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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DRAKE ERIC DALTON,

Defendant and Appellant.

G044228

(Super. Ct. No. 07WF0685)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla M. Singer, Judge. Affirmed with directions.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Eric Swenson and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Drake Eric Dalton of seven counts of second degree robbery, nine counts of felony false imprisonment, and one count each of attempted second degree robbery and kidnapping. Dalton challenges the sufficiency of the evidence to support his kidnapping conviction, arguing the four or five feet he moved a janitor towards a safe inside a restaurant did not amount to kidnapping. But he overlooks that he first forced the janitor at gunpoint to move from *outside* the restaurant 10 or more feet to a locked door and then into the restaurant, substantially increasing his victim's risk of harm and thereby meeting the asportation element of kidnapping. Dalton also challenges the sufficiency of the evidence to support his conviction for one of the robberies since the victims at one store could not identify him and the DNA recovered at that location was inconclusive. The jury, however, reasonably could infer Dalton committed the robbery from DNA evidence and eyewitness identifications in three substantially similar robberies that Dalton committed nearby. We also reject Dalton's claim he should have faced cross-examination only on the one robbery for which he wanted to provide an alibi. Finally, we conclude the trial court did not err by admitting disguises found in Dalton's backpack even though he did not use them in any of the robberies. Consequently, we affirm the judgment, albeit with directions to correct the abstract of judgment as we specify in the disposition.

I

FACTUAL AND PROCEDURAL BACKGROUND

In mid-February 2007, a gunman wearing a black mask confronted two 99 ¢ Only Store (99 Cent Store) employees in Huntington Beach, Mark McMullen and Tauafiafi Tafaouillii, at the door of the manager's office half an hour after closing. The mask revealed only the man's mouth and a little bit of white skin beneath his eyes. He

carried a black semiautomatic hand gun in his right hand, jabbed it in McMullen's face, and demanded, "[G]ive me the money." The robber ordered McMullen, Tafaoillii, and three other employees into the office and down on their knees, where he confiscated their cell phones. Continuing to demand, "Where is the fucking money?," he sent Tafaoillii and McMullen, who was the manager, to the safe at the front of the store while he held the other three employees hostage in the office. He seized the \$600 McMullen and Tafaoillii returned with, ordered the employees not to look at him, and fled.

The victims estimated the robber was around six feet tall, about 170 to 180 pounds, between 35 and 45 years old, and one noticed wrinkles under his eyes, but the one victim shown a photographic "six pack" by investigating officers could not identify the robber among the photos shown. A fingerprint taken from a hallway door did not match Dalton's fingerprints, and the trace DNA sample recovered on the printer in the manager's office where the robber set down the cell phones was inconclusive because it could have been left by one in three persons, including Dalton.

Three weeks later, on March 9, 2007, an armed man entered a Daphne's restaurant before it opened and surprised three employees standing near the walk-in freezer. The store was located in Huntington Beach near the 99 Cent Store victimized the previous month. A tall Caucasian, the man wore a dark baseball cap, sunglasses, and a bandanna that together shielded his facial features other than a part of his forehead. He herded the employees, including shift leader Jose Diaz, into the freezer and onto their knees. He ordered Diaz to open the safe and not to "fuck with" him. Diaz complied, punched in the combination, and handed the robber \$1,400 from the safe. The robber ordered the employees not to look at him, took their cell phones, forced Diaz back into the freezer, and departed.

One of the restaurant employees selected from a photographic six-pack three men, including Dalton, who resembled the robber, and her husband, also an employee, identified Dalton as the robber in a six-pack lineup, although he was not sure. The police collected DNA swabs from the restaurant door handle, the cash register, and the freezer door handle for later testing.

Less than two weeks later, on March 21, 2007, and a few miles away in Westminster, a tall heavysset Caucasian between 35 and 40 years old, wearing gloves, sunglasses and a black hooded sweatshirt, held up the cashier mid-morning at a Jack in the Box restaurant. The man placed his order, but then held out a gun and demanded the money in the register. The cashier handed him approximately \$200 and, when the man fled, she called 911.

The cashier identified Dalton as the robber from the photographs the police showed her. She also noted the robber had a very strong body odor. Another employee had seen a man who looked like Dalton outside the restaurant before the robbery and again at the cash registers about to order food, before the employee went about other tasks. The employee identified a photograph of Dalton as the man she had seen.

Two days later at a nearby In-N-Out restaurant in Westminster, an armed man approached the restaurant janitor, Kevin Faulkner, around 6:25 a.m. while Faulkner was outside in the parking lot about 10 feet from a locked entrance to the restaurant. The man was stocky, Caucasian, seemed to be in his mid-40's and a little over six feet tall, wore a dark hooded pullover sweatshirt, a dark colored hat, dark shoes, and khaki pants. Pressing the gun into Faulkner's back and ribs, the man had him open the security door and forced him into the restaurant, warned Faulkner repeatedly not to look at him, and moved him to a desk at the back of the store next to the safe. The man attempted to open

the safe and ordered Faulkner to do so when he failed, but Faulkner told him only the manager could open it and he would not arrive until later in the day. The would-be robber then left the store and Faulkner warned his fellow employees there had been an attempted robbery and called 911.

At 6:42 a.m., Westminster Police Detective William Drinnin received a radio dispatch about the In-N-Out robbery attempt and, as he drove to the restaurant, he spotted a man on a bicycle matching the robber's description. The bicyclist, Dalton, turned into a motel parking lot and Drinnin followed, intercepting him as Dalton wheeled his bicycle into an elevator. When Dalton refused to exit the elevator as Drinnin ordered, he and another officer removed Dalton and handcuffed him. Drinnin noticed a strong body odor emanating from Dalton. The officers found tucked into the right side of Dalton's waistband a black semiautomatic "replica"-type airgun that could fire pellets or BB's. They also found on the left side of his waistband a large hunting knife in a sheath.

Dalton wore three layers of shirts and two layers of pants, including a pair of black sweatpants over khaki pants, and he had a black sweatshirt and a backpack in his bicycle basket. The backpack contained a black beanie, a dark baseball cap, a pair of brown gardening gloves, some surgical or painter's masks, a pair of clear protective glasses, a pair of yellow or gold reflective sunglasses, a set of keys, and Dalton's wallet with his driver license and credit cards. A search of Dalton's motel room yielded a checkbook with his Huntington Beach address and a notebook containing the addresses of eight local 7-11 convenience stores. Dalton had stayed at various times over the preceding month at the motel and another nearby motel, both of which were near the In-N-Out and Jack in the Box robbery locations in Westminster and about two to three miles from the 99 Cent Store and Daphne's restaurant in Huntington Beach.

Dalton's booking information showed he was 5 feet 10 inches tall and 190 pounds, and other documentation showed he was 5 feet 11 inches tall. He was 48 years old at the time of trial in September 2010, and therefore about 44 or 45 when he was arrested. The police took a DNA sample from Dalton following his arrest. The testimony at trial showed Dalton could not be excluded as a major contributor of the DNA samples recovered at Daphne's restaurant. Fewer than one in 100 million persons could not be excluded as the major contributor of the freezer door sample. Fewer than one in a billion persons could not be excluded as the major contributor of the cash register sample. But a Texas inmate, Mario Omar Martinez, also fit within the DNA profile of the Daphne's restaurant samples; however, a warden from the Texas prison testified Martinez was continually incarcerated there during the relevant time period.

Dalton testified in his defense. He explained he was in Arizona on the date of the 99 Cent Store robbery and furnished receipts from a jewelry store, an antique store, and a thrift store to support his claim, but the record does not reflect whether those were cash transactions or purchases made with a credit card in his name. On cross-examination, Dalton also claimed he was in Arizona on the date of the Daphne's restaurant robbery, he was at a construction job site when the Jack in the Box was robbed, and he was bicycling back from a Carl's, Jr., restaurant, not an In-N-Out when he was arrested. He explained the goggles, dust masks, and other items in his backpack that could be used as disguises were for temporary construction jobs he engaged in, including painting and texturing, he carried the knife because he had been in an altercation two days before he was arrested, and he used the pellet gun to deal with a vermin problem at his home. He thought the police officers pulled him out of the elevator because they wanted to use it, not because he was resisting them. He had made the list of 7-11

convenience stores because he was trying to find an acquaintance named “Mike” to whom he had entrusted his dog. Dalton’s former girlfriend, Deborah Duffield, testified she had written to and visited several 7-11 stores in an attempt to find Mike, and that Dalton kept fastidiously clean and never had any body odor. Dalton also presented expert witness testimony describing the unreliability of eyewitness identification and challenging the prosecution’s DNA statistics.

II

DISCUSSION

A. *Substantial Evidence Supports Dalton’s Kidnapping Conviction*

Dalton challenges the sufficiency of the evidence to support his conviction for kidnapping Faulkner by forcing him at gunpoint to open the locked In-N-Out security door, enter the restaurant, and walk to the safe, which Dalton unsuccessfully tried to open. The jury acquitted Dalton of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)); all further undesignated statutory references are to this code), but convicted him of simple kidnapping (§ 207, subd. (a)). Dalton argues the “four to five feet” traversed inside the restaurant was too insignificant to meet the necessary movement or “asportation” element of kidnapping. (See § 207, subd. (a) [“forcibly . . . carr[ying]” away victim against his or her will constitutes kidnapping].) Kidnapping requires that the perpetrator move the victim in a substantial manner by use of physical force or fear, without the person’s consent. (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1434-1435.)

As we have explained, California case law formerly provided that “the ‘actual distance’ the victim was moved was the sole factor for determining whether the evidence showed asportation for purposes of simple kidnapping.” (*People v. Bell* (2009)

179 Cal.App.4th 428, 436.) In *People v. Martinez* (1999) 20 Cal.4th 225, however, the Supreme Court determined nothing “limits the asportation element solely to actual distance.” (*Id.* at p. 236.) Rather, “*Martinez* established a new asportation standard for simple kidnapping — one that took into account ‘the “scope and nature” of the movement . . . , and any increased risk of harm’ — thereby bringing the standard closer to the one for aggravated kidnapping.” (*Bell*, at p. 436.) Thus, the jury’s consideration may include “such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, [or] increased both the danger inherent in a victim’s foreseeable attempts to escape and the attacker’s enhanced opportunity to commit additional crimes. [Fn. omitted.]” (*Martinez*, at p. 237; see *People v. Shadden* (2001) 93 Cal.App.4th 164, 169 (*Shadden*) [movement of victim nine feet sufficient to support asportation element].)

An appellate court reviews the record in the light most favorable to the judgment below. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; *People v. Johnson* (1980) 26 Cal.3d 557, 576–578.) The test is whether substantial evidence supports the verdict, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) It is the jury’s exclusive province to assess the credibility of the witnesses, resolve conflicts in the testimony, and weigh the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*).) Thus, the fact circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932–933 (*Bean*).) Accordingly, a defendant “bears an enormous burden” when challenging the sufficiency of the evidence. (*Sanchez*, at p. 330.)

Here, the record amply supports the jury's kidnapping verdict because by forcibly moving Faulkner from a public area outside the restaurant *into* the building, Dalton substantially increased the risk of harm from his acts. For example, he exacerbated the danger inherent in escape attempts a kidnapping victim foreseeably may contemplate, increased the risk of potential confrontations with Faulkner or other employees in confined quarters inside the building, and he decreased the likelihood of detection, thereby prolonging a situation rife with danger, and he enhanced his opportunity to commit additional crimes besides the kidnapping, including his robbery attempt. (See, e.g., *Shadden, supra*, 93 Cal.App.4th at p. 170 [moving rape victim from front of video store to back room "enhanced his opportunity to rape and injure her"]; *People v. Salazar* (1995) 33 Cal.App.4th 341, 348 [risk of harm increased where the defendant moved victim from outside walkway of motel to room].) Dalton's sufficiency of the evidence challenge therefore fails.

B. *Substantial Evidence Supports the Jury's Verdict on the 99 Cent Store Offenses*

Dalton challenges the sufficiency of the evidence to support the jury's conclusion he committed the 99 Cent Store robbery and false imprisonment offenses. Noting that none of the five victims at the 99 Cent Store identified him as the perpetrator, and the scant fingerprint and DNA evidence at the scene did not establish the robber's identity, he asserts the evidence was insufficient as a matter of law to support the jury's verdict. He observes the prosecutor conceded in closing argument that "[i]f all we had was the 99 Cent Store, that was the only robbery, you wouldn't be here" because "[t]here is no way that this case could be proved beyond a reasonable doubt standing on its own," given "[t]here is no identification made by any of the victims" and "no DNA at this location."

Dalton also insists his positive identification in the later robberies was irrelevant because “the purported similarities” to the 99 Cent Store robbery “were more imagined than real.” Specifically, the mere coincidence that the perpetrator in each robbery was a white male, “who wore masks or gloves or otherwise disguised their identities, hardly distinguishes the robberies from other robberies, or from each other.” Nor was it particularly distinctive “in this electronic day and age” that the robber in two instances “sought to avoid detection . . . by . . . collecting the employees’ respective cell phones”

As the prosecutor showed at trial, however, the similarities between the robberies were pervasive, even idiosyncratic in some instances, and the police recovered circumstantial physical evidence connecting Dalton to the 99 Cent Store robbery. For example, in the first and last offenses, at the 99 Cent Store and In-N-Out, respectively, the perpetrator wore layers of clothing that suggested a plan to peel off outer garments after bicycling away from each crime scene. Specifically, the police dispatch following the In-N-Out incident described the perpetrator as a middle-aged white male wearing a black sweatshirt, a black beanie, and tan or khaki pants. The arresting officer stopped Dalton because he matched that description and appeared to have black clothing in his bicycle basket. Dalton was wearing several layers of shirts with an additional layer, a hooded black sweatshirt, in the basket. Dalton admitted in his testimony that he was wearing khaki pants under black sweatpants or workout pants when he was arrested. The officer also found a black beanie in Dalton’s backpack.

Similarly, the perpetrator at the 99 Cent Store had worn a black beanie, and one of the victims noticed a peculiarity: the perpetrator wore two pairs of pants — a black pair over a khaki pair — suggesting a curiously similar plan to shed clothing to

avoid detection. After the attempted robbery at the In-N-Out, the police also recovered in Dalton's waistband a replica gun, and the shift manager at Daphne's restaurant and two of the 99 Cent Store victims each thought the assailant's gun might be fake.

Other similarities among the various offenses included that during each a middle-aged white male perpetrator disguised most of his face, wore gloves, held what appeared to be a black semiautomatic handgun in his right hand, herded or directed employees to the safe or register in each establishment to retrieve cash, ordered the employee or employees not to look at him, and in two instances ordered the employees to kneel down in a back room and took the employees' cell phones from them. The first two robberies at the 99 Cent Store and Daphne's restaurant occurred within three weeks, were near each other in Huntington Beach, and the second two showing much the same modus operandi were near each other in Westminster approximately 10 days later, with all four incidents occurring within bicycling distance of the motel where the police arrested Dalton after the In-N-Out offense. Dalton had stayed at motels in the area over the preceding weeks, and the police found in his motel room a list of eight local convenience stores, suggesting a plan to target similar businesses. Although a biological sample recovered at the 99 Cent Store was not conclusive, Dalton could not be excluded as the DNA provider.

While all the foregoing evidence could be reconciled with the conclusion that despite the similarities to the three offenses in which witnesses or DNA evidence identified Dalton, he did not commit the initial offense at the 99 Cent Store, that is not the test on appeal. (*Bean, supra*, 46 Cal.3d at pp. 932-933.) Similarly, though nothing conclusively established Dalton robbed the 99 Cent Store, that is not the test either. Rather, the jury reasonably could conclude the coincidences and similarities in the

evidence fingered Dalton as the perpetrator, and we may not intrude on the trier of fact's exclusive province to make that determination. (*Sanchez, supra*, 113 Cal.App.4th at p. 330.) Consequently, Dalton's invitation to reweigh the evidence and find it insufficient fails.

C. *No Error in Failing to Grant Dalton's Request for Limited Cross-Examination*

Dalton contends the trial court erred by denying his motion to limit the prosecutor to cross-examining him solely about the 99 Cent Store robbery, not any of the other holdups. Dalton sought to limit his cross-examination on grounds he intended to testify only to provide his alibi to the 99 Cent Store offenses, namely, that he was in Arizona on that date. Dalton therefore concludes cross-examination touching on the other offenses would unlawfully exceed the scope of his planned testimony. Dalton relies generally on his federal and state constitutional right not to be called by the prosecution as a witness against himself (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15; accord, Evid. Code, § 772), and more specifically on Evidence Code section 761, which defines "Cross-examination" as the examination of a witness other than by a direct examiner "upon a matter that is within the scope of the direct examination of the witness." The trial court denied Dalton's motion and advised him that if he elected to testify, the court would not bar the prosecutor from cross-examining him "on each and every charge that's in this information." The prosecutor did exactly that when Dalton testified and, contrary to Dalton's claim, the trial court's ruling was not erroneous.

The general rule, as summarized by the United States Supreme Court, is that "a defendant who speaks in his own defense cannot avoid testifying fully. [¶] '[A] defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct

examination. . . .” (*Jenkins v. Anderson* (1980) 447 U.S. 231, 236, fn. 3.) Thus, a defendant may not confine cross-examination to a narrow review and rebuttal of the “precise facts” about which he testifies. (*People v. Gates* (1987) 43 Cal.3d 1168, 1185, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) To the contrary, our Supreme Court has recognized that when a defendant “takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is ‘very wide.’” (*People v. Cooper* (1991) 53 Cal.3d 771, 822 (*Cooper*)). ““A defendant who takes the stand to testify in his own behalf waives the privilege against self-incrimination to the extent of the scope of relevant cross-examination. [Citations.] “It matters not that the defendant’s answer on cross-examination might tend to establish his guilt of a collateral offense for which he could still be prosecuted.”” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 72.)

Consequently, when a defendant testifies and denies committing the crime charged, as Dalton did in recounting his alibi concerning the 99 Cent Store robbery, he waives the privilege against self-incrimination regarding similar *uncharged* collateral crimes put at issue in the prosecution’s case-in-chief. (*Cooper, supra*, 53 Cal.3d at p. 822; *People v. Thornton* (1974) 11 Cal.3d 738, 760 (*Thornton*), disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, and abrogated on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 234.) We see no reason for a different rule that would bar cross-examination concerning similar *charged* crimes.

In *Thornton*, the defendant claimed “it was error to permit the prosecution to cross-examine him on the [uncharged] Marcia B. and Edith B. incidents because he did not testify relative to these incidents on direct examination.” (*Thornton, supra*, 11 Cal.3d at p. 760.) The court explained: “This contention is without merit. Defendant’s

testimony on direct examination was essentially a general denial of guilt as to each and all of the charged crimes and sought to establish that the victim's identification of him as the malefactor was mistaken. *He thus placed the matter of identity squarely in issue, and the prosecutor's attempt to establish on cross-examination his involvement in offenses whose similarity to the charged offenses indicated a common malefactor was proper.*" (*Id.* at p. 760, italics added; accord, e.g., *People v. Tarantino* (1955) 45 Cal.2d 590, 599 ["The cross-examination here [concerning similar uncharged crimes left unmentioned by the defendant] was directed primarily to matters implicit in Tarantino's general denial, i.e., his purpose and motive, *his general plan and scheme*" (italics added)].)

The same is true regarding similar *charged* crimes when the issue is the perpetrator's identity: the prosecutor may cross-examine the defendant concerning those offenses though the defendant omits them in his direct testimony. (*People v. Perez* (1967) 65 Cal.2d 615, 620-621.) The Supreme Court in *Perez* observed that "on direct examination defendant testified to an alibi with respect to counts 1 and 2 [both robberies,] and thus in effect denied the offenses charged in those counts." (*Id.* at p. 621.) The court found proper not only cross-examination regarding a similar uncharged, "collateral" robbery offense unmentioned by the defendant, but further that "[c]ross-examination as to the robberies *charged* in counts 3 and 4 likewise would have been proper. Those robberies, like the collateral robbery, disclosed a plan, pattern, and *modus operandi* similar in many respects to those charged in counts 1 and 2." (*Id.* at p. 621, first italics added.) The court explained, "The fact that defendant was then on trial for the robberies charged in counts 3 and 4 does not preclude a determination that [his Fifth Amendment] waiver," arising from his decision to testify concerning counts 1 and 2, "extends to th[e] offenses" charged in counts 3 and 4. (*Ibid.*) "To hold otherwise would permit a

defendant to withdraw from the crossfire of interrogation before the reliability of his testimony has been fully tested.” (*Ibid.*)

In effect, Dalton’s asserted alibi concerning the 99 Cent Store robbery raised a similar inference of mistaken identity in the other charged offenses. “An implied denial of guilt,” however, “is considered as testimony denying the existence of any evidence relevant on the issue of guilt, which makes cross-examination about the subject of any such evidence properly within the scope of the direct examination.” (*People v. James* (1976) 56 Cal.App.3d 876, 888.) Put another way, when a defendant voluntarily testifies, the prosecutor may fully amplify his testimony by inquiring into related facts and circumstances, and by cross-examination that explains or refutes his statements *or the inferences which may be drawn from them.* (*People v. Harris* (1981) 28 Cal.3d 935, 953.) Thus, a testifying defendant waives the privilege against self-incrimination on related matters if there is a necessary or logical connection between the charged offense and the other evidence showing criminal activity. The accused who testifies may be cross-examined and impeached with that matter, even if it tends to incriminate him, because the accused has opened the door and made the interconnected matter relevant by offering exculpatory testimony. Accordingly, the prosecutor here was entitled to refute inferences from Dalton’s testimony that he perpetrated neither the 99 Cent Store robbery, nor the similar charged crimes in the area. The trial court’s ruling was correct.

D. *The Trial Court Did Not Err by Failing to Exclude the Painter’s Masks*

Dalton argues the trial court erroneously admitted several white or tan-colored painter’s or surgical masks found in his backpack upon his arrest, even though the perpetrator in none of the charged offenses wore a similar mask. For example, the 99 Cent Store robber wore a black beanie and a black mask revealing only his mouth and

eyes, the Daphne's restaurant robber wore a bandanna, dark gloves, dark sunglasses, and a dark baseball cap, the Jack in the Box robber wore a black hooded sweatshirt and orange, reflective sunglasses, and the In-N-Out perpetrator wore a dark, hooded pullover sweatshirt and a dark colored hat.

But though a particular mask or disguise is not used in committing a charged offense, the defendant's possession of the item may nevertheless furnish admissible evidence of a common scheme, plan, or modus operandi. (*People v. Sheets* (1967) 251 Cal.App.2d 759, 763-765.) Thus, in *Sheets* the defendant's possession of a mask and a gun while appearing to surveil a convenience store in a remote area tended to show the defendant's modus operandi of targeting similar stores, though the perpetrator had not worn a mask in the convenience store robbery charged in the information. The *Sheets* court explained in concluding the mask was admissible that "whenever the quarrel is between relevancy and the policy of the law to protect the accused against bias and prejudice likely to be engendered from the admission of relevant evidence, a balancing process must take place — a weighing of the probative value of the evidence offered against the harm it is likely to cause." (*Id.* at p. 764.)

Here, in addition to the masks, the police found in Dalton's backpack a black beanie resembling both the beanie worn in the 99 Cent Store robbery and the black hat in the attempted robbery at In-N-Out, reflective sunglasses similar to those disguising the Jack in the Box robber's identity, and brown gloves like those used by the Daphne's restaurant robber. Dalton matched the description of the In-N-Out gunman, and the police intercepted him on his bicycle returning to his motel room within half an hour of that offense. A search of his motel room uncovered a notebook containing the addresses for eight local convenience stores, and the motel and others Dalton recently stayed at

were also within two to three miles of the 99 Cent Store and the Daphne's restaurant. The trial court reasonably could conclude the painter's or surgical masks were admissible to show Dalton's ready access to materials to conceal his identity, tending to link him to the perpetrator's modus operandi in the charged offenses.

Even assuming *arguendo* the court erroneously admitted the masks (but see Evid. Code, § 352 [probity-prejudice balancing test committed to trial court's sound discretion], we discern no prejudice. There was nothing inflammatory about the masks, unlike, as Dalton argues, admitting a dissimilar firearm when the type of gun used in an offense is known, which may prejudice the defendant in the eyes of the jury as "the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577, disapproved on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98, and *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2; see also *People v. Karis* (1988) 46 Cal.3d 612, 638 [reversible prejudice arises from "evidence which uniquely tends to evoke an emotional bias against the individual"].) As discussed, ample evidence supported the jury's verdict, Dalton had the opportunity to explain his possession of the masks, and we see no possibility under any standard of review of a different outcome had the masks been excluded as Dalton claims they should have been.

III

DISPOSITION

The judgment is affirmed. As Dalton and the Attorney General suggest, and we agree, we direct the trial court to correct (Pen. Code, § 1260) the abstract of judgment to reflect the trial court's dismissal of the felony false imprisonment conviction in count 17 and its stay of imposition of sentence for the attempted robbery conviction in

count 16. The trial court is directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.