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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.

NEIL AGUSTUS EDMUND,

Defendant and Appellant.

G050700

(Super. Ct. No. INF064944)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Bernard Schwartz, Judge. Affirmed as modified.

Richard A. Levy, 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, Arlene A. Sevidal, Lise
Jacobson and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Neil Augustus Edmund was convicted of special circumstances murder for fatally shooting a store clerk during an attempted robbery. His appeal focuses primarily on the trial court's decision to exclude certain evidence intended to prove he was not the shooter. He also challenges the admission of evidence showing he had robbed the same store twice in the past, as well as the prosecutor's references to those prior robberies. And he contends the wording of the juror questionnaire was unfair. Other than to correct an undisputed sentencing error, we affirm the judgment.

FACTS

On February 4, 2009, at about 9:00 p.m., Juan Munoz and Jorge Segovia were working at the Super One convenience store in Desert Hot Springs when a black man wielding a .45 caliber handgun entered the store. The gunman, who was wearing a dark hoodie and had a green bandana over his face, pointed his weapon at the clerks and told them to “[g]et down on the ground, motherfucker[s].” Munoz started laughing because he thought the encounter was some sort of joke. However, after the gunman pistol whipped his face, he realized that was not the case. Alarmed by the violence, Segovia hit the deck, and Munoz went to the cash register as directed by the gunman. Munoz acted calm and compliant, but he tried to run away when the gunman ordered him to hand over the register money. At that point, the gunman fired a single shot that struck Munoz in the head, killing him. Then he turned toward Segovia and pointed his gun at him before fleeing the store.¹

Armando Maya, a former police officer, was sitting outside the store in his truck when the shooting occurred. Following the shot, he saw a black man with a green bandana over his face run out of the store. The man made eye contact with Maya and then ran toward an apartment complex located behind the store.

¹ At trial, the prosecution played a video recording of the shooting that was captured by one of the store's surveillance cameras.

Local resident Fanny Damian also saw the gunman. Upon hearing the shot, she looked toward the store and saw a black man running down the street in her direction. The man looked Damian in the eye as he passed her and headed toward a nearby apartment building located at 68130 Calle Las Tiendas.

One of the people who lived in that building was Tesha Miller, appellant's aunt. At the time of the shooting, Miller was the girlfriend of Demontre Alexander. They had three children together, and Alexander spent a considerable amount of time at Miller's apartment. In fact, on the day of the shooting, Alexander spent most of the day there. That evening, before the shooting, appellant was at the apartment too. He was with Alexander, Miller and their children until about 8:45 p.m., at which time he left for about 20 minutes. Upon returning, he was holding a .45 caliber handgun Alexander had sold him two days earlier. He approached Alexander and told him "it went bad" and he had "shot somebody."

Alexander took the gun from appellant and removed the loaded clip. When he gave it back, appellant said "somebody in the store went for a gun," and alluded to the fact he already had "two strikes." He asked Alexander if he would be willing to take the gun and swap pants with him, but Alexander refused, so appellant left the apartment. When he returned about 45 minutes later, he was wearing different clothing. He started telling Alexander what he did with the gun, but Alexander cut him off because he did not want to know.

Two days later, on February 6, 2009, Alexander spoke with appellant and asked him why he tried to rob the store. Appellant said he wanted to get money so he could register his car. That day, the police conducted a parole search at appellant's Desert Hot Springs house, which was located a mile or two from the crime scene. In the master bedroom, they found a black hooded sweatshirt that resembled the one worn by

the shooter. And in appellant's garage, they found a green bandana covered with dirt and oil. Appellant was present during the search but not arrested. He said he would help the police find the shooter if they gave him "some consideration" in return.

A week later, police found appellant's house vacant. After learning his family had moved to Palm Springs, they went there and arrested him. At the house, they found a pair of jeans resembling those worn by the shooter.

The next day, the police went to the Desert Hot Springs home of appellant's aunt Karen Johnson. In her backyard, investigators discovered the remnants of some recently burned clothing materials. Forensic testing revealed they were consistent with the black hooded sweatshirt and the green bandana worn by the shooter. Johnson said she knew nothing about the burned materials. However, she told the police she had heard someone in her backyard the previous evening.

Following his arrest, appellant was interrogated at the Desert Hot Springs Police Department. While he did not deny he had robbed the store, appellant insisted he had nothing to do with Munoz's death. The police did not believe him. They told appellant they had watched the surveillance videos of the shooting and knew from their investigation he was the gunman. When they asked appellant if he thought Munoz deserved to die, he said no. And when they asked him if anyone could have anticipated what happened, he said everything was "in God's hands."

Hoping to obtain a confession, the investigators reminded appellant that not all shootings are intentional. They told appellant he might fare better if it turned out the shooting was merely a mistake, but appellant disagreed. Signaling his knowledge of the law, and the felony murder rule in particular, he said whoever shot Munoz was looking at a very long sentence regardless of their intent. As appellant put it, "That's life [right] off the top. [¶] . . . [¶] It's life. Period." Although he continued to deny involvement in the

shooting, he did say he felt bad about what happened to Munoz. He also answered “uh huh” when the investigators asked him if he thought the shooting was a “freak thing.” He never explicitly confessed to being the shooter.

However, when the police showed eyewitnesses Segovia, Maya and Damian a photographic lineup containing appellant’s picture, they each picked him out as the gunman. They also identified appellant at trial as the man they saw at, or running away from, the store. In addition, Damian testified she saw appellant return to the store after the shooting, while the police investigation was still underway. According to Damian, appellant pulled up to the store with his friends and said, “That’s what the fucking Mexican gets.” However, they drove away without being seen by the police.

At trial, the prosecution played a recording of a phone conversation appellant had while he was in jail. During the conversation, appellant was asked if he was going to seek a speedy trial. According to the transcript of the call, appellant replied, “why I gonna do a speedy trial . . . I don’t know what the fuck [is] going on even though I know I committed this shit.”

Daniel Shattuck, an audio technician for the Riverside District Attorney’s Office, testified he analyzed appellant’s speedy trial statement by utilizing a computer program that created a “voice print” of appellant’s words. The results of Shattuck’s analysis were consistent with the transcript, i.e., he determined appellant said, “I know I committed this shit.” He did not detect any sound between the words “I” and “committed.”

However, defense expert John Baugh, Ph.D., a professor emeritus at Stanford University who specializes in sociolinguistics and African-American language behavior, testified that when he analyzed the statement, he heard a nasalized form of the word “ain’t” between those two words. Thus, in Dr. Baugh’s opinion, appellant actually said, “I know I *ain’t* committed this shit.” (Italics added.)

Appellant's wife Elizabeth Alvarez and his girlfriend Brandi Johnson also testified on appellant's behalf. Alvarez claimed appellant was with her in Palm Springs at the time of the shooting. And Johnson testified she met appellant at a shopping center in Desert Hot Springs shortly thereafter. Johnson said appellant was wearing a white tank top and baggy shorts and seemed perfectly normal that night.

The defense also called Coleen Bernie and William Maghoney. They both saw the shooter flee from the store, but unlike the other eyewitnesses, they did not identify appellant as the gunman when they were shown a photographic lineup containing his picture.

Rounding out appellant's case, defense investigator William Sylvester testified he interviewed Alexander over the phone in October 2012, three and a half years after the shooting. During that call, Alexander said he "made up" everything he had told the police. In particular, Alexander recanted his claims that he had seen appellant with a gun on the night of the shooting and that appellant had told him something had gone wrong that evening. Alexander also told Sylvester the police had threatened to make him an accessory if he did not cooperate with them. At trial, Alexander testified that when he spoke to Sylvester on the phone in 2012, he just told Sylvester what he wanted to hear. Alexander said he was tired of dealing with the case and admitted he had to be subpoenaed to testify at trial.

In the end, the jury rejected appellant's alibi defense and convicted him of first degree murder, two counts of attempted robbery, and being a felon in possession of a firearm. The jury also found true the special circumstances allegation the murder was committed during a robbery and found appellant personally and intentionally discharged a firearm, causing death. After the jury rejected the death penalty, appellant admitted having suffered two prior strike convictions, and the court sentenced him to life in prison without the possibility of parole.

DISCUSSION

Appellant's Alleged Jailhouse Confession

We deal first with whether appellant confessed. There was conflicting expert testimony on the issue of whether appellant actually confessed when he was asked if he was going to pursue a speedy trial, and appellant contends the trial court erred in refusing to allow him to present additional testimony in the form of lay opinion on this issue.

When the issue arose during trial, defense counsel made an offer of proof that Troy Edmund, a relative of appellant, was the person appellant was speaking to during the conversation in question. Defense counsel requested that he be allowed to ask Troy what appellant said to him, or alternatively, that he be allowed to ask Troy if appellant ever confessed to him. The prosecutor opposed the request. He argued that, because a recording of the conversation was played for the jury, the best evidence rule precluded Troy from testifying as to what appellant told him. The prosecutor also argued that such testimony would violate the hearsay rule. Without passing on the best evidence issue, the trial court excluded Troy's proposed testimony on the basis it was hearsay.

Appellant contends this was error, but while the nature of Troy's proposed testimony raises some interesting questions about the applicability of the hearsay and best evidence rules, we need not decide whether the trial court erred in excluding it. That's because it is extremely unlikely Troy's testimony about what appellant allegedly told him would have affected the verdict one way or another. After all, Troy is related to appellant, raising the specter of bias, and defense witness Dr. Baugh, a highly qualified expert in the field of linguistics, testified to exactly what Troy was going to say: That appellant actually told Troy he did *not* commit the alleged crimes. The jury also heard the actual tape recording during the trial, so it was in a very good position to decide for itself what appellant said. All things considered, it is not reasonably probable appellant

would have obtained a more favorable outcome had Troy been allowed to testify. In fact, we are confident beyond a reasonable doubt the exclusion of his testimony was immaterial to the verdict. Therefore, reversal is not required. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818.)

Exclusion of Other Jailhouse Calls

Appellant also contends the trial court erred by not allowing him to present evidence that, during the four years he was in custody before trial, he had about 750 other conversations that were recorded by jail authorities. Appellant asserts that since the prosecution did not attempt to admit any of these other conversations, one could infer they were not incriminating, and it was thus unlikely he actually confessed to Troy. However, we do not believe the trial court erred in excluding evidence about the number of conversations appellant had while he was in custody.

We phrase our holding in this manner because, while the trial court did not allow the defense to elicit testimony about the *number* of conversations appellant had, it did allow the defense to make its underlying point that the prosecution's presentation of a single jailhouse recording cast doubt on the reliability of appellant's alleged confession. To that end, defense counsel told the jury in closing argument, "The fact that you don't ever see [appellant] out in the hall, I think you can probably put two and two together, he's still in custody; okay? Four years he's been in there. And in four years, what the prosecution brings you is nine seconds of a phone call." This suggested – probably improperly since it relied on facts not in evidence – that there were other conversations the prosecution did not use and thus the jury should be skeptical about the single phone call that was admitted. (Cf. Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].) So the point was made.

In any event, defense counsel never made an offer of proof as to when or to whom the other calls were made. Depending on these factors, it might not be surprising to learn these calls did not contain any explicit confessions. However, they did apparently contain some incriminating statements by appellant. In arguing the issue below, the prosecutor noted some of the calls contained gang references and admissions by appellant he had previously stabbed someone while in prison. This undermines the premise of appellant's argument that there was only one incriminating conversation in the bunch. It also refutes appellant's claim he had a "habit" of not confessing, and therefore the number of calls he made in custody was admissible to show that, in compliance with his usual practice, he did not confess to Troy. We discern no abuse of discretion in the court's handling of this issue.

Exclusion of Expert Testimony on Eyewitness Identification

Next, appellant asserts the trial court erred in denying his request to call an expert witness on the issue of eyewitness identification. He claims expert testimony was needed to educate the jury on the factors affecting the reliability of eyewitness perception, but that is not the case.

As our Supreme Court has observed, expert testimony on eyewitness identification "will not often be needed" because jurors are usually fully capable of evaluating the reliability of such identifications. (*People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on another ground by *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) That is especially true when, as here, the jury is thoroughly instructed on the various factors that can affect the reliability of a witness's identification. (See CALCRIM No. 315, as given [listing 14 such factors].)

Ultimately, "the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion[.]" (*People v. McDonald, supra*, 37 Cal.3d at p. 377.)

It is not an abuse of discretion to exclude an expert if the eyewitness' testimony was strong and there was other evidence linking the defendant to the crime. (*People v. Sanders* (1995) 11 Cal.4th 475, 509.)

Here, eyewitnesses Segovia, Maya and Damian all got a good look at the gunman as he was fleeing the scene, and they all unequivocally identified appellant as that man, both before and during trial. Also, following the shooting, appellant allegedly made highly incriminating statements to Alexander, and a green bandana was found at his home. In addition, remnants of charred clothing and a green bandana were found at appellant's aunt's house. So, this is not a case in which the eyewitness testimony was uncorroborated.

In ruling on appellant's request to call an expert on eyewitness identification, the trial court was well aware of this evidence. It also took into account that appellant had admitted to the police that he was at the scene of the shooting. While we agree with appellant that the record is devoid of an *express* confession in that regard, there were numerous instances during the interview in which appellant's words and body language *impliedly* suggested he was involved in the shooting. For example, at one point appellant acknowledged the shooting was a "freak thing," and at another point he nodded in apparent agreement when the detectives asked him if the shooting was an accident. While not inescapably incriminating, we think the overall tenor of appellant's interview was generally unfavorable to him. Appellant also allegedly confessed to Troy about having committed the charged offenses, although, as noted above, that issue was disputed too. Under the totality of the circumstances, we cannot say the trial court abused its discretion in refusing to allow expert testimony on the issue of eyewitness identification.

Exclusion of Third-Party Culpability Evidence

Appellant feels the trial court violated his due process rights by preventing him from presenting evidence and arguing that Alexander was the person who shot Munoz. This claim also fails.

“An accused may defend against criminal charges by showing that a third person, not the defendant, committed the crime charged. He has a right to present evidence of third party culpability where such evidence is capable of raising a reasonable doubt as to his guilt of the charged crime. But evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. [Citations.]” (*People v. Mackey* (2015) 233 Cal.App.4th 32, 110-111.) We review the trial court’s ruling excluding third party culpability evidence under the deferential abuse-of-discretion standard (*People v. Prince* (2007) 40 Cal.4th 1179, 1242) discussed above. Under that standard, we are powerless to disturb the court’s ruling unless it exceeds the bounds of reason in light of all the circumstances presented. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1181.)

Appellant argues there was powerful circumstantial evidence implicating Alexander as the gunman. He points out Alexander was not only in the vicinity of the shooting when it occurred, he had knowledge about how the shooting occurred. In addition, he once owned the very gun appellant allegedly used to shoot Munoz. And while Alexander testified he sold the gun to appellant two days before the shooting, he never explained why he did so or what, if anything, he got in return. Moreover, Alexander was never excluded as the gunman because none of the eyewitnesses were asked if they could identify him.

The problem is, none of these factors implicated Alexander as the *actual perpetrator* of the alleged crimes. Plus, we know Alexander’s girlfriend lived near the Super One store, and she is also appellant’s aunt, so it’s hardly surprising that Alexander was in the area at the time of the shooting and that appellant may have confessed certain details to him about the crime. He and appellant may not have been close friends, but that certainly would not have precluded appellant from asking for his help in the wake of the shooting, as Alexander alleged.

Perhaps more importantly, it appears Alexander simply did not resemble the gunman who was captured on the surveillance videos. The trial court initially surmised Alexander “may perhaps match the [gunman’s] physical description[.]” But after seeing Alexander testify, the court put that notion to rest, stating Alexander did not “in any way, shape or form” resemble the gunman. As a reviewing court, we are in no position to second-guess the trial court’s factual finding in that regard. Suffice it to say, appellant has failed to show the trial court’s decision to preclude his proffered third-party culpability theory constitutes an abuse of discretion. The decision did not violate appellant’s constitutional right to present a defense. (*People v. Prince, supra*, 40 Cal.4th 1179, 1243.)

Admission of the Prior Robberies

Appellant contends the trial court erred in admitting evidence he had robbed the store where Munoz was killed on two prior occasions. Again, we disagree.

The victim of those robberies was Fermin Lopez. At trial, he testified he worked at the Super One store back in the nineties, when it was called Gibson’s Market. On the evening of June 14, 1998, a black man with a red bandana over his face entered the store with a handgun and told Lopez, “Give me the money, motherfucker or I’ll kill you[.]” After Lopez surrendered what was in the till, the man asked if there was any other money in the store. Lopez said no, but he did offer up a box of change, which the man took as he ran out the door.

Three months later, a similar incident occurred. On the evening of September 3, 1998, a black man with a brown bandana over his face came into the store with a sawed-off shotgun. He called Lopez a “motherfucker” and said he was going to kill him if he did not give him all his money. Lopez gave the man the register money, as well as some change and cigarettes. Although the man asked for more, he fled the store without further incident. He appeared, according to Lopez, to have the same voice, mannerisms and appearance as the man who had previously robbed him.

Notwithstanding the obvious distinction that Lopez was never shot at, the trial court felt these prior robberies were sufficiently similar to the present case to establish appellant's identity and intent and the existence of a common plan. In fact, the court described the Lopez robberies as being strikingly similar to, and "almost identical in nature" to what happened in the present case. The court did not believe Lopez's testimony was unduly prejudicial or time consuming in light of all the other evidence that was presented.

As appellant correctly notes, Evidence Code section 1101 generally prohibits evidence of a defendant's uncharged conduct to prove his conduct on a specific occasion or his propensity for criminal activity. (Evid. Code, § 1101, subd. (a).) But such evidence may be admitted if it is relevant to establish a material fact in the case, such as intent, plan or identity. (*Id.*, subd. (b).) Admissibility turns on whether the uncharged conduct is sufficiently similar to the charged offense: The least degree of similarity is required to prove intent, a greater degree of similarity is required to prove the existence of a common plan, and the greatest degree of similarity is required to prove identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403.) Indeed, to be admissible on the issue of identity, which was the key issue in this case, "the charged and uncharged offenses [must] display a "pattern and characteristics . . . so unusual and distinctive as to be like a signature.'" [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1148.)

Even if the evidence in question meets this standard, it may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by its prejudicial effect. However, the trial court has considerable discretion in making this determination. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405.) Rulings made under Evidence Code sections 1101 and 352 will not be disturbed on appeal unless they are arbitrary, capricious or patently absurd. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

The trial court's decision to admit evidence of the prior robberies on the issue of identity was none of these things. In both the prior robberies and the present case, the robber was black, had a gun and covered his face with a bandana. He also threatened the victims (verbally or physically) and referred to them as "motherfuckers." And on top of that, all the robberies occurred at night *at the very same location*. The fact appellant targeted the same store on three separate occasions indicates he likened the store to his own personal ATM. It's what distinguishes his case from other cases where the requisite degree of similarity to prove identity was found to be lacking. (See, e.g., *People v. Rivera* (1985) 41 Cal.3d 388, 392-393, disapproved on another ground in *People v. Lassie* (2010) 47 Cal.4th 1152, 1168, fn. 10.)

For the same reasons, the Lopez robberies were also relevant to show a common plan and appellant's intent. Even though appellant effectively conceded the issue of intent, that did not preclude the prosecution from offering evidence on that issue at trial. (See *People v. Rogers, supra*, 57 Cal.4th at p. 330 [in upholding the admission of prior acts evidence to prove intent, the court stated the defendant "'may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.'"].)

In challenging the admission of the prior robberies, appellant also notes that, when shown a surveillance photograph of the man who shot Munoz, Lopez was unable to say whether he was the man who had robbed him. The suggestion is that there was insufficient evidence linking appellant to the Lopez robberies. However, any doubt appellant was the man who robbed Lopez was put to rest by appellant himself, during his interview with the police. When the police brought up the Lopez robberies, appellant chuckled at first. But upon realizing the import of his prior actions, he expressed concern they might come back to haunt him in the present case. And at another point of the interview, when the police were accusing him of robbing Munoz, appellant conceded he

had previously gone to jail for doing the “same shit” before. Viewing these statements in the context of Lopez’s testimony, the jury could reasonably infer the man who robbed Lopez and the man who shot Munoz were one in the same.

As for the issue of prejudice, Lopez’s testimony was relatively brief and far less dramatic than the events in the instant case, in which one of the victims was actually shot and killed. In addition, the trial court properly instructed the jury as to the permissible use of the prior robberies. (See CALCRIM No. 375, which informed the jurors they could only consider the evidence of appellant’s prior bad acts to prove his intent, identity or a common plan, and not that he was criminally inclined.) For all these reasons, we uphold the admission of Lopez’s testimony. The trial court did not abuse its discretion in allowing him to explain how he was twice robbed back in 1998.

Alleged Prosecutorial Misconduct

In a related argument, appellant alleges the prosecutor committed prejudicial misconduct in his opening statement by telling the jury appellant had pleaded guilty to robbery in both cases involving Lopez. Appellant argues this was misleading because in one of the cases the robbery charge was actually reduced to grand theft as part of a plea bargain. And in the other case, the disposition was not reached via a plea bargain. Appellant also faults the prosecutor for eliciting evidence he was on parole at the time of the shooting. He sees himself as being the victim of intentional character assassination, however, “[w]hat is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant.” (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

As explained in the previous section, the evidence implicating appellant in the Lopez robberies was properly admitted, and appellant effectively conceded committing the robberies in his interview with the police. What charge he was eventually convicted of and how that charge was arrived at was of no import whatsoever. At trial, appellant also stipulated to having previously been convicted of a felony for purposes of

the firearm count. And Alexander testified that, in the wake of the shooting, appellant told him he already had “two strikes.” On this record, which clearly showed appellant was no angel before the shooting, any misconduct of the type suggested by appellant was manifestly harmless.

Juror Questionnaire

Appellant contends the questionnaire given to the prospective jurors rendered his trial unfair because it alluded to the fact that all criminal trials are preceded by a judicial determination of probable cause. There was no error.

The original questionnaire provided to the jury pool said, “California law enforcement must have probable cause to arrest a suspect of a crime. The Superior Court of California must then determine that probable cause exists before a defendant can be charged with a felony offense. . . . After a judicial determination of probable cause is made in a criminal case, all criminal defendants in California have a right to a jury trial. After a probable cause hearing, a jury trial date is set. At trial, the defendant is presumed innocent. The People have the burden of proving the defendant guilty beyond a reasonable doubt. It is a jury’s job at trial to determine if the People have proven beyond a reasonable doubt that a defendant is guilty of the crime that he is charged with.”

Before trial, defense counsel objected to this passage on the basis it was irrelevant and improperly suggested appellant was probably guilty because a court had already determined there was probable cause to support the charges. The trial court disagreed, describing the passage as a commonsense primer on how the criminal justice system operates. However, after the second line of the passage, the court did add the following sentence: “The fact that a defendant is arrested for a crime is not evidence of his guilt.” Appellant contends this addition failed to cure the problem created by the reference to a judicial determination of probable cause. In his mind, the reference violated his right to due process because it effectively vouched for the prosecution’s case and insinuated the trial court thought he was guilty.

“‘[F]undamental fairness [is] the touchstone of due process’ [citation] and so a due process violation is usually established when the state proceeds in a manner that renders a trial fundamentally unfair. . . . [Citation.]” (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1422.) Conversely, no due process violation will be found if the jury is provided fair and evenhanded guidance on how to decide the case. (See, e.g., *People v. Lenart* (2004) 32 Cal.4th 1107, 1133-1134.)

Here, the challenged language was fair and evenhanded. While it stated probable cause is a prerequisite for an arrest and trial, it also reminded the prospective jurors an arrest is not evidence of guilt, and all defendants are presumed innocent. In other words, while there must be some justification to bring a person to trial, jurors must put that out of their mind and start with the presumption of innocence once the trial begins. That is not a particularly difficult concept to comprehend. In this regard, we must remember that “jurors are presumed to be intelligent and capable of understanding and applying the court’s instructions. [Citation.]” (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) There is nothing in the record suggesting the jury was biased against appellant or failed to decide the case in a fair and impartial manner.

Appellant draws our attention to cases in which the *prosecutor* improperly urged the jury to infer the defendant was guilty due to the fact there had been a prior determination of probable cause. (See, e.g., *People v. Wayne* (1953) 41 Cal.2d 814, 829; overruled on another ground in *People v. Bonelli* (1958) 50 Cal.2d 190; *People v. Whitehead* (1957) 148 Cal.App.2d 701, 706; *People v. Hale* (1947) 82 Cal.App.2d 827, 832-833.) But that did not happen here. The language of the jury questionnaire simply informed prospective jurors of the standard rules and procedures for bringing a person to trial. It did not undermine appellant’s right to a fair trial.

Sentencing Fees

Lastly, appellant argues, and respondent concedes, the court erred by imposing an excessive criminal assessment fee and failing to impose a court security fee.

(See Gov. Code, § 70373; Pen. Code, § 1465.8.) As requested by the parties, we will modify the judgment to reflect the fees that are properly applicable in this case.

DISPOSITION

The judgment is modified to reduce appellant's criminal assessment fee from \$390 to \$120 and to impose a court security fee in the amount of \$160. The clerk of the superior court is ordered to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy to the Department of Corrections and Rehabilitation and other appropriate agencies. As so modified, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.