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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEROY J. GREENWOOD, Defendant and Appellant.	B182924 (Los Angeles County Super. Ct. No. YA056661)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed in part; reversed in part and remanded.

Law Offices of John F. Schuck and John F. Schuck, 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, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Leroy Greenwood was charged with crimes arising out of three armed robberies and one attempted armed robbery. He was ultimately found guilty of three counts of robbery (Pen. Code, § 211), one count of attempted robbery (Pen. Code, §§ 664, 211), three counts of kidnapping for robbery (Pen. Code, § 209, subd. (b)(1)), and eleven counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)). A firearm enhancement was found to be true with respect to each count (Pen. Code, §§ 12022.5, 12022.53, subd. (b)). Additionally, defendant was found to have suffered six prior serious felony convictions, within the meaning of Penal Code section 667, subdivision (a)(1) and the Three Strikes law (Pen. Code, § 667, subds. (b)-(i)). Defendant was sentenced to a lengthy term of imprisonment. On appeal, defendant contends: (1) the photographic displays from which the witnesses identified him were unduly suggestive; (2) the trial court erred in denying his motion for self-representation made during voir dire; (3) the evidence is insufficient to support the assault with a firearm convictions and firearm enhancements as there is insufficient evidence he used a real, loaded gun; (4) his right to due process was violated when the jury found true two sentence enhancements that were not charged in the information; and (5) his sentence is unconstitutional under *Blakely v. Washington* (2004) 542 U.S. 296. We reverse the convictions arising from a single suggestive photographic display and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The charges against defendant arose out of four separate incidents: a robbery at a Hometown Buffet in Hawthorne; a robbery at an El Torito Grill in Torrance; a robbery

at a Hometown Buffet in Westchester; and an attempted robbery at a Houston's in Manhattan Beach.

1. *The Hawthorne Hometown Buffet Robbery*

On May 27, 2003, at approximately 7:45 a.m., some employees were at the restaurant to prepare for opening. Employee Ana Maria Garrido arrived at work and knocked on the restaurant's window to be let in. She was approached on the sidewalk by defendant, who wore a chef's coat, a dark baseball cap, and dark sunglasses. Defendant asked to speak to the manager to get a job application. Garrido told him to come back later. Another employee opened the door for her, so she entered the restaurant. As she tried to close the door behind her, defendant put his hand in the door, preventing her from doing so. Defendant then pulled a gun from his waistband and pointed it through the partially open door. Garrido saw only the gun's black barrel. Defendant told her, "Be quiet and I don't do nothing to you." He ordered Garrido and the other employee to turn around and not look at him. He placed the gun to Garrido's back.

Defendant told the other employee to call for the manager; he did so. There were seven employees in the restaurant at this time. Defendant ordered them all to lie on the floor and not move. One employee, Idovac Decoline, thought it was a joke, and did not drop. Defendant stated, "I said get down." Decoline still remained standing. Defendant said, "You don't hear me?" and pointed his gun at Decoline. Decoline complied, as did the others. Defendant then told them to stand up. He walked all of the employees, at gunpoint, over to a storage room. He checked them all for cellular

telephones. Then he told them to walk to the office, stating, "Whoever runs, I'm gonna shoot your head." The employees did as they were told. Upon reaching the office, defendant again directed them to lie on the floor. Defendant then ordered manager Victor Arizmendi to open the safe at gunpoint, and put the money therein in a trash bag. Arizmendi did so, and gave defendant the money. The amount was less than $1000.

Thereafter, defendant ordered all of the employees into the walk-in refrigerator. Once they were inside the refrigerator, the doorbell rang on the back door, signifying the arrival of the cleaning crew. The Hometown Buffet was cleaned by a group of adults with developmental disabilities, who were supervised by a job coach, Jimme Lee Tyler, and his assistant, Tamika Brown. When nobody responded to their doorbell, they went around to the front of the restaurant. Defendant opened the front door for them. The group entered the restaurant and began working. Tyler brought up the rear, and defendant came up behind him, pointing a dark revolver at him. Defendant started screaming at Brown and the others to stop working and follow his instructions. Eddie McKnight, the lowest-functioning member of the crew, had sat down on a bench, unaware of what was happening. Defendant shouted an obscenity at him and struck him on the head with the butt of his gun, causing bleeding. Tyler immediately ran over to McKnight and tried to explain to defendant that McKnight had a developmental handicap. He helped McKnight up and attempted to comply with defendant's demands. Defendant put the gun to the back of one of the other members of the cleaning crew, Vinicio Lopez, and led the group to the walk-in refrigerator. Lopez described the gun as a .38 caliber handgun. Brown testified that it was a black revolver.

Once the cleaning crew had joined the employees in the cooler, defendant asked them if any of the new arrivals had cellular phones; none did. Then he told them to count to 120, closed the refrigerator door, and left. The group eventually escaped via an opening used to pass food out of the refrigerator.

In November 2003, after police identified defendant as a possible suspect in this robbery, they prepared a "six-pack" photographic display to show the victims. In each such photographic display used in this case, an identification number was printed on the bottom center of the six-pack, directly beneath photo number five. Defendant contends on appeal that the use of a photographic display with an identification number is unduly suggestive, in that it makes photo number five stand out from the other photographs in the display. In the display used with respect to this robbery, defendant's picture was in position five. Garrido, Decoline, Tyler and Brown identified defendant from the photographic display and at trial.[1] Lopez identified defendant from the photographic display, but stated defendant was not the robber at trial.

With respect to this robbery, defendant was charged with, and convicted of: robbery of Arizmendi with a Penal Code section 12022.53 enhancement found to be true (count fourteen); and assaults with a firearm of Garrido, Decoline, Brown, Lopez,

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[1] Garrido was unsure of her in-court identification of defendant.

Tyler and McKnight with Penal Code section 12022.5 firearm enhancements found to be true (counts fifteen through twenty[2]).

2. *The El Torito Grill Robbery*

On August 4, 2003, at 7:30 a.m., manager Ray Rojas and his chef were at the El Torito Grill, prior to opening. Defendant rang the doorbell at the back door. Rojas asked who was there. Defendant said, "Delivery." Rojas opened the door. Defendant was wearing a chef's coat, a hat, and shaded glasses. Defendant was carrying a briefcase in front of him. He pulled a gun out of the briefcase, stating, "This is a robbery," and pointed the gun at Rojas. Rojas testified the gun was a "grayish" medium-sized revolver, a .38 caliber or .357. Rojas is familiar with weapons and can identify one. He testified the gun looked real.

Defendant asked if anyone else was in the restaurant. Rojas responded that the chef was in the walk-in cooler, conducting inventory. Defendant stated, "If you don't want me to hurt you, do as I say." At gunpoint, defendant directed Rojas to take him to the office, where he then directed Rojas to open the safe. At defendant's command, Rojas took money out of the safe and placed it in defendant's briefcase. There was nearly $9000. Defendant then ordered Rojas into the walk-in cooler. He ordered Rojas to turn around, and then ran out the back door.

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[2] With respect to count twenty, the assault with a firearm of McKnight, a great bodily injury enhancement had been alleged (Pen. Code, § 12022.7). Although evidence of great bodily injury was presented to the jury, the question of the truth of the enhancement was not submitted to them, apparently by oversight.

When defendant was subsequently identified by police as a suspect in this robbery, police compiled a photographic display which included defendant's photograph. In the photographic display showed to Rojas, defendant's photograph was in position four, not position five, under which the identification number appeared. Rojas positively identified defendant from the photographic display and at trial.

With respect to this robbery, defendant was charged with, and convicted of: kidnapping for robbery of Rojas, with a Penal Code section 12022.53 enhancement found to be true (count one); robbery of Rojas, with a Penal Code section 12022.53 enhancement found to be true (count two); and assault with a firearm of Rojas, with a Penal Code section 12022.5 firearm enhancement found to be true (count three).

3. *The Westchester Hometown Buffet Robbery*

On September 29, 2003, in the morning before the restaurant opened for business, several employees were preparing the restaurant for opening. Defendant approached the front door and waved to the employees inside, seeking entry. The outside door enters onto a small foyer, where one must enter a second, inner set of doors in order to enter the restaurant itself. Employee Emille Delrey went through the inner set of doors, stood in the foyer, and opened the outer door slightly to speak to defendant. Employee Rhyon Taylor joined Delrey. Defendant wore a dark baseball cap and sunglasses. He carried a briefcase. He claimed to be looking for work; Taylor told him to return during business hours. Taylor turned to leave. Defendant said, "Hold on, man. Check it out." He pulled a gun out of his briefcase and told Delrey to open the door all

the way. Taylor turned to see the gun; it was black, and may have been a revolver, perhaps .38 caliber. Delrey opened the door.

Defendant had Delrey and Taylor walk into the restaurant. He walked behind them, placing the gun against Taylor's back. He warned, "I don't want to hurt nobody, especially not no black man." He demanded to be taken to the manager. Delrey pleaded not to be killed. Defendant told Delrey to stop looking at him. He stated, "I'm not going to hurt anybody. I'm not going to kill nobody. I just want you all to take me to the manager." Taylor and Delrey brought defendant to the manager's office, but there was no response to their knock on the door. Defendant told them to stop "playing with" him. Taylor and Delrey continued walking through the restaurant, at gunpoint, in search of a manager. Eventually, they spotted Ramiro Pedroza, their manager.

Defendant put his gun to Pedroza's head and ordered Pedroza to take him to the office. Pedroza complied; Delrey and Taylor went as well. Defendant ordered Delrey and Taylor to face the wall and directed Pedroza to take the money out of the safe and put it in his briefcase. Pedroza complied, giving defendant $900. After receiving the money, defendant told the three men not to leave until they had counted to a particular number, and then left.

When defendant was identified as a suspect in this robbery, police compiled a photographic display. Defendant's photograph was placed in position three, a position that did not have the identification number under it. Taylor and Pedroza identified defendant from the photographic display and at trial. Additionally, an employee at a

nearby store who had seen defendant that morning identified defendant's photograph as one of two in the six-pack that looked "extremely similar" to the man she had seen.

With respect to this robbery, defendant was charged with, and convicted of: kidnapping for robbery of Delrey and Taylor, with Penal Code section 12022.53 enhancements found to be true (counts four and seven);[3] robbery of Pedroza, with a Penal Code section 12022.53 enhancement found to be true (count nine); and assaults with a firearm of Pedroza, Delrey, and Taylor (counts six, eight, and ten). A Penal Code section 12022.5 firearm enhancement was charged only with respect to the assault with a firearm of Pedroza, yet was submitted to the jury, and found to be true, with respect to all three assaults with a firearm.

4. *The Houston's Attempted Robbery*

On October 31, 2003, at 6:30 a.m., before the restaurant opened for business, employees were preparing the restaurant. Defendant knocked on the side door, which was for deliveries. Employee Armando Moreno told him to go around to the main door, which was open. Defendant entered the restaurant. He wore a chef's coat, a dark baseball cap, and dark sunglasses. He also wore denim pants with a distinctive logo on them. He carried a briefcase. Defendant asked to see the manager. Moreno escorted defendant to the walk-in cooler, where the assistant kitchen manager, Phillip Mitchell Hughes, was working. Defendant pulled a black .38 caliber revolver from his briefcase

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[3] Defendant was also charged with the kidnapping for robbery of Pedroza (count five); the jury found him not guilty.

and pointed it at Hughes. Hughes ran inside the cooler, and exited through the back. Defendant followed. Moreno left through the front of the restaurant to get help. Moreno and Hughes ended up at neighboring businesses and both asked the people there to call 911.

Defendant returned to the parking lot, entered a black Corvette with no license plates, and drove off. Police officers had been in the area, and gave chase. Defendant led police on a high-speed chase, during which he ran red lights, wove in and out of traffic, and drove the wrong way on a one-way street. A video camera in the police car recorded the chase. Defendant would eventually contend that the recorded chase was *staged*. Defendant believed that the police faked a chase after defendant was arrested, with an officer driving defendant's Corvette.

During the chase, defendant threw a chef's jacket and a baseball cap from the car. Ultimately, defendant stopped his car, exited, and continued on foot. A briefcase was found on the seat of the Corvette, and sunglasses were found on the floorboard. The car was registered to defendant. Police set up a containment perimeter and searched for defendant. Several hours later, he was found hiding under a pile of debris.

A field show-up was conducted. Hughes identified defendant, who was wearing the same distinctive pants he wore during the attempted robbery. Both Hughes and Moreno identified defendant at trial.[4]

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[4] When defendant had abandoned the Corvette, police found that it was registered to defendant. Police immediately compiled a six-pack containing defendant's DMV

With respect to this incident, defendant was charged with, and convicted of: attempted robbery of Hughes with a Penal Code section 12022.53 enhancement found to be true (count eleven); and assault with a firearm of Hughes with a Penal Code section 12022.5 firearm enhancement found to be true (count twelve).[5]

5. *Defendant's Admission and Other Evidence*

Once in police custody, defendant was hospitalized where he was treated for a heart condition. Manhattan Beach Police Department Officer Steve Kitsios was guarding him. After a few hours, Officer Kitsios saw defendant's heart monitor racing, and tried to calm him, telling him to relax. Defendant responded, "I'm not worried about this case. All I need me is one little, black old lady on the jury and I'm going to win this trial."

Defendant had previously lived with his brother. Defendant's brother had been a cook, and still possessed several chef's jackets. No weapon was ever recovered.

6. *The Defense*

Although defendant was represented by counsel at trial, he exercised his right to represent himself for much of the pretrial proceedings. Before trial, when defendant was representing himself, defendant argued the photographic displays should be excluded as unduly suggestive. Relying on the six-pack used in the Hawthorne

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registration photograph. Neither Hughes nor Moreno was able to make any identification from that display.

[5] There was no count thirteen in the operative information.

Hometown Buffet identifications as representative, defendant argued the displays were suggestive both because he was the only clean-shaven individual in the pictures and because the identification number appeared beneath his photograph. The court determined that several individuals shown in the Hawthorne Hometown Buffet six-pack, including defendant, appeared to have a small amount of facial hair, and concluded the display was not unduly suggestive for that reason. The court also concluded the identification number was not unduly suggestive, and indicated that both of these issues would be potential areas for cross-examination.

At trial, defendant's defense consisted in large part of the testimony of Professor Edward Geiselman, an expert in eyewitness psychology, who testified that the photographic displays used in this case were suggestive. However, he did not suggest that the presence of the identification number underneath defendant's photograph in the Hawthorne Hometown Buffet display was suggestive. Indeed, although prosecution witnesses were cross-examined on their identifications from the six-packs, they were never cross-examined on whether the presence of the identification number had influenced them.[6]

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[6] There appears to be a solid strategic reason for this. If counsel had made the argument that the presence of the identification number beneath photograph number five suggested that the witness should select number five, it would have made the identifications in the El Torito Grill robbery and the Westminster Hometown Buffet robbery more persuasive, as defendant's photograph had been identified in those instances when his photograph was *not* in position five.

Defendant also introduced evidence that fingerprints had been taken from the crime scenes, but none of the fingerprints matched him. Defendant also introduced evidence that, when he was arrested, he had a small quantity of drugs in his possession, suggesting that this was the reason he fled police and made the incriminating statement.

7. *Sentencing*

The jury found true the allegations of six prior serious felony convictions. Defendant's motion to dismiss strike priors was denied. Defendant was sentenced as follows: The three kidnapping for robbery convictions were dismissed. For each of the four robbery (and attempted robbery) counts, defendant was sentenced to a consecutive term of 25 years to life (pursuant to the Three Strikes law) plus 10 years for the firearm enhancement (Pen. Code, § 12022.53, subd. (b)), plus 5 years for the prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)(1)), for a total term of 100 years to life consecutive to 60 years. Defendant had also been convicted of assault with a firearm on three of the robbery (or attempted robbery) victims (Rojas (El Torito Grill); Pedroza (Westminster Hometown Buffet) and Hughes (Houston's)); sentence on these counts was stayed pursuant to Penal Code section 654. For each of the remaining eight counts of assault with a firearm, defendant was sentenced to a consecutive term of 25 years to life (pursuant to the Three Strikes law) plus the middle term of 4 years for the firearm enhancement (Pen. Code, § 12022.5), plus 5 years for the prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)(1)) for a total term of 200 years to life consecutive to 72 years. In total, defendant was sentenced to 300 years

to life in prison, consecutive to a determinate term of 132 years. Defendant filed a timely notice of appeal.

ISSUES ON APPEAL

Defendant contends the photographic displays from which he was identified were unduly suggestive. We agree that the Hawthorne Hometown Buffet photographic display was unduly suggestive and therefore reverse the convictions arising from that incident. Defendant contends the trial court erred in denying his motion for self-representation made during voir dire; we conclude the motion was untimely and that the trial court was within its discretion to deny the motion, given defendant's proclivity to assert and waive his right to self-representation. Defendant contends the evidence is insufficient to support the assault with a firearm convictions and firearm enhancements as there is insufficient evidence that he used a real, loaded gun; we conclude the evidence is sufficient, based on the observances of the witnesses and defendant's own statements. Defendant contends he should not have been sentenced on two sentence enhancements that were not charged in the information; we conclude the information put him on sufficient notice. Finally, defendant contends his sentence is unconstitutional under *Blakely v. Washington* (2004) 542 U.S. 296; we disagree.

DISCUSSION

1. *Unduly Suggestive Photographic Display*

Defendant contends the Hawthorne Hometown Buffet photographic display was unduly suggestive because his photograph was placed in position five, directly above

the identification number. He argues the remaining photographic displays were unduly suggestive because he was the only individual in the displays to appear clean shaven.

"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." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) In determining whether the identification procedure was unduly suggestive, " '[t]he question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*Id*. at p. 990.) Once it is determined that a pretrial identification procedure was impermissibly suggestive, the prosecution has the burden of establishing, by clear and convincing evidence, that a subsequent in-court identification is not thereby tainted. (*People v. Citrino* (1970) 11 Cal.App.3d 778, 783.) If an error has been established, we must determine whether, beyond a reasonable doubt, a jury presented solely with the remaining, untainted evidence would have convicted the defendant. (*People v. Carlos* (2006) 138 Cal.App.4th 907, 912.) We review the issue de novo. (*Ibid.*)

In *People v. Carlos, supra,* 138 Cal.App.4th 907, Division One of the Second Appellate District considered whether a photographic display with an identification number directly beneath the defendant's photograph (in position five) was unduly suggestive.[7] The court concluded that it was. "The problem with the six-pack is obvious – it is not just that [defendant]'s name and an identification number are printed on the front of the form, it is that they are printed directly below his picture. The prosecutor's representation that all six-packs are similarly labeled may be correct, but whether by chance or design the problem here is that the suspect's photograph is directly above the name and number. Although the name placement is not quite an arrow pointing to [defendant], it is plainly suggestive." (*Id*. at p. 912.)

We first consider the photographic display used in connection with the Hawthorne Hometown Buffet robbery. Here, an identification number, and a second number indicating defendant's name,[8] appear on the photographic display directly beneath photograph five, defendant's picture. As in *People v. Carlos*, the presence of the numbers beneath defendant's photograph is plainly suggestive. We therefore consider whether the identifications were nevertheless reliable under the totality of the circumstances. The Hawthorne Hometown Buffet robbery took place on May 27, 2003. The suggestive photographic display was not shown to the witnesses until over *five*

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[7] The opinion in *People v. Carlos* was first raised by defendant in his reply brief. We invited additional letter briefs on the impact of the decision.

[8] The notation reads: "ID:70552 Name:03-8105#3"

months later. The witnesses – particularly the cleaning crew witnesses who arrived during the robbery – did not have a lengthy opportunity to observe the robber. The witnesses' descriptions of the robber were not so detailed as to give rise to an inference that they would have selected defendant's photograph regardless of the suggestiveness of the display. While it is true that the witnesses were admonished not to consider any markings or writings that may have appeared on the photographs, one witness, Decoline, clearly ignored the admonition – putting circles around both defendant's photograph and the number that appeared beneath it. We therefore conclude that, with respect to the pretrial identifications made from the photographic display, there was a substantial likelihood of irreparable misidentification.

Next, we consider whether the in-court identifications of Garrido, Decoline, Tyler and Brown were tainted by the improper pretrial identifications. Each of these four witnesses made an in-court identification of defendant only *after* being reshown the suggestive photographic display and being reminded of their selection of defendant's photograph. Moreover, although Garrido identified defendant at trial, she was uncertain of the identification. On these facts, we cannot conclude that the in-court identifications of defendant were nevertheless reliable, despite the unduly suggestive six-pack.

As such, we are not convinced that the error was harmless beyond a reasonable doubt. In the absence of the improper photographic identifications, and the in-court identifications they likely tainted, the evidence linking defendant to the Hawthorne Hometown Buffet robbery is, while sufficient to support a conviction, not so overwhelming that we can conclude the jury would have reached the same result. We

note that one witness, Lopez, testified at trial that defendant was *not* the robber.[9] There was no physical evidence linking defendant to the robbery. While a jury might conclude that the similarity between the four different events proves that the same man committed all of them (for example, the perpetrator of the Hawthorne Hometown Buffet robbery wore a chef's coat, as did the perpetrator of the El Torito Grill robbery and the Houston's attempted robbery), the jury might also conclude that differences between the events raise a reasonable doubt (for example, the Hawthorne Hometown Buffet robbery was the only one in which the perpetrator did not carry a briefcase). The convictions arising out of the Hawthorne Hometown Buffet robbery cannot stand.[10]

Defendant next argues that the photographic displays used with respect to the other crimes were also unduly suggestive, in that he was the only clean-shaven individual appearing in the displays. We disagree. We have reviewed each of the photographic displays, and do not find the differences in facial hair to be unduly suggestive. With respect to the El Torito Grill robbery, Rojas identified defendant's photograph from Exhibit 3. In that display, defendant appears to have the small hint of a mustache, as do three other individuals in that display (those in positions two, three

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[9] Although Lopez was developmentally disabled, there was no evidence introduced as to whether his disability might affect his ability to make an identification.

[10] As the court noted in *People v. Carlos, supra,* 138 Cal.App.4th at p. 912. "This problem can be avoided in the future by labeling the six-packs on the back or, if they must be labeled on the front, by placing the name and identification number so they do not highlight any of the photographs." Alternatively, the six-pack can be placed in a windowed folder which hides from view everything except the six images.

and five; defendant's photograph is in position four). With respect to the Westchester Hometown Buffet robbery, the witnesses identified defendant's photograph from Exhibit 7. Each individual represented in the array appears to have a slightly different quantity of facial hair. Defendant, in position three, appears to have more of a mustache than the individual in position four, but less than the individual in position one. While no other individual pictured has *precisely* the same amount of facial hair as defendant, it is clear that defendant's image does not in any way stand out from the others due to the amount of facial hair present. We therefore conclude the photographic displays were not unduly suggestive.[11]

2. *Request for Self-Representation*

Defendant contends the trial court erred in denying his motion for self-representation, made after jury selection had commenced. A defendant has a constitutional, unconditional right to represent himself or herself if a timely unequivocal request for self-representation is made. (*Faretta v. California* (1975) 422 U.S. 806, 834-836; *People v. Webster* (1991) 54 Cal.3d 411, 436 [no unequivocal request]; *People v. Wright* (1990) 52 Cal.3d 367, 409 [same].) A timely request is one made a reasonable time prior to the commencement of trial. (*People v. Windham* (1977) 19 Cal.3d 121, 124, 127-128.) When a defendant makes an untimely request for self-representation, the trial court has discretion to decide whether or not to grant the

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[11] We also note that the admonition given to witnesses before viewing the photographic displays includes the warning, "Keep in mind that hair styles, beards, and mustaches may be easily changed."

request. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1320-1321.) The fact that a defendant making an untimely request for self-representation does not seek a continuance does not deprive the court of discretion to deny the motion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 963.)

In exercising its discretion, the trial court should take into consideration the following factors: (1) the quality of defense counsel's representation; (2) the defendant's prior requests to substitute counsel; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay which would be caused by granting the motion. (*People v. Windham*, *supra*, 19 Cal.3d at pp. 127-128.) The court need not explicitly consider each of the factors when the record indicates sufficient reasons to constitute an implicit consideration thereof. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) The trial court's exercise of discretion will not be overturned except upon a showing of abuse. (*People v. Clark* (1992) 3 Cal.4th 41, 101.)

We set forth, at length, the history of defendant's assertions and subsequent waivers of the right to self-representation. On January 27, 2004, defendant was charged by information with the crimes arising out of the incidents set forth above. He entered a plea of not guilty. On February 18, 2004, he requested a *Marsden*[12] hearing to replace trial counsel. The trial court concluded defendant actually wanted to proceed in pro per. The trial court gave defendant the necessary forms to request self-representation. On March 2, 2004, defendant's motion for self-representation was granted.

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[12] *People v. Marsden* (1970) 2 Cal.3d 118.

On July 2, 2004, defendant requested co-counsel. His request was denied. On August 24, 2004, defendant requested a continuance. His request was denied. Defendant responded, "In pushing me -- well, you guys are going to have the trial pretty much without me, because I'm not picking a jury, I'm not giving up my status, and I refuse to be railroaded." The trial court determined defendant was ready for trial over his objection. Defendant responded, "You're going to have it without me." The trial court warned defendant he risked a finding of contempt.

On August 21, 2004, defendant gave up his pro per status for the first time. The court reappointed Deputy Public Defender Richard Kim, who had represented defendant when he had first sought self-representation. Defendant believed Attorney Kim had been involved in the alleged forgery of the pursuit videotape. As Attorney Kim had been reappointed and defendant claimed a conflict with Attorney Kim, the court cleared the courtroom to conduct a *Marsden* hearing. Defendant refused the *Marsden* hearing. Defendant again objected to proceeding with Attorney Kim as his counsel, but when asked why he did not want a *Marsden* hearing, defendant claimed that he did not need one, saying, "I see how this is going." After defendant repeated that he wanted an attorney other than Attorney Kim but refused a *Marsden* hearing, the court gave defendant a choice of Attorney Kim or proceeding in pro per. Defendant again rejected Attorney Kim, so his pro per status was reinstated.

On September 7, 2004, defendant successfully filed a peremptory challenge against Judge Eric Taylor, the trial judge. The case was transferred to the courtroom of Judge Andrew C. Kauffman. Before this new judge, defendant explained that he was

"overwhelmed" by preparing for trial and that he really needed legal counsel, but that he did not want to be represented by Attorney Kim. When the court explained that the trial would proceed, defendant stated he would not participate, promising to just sit quietly and not disturb the proceedings. At this point, the court suggested appointing standby counsel; defendant agreed. Attorney David Herriford was appointed standby counsel.

The court then explained to defendant that if he wanted to give up his pro per status, Attorney Herriford would be appointed as counsel. The court cautioned, "once you give up your pro per status, it's gone. You won't get it back." After meeting briefly with Attorney Herriford, and being assured that Attorney Herriford would be granted all necessary continuances, defendant agreed to accept Attorney Herriford as counsel. The court again indicated that if defendant waived his right to proceed in pro per, he could not get it back. Defendant agreed and gave up his pro per status for a second time. Attorney Herriford was appointed counsel for defendant.

On January 24, 2005, the day set for trial, defendant filed a handwritten *Marsden* motion. At the hearing, defendant explained that he had previously shown the allegedly falsified police chase video to Attorney Herriford, and had pointed out all of the places on the video which demonstrated the tape had been falsified. Defendant alleged that, subsequent to the time he showed the tape to Attorney Herriford, the video had been changed to redact all of the questionable frames he had identified for Attorney Herriford. Arguing that Attorney Herriford had conspired with the prosecution to tamper with the evidence against him, defendant sought new counsel. The trial court agreed to compare the current, allegedly edited, version of the chase video with the

purportedly unaltered version in the possession of defendant's expert. After viewing both tapes, the court concluded they were exactly the same. Finding no merit to defendant's contention that Attorney Herriford had tampered with the evidence, the court denied defendant's *Marsden* motion. At this point, defendant requested to proceed in pro per, and indicated he was ready for trial. The court granted defendant pro per status for the third time. Attorney Herriford remained standby counsel.

The case was eventually transferred to the courtroom of Judge Mark S. Arnold for trial. On February 2, 2005, the trial court advised defendant of the difficulties of self-representation. Defendant indicated he wanted to retain his pro per status. Defendant sought a continuance to subpoena expert witnesses who would allegedly show the pursuit video had been falsified; the request was denied.

On February 3, 2005, defendant waived his pro per status for the third time. The court explained to defendant that the trial was about to commence. The court warned that if defendant gave up his pro per status, it would be for the entire case, and that he would not get it back. Defendant agreed. Attorney Herriford was reappointed counsel for defendant. Jury selection commenced.

The next day, jury selection continued during the morning session. During the afternoon session, defendant requested to represent himself for a fourth time. The court denied defendant's motion, and the case proceeded with Attorney Herriford representing defendant.

On appeal, defendant contends the trial court erred in denying his fourth request for self-representation. As the request was made partway through jury selection, it was

untimely and the trial court therefore possessed discretion to deny the motion. Considering the five factors that should go into a trial court's exercise of discretion, it is apparent that the court's discretion was not abused. First, the quality of defense counsel's representation was not subject to question. Second, the defendant's prior requests to substitute counsel were plentiful. This was not defendant's first request, but his *fourth* request to proceed in pro per, after he had previously been granted self-representation three times, and had thereafter waived such status. Third, the reasons for the request were unpersuasive. Defendant sought to replace Attorney Herriford because he believed that Attorney Herriford had conspired with the prosecution to alter the videotape, a charge which had already been investigated and determined to be untrue. Fourth, the length and stage of the proceedings did not weigh in favor of granting defendant's request; this promised to be a lengthy trial with many witnesses, and jury selection had already commenced. As to the fifth factor, the disruption or delay that may be caused by granting the motion, it is true that defendant did not request a continuance.[13] This factor alone is not controlling and, on balance, the trial court did not abuse its discretion in denying the motion.

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[13] We note that defendant previously expressed an intention to not participate in the proceedings when he did not get his way when representing himself. The possibility that defendant might attempt to bring the trial to a halt by absenting himself may also have been a consideration of the trial court.

3. *Sufficiency of the Evidence that the Defendant Used a Real, Loaded Gun*

Defendant contends that, as no gun was ever found and there is no suggestion that he ever fired his weapon, there is insufficient evidence that he used a real, loaded gun.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances

might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

To establish that a defendant used a firearm within the meaning of the firearm enhancements, there must be evidence of a *firearm* designed to shoot and which gives the appearance of shooting capability. (*People v. Nelums* (1982) 31 Cal.3d 355, 358-359.) To establish the offense of assault with a firearm, committed by threatening someone with a gun, there must be evidence the gun was loaded.[14] (*People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1325.)

"The character of the weapon may be shown by circumstantial evidence. [Citation.] From testimonial descriptions of the weapon and its role in the commission of the crime, a jury may draw a reasonable inference of guilt. [The r]easonableness of the inference depends upon [the] adequacy of the descriptions." (*People v. Hayden* (1973) 30 Cal.App.3d 446, 451-452.) When robbery victims "testified that the robber pointed and threatened them with a weapon which they variously described as a gun, revolver and small caliber revolver," and that he ordered them to place their valuables in

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[14] Defendant was convicted of assault with a firearm on McKnight because he struck McKnight on the head with his gun. An assault with a firearm conviction on the basis that the gun was used as a club or bludgeon need not be supported by evidence the gun was loaded. However, the remaining counts of assault with a firearm were based on defendant pointing his gun at the victims with an intent to shoot; such threats do not constitute assaults unless the gun was loaded.

a bag, the evidence was held sufficient to sustain a finding that the defendant used a firearm. (*People v. Hayden, supra,* 30 Cal.App.3d at pp. 452-453.)

Similarly, a "defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a loaded weapon." (*People v. Rodriguez, supra,* 20 Cal.4th at p. 13.) A threat to shoot someone can reasonably be interpreted "as an admission by [the] defendant of his present ability" to do so. (*Id*. at pp. 7, 12.) Indeed, simply pointing a gun at someone and saying, "Don't" may be sufficient evidence from which a jury can infer that the gun was loaded. (*Id*. at pp. 13-14.)

In this case, there was sufficient evidence from which the jury could determine that defendant used a real, loaded gun. Witnesses in each of the four incidents described defendant's weapon as a revolver. Indeed, in each incident, at least one witness described defendant's weapon as being a .38 caliber handgun. Moreover, defendant's words and conduct were sufficient for the jury to infer the revolver was loaded. At the El Torito Grill, defendant, when pointing his gun at Rojas, threatened to "hurt" him if he did not comply. At the Hawthorne Hometown Buffet, defendant threatened to shoot in the head anyone who ran. At the Westchester Hometown Buffet, defendant told Taylor he did not want to "hurt" him, while pushing the gun to Taylor's back. As such, defendant's own words are implied admissions that his gun was loaded. Defendant's conduct was to similar effect. At each of the three robbery locations, defendant obtained compliance with his demands by pointing his gun at his victims, implicitly threatening to shoot them if they did not comply, and therefore implying the

ability to do so.[15] While the employees at Houston's ran after defendant pulled his gun, the jury could infer that if defendant used a loaded gun in his first three robberies, he continued to do so in his next attempt. The evidence is therefore sufficient.

4. *Uncharged Sentence Enhancements*

In two counts, with respect to victims Delrey and Taylor, defendant was charged with assault with a firearm, but the personal use of a firearm enhancement (Pen. Code, § 12022.5) was not alleged. The enhancement allegations were nonetheless submitted to the jury, without objection. The jury found them true, and defendant's sentence was duly enhanced. Defendant again did not object. On appeal, defendant contends his sentence on these enhancements constitutes a violation of due process as the enhancements were not charged with respect to those counts in the information.

Recent authority is to the contrary. The statutory pleading requirements (Pen. Code, § 1170.1, subd. (e)) and constitutional due process are satisfied if an enhancement is simply pleaded in other counts of the information. (*People v. Riva* (2003) 112 Cal.App.4th 981, 1002.) As the enhancement was pleaded in several counts in the information, it is apparent defendant was on notice that he had to defend against the firearm enhancement allegation.[16] There was no error.

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[15] Particularly illustrative was defendant's conduct with respect to Decoline, the Hawthorne Hometown Buffet employee who did not drop to the floor at defendant's initial command. Defendant repeated his command saying, "You don't hear me?" while pointing the gun at Decoline. The implied threat is apparent.

[16] Obviously, the better practice would be to allege the enhancements with each count.

5. *Blakely Is Not A Bar*

Defendant contends the imposition of consecutive sentences is barred by *Blakely*. The California Supreme Court has held the imposition of consecutive terms is not unconstitutional under the rationale of *Blakely* (*People v. Black* (2005) 35 Cal.4th 1238, 1244) and we are bound by the Supreme Court's holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[17]

6. *Conclusion*

We reverse the convictions related to the Hawthorne Hometown Buffet robbery, counts 14-20, and remand for a new trial. We note that defendant's sentence on the remaining counts is an indeterminate term of 125 years to life consecutive to a determinate term of 63 years.[18]

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[17] Defendant received consecutive sentences pursuant to the Three Strikes law. (Pen. Code, § 667, subd. (c)(6).) In other words, consecutive sentences were imposed due to his prior convictions, not based on any other aggravating factor. Even if California's determinate sentencing scheme were invalidated under *Blakely*, it is not apparent that defendant would be entitled to any relief.

[18] We court sought additional briefing on whether defendant's sentence enhancements under Penal Code section 667, subdivision (a) were properly calculated. As the prior convictions were not brought and tried separately, the trial court properly imposed a single enhancement on each count.

DISPOSITION

The convictions on counts 14-20 are reversed and the matter is remanded for a new trial on those counts only. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.