ These dissimilarities went to the weight of the evidence, not its admissibility. No two robberies are ever going to be exactly alike. It is conceded that, despite these differences, Mahan and Andrews committed all five robberies. It is not unreasonable to conclude that defendant did, too.

In sum, for the foregoing reasons, the trial court did not abuse its discretion by denying defendant's motion to strike the evidence of the final robbery.

III

SENTENCING ISSUES

A. *Additional Factual and Procedural Background.*

The probation officer submitted a probation report dated August 10, 2010. It stated that defendant had two felony convictions — a 2004 Nevada conviction for

⁶ Defendant claims that locking the front door showed him to be inexperienced and inept, because it supposedly delayed the robbers' escape. The video, however, is to the contrary. As the robbers were leaving, an employee went to the front door with them. Unlocking it delayed them by seconds, at most.

The last robbery lasted longer than any of the others largely due to the time that Robber Two and Robber Three consumed in getting Xboxes from the stockroom, shutting the employees inside, and then arguing about it.

attempted burglary and a 2007 California conviction for robbery.⁷ (The latter was, of course, defendant's conviction, as a result of his guilty plea, for the final robbery.)

The probation report also stated that defendant was presumptively ineligible for probation because a deadly weapon had been used. This was incorrect. Under Penal Code section 1203, subdivision (e)(2), “[a]ny person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted” is presumptively ineligible for probation. It has been held that this encompasses only personal use; it does not encompass vicarious use. (*People v. Alvarez* (2002) 95 Cal.App.4th 403, 406–409, and cases cited.) There was no evidence that defendant *personally* used a deadly weapon.

The probation officer opined that there were some factors supporting a grant of probation (Cal. Rules of Court, rules 4.414(b)(4) [ability to comply with reasonable terms of probation], 4.414(b)(5) [the likely effect of imprisonment on the defendant], 4.414(b)(6) [the adverse collateral consequences on the defendant's life]), as well as some factors supporting a denial of probation (Cal. Rules of Court, rules 4.414(a)(1) [the nature and circumstances of the crime as compared to other instances of the same crime], 4.414(a)(6) [the defendant was an active participant], 4.414(a)(8) [the manner in which

⁷ In addition, defendant had a 2000 juvenile adjudication for first degree burglary, as a felony. This was not a “strike,” because defendant was under 16 when he committed it and because it is not an offense listed in Welfare and Institutions Code section 707, subdivision (b). (Pen. Code, §§ 667, subd. (d)(3), 1170.12, subd. (b)(3); see also *People v. Garcia* (1999) 21 Cal.4th 1, 8, 13.)

the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant]). Nevertheless, he concluded that defendant “is not viewed as suitable for a grant of formal probation given the circumstances of the offenses and his active participation”

In a sentencing memorandum, the prosecution conceded that defendant was, in fact, eligible for probation. It argued, however, that *all* of the relevant factors supported the denial of probation.

On October 1, 2010, the trial court outlined an indicated sentence. After hearing argument, however, it asked the parties to submit further briefs regarding the application of Penal Code section 654.

On October 29, 2010, at the continued sentencing hearing, defense counsel raised an issue of juror misconduct. The trial court granted a further continuance for purposes of a motion for new trial.

On March 11, 2011, the trial court denied the motion for new trial. It then imposed the same sentence as its indicated sentence five months earlier. It began by stating: “[D]efendant is ineligible for a grant of probation unless the court finds this to be an unusual case. I do not find that it is an unusual case particularly given . . . there was a deadly weapon used in the course of these many robberies.”

B. *Finding of Probation Ineligibility.*

Defendant contends that the trial court erred by finding that he was presumptively ineligible for probation, because he did not personally use a deadly weapon. The People concede the error (although they argue that it was harmless).

We briefly considered whether defendant was presumptively ineligible for probation in any event, because he had two prior felony convictions. (Pen. Code, § 1203, subd. (e)(4).) It has been held, however, that a felony conviction is not a “prior” for this purpose unless it occurred before the current *crime*; it is not enough that it occurred before the current *conviction*. (*People v. Superior Court* (1930) 208 Cal. 688, 690-691; *In re Pfeiffer* (1968) 264 Cal.App.2d 470, 476; see generally *People v. Balderas* (1985) 41 Cal.3d 144, 201.) Here, defendant’s 2007 robbery conviction did not occur until after the current crimes. And his juvenile adjudication is not a “conviction” at all. (Welf. & Inst. Code, § 203.)

We agree with the People, however, that the error was harmless. Defendant committed a series of at least five robberies. Presumably, if he had not been arrested, he would have continued to rob. He was an active participant; he led the way into the store, and he was responsible for taking the cash from the registers. Although defendant did not personally use a firearm, his accomplice did; each time, all of the employees and customers who happened to be in the store were placed in fear of their lives. The robberies displayed criminal sophistication and professionalism. For these reasons, the probation officer’s opined that defendant was not suitable for probation.

In addition, defendant had a significant criminal record: The 2000 juvenile adjudication for first degree burglary and the 2004 conviction for attempted burglary.⁸ In connection with the latter, he had been placed on probation for 18 months. He had started committing the current series of robberies only about nine months after completing probation.

Given these facts, we see no reasonable probability that the trial court would have granted probation. Defendant argues that he was young (only 22 when the robberies were committed). However, this cuts both ways; for one so young, he had already racked up quite a criminal record. Defendant also points out that he had been “out of custody without incident.” This is true, however, only between February 2010, when he was released after serving his sentence in connection with the final robbery, and July 2010, when he was found guilty and remanded into custody. And one would expect him to be on his best behavior while awaiting trial.

Defendant argues that the error violated his federal constitutional right to due process. “[D]efendant’s argument — which is based on an unreasonable reading of *Hicks v. Oklahoma* (1980) 447 U.S. 343 [65 L.Ed.2d 175, 100 S.Ct. 2227] — is to the effect that error under state law is ipso facto error under the due process clause of the Fourteenth Amendment. But “[a] state-law violation is *not* automatically a violation of

⁸ Defendant backhandedly concedes that there is “some justice to th[e] point of view” that his “prior record was not minor.”

federal constitutional due process’ [Citations.]” (*People v. Clair* (1992) 2 Cal.4th 629, 658, fn. 5.)

C. *Failure to Obtain a Supplemental Probation Report.*

Defendant contends that the trial court erred by sentencing him based on a stale probation report.

Defense counsel did not object below. Nevertheless, when a defendant is eligible for probation, this error cannot be forfeited by silence; it can be waived only expressly and on the record. (Pen. Code, § 1203, subd. (b)(4); *People v. Dobbins* (2005) 127 Cal.App.4th 176, 181-182; see also *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432 [Fourth Dist., Div. Two].)

California Rules of Court, rule 4.411(c) provides: “The court must order a supplemental probation officer’s report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.” “The Advisory Committee Comment to the rule suggests that a period of more than six months may constitute a significant period of time” (*People v. Dobbins, supra*, 127 Cal.App.4th at p. 181.)

Here, the probation report was prepared seven months before sentencing actually took place. It follows that the trial court erred by failing to obtain a supplemental probation report. Indeed, the People do not argue otherwise. However, they do argue, again, that the error was harmless.

There is “no federal constitutional right to a supplemental probation report. Because the alleged error implicates only California statutory law, review is governed by the *Watson* harmless error standard. [Citations.] That is, we shall not reverse unless there is a reasonable probability of a result more favorable to defendant if not for the error. [Citation.]” (*People v. Dobbins, supra*, 127 Cal.App.4th at p. 182.)

As already discussed, based on the original probation report, there was no reasonable probability that the trial court would have granted probation. This was due to (1) the circumstances of defendant’s crimes and (2) defendant’s criminal history — factors that would not change over time. Defendant had been in jail continuously between his conviction and the sentencing hearing. Even if a supplemental probation report had been filed, and even if it showed that defendant had been a model inmate during that time, the trial court still would not have granted probation. If there were any favorable new developments, defense counsel had the opportunity to advise the trial court of them, either in writing, by filing a new sentencing memorandum, or orally, at the sentencing hearing. He did not do so.

We therefore conclude that the failure to obtain a supplemental probation report was harmless error.

IV
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.

	1/30/07	2/7/07	2/11/07	2/12/07	2/13/07
Robber One:					
Top	dark hoodie	dark hoodie	dark hoodie	dark hoodie	dark hoodie
Bottom	dark jeans	dark pants	dark jeans	dark pants	dark pants
Mask	dark fabric object	light cloth or bandanna	dark printed bandanna	mask or bandanna	dark printed bandanna
Robber Two:					
Top	dark	dark fur-lined hoodie	dark hoodie	dark hoodie	dark hoodie
Bottom	dark	dark	dark jeans with faded thighs	dark jeans with faded thighs	dark jeans with faded thighs
Mask	dark fabric object	light cloth or bandanna	light printed bandanna	light bandanna	light bandanna
Arming	shotgun	sawed-off shotgun	rifle (like Ex. 21)	short rifle (like Ex. 21)	shotgun
Robber Three:					
Top	light multicolored hoodie	light multicolored hoodie over white shirt	black hoodie over red shirt	light multicolored hoodie	light multicolored hoodie over red shirt
Bottom	light pants	dark pants	light blue pants	light pants	light pants
Mask		Blood-dripping Scream mask	Red or blood-dripping Scream mask	Scream mask?	Blood-dripping Scream mask

APPENDIX A