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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE ROBERT COLLIER,

Defendant and Appellant.

H039927

(Santa Clara County

Super. Ct. No. CC822808)

Defendant Joe Robert Collier appeals from a judgment of conviction entered after a jury found him guilty of first degree burglary (Pen. Code, §§ 459, 460, subd. (a) and found true the allegation that a nonaccomplice was present during the burglary (Pen. Code, § 667.5, subd. (c)(21)). In a bifurcated proceeding, the trial court found true the allegations that defendant had suffered four prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and four prior serious felony convictions (Pen. Code, § 667, subd. (a)). However, the trial court struck one of the prior serious felony conviction findings, because it was not brought and tried separately. The trial court sentenced defendant to 25 years to life plus a consecutive term of 15 years.

On appeal, defendant requests that this court conduct an independent review of the in camera hearings on his *Pitchess*<sup>1</sup> motion. He also contends that unduly suggestive

<sup>1</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

pretrial identification procedures and tainted in-court identification of him violated his constitutional rights to due process and a fair trial. We conclude that the judgment must be reversed for a new hearing on defendant's *Pitchess* motion.

## **I. Statement of Facts**

### **A. Prosecution Case**

On September 5, 2008, Marcello Norris and his wife Brezzie moved into an apartment at 130 Crocker Road in San Jose. Most of their belongings were still packed that night. However, Mr. Norris, who worked as a DJ, had put the needles for his vinyl records, his laptop, an external hard drive with MP3's, and other equipment necessary for converting analog records to digital music in or next to a backpack in the bedroom. There were also turntables with the backpack. The Norrises had cell phones, which were in the chargers on the tables on either side of their bed.

The Norrises went to bed at around 10:00 p.m. Mr. Norris fell asleep while his wife watched a movie on the computer. Mrs. Norris eventually fell asleep as well. During the early hours of the morning, Mrs. Norris was awakened by a rustling sound coming from the side of the bed. She saw a man, who was crouched down near the bed, going through one of their backpacks. According to Mrs. Norris, the intruder was in his 40's or 50's, and had salt-and-pepper colored hair and a tattoo on his right arm. He was wearing a blue tank top and jeans. She could clearly see his nose line, his shoulders, his face, and his hair, because he was a foot or two away from her. The overhead light was not on. However, there was light from the street coming in through the window as well as light from the closet and the computer screen. After Mrs. Norris observed the intruder for about 30 to 40 seconds, she touched her husband and told him that someone was in the house. She and the intruder made eye contact for about 10 seconds and she was able to see his whole face from a distance of three to four feet.

Mr. Norris woke immediately and saw the intruder, who was eight to nine feet away. He observed the intruder for 20 to 25 seconds before the intruder ran from the bedroom. Mr. Norris described the intruder as medium build, early 40's, and six feet two inches to six feet three inches tall. His complexion was "a little lighter" than Mr. Norris's.<sup>2</sup> The intruder had salt-and-pepper colored hair, a goatee, and a tattoo on his right shoulder. He was wearing "saggy" jeans, red underwear, and a white or gray tank top. As Mr. Norris was observing the intruder, there was light from the bedroom window, the bathroom, and the computer screen.

The intruder stood up, grabbed Mrs. Norris's cell phone from the charger, and ran out of the bedroom. He also grabbed the backpack and attempted to put it over his shoulders. Mrs. Norris noticed that the intruder's jeans were sagging, he was wearing red underwear, and he smelled of strong cologne.

Mr. Norris jumped out of bed and chased the intruder. He followed him out the front door and through a courtyard, which was lit by lamp posts. The intruder, who was wearing Mr. Norris's backpack containing his DJ equipment, ran across the lawn and disappeared behind a parking lot. Mr. Norris chased the intruder for one to two minutes. The closest that he got to the intruder during the chase was 26 feet. Mr. Norris then returned to his wife.

Mrs. Norris watched her husband chase the intruder, but did not follow him. She noticed that the front window in the living room was open and the screen had been removed. She also found a sweatshirt and a denim jacket near this window. The jacket smelled the same as the cologne on the intruder. When Mr. Norris returned, his wife told him that their cell phones and his backpack were missing.

Since the Norrises did not have a landline, they drove to a pay phone. Mrs. Norris brought the jacket and sweatshirt with her, because she believed that they belonged to the

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<sup>2</sup> The Norrises and defendant are African-American.

intruder and she did not want him to retrieve them while they were gone. There was a wallet in the pocket of the jacket, but Mrs. Norris did not open it.

When the pay phone at the 7-Eleven store was not functioning, they drove downtown where the bars and restaurants were closing. At approximately 2:50 a.m., the Norrises flagged down Officer Joel Casey. Mrs. Norris told him that a man had broken into their apartment, taken several items, and left a sweatshirt and jacket. Officer Casey searched the jacket and found a wallet containing identification cards, including a driver's license. Since Officer Casey could not leave the scene, he called dispatch to report the burglary. At 2:55 a.m., the officer provided the information on the driver's license, that is, "black male adult, six-two, . . . 250 pounds, black and brown." "[B]lack and brown" referred to the color of his hair and eyes. Two minutes later, based on what the Norrises had told him, he reported that the intruder was last seen wearing a blue tank top, red boxers, and dark jeans, and had a tattoo on his right shoulder. He also provided the driver's license number, but mistakenly omitted one number. After he completed the call, he put the driver's license in the wallet, placed the wallet in the jacket, and gave the jacket to the Norrises.

The Norrises returned to their apartment and the police arrived 10 to 15 minutes later. Officer Rommel Macatangay took the Norrises' statements. Mrs. Norris described the intruder as an African-American male, about six feet tall, heavy set, and in his 40's or 50's. He had salt-and-pepper colored hair and was wearing a blue tank top, red underwear, and dark jeans. She also indicated that she would be able to identify him if she ever saw him again. Mr. Norris gave the officer a description of the intruder as a black male wearing a tank top and dark jeans. He did not hear the description that his wife provided. One of the Norrises told Officer Macatangay that the intruder had a tattoo.

After the Norrises had provided descriptions of the intruder, Mrs. Norris showed the sweatshirt and the jacket to Officer Macatangay. He found a wallet containing

identification cards and a bag of marijuana in the jacket. After Officer Macatangay admonished the Norrises that “this may or may not be the person involved,” he showed defendant’s driver’s license to them. They identified defendant as the intruder. Officer Macatangay notified dispatch that defendant was a suspect in the burglary.

At approximately 3:20 a.m. or 3:30 a.m. on the same day, Deputy Sanford Fisher was driving in the area of Monterey Road and Blossom Hill Road. He observed defendant driving a green Saturn and turning abruptly into the bike lane. Deputy Fisher initiated a traffic stop and asked defendant for his identification. Defendant was unable to provide any identification, but he told the officer his name, birth date, and address. After Deputy Fisher administered a sobriety test, he arrested defendant for driving under the influence of alcohol or drugs.

Deputy Fisher pat searched defendant, who was wearing a blue tank top and jeans, and found a bottle of cologne and a cell phone on him. Deputy Fisher searched defendant’s car and found two cell phones, a laptop, a backpack, and some electronic equipment. There was also a second backpack in the trunk. Defendant told him that the cell phones and the car belonged to his girlfriend. Since defendant was being cooperative, Deputy Fisher agreed not to tow the car so that defendant’s girlfriend could retrieve it. At that time, Deputy Fisher was not aware that defendant was considered a suspect in the burglary of the Norrises’ apartment. Defendant was taken to jail where he submitted to a blood test. The results indicated that defendant’s blood contained THC, a metabolite of marijuana.

When he began his shift that evening at 9:00 p.m., Officer Macatangay told Sergeant Christina Lacap that defendant had been arrested for driving under the influence less than a mile from the Norrises’ apartment. However, defendant had already been released from jail by this time. A few days later, Sergeant Lacap spoke to Deputy Fisher about the traffic stop. He told her that there were two cell phones, a laptop, a backpack, and some electronic equipment in the backseat of the car.

Defendant was admitted to Life Choices treatment facility on July 31, 2008. While living at the facility, defendant received clothing that was either donated or given to him by friends. According to the director, defendant “always” wore tank tops and “smelled clean.” On August 19, 2008, nine residents of Life Choices were scheduled to be transported to the Department of Motor Vehicles. Defendant applied for a duplicate California identification card on that day. On September 5, 2008, defendant left the treatment facility and did not return. While defendant was at Life Choices, he never reported that his wallet had been lost or stolen.

## **B. Defense Case**

### **1. Third Party Culpability Evidence**

In September 2008, R.M. was 16 years old and a Norteno gang member, who lived with his family near the Norrises’ apartment. At that time, he was on home detention and wearing an electronic monitor. If he had left the Thornbridge Apartments, he would have violated the terms of his probation. On the evening before the burglary, he was sitting on the stairs outside his apartment and talking with a friend. He was wearing a new black sweatshirt, but removed it and placed it on the railing. His keys to the apartment were in the sweatshirt. At about 10:00 p.m., he returned to his apartment and left the sweatshirt on the railing. The following morning, he looked for the sweatshirt in his apartment, but it he could not find it. After talking with his mother, he remembered that he had left the sweatshirt on the railing. However, when he went outside, the sweatshirt was gone. R.M. identified the sweatshirt found outside the Norrises’ apartment as his.<sup>3</sup>

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<sup>3</sup> Mr. Norris testified that he did not know R.M. and had never met any of his neighbors. He stated that there was “no chance” that he could have confused a 16-year-old Hispanic male with a 50-year-old African-American male. When Mrs. Norris was shown a photograph of R.M., she stated that she had never seen him before.

Shortly after the Norrises' apartment was burglarized, someone entered R.M.'s apartment and stole a bag of his clothing, a pair of shoes, and his sister's computer speakers. Since there were no signs of forced entry, both R.M. and his mother believed that the intruder used her son's key to enter through the front door.

## **2. Expert Testimony**

Dr. Geoffrey Loftus, a psychology professor at the University of Washington, testified as an expert on memory. He explained that as an individual experiences an event, he or she gets "a series of disconnected, disorganized, incoherent fragments of information from the event . . . ." He noted that individuals, who experience a significant event, think about it repeatedly and "their memory for it will change in some way or another." Individuals may add information to their memory. This post-event information can take several forms. Individuals may make inferences about what probably occurred during the event, and then store these inferences in their memory as if they were circumstances that they actually experienced when they were not. Individuals may also have conversations about the event with others, and this information from external sources can change their memories of the event. Thus, as time passes, memories become more detailed, more organized, more in keeping with an individual's expectations, beliefs, and motivations. However, as an individual becomes more confident of his or her memory, it does not necessarily become more accurate.

Dr. Loftus also testified that memory tends to be inaccurate under certain circumstances. First, certain factors may cause an individual's original memory of what happened to be incomplete. These factors include: poor lighting, insufficient time to process the event, distance from the event, duress or stress, or competing events drawing the individual's attention. Second, the interval between when the event ends and when the witness is required to remember the event affects the accuracy of an individual's memory. Third, the manner in which an individual is questioned about the memory can cause a bias or inaccuracy.

Amanda Cardenas testified as expert witness in the area of DNA analysis. She tested the DNA taken from the sweatshirt and the jacket found outside the Norrises' apartment. There was a mixture of DNA on the sweatshirt from at least three people. R.M. was the major contributor and defendant was excluded as a contributor. There were at least four possible contributors to the DNA on the jacket, including at least one male. The results were insufficient to identify anyone.

Kimberly Smith testified as an expert in the area of fingerprint analysis. She analyzed the fingerprints taken from the interior and exterior of the open window in the Norrises' apartment. There was one latent lift card from the interior of the window and two from the exterior. The only usable prints were the latent prints from the interior of the window. Smith compared these prints to the prints of defendant and the Norrises. Defendant's prints did not match and Mrs. Norris could not be excluded as a possible contributor of the prints. Smith did not compare R.M.'s prints to those from the interior of the window.

Young Kang, a radiologist at Santa Clara Valley Medical Center, testified that he conducted a foot X-ray of defendant on August 11, 2008. Defendant had a broken bone in his second toe, which already showed signs of healing. This type of fracture would have taken two to three weeks to a couple of months to heal and would have caused defendant pain when he ran over an extended period of time.

## **II. Discussion**

### **A. *Pitchess* Motion**

Defendant requests that this court conduct an independent review of the in camera hearing on the *Pitchess* motion. The Attorney General does not oppose this request.

Prior to trial, defendant filed a *Pitchess* motion which sought discovery of information from the personnel files of Officer Macatangay, Sergeant Lacap, and Deputy Fisher. Defendant sought discovery of "[a]ny reports, documents, or other evidence of

complaints of: unduly suggestive identification procedures, impermissible suggestions of suspects and/or theories to witnesses, conspiracy to commit perjury, perjury, false statements to officers of the court, failure to follow policies and procedures of respective police agencies, intentional omissions of exculpatory or pertinent facts from police reports, false statements in reports, false claims of probable cause, false claims of disability, false time cards, any conduct arguably evidencing moral turpitude, or any other evidence of or complaints of dishonesty” in the personnel records of the named law enforcement officers. The county and the city filed opposition to the request. The trial court determined that defendant’s *Pitchess* motion showed good cause for discovery of relevant evidence contained in personnel files, conducted in camera hearings, and denied the motion.

A criminal defendant has a limited right to discovery of law enforcement officer personnel records. (*Pitchess, supra*, 11 Cal.3d at pp. 537-538; Evid. Code, §§ 1043-1045.) “To initiate discovery, the defendant must file a motion supported by affidavits showing ‘good cause for the discovery,’ first by demonstrating the materiality of the information to the pending litigation, and second by ‘stating upon reasonable belief’ that the police agency has the records or information at issue. [Citation.] This two-part showing of good cause is a ‘relatively low threshold for discovery.’ [Citation.] [¶] If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance. [Citations.]” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.)

*People v. Mooc* (2001) 26 Cal.4th 1216 set forth the manner in which the in camera hearing is held: “When a trial court concludes a defendant’s *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer’s personnel files, the custodian of the records is obligated to bring to the trial court all ‘potentially relevant’ documents to permit the trial court to examine them for itself.

[Citation.] . . . Documents clearly irrelevant to a defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise of Evidence Code sections 1043 and 1045 that the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records. The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*Id.* at pp. 1228-1229.)

Here, two in camera hearings were held. Prior to taking an oath, the custodian of records for the San Jose Police Department stated that he had reviewed the Internal Affairs records and the personnel files of the officers. The custodian then testified that there was no relevant information in the files for either Sergeant Lacap or Officer Macatangay. However, the trial court did not question the custodian about what records were present in the files or what records had been reviewed in order to reach the conclusion that no documents were responsive. The trial court did not independently review the files, deferred to the custodian's judgment, and determined that defendant was not entitled to any discovery. In the other hearing, the custodian of records for Santa Clara County Sheriff's Department did not take an oath. He stated that he had reviewed the Internal Affairs records for Deputy Fisher. Counsel then indicated that two complaints had been filed against the deputy. The trial court reviewed the complaints, summarized their contents, and concluded that defendant was not entitled to discovery. However, the trial court did not question the custodian about what documents were included in the custodian's review. With the exception of the two complaints, the trial court did not independently review the files and deferred to the custodian's judgment before making its ruling.

The present case is similar to *People v. Guevara* (2007) 148 Cal.App.4th 62 (*Guevara*). In *Guevara*, the custodian of records testified that none of the officers' personnel files contained information that was potentially responsive to the *Pitchess* motion. (*Id.* at p. 68.) Thus, the trial court did not review any documents from the personnel files. (*Ibid.*) However, the city attorney stated that there was a sealed document listing what the custodian of records "did and examined and the case to show there was nothing relevant.'" (*Ibid.*) The trial court did not review this document and it was not included in the record on appeal. (*Ibid.*) *Guevara* concluded: "[I]n cases such as this where the custodian of records does not produce the entire personnel file for the court's review, he or she must establish on the record what documents or category of documents were included in the complete personnel file. In addition, if it is not readily apparent from the nature of the documents that they are nonresponsive or irrelevant to the discovery request, the custodian must explain his or her decision to withhold them. Absent this information, the court cannot adequately assess the completeness of the custodian's review of the personnel files, nor can it establish the legitimacy of the custodian's decision to withhold documents contained therein. Such a procedure is necessary to satisfy the Supreme Court's pronouncement that 'the locus of decisionmaking' at a *Pitchess* hearing 'is to be the trial court, not the prosecution or the custodian of records.' [Citation.] It is for the court to make not only the final evaluation but also a record that can be reviewed on appeal." (*Id.* at p. 69.) Thus, the cause was remanded for a new *Pitchess* hearing. (*Ibid.*)

As in *Guevara*, the procedure used in this case did not meet the requirements of *Mooc*. The custodians did not establish what documents or category of documents were included in their review of the files for the law enforcement officers. Though two complaints against Deputy Fisher were reviewed by the trial court, the custodians also did not explain their decisions not to produce any other documents. Thus, the cause must be remanded.

## **B. Pretrial Identification Procedures**

Defendant contends that the trial court erred when it denied his motion to exclude the Norrises' identification of defendant as the burglar. He contends that the pretrial identification procedures were unduly suggestive and tainted any in-court identification of defendant.

### **1. Background**

The preliminary hearing was held on June 10, 2009. The trial court granted defendant's request for a "blackboard" hearing, and thus defendant was not in the courtroom when the Norrises described the intruder. Mrs. Norris testified that she viewed the intruder from a distance of approximately two feet for 30 to 45 seconds and the closet light was on. The intruder was an African-American male in his 40's or 50's with a medium skin tone, about six feet tall, medium build, and around 170 pounds. The intruder had a tattoo on his right shoulder,<sup>4</sup> black or dark brown eyes, salt-and-pepper colored hair, sideburns, and a goatee. His hair was "like a beanie afro" and had not been recently cut. He was wearing a red or blue tank top, stone-washed jeans, and red boxers. Mr. Norris testified that the intruder was an African-American male in his early 40's with a medium skin tone, salt-and-pepper colored hair, beard and a goatee. He had a tattoo on his right upper arm. His hair was curly and looked as if he had not combed it. The intruder was wearing a tank top and red underwear. He was about six feet tall and had a medium or average build. Mr. Norris was approximately eight feet from the intruder and he saw the intruder 20 to 25 seconds before the intruder left the bedroom. According to Mr. Norris, there was lighting from the computer. Mr. Norris also testified that his description of defendant was based on his independent recollection and not on anything

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<sup>4</sup> Defendant's tattoo, which counsel described for the record, extends from the top of his shoulder to the upper part of his wrist. It is dark green, included both writing and pictures, and "some of the tattoos are not all the way filled in."

someone else had told him. After defendant entered the courtroom, both Mr. and Mrs. Norris identified defendant as the intruder.

Mrs. Norris also testified that she met the officers at her home and gave them a description of the intruder before she gave them a jacket containing a wallet that had been left outside her window. She suspected that the clothing belonged to the intruder. One of the officers removed a parole identification card and a driver's license from the wallet and showed them to Mrs. Norris, who recognized the man in the photographs as the intruder. The officer asked, "Is this the person that came into the house?" No attempt was made to cover up any of the words on the cards, and Mrs. Norris knew that one of the cards was a parole card. When Mrs. Norris was shown the driver's license, she read defendant's name, but did not have an opportunity to see any other identifying information. One of the officers indicated to another officer that she knew him and had seen him riding a bike. After Mr. Norris gave his description of the burglar, he was shown defendant's driver's license and then his parole card. However, he did not recognize the man in the photos.

At the end of the hearing, defendant moved to exclude the out-of-court identifications, because the police had used a suggestive procedure. Defendant argued that the police did not admonish the witnesses. They also showed the victims one person photos, and told them that the person in the photos was on parole. The trial court denied the motion.

On August 18, 2009, defendant filed a motion to exclude suggestive pretrial and in-court identifications. A few weeks later, the trial court held a hearing on the motion. Officer Macatangay testified regarding his investigation of the burglary. After he arrived at the apartment, he spoke to the Norrises and learned what had happened. He then separated them and spoke to Mrs. Norris. She described the intruder as a black male adult, approximately six feet tall, heavy set, and wearing a tank top. She stated that she could identify the intruder if she saw him again. Mr. Norris described the intruder as a

black male adult, who was wearing a tank top and dark pants. Officer Macatangay could not recall if he asked the Norrises to describe the intruder's weight, hair color or style, age, eye color, facial hair, or complexion tone. It would have been his habit and custom to ask about any identifying marks, such as scars or tattoos.

After Officer Macatangay obtained descriptions, someone pointed out a jacket and a sweatshirt that had been left behind by the intruder. He looked through the jacket and found a wallet containing defendant's parole card, driver's license, and social security card. Officer Macatangay showed the Norrises the parole card and the driver's license and they identified the man in the photos as the intruder. He could not recall what he said to the Norrises prior to showing them the identification cards. Defendant's driver's license described him as six feet two inches tall, 250 pounds with black hair and brown eyes. The photograph on the license was that of a black male adult.

The parties agreed to permit the trial court to consider the preliminary hearing transcript in addition to the testimony before it. The parties also stipulated that the Norrises flagged down Officer Casey in downtown San Jose at approximately 2:50 a.m. About five minutes later, Officer Casey called dispatch and described the intruder as a black male adult, six feet two inches tall, 250 pounds, with black hair and brown eyes. At 2:57 a.m., he notified dispatch that the suspect was last seen wearing a blue tank top and dark jeans, and had a tattoo on his upper right shoulder.

The trial court found that the Norrises' initial descriptions of the intruder matched defendant and were made when those observations were still fresh in their minds. The trial court also found their preliminary hearing testimony compelling and denied the motion.

On October 1, 2009, defense counsel declared a conflict of interest and withdrew from representing defendant. On the same day, the trial court found that none of its rulings were binding.

On May 7, June 23, and August 19, 2010, defendant, who was now representing himself, renewed his motion to suppress the pretrial and in-court identifications.

On July 2, 2010, the motion to suppress was denied. However, after the prosecutor asked the court's bailiff about retention of GPS data by the sheriff's department, the matter was sent back to the master trial calendar to have another judge assigned for trial.

On January 19, 2011, the trial court held a hearing on in-limine motions. Officer Casey testified regarding his interactions with the Norrises on September 6, 2008. He was working in downtown San Jose when they approached him and told him that someone had burglarized their apartment. The officer called dispatch at 2:51 a.m. to report the burglary. They handed the officer a jacket that had been left by the intruder. The jacket contained a wallet. Officer Casey found a driver's license inside the wallet and relayed the information on the driver's license to dispatch at 2:53 a.m. The description was a black male adult, six feet two inches tall, 250 pounds, black hair, and brown eyes. At 2:57 a.m., Officer Casey informed dispatch that the suspect was last seen wearing a blue tank top, dark jeans, and that he had a tattoo on his upper right shoulder. The officer did not recall if the Norrises described the intruder's race, height, or weight. When the officer read the information from the driver's license to dispatch, the Norrises were close enough to have heard him.

Following argument, the trial court denied the motion after concluding that the Norrises' identifications were not tainted by a suggestive pretrial procedure based on the totality of the circumstances. The trial court found that Officer Macatangay's action of showing the identification cards to the Norrises was analogous to a field showup shortly after the crime was committed. The trial court also stated that it was relying on Mrs. Norris's testimony that when she observed the intruder, he was illuminated by three different sources of light. Thus, Mrs. Norris provided an independent identification free from any taint arguably caused by the field showup.

## 2. Analysis

A pretrial identification procedure that is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification” violates a defendant’s right to due process of law. (*Simmons v. United States* (1968) 390 U.S. 377, 384.) As our high court has stated, “[t]he ‘single person showup’ is not inherently unfair.” [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) “‘In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.’ [Citation.] It is defendant’s burden to demonstrate the existence of an unreliable identification procedure. [Citation.] ‘We review deferentially the trial court’s findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court’s ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive.’ [Citation.]” (*People v. Lucas* (2014) 60 Cal.4th 153, 235.)

We first note that the Norrises described the intruder twice before being shown the identification card photos. They described the intruder to Officer Casey as wearing a tank top, red boxers, and with a tattoo on his right shoulder. Mrs. Norris described the intruder to Officer Macatangay as a black male adult, approximately six feet tall, heavy set, and wearing a tank top while Mr. Norris described him as a black male adult, who was wearing a tank top and dark pants. The descriptions provided by the Norrises were not overly general and matched the description of defendant.

Defendant first argues that the showup was unduly suggestive, because both the Norrises and Officer Casey assumed that the jacket belonged to the intruder. Given that the jacket was found by the open window, it was a reasonable assumption to make. In any event, that the mere presence of the identification cards at the scene was incriminating does not render the subsequent showup unduly suggestive.

Defendant also contends that when Officer Macatangay showed the Norrises the identification cards, he failed to cover the identity information on the card and to conceal the fact that one of the cards was a parole card. Mrs. Norris testified, however, that she saw defendant's name on his driver's license, but did not see the descriptive information. Though defendant's status as a parolee would not have affected the accuracy of their description of the intruder, it did tend to suggest that he was the perpetrator.

Defendant next claims that the Norrises' description of the intruder at the preliminary hearing was based on the identification cards rather than their independent recollection. The record does not support this claim. The identification cards indicated that defendant was a black male adult, six feet two inches tall, 250 pounds, with black hair and brown eyes. However, the Norrises' description did not match all the information on the identification cards and included other information. They described the intruder as having salt-and-pepper colored hair, weighing 170 pounds, wearing a blue tank top and jeans, and having a tattoo on his right shoulder.

However, even assuming that the showup was unduly suggestive, the identifications had sufficient indicia of reliability. First, the Norrises had a very good opportunity to view the intruder. Mrs. Norris viewed the intruder by the side of her bed from a distance of approximately two feet for 30 to 45 seconds. Mr. Norris viewed the intruder from a distance of approximately eight feet for 20 to 25 seconds. Though there was no overhead lighting, there was light from the closet and the computer screen. Moreover, there was nothing distracting the Norrises while they focused their attention on the intruder in their bedroom. Though Mrs. Norris underestimated his weight, their

descriptions were accurate, including that the intruder's hair was turning gray. Mrs. Norris testified that she could identify the intruder if she saw him again. Mr. Norris testified that his description of defendant was based on his independent recollection and not on anything someone else had told him. In addition, their descriptions were provided to the police within an hour or two after the burglary. Thus, the identification evidence was reliable under the totality of the circumstances and did not violate defendant's right to due process.

### **III. Disposition**

The judgment is reversed. The cause is remanded to the trial court with directions to hold a new hearing on defendant's *Pitchess* motion in conformance with the procedures described in this opinion. If the trial court finds that there are discoverable records, they shall be produced and the court shall conduct such further proceedings as are necessary and appropriate. If the court finds that there are no discoverable records, or that there is discoverable information but defendant cannot establish that he was prejudiced by the denial of discovery, the judgment shall be reinstated as of that date.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.