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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT MICHAEL FOSTER,

Defendant and Appellant.

H038091

(Santa Clara County

Super. Ct. No. C1109943)

Pursuant to a negotiated disposition, Gilbert Foster (defendant) pleaded no contest to five counts of second degree robbery (Pen. Code, §§ 211, 212.5). Defendant admitted that as to each of the robbery counts he personally used a firearm within the meaning of Penal Code section 12022.53. In exchange for his no contest pleas defendant was promised a prison sentence of between 12 and 20 years.

On January 13, 2012, the court sentenced defendant to 17 years in state prison.<sup>1</sup> Defendant filed a timely notice of appeal and sought and was granted a certificate of probable cause.

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<sup>1</sup> Although the court did not specify how the court arrived at 17 years, the abstract of judgment reflects that the court sentenced defendant to five years on one of the robbery counts (count one) plus 10 years for the gun enhancement and two one-year terms for the prior prison terms; the court imposed concurrent five year terms on the remaining robbery counts.

Defendant's appointed counsel has filed an opening brief in which no issues are raised and asks this court for an independent review of the record as required by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel has declared that defendant was notified that no issues were being raised by counsel on appeal and that an independent review under *Wende* was being requested.

On July 26, 2012, we notified defendant of his right to submit written argument on his own behalf within 30 days. Defendant has submitted a letter brief in which he asserts he should have been charged with only attempted armed robbery because the robbery was never completed; he was sentenced on the gun enhancement, but he did not have a weapon; pursuant to Penal Code section 654 the sentences on counts two through five should have been stayed; and pursuant to "People Vs. Blandal (1993)" he should have been awarded the chance to participate in a line-up and counsel's failure to request a line-up constitutes ineffective assistance of counsel.

Pursuant to *Wende, supra*, 25 Cal.3d 436, we have reviewed the entire record and have concluded there is no arguable issue on appeal that benefits defendant. However, we do find that the court erred in considering defendant's ability to pay a court security fee (Pen. Code, § 1465.8) and a criminal conviction assessment (Gov. Code, § 70373).

Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Id.* at p. 110.) In addition, we have described defendant's contentions. We will explain why we have rejected them. (*Id.* at p. 113.)

#### *Facts*<sup>2</sup>

On June 21, 2011, at approximately 11:10 p.m. one of the owners of Seniore's Pizza in Santa Clara viewed the restaurant's surveillance cameras remotely via his cellular telephone; he saw defendant and codefendant Sean Nevels wearing hooded sweatshirts

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<sup>2</sup> The facts are taken from the probation officer's report.

and surgical masks enter the business through the back door. Upon switching to another surveillance camera, the owner saw either defendant or the codefendant strike an employee, who was near the cash register, with a handgun.

Five Seniore's Pizza employees were closing the restaurant for the night when defendant and the codefendant entered. Either defendant or the codefendant was armed with a revolver and the other carried a semi-automatic handgun. The employees were ordered to the floor and their hands were bound with duct tape, a belt and an electrical cord. The defendants moved the employees around the business at gunpoint. Either defendant or the codefendant struck the restaurant manager in the head with a handgun and ordered him to open the register; the defendant and codefendant grabbed the money taking approximately \$1256.50 in cash from the register. They fled the premises.

Subsequently, defendant and the codefendant were located in a search of the area around the pizzeria. When instructed to stop by the police, defendant complied and was taken into custody.

A second codefendant was found in the pizzeria's parking lot; he was in a vehicle that had the engine running and headlights turned off. The vehicle contained an empty handgun case, ammunition and a portable police scanner.

#### *Proceedings Below*

Defendant was charged by felony complaint with five counts of second degree robbery. (Pen. Code, §§ 211, 212.5.) With respect to each count, it was alleged that defendant personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b); and had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

After defendant waived his right to a preliminary examination, on November 16, 2011, after signing and initialing an "ADVISEMENT OF RIGHTS, WAIVER, AND PLEA FORM" and being advised of his constitutional rights and consequences of his

pleas by the court, defendant entered no contest pleas to all five robbery counts and admitted the personal gun use enhancements.<sup>3</sup>

As noted, thereafter, the court sentenced defendant to 17 years in state prison. The court imposed a \$10,000 restitution fund fine and a parole revocation fine in the same amount was imposed but suspended. However, the court found that defendant did not have the ability to pay a court security fee (Pen. Code, § 1465.8), a criminal conviction assessment (Gov. Code, § 70373) or a criminal justice administration fee (Gov. Code, § 29550 et seq.).

#### *Defendant's Contentions*

As to defendant's contention that he should have been charged with only attempted armed robbery because the robbery was never completed, defendant is mistaken. Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) "The crime of robbery is complete when the robbers without lawful authority and by means of force or fear obtain possession of the personal property of another in the presence of its lawful custodian and reduce it to their manual possession. It is not necessary that, to complete the crime, they carry it out of the physical presence of the lawful possessor or make their escape with it." (*People v. Beal* (1934) 3 Cal.App.2d 251, 253.) Since defendant and the codefendant took the money from the cash register and fled the building, defendant could be charged with robbery and not just attempted robbery.

As to defendant's contention that he was sentenced on the gun enhancement, but he did not have a weapon, defendant admitted that he *personally* used a handgun in the

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<sup>3</sup> In the form, defendant was advised of his constitutional rights, the consequences of his pleas, including immigration consequences and the maximum term of imprisonment for the offenses to which he would be entering his pleas. Defendant waived his constitutional rights.

commission of the robberies. Thus, as part of his no contest plea, defendant admitted the firearm use allegation. Admissions of enhancements are subject to the same principles as guilty pleas. (See *People v. Jackson* (1985) 37 Cal.3d 826, 836, overruled on other grounds as stated in *People v. Burton* (1989) 48 Cal.3d 843, 863.) With respect to a guilty plea, it admits every element of the offense charged and is a conclusive admission of guilt. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895; *People v. Turner* (1985) 171 Cal.App.3d 116, 125 (*Turner*)).) It waives any right to raise questions about the evidence, including its sufficiency. (*Turner, supra*, at p. 126.) Defendant may not now challenge his admission.

As to defendant's contention that pursuant to Penal Code section 654 the sentences on counts two through five should have been stayed, again, defendant is mistaken. The limitations of Penal Code section 654 do not apply to crimes of violence against multiple victims. (*People v. King* (1993) 5 Cal.4th 59, 78.) Here, there were multiple victims and defendant committed a violent crime against each. (Pen. Code, § 667.5 [robbery is a violent felony].)

Finally, as to defendant's contention that pursuant to "People Vs. Blandal (1993)" he should have been awarded the chance to participate in a line-up and counsel's failure to request a line-up constitutes ineffective assistance of counsel, we are at a loss in determining the case defendant is relying on for this proposition.

Certainly, in an appropriate case, due process requires that an accused, on timely request, be afforded a pretrial lineup in which witnesses to the alleged offense may participate. However, the right to a lineup arises only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of mistaken identification that a lineup could tend to resolve. (*People v. Baines* (1981) 30 Cal.3d 143, 147–148; *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) Such is not the case here.

More importantly, to the extent defendant's contention alleges ineffective assistance of counsel this claim cannot be resolved on the present record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Finally, we find that the court erred in finding that defendant did not have the ability to pay a court security fee and a criminal conviction assessment that the probation officer recommended defendant pay. Penal Code section 1465.8, subdivision (a), requires the court to impose a fee on every conviction "[t]o ensure and maintain adequate funding for court security." Similarly, Government Code section 70373, subdivision (a)(1) requires the court to impose an assessment on every felony conviction "[t]o ensure and maintain adequate funding for court facilities." "Neither statute provides for considering a defendant's ability to pay . . . ." (*People v. Shiseop Kim* (2011) 193 Cal.App.4th 836, 842.)

As these are mandatory provisions that must be imposed and, as noted, there is no ability to pay requirement, we may correct the order on appeal in the first instance (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; *People v. Rodriguez* (2000) 80 Cal.App.4th 372, 374); we do not see any purpose in soliciting supplementary briefing regarding this disposition. Should defendant claim to be aggrieved as a result, he may petition for rehearing. (Gov. Code, § 68081.)

#### *Disposition*

The judgment is modified to include a court security fee pursuant to Penal Code section 1465.8 and criminal conviction assessment pursuant to Government Code section 70373 as recommended in the probation officer's report in this case. As so modified the judgment is affirmed. The clerk of the court is directed to amend the abstract of judgment to reflect imposition of this fee and assessment and forward a copy to the Department of Corrections and Rehabilitation.

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ELIA, Acting P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MÁRQUEZ, J.