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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMAHL TRAVOUGH DUNN, Defendant and Appellant.	B181660 (Los Angeles County Super. Ct. No. NA061859)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean, Jr., Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Peggie Bradford Tarwater, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

Appellant was charged with 11 counts of robbery, arising from the armed robbery by two men of the Long Beach 99 Cents Only Store on June 21, 2004. During the robbery, 10 of the store's employees were made to lie or kneel on the floor of the attached warehouse, where one of the two robbers kept them at gunpoint. The other, also armed, took the assistant manager to open the safe in the office, from which he took approximately $3,000 before returning the assistant manager to the other employees. Appellant was convicted on all 11 counts, and the jury found true the special allegation made in each count that he personally used a handgun in the commission of the crime, within the meaning of Penal Code section 12022.53, subdivision (b). On March 8, 2005, appellant was sentenced to 26 years in prison, and he timely filed a notice of appeal the same day.

DISCUSSION

1. *Appellant's Contentions*

Appellant makes four assignments of error. He contends that the trial court erred in denying his motion for a pretrial lineup; that there was insufficient evidence of constructive possession of the store's money by each of the 10 employees to support separate robbery convictions; that the trial court erred in failing to define actual and constructive possession of property stolen in the course of a robbery; and that the trial court erred in allowing the prosecution to impeach him with his prior conviction of felon in possession of a firearm.

2. *Denial of Motion for Lineup*

Appellant contends that the trial court erred in denying his motion for a pretrial lineup. The trial court found that appellant's motion had failed to reach the "threshold set by the *Evans* case and its progeny," referring to the due process

requirement that "in an appropriate case . . . an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate." (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625 (*Evans*).) The "threshold" set forth in *Evans* required appellant to show that (1) the request was timely; (2) eyewitness identification was a material issue; (3) there was a reasonable likelihood of a mistaken identification; and (4) a lineup would tend to resolve any issue of mistaken identification. (*People v. Farnam* (2002) 28 Cal.4th 107, 184.) "The questions whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries which necessarily rest for determination within the broad discretion of the magistrate or trial judge. [Citations.]" (*Evans*, at p. 625.)

Eyewitness identification was a material issue. The employees in the store at the time were Olivia Garcia (the assistant manager), Carlos Rivera, Benita Gonzalez, Tomasa Ruan, Maria Martinez, Ana Herrera, Irma Devenegas, Jose Salvatierra, Walter Lopez, Freddie Gerado, and Julio Sanchez. The robbery took place between approximately 5:15 a.m. and 6:00 a.m., and later that morning, Garcia, Salvatierra, Rivera, Herrera, and Devenegas were taken separately to a field showup where all identified appellant as one of the robbers.[1]

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[1] Devenegas was unable to identify appellant in court, and she denied having identified appellant in the field, claiming that one of the men in custody resembled one of the robbers and was similarly dressed, but she was too nervous to recognize anyone. Long Beach Police Officer Jennifer Roque testified, however, that she questioned Devenegas and transported her to the field showup, where she looked at appellant and said in Spanish, "Yes, it's him." It was appellant's burden to challenge the field identifications as unduly suggestive. (See *People v. Cooks* (1983) 141 Cal.App.3d 224, 305-306.) Because he did not do so and does not claim unfairness on appeal, we assume that the field identifications were fair.

"The broad discretion vested in a trial judge or magistrate includes the right and responsibility on fairness considerations to deny a motion for a lineup when that motion is not made timely. Such motion should normally be made as soon after arrest or arraignment as practicable." (*Evans*, *supra*, 11 Cal.3d at p. 626.) Appellant did not file his motion until October 13, 2004, nearly four months after his arrest and field identification, more than one month after the preliminary hearing, and three weeks after his arraignment. "The value of a pretrial lineup is substantially diminished once a preliminary examination has been conducted and a direct confrontation between a defendant and his accusers has occurred." (*People v. Baines* (1981) 30 Cal.3d 143, 148.) Because appellant was represented by the same counsel at preliminary hearing and trial, he was required to justify his failure to make the motion prior to arraignment. (See *id*. at p. 149.)

In support of the motion, counsel submitted his declaration in which he suggested that it was not filed prior to the preliminary hearing because Garcia, the only witness who appeared at the hearing, testified that "she had trouble making an identification of the defendant without the hood over his head [and] once the hood was put on over his head she then made her identification of him."[2] Counsel admitted in the declaration, however, that he had reviewed the police reports, and he discerned from them that the other witnesses had identified appellant because he was dressed in clothing similar to what one of the robbers wore (black hooded sweatshirt, Converse "All Stars" shoes). Counsel's argument at the hearing on the motion -- that many people dressed in a similar fashion in that neighborhood -- suggests that he could have made the motion sooner. He told the court that he advised appellant against it, however, explaining that it would not make sense,

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[2] Garcia testified, "At first I couldn't recognize him that well. But then later on, yes, it was him." Defense counsel then asked, "With the hood on?" Garcia replied, "Yes."

because five people had already identified him. Counsel changed his mind when he heard Garcia's testimony at the preliminary hearing, because it corroborated his belief that the witnesses had identified appellant "on the clothes."

"When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.] . . . In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) The trial court's "discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) It is the appellant's burden to demonstrate that the trial court's decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.)

Appellant has not shown that the trial court's denial of the motion was irrational, arbitrary, capricious, or not guided by appropriate legal principles. Counsel's explanation justified neither a delay of more than a month after the preliminary hearing, nor a failure to bring the motion prior to arraignment. Moreover, appellant has not shown that he was justified in waiting until after the preliminary hearing. Indeed, he has established his untimeliness by admitting that the motion was based upon counsel's impression of information in the police reports, which was simply corroborated by Garcia's testimony, causing him to reconsider his decision not to bring the motion.

Appellant's showing that there existed a reasonable likelihood of a mistaken identification consisted of counsel's assertion that the witnesses identified appellant because of his clothes, not his physical appearance, and upon his argument that a guilty man would not have gone back to the scene of the crime dressed in the same clothes. However, appellant's premise -- that the witnesses identified the clothing, not the physical features -- falls short of showing a reasonable likelihood of a mistaken identification. Although the burden to produce evidence to support his motion was upon appellant (see *People v. Yonko* (1987) 196 Cal.App.3d 1005, 1009), he did not place the police reports in evidence, and trial testimony shows that he exaggerated the witnesses' reliance upon similar clothing. Garcia testified that she had no doubt about appellant's identity, "[b]ecause those faces were stamped in my head." She explained that at the field showup, she recognized appellant before she asked the police to put his hood up, but was not sure enough to say so to the police until after they had done so. Rivera identified appellant at the field showup as one of the robbers, explaining that he had no doubt, not only because of his black sweater, but also because he recognized appellant's goatee. Herrera was taken to a field showup by Long Beach Police Officer Robert Trout, and she recognized appellant as the robber with the goatee who had threatened to shoot her in the back room unless she stopped looking at him. Trout quoted her as having said, "I know by his eyes and cheeks. He is also wearing the same shoes." Devenegas, who claimed she was not able to identify appellant in the field, did give Roque a physical description close to appellant's, confidently describing him as a Black male, approximately 6'2" to 6'4", thin build, wearing a black hooded sweatshirt with a zipper in front, dark pants, perhaps shorts, and black canvas shoes with white soles. Appellant is 6'0" or 6'1" tall, weighed 180 pounds when arrested, and was wearing a black hooded sweatshirt and black canvas shoes with white soles.

Appellant contends that an important factor indicating the possibility of misidentification was the difference in testimony regarding the color of his gloves. One witness thought appellant was wearing black gloves during the robbery; two witnesses testified that they were gray. Whatever the significance of the gloves' color, the information was available to appellant prior to the preliminary hearing. Counsel admitted that the foundation for his arguments was found in the police reports prior to the preliminary hearing, and the discrepancy in glove color was noted in those reports. Officer Roque saw appellant wearing gray gloves just before he ran from her, and Officer Riordan recovered gray gloves as he chased appellant. Appellant told Detective Steve Prell the day of the robbery that he threw down brown gloves when he ran.[3] Thus, because appellant's attempt to show there was a reasonable likelihood of a mistaken identification establishes that he had sufficient information to bring the motion prior to the preliminary hearing and the arraignment, his motion was untimely. We conclude that the trial court did not abuse its discretion in denying appellant's motion for a lineup.[4] (*Evans*, *supra*, 11 Cal.3d at p. 626; *People v. Baines*, *supra*, 30 Cal.3d at pp. 148-149.)

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[3] Appellant claims that no witness was asked to identify the gloves in evidence, but appellant testified and identified them as his.

[4] As the trial court did not err, there is no need to consider appellant's claim that error caused a miscarriage of justice. We would reject it in any event. Appellant contends that prejudice is established by the likelihood of mistaken identification shown by the witnesses' inability to pick his booking photo from a photo spread shown to them by a defense investigator one week prior to trial. A fairly conducted field identification soon after the crime was committed is generally considered more accurate than an identification made months later. (*In re Richard W.* (1979) 91 Cal.App.3d 960, 970.) Further, we observe that appellant does not suggest that his booking photo is a better likeness than his live person. Garcia, Salvatierra, and Rivera all identified appellant in court as the robber who stayed with the other employees when the other robber took Garcia to the safe; all testified that they had no doubt. Herrera identified appellant in court as looking

3. *Multiple Robbery Victims*

Appellant was convicted of 11 counts of robbery, count 1 naming Garcia as the victim and each of the remaining 10 counts naming one of the other employees forced at gunpoint to remain in the warehouse while Garcia was taken to the safe. Appellant contends that there was insufficient evidence to support his convictions on all but count 1, because there was no evidence that any employee other than Garcia had actual or constructive possession of the stolen money.

"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.) "To constitute robbery the property must be removed from the possession and immediate presence of the victim against his will . . . ." (*People v. Ramos* (1982) 30 Cal.3d 553, 589.) Possession may be actual or constructive. (*People v. Nguyen* (2000) 24 Cal.4th 756, 761 (*Nguyen*).) "'"Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property." [Citation.]'" (*Id*. at p. 761.) Robbery convictions have been upheld upon a finding of constructive possession of an employer's property by security guards, janitors, a store truck driver, and others who do not have the responsibility of handling the property which was stolen. (*Ibid*.)

Here, the 11 employees in the store at the time of the robbery were Garcia, the assistant manager; stocking clerks Rivera, Herrera, and Devenegas; delivery truck driver Salvatierra and his assistant, Lopez; and five other employees --

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very much like the man who stayed in the storeroom with the employees, but later in her testimony, she identified appellant as the man who threatened to shoot her. We therefore reject appellant's contention that a reasonable likelihood of mistaken identification is shown by the witnesses' failure to recognize appellant's booking photo more than six months after the crime.

Gonzalez, Ruan, Martinez, Gerado, and Sanchez -- whose job titles were not in evidence, but who shared the responsibility to prepare the store prior to opening. Each was named as a victim in a separate count, resulting in 11 separate robbery convictions.

Appellant asks that we apply *People v. Frazer* (2003) 106 Cal.App.4th 1105 (*Frazer*), which enunciated a "standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property . . . ." (*Id*. at p. 1115.) The *Frazer* standard requires a fact-based inquiry to determine "whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property." (*Ibid*.) Applying that standard, the court upheld the multiple convictions after concluding that "to the extent nonmanagerial employees could access the cash registers and/or product inventory in order to service the customers, they could reasonably be deemed in constructive possession of the money in the safe via their access to the manager. That is, the entire retail team could reasonably be viewed as having implied authority over whatever property was necessary to handle the sales, including the money in the safe through the manager." (*Id*. at p. 1119.)

Appellant urges that we reject, as the *Frazer* court did (see *Frazer, supra,* 106 Cal.App.4th at pp. 1114-1115), the broader standard of *People v. Jones* (2000) 82 Cal.App.4th 485, under which "business employees -- whatever their function -- have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*Id*. at p. 491.) The court in *People v. Jones* relied in part upon an earlier *Jones* -- *People v. Jones* (1996) 42 Cal.App.4th 1047. (See *People v. Jones, supra,* 82 Cal.App.4th at p. 491.) Although the two are unrelated, the earlier case has been called *Jones I*, and the

later case, *Jones II*. (See, e.g., *Frazer*, at p. 1114.) We shall do the same.[5] In *Jones I*, the appellant asserted that he could not be convicted of robbing a truck driver who was a store employee present in the cash register area of the store where the robbery occurred. (See *Jones I*, at p. 1052.) During the robbery, the truck driver "was ordered to the ground by the robbers and kicked and forced into the break room with the customers and other store employees. He was not a witness at the trial and there was no testimony the robbers removed any of his personal property from his possession during the robbery." (*Id.* at p. 1053.) After reviewing authorities on constructive possession, the court concluded that "employees such as the store truck driver here . . . have sufficient representative capacity with respect to the owner of the property to be the victim of robbery." (*Id*. at p. 1054.)

The *Jones I* and the *Jones II* courts rejected what appears to be a contrary holding in *People v. Guerin* (1972) 22 Cal.App.3d 775 (*Guerin*). (See *Jones II*, *supra*, 82 Cal.App.4th at p. 491; *Jones I*, *supra*, 42 Cal.App.4th at p. 1055.) The *Guerin* court held that in order to sustain multiple convictions, there must be multiple takings and, as an additional reason to reverse a separate robbery count naming a box boy as the victim, the court found "nothing, other than that he was a co-employee of the other three, to suggest that he had any dominion or control whatsoever over any money." (*Guerin*, at p. 782.) A decade later, the Supreme Court overruled *Guerin*'s holding that in order to sustain multiple convictions, there must be multiple takings, but the court made no mention of its box boy observation. (*People v. Ramos*, *supra*, 30 Cal.3d at p. 589.) The *Jones I* court concluded that "*Guerin* is wrong and even a market box boy has sufficient

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[5] The conflict between *Frazer* and *Jones II* is now before the California Supreme Court in *People v. Scott* (July 16, 2005, C044964) (nonpublished opinion), review granted November 16, 2005, S136498.

representative capacity vis-a-vis the owner so as to be in 'possession' of the property stolen from the store owner." (*Jones I, supra*, 42 Cal.App.4th at p. 1055.)[6] The *Jones II* court characterized *Guerin* as "an anomaly in light of evolving case authority broadening the permissible range of robbery victims." (*Jones II, supra,* at p. 491.) *Frazer* is the only published case to follow *Guerin's* definition of constructive possession as excluding employees who are not shown to have had authority to control the property stolen from the employer. (See *Frazer, supra*, 106 Cal.App.4th at p. 1113.)

As the Supreme Court has not squarely addressed the issue, we must await its opinion in *People v. Scott*, for a resolution; however, we are not without some indication of the court's leaning. In *Nguyen*, while rejecting a separate robbery conviction as to a mere visitor who had been held at gunpoint with the store's employees, the court observed that "the theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims." (*Nguyen*, *supra*, 24 Cal.4th at p. 762.) Neither the appellant nor the court questioned the validity of the remaining robbery convictions naming employee victims, notwithstanding that only three employees testified that their money and property had been taken, a fourth was not asked, and the remaining five did not testify. The court pointed out that it had previously held that "'"a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property."'" (*Id*. at p. 761, quoting *People v. Miller* (1977) 18 Cal.3d 873, 880.) In addition to citing *Jones I*, the court listed numerous other authorities illustrating its observation, including *People v.*

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[6] The dissent in *Jones I* cited *Guerin*, not in support of a "dominion and control" rule of constructive possession, but to urge a requirement that the circumstances show the employee had implied authority over the property. (See *Jones I, supra*, 42 Cal.App.4th at p. 1057 (dis. opn. of Johnson, J.).)

Masters (1982) 134 Cal.App.3d 509, 519-520 (waitress was also a robbery victim, although the cook was closer to the cash register); *People v. Arline* (1970) 13 Cal.App.3d 200, 202, disapproved on another ground in *People v. Hall* (1986) 41 Cal.3d 826, 834 (gas station attendant was a victim of robbery although another employee had the key to the cash box); *People v. Downs* (1952) 114 Cal.App.2d 758, 765 (two night janitors were victims of robbery of money in employer's safe). (*Nguyen*, at pp. 761-762.)[7]

The *Frazer* court rejected as dicta the Supreme Court's discussion in *Nguyen* of the history of constructive possession. (*Frazer*, *supra*, 106 Cal.App.4th at p. 1114.) We discern from its exhaustive analysis in *Nguyen*, however, that the court has embraced the more expansive concept of constructive possession as including mere employment by the owner of the stolen property. When the Supreme Court has conducted an elaborate review of authorities indicating a long acquiescence in the legal principal discussed, we feel bound to follow its dictum. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 947, p. 989.) This is particularly so where, as in *Nguyen*, the entire court has unanimously concurred in the opinion. (*People v. Nelson* (2006) 142 Cal.App.4th 696, 706.)

Recently, another appellate court has followed *Jones II*'s conclusion that "'[b]usiness employees -- whatever their function -- have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner,'" by upholding robbery convictions where the victims were two janitors, although other employees, including an assistant manager, were still working in the store. (*People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521, quoting *Jones II*, *supra*, 82 Cal.App.4th at p. 491.) We agree with *Gilbeaux*,

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[7] *Jones II* was published July 20, 2000; the Supreme Court published *Nguyen* on December 28, 2000.

Jones II, and *Jones I*. All 11 victims in this case were employees of the 99 Cents Only Store when appellant robbed it, and all were forced into the warehouse at gunpoint and made to kneel or lie on the floor while their employer's money was stolen. Whatever their function, they were the representatives of their employer and on their employer's premises, which gave them constructive possession of the employer's property. (See *Gilbeaux*, at p. 521; *Jones II*, at p. 491; *Jones I*, *supra*, 42 Cal.App.4th at p. 1054.) As all were shown to be employees, the finding that they were all victims is supported by substantial evidence.

4. *Failure to Instruct on Distinction between Actual and Constructive Possession*

The trial court instructed the jury with CALJIC No. 9.40. The portion of the instruction relating to possession as read by the court provides: "Every person who takes properties in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear, and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery. [¶] The words 'takes' or 'taking' require proof of, one, taking possession of the property, and carrying it away for some distance, slight or otherwise. [¶] Immediate presence means an area within the alleged victim's reach, observation or control so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property."

Appellant contends that the court should have given an instruction defining constructive possession following a question by the jury during deliberation.[8]

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[8] Among other things, the jury asked, "Does the count of robbery apply to employees of a store who do not have the means or access to the 'property' or 'cash?'"

Neither party requested such an instruction, but appellant contends the trial court should have given one sua sponte. We reject this contention, because instructing the jury on the more expansive definition of constructive possession could not have assisted the defense, but would instead have made the prosecution's case easier as to the 10 nonmanagement employees, as CALJIC No. 9.40 suggests a more restrictive standard of immediate observation and control.[9] Thus, appellant was not prejudiced by the omission, whether measured under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (more favorable result probable without omission), or under the stricter standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (harmless beyond a reasonable doubt).

5. *Prior Convictions Admitted to Impeach Appellant's Credibility*

Appellant contends the court erred in admitting, for impeachment purposes, evidence of his 2002 conviction for violation of Penal Code section 12021, felon in possession of a firearm. Appellant moved to exclude both his felon-in-possession conviction and his 2003 conviction for violation of Penal Code section 666, petty theft with a prior. At the motion hearing, defense counsel argued at length that neither conviction should be allowed, and that the prejudicial effect of such impeachment outweighed any probative value. The court expressly denied the motion as to the theft conviction, but deferred ruling on the firearm conviction pending determination whether the latter constituted a crime of moral turpitude.[10]

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[9] The Oxford English Dictionary (2d ed. 1989) defines possession as "holding or having something (material or immaterial) as one's own, or in one's control; actual holding or occupancy, as distinct from ownership." (See Oxford English Dict. Online (2d ed. 1989)<http://www.oed.com>[as of Nov. 20, 2006].)

[10] The court's statement that the firearm conviction "may be more probative than prejudicial" does not, as appellant asserts, demonstrate uncertainty. Taken in context, the court's comment makes clear that it had completed the weighing

There is no further hearing or ruling on the record. However, appellant testified and submitted to cross-examination -- including impeachment with both prior convictions -- without further objection.

There is no dispute that the crime of felon in possession of a firearm is one of moral turpitude. (*People v. Littrel* (1986) 185 Cal.App.3d 699, 702-703.) So long as the felony is one of moral turpitude, its admissibility to impeach a witness in a criminal proceeding is subject only to the trial court's exercise of discretion under Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 316-317.)

Appellant does not dispute that his firearm conviction was one of moral turpitude, or that the court had the discretion to admit it. Instead, he contends the court did not engage in the weighing process required by Evidence Code section 352. Specifically, appellant claims the court was required to state on the record its evaluation of the four factors outlined in *People v. Beagle* (1972) 6 Cal.3d 441.[11] We disagree. There is no requirement that the court expressly articulate every reason for its decision to admit a prior conviction for impeachment, so long as it is clear that the court understood the weighing process required by section 352 and engaged in it. (See *People v. Montiel* (1985) 39 Cal.3d 910, 924.) On the record before us, it is clear the court did. We conclude the trial court properly exercised its discretion.

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process and was deferring ruling on admissibility solely to determine whether the firearm offense qualified as one of moral turpitude.

[11] The four factors are "(1) whether the prior conviction reflects on honesty and integrity; (2) whether it is near or remote in time; (3) whether it was suffered for the same or substantially similar conduct for which the witness-accused is on trial; and, (4) finally, what effect admission would have on the defendant's decision to testify." (*People v. Castro, supra,* 38 Cal.3d at p. 307.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.