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REPORTS**

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IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EMIR RIGOBERTO ACOSTA et  
al.,

Defendants and Appellants.

B267775

(Los Angeles County  
Super. Ct. No. BA412073)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant Emir Rigoberto Acosta.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Fredy Rojas.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Emir Rigoberto Acosta and Fredy Rojas appeal from judgments and sentences arising from the shooting death of Fredy Rojas's cousin, Antonio Rojas.<sup>1</sup> Fredy contends there was insufficient evidence to support his conviction for voluntary manslaughter. Acosta contends there was insufficient evidence to support the jury's finding that he was the shooter. Acosta further contends that the in-court identification of him by several witnesses was improper, and that the trial court erred in failing to instruct the jury to consider the evidence against each defendant separately. For the reasons set forth below, we find no reversible error and, accordingly, affirm.

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<sup>1</sup> Because the victim and many witnesses are family members of Fredy Rojas, their first names are used for ease of reference.

## STATEMENT OF THE CASE

Appellants were jointly charged with murder (Pen. Code, § 187, subd. (a)),<sup>2</sup> and Acosta was separately charged with being a felon in possession of a firearm (§ 29800, subd. (a)(1)). As to the murder charge, it was alleged that the offense was committed in association with and to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)) and that a principal, Acosta, personally used a firearm to commit the offense (§ 12022.53, subds. (b)-(d)).

Appellants were jointly tried. The jury convicted Acosta of second degree murder and being a felon in possession of a firearm. It acquitted Fredy of murder, but found him guilty of the lesser included offense of voluntary manslaughter. With respect to both defendants, the jury found true gang and firearm allegations.

The trial court sentenced Acosta to 40 years to life, and Rojas to 22 years in state prison. Appellants timely appealed.

## STATEMENT OF THE FACTS

### A. *Prosecution Case*

A number of witnesses testified to the shooting death of Antonio Rojas on May 25, 2013. Areli Rojas testified that she and her husband, Jose Baltazar, held a party in their backyard to celebrate the baptism and first birthday of their

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<sup>2</sup> All further statutory citations are to the Penal Code, unless otherwise stated.

son.<sup>3</sup> They had invited other Rojas family members and several close friends. Although Fredy was Areli's cousin, he was not among the invited guests. Nevertheless, Fredy arrived at the party with several companions.

Areli observed Fredy help himself to beer and get more beer for his group. Areli also observed Fredy approach the DJ and grab the back of his neck. While Fredy was holding him, the DJ announced, "El Hoyo Maravilla." Recognizing this as the name of the local street gang, Areli felt uncomfortable.

When Fredy continued to help himself to beer, Areli told him that her husband or her brother would serve the group. Fredy angrily responded that Areli's house was "part of his neighborhood." Areli's father, Jose Rojas, told Fredy to calm down. Fredy pushed Jose in the chest and repeated that it was "his neighborhood."

Areli's brother, Antonio, also told Fredy to calm down and stated that "he didn't want any trouble." Antonio told Fredy to go back to his friends. Fredy responded that "he could do whatever he wanted" because "the house was part of his neighborhood." Fredy then punched Antonio, and Antonio punched back. Four or five people tried to separate the two men. Fredy then shouted "woo-woo" toward the direction of his friends, which Areli took as a signal to his

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<sup>3</sup> Because Areli's husband has the same first name as Areli's father, we refer to the former as Baltazar and the latter as Jose.

friends to join the fight. Immediately, five men came to Fredy's assistance, and started fighting with other people. Areli was struck and knocked to the ground, unconscious.

After she recovered, Areli saw Antonio on the ground, with his wife next to him. People were screaming and running out of the backyard. Areli saw Fredy and one of his friends -- later identified as Mike Hoffman -- walking away. About a minute later, the two men returned. Hoffman pointed a gun at Jose and said, "We're back again to finish what we started." Areli jumped in front of her father, and the two men walked away. Areli called the police and was informed that they already had been contacted. Ten to 15 minutes later, the police arrived and arrested Fredy and Hoffman, who had been restrained by other guests.

Baltazar's testimony corroborated that of his wife Areli concerning the events leading up to the shooting. Baltazar testified that he heard the DJ give a shoutout to El Hoyo Maravilla (HMY). Later, Fredy approached him and asked for more beer. When Baltazar told Fredy to finish the beer he was holding, Fredy became upset. When Areli's father told Fredy to calm down and leave, Fredy hit him. Fredy and Areli's brother Antonio then began fighting.

Fredy's friends came to assist him. Baltazar identified Acosta as one of those friends. When Orsy, the boyfriend of Baltazar's niece, attempted to separate Fredy from Antonio, Acosta broke a bottle over Orsy's head. Then, Baltazar saw Acosta shoot Antonio, before running away and jumping over a fence.

Later, Baltazar saw Fredy and Hoffman exit the backyard. He followed the two men until Hoffman pulled out a gun and told him to “Stay there, stay there.” About five minutes later, Fredy and Hoffman returned. Baltazar struck Hoffman and held him on the ground until the police arrived. On cross-examination, Baltazar acknowledged that when interviewed by Los Angeles County Sheriff’s Detective Brandt House after the shooting, he claimed not to have seen the shooter. Baltazar explained he was nervous.

Jose testified that Fredy arrived at the party around 10:00 p.m. Jose observed Fredy standing with several other uninvited guests, including Acosta. Jose identified Acosta in court, describing him as the defendant having tattoos on his neck and hand. He had seen Acosta on a prior occasion, at another party at the same house. Later, Jose heard the DJ give a shoutout to “the ones from Hoyo Maravilla.” After Fredy began arguing with Areli and Baltazar about beer, Jose told Fredy to take the beer and leave. Fredy responded by grabbing Jose’s shirt collar. Antonio, Jose’s son, noticed Fredy’s action. Antonio said he would retaliate if those “sons of bitches touched his dad.” Fredy then yelled “woo-woo-woo” at his friends, who responded by attacking Jose. Jose was struck and fell down, unconscious. When he recovered, he observed that a guest named Orsy was “really bloody.”

Later, Fredy and Hoffman confronted Jose. Hoffman aimed a gun at him and said, “Now it’s your turn.” After some women guests surrounded and shielded Jose, the two men walked away. Subsequently, sheriff’s deputies arrived

and arrested Fredy and Hoffman. On cross-examination, Jose acknowledged he had told the deputies that night that Fredy had arrived at the party with Hoffman and two “unknown males.” Jose explained that he had told the deputies that Fredy arrived with several men whose names he did not know, and that he did not know Acosta’s name at the time he spoke with the deputies.

Fidel Rojas, Fredy’s uncle, testified he attended the party. He saw Fredy and Acosta there. Fidel identified both men, and stated he had seen Acosta before at a prior family party. Fidel saw the fight between Fredy and Antonio; Fredy threw the first punch. Antonio started beating up Fredy, and about five other people assisted him. Fredy then whistled to his companions, who came running. During the ensuing brawl that involved 15 to 20 people, Acosta drew a gun from his waistband and shot Antonio. At the time the shot was fired, Fidel was standing behind Acosta at an angle, about four meters away. He was able to see the tattoos on Acosta’s left hand and neck. After shooting Antonio, Acosta jumped over a fence and “fled like a coward.”

Fidel acknowledged that when interviewed by sheriff’s deputies after the shooting, he did not describe the man who shot Antonio. However, at the preliminary hearing, he identified Acosta as the shooter. On cross-examination, Fidel acknowledged testifying at the preliminary hearing that he had never seen Acosta before the shooting, but explained that he meant he had not known Acosta’s name until that day.

Ines Rojas, Antonio's mother, testified she attended the party and witnessed the shooting. Ines saw the pistol in the shooter's hand, and noticed the shooter had letters tattooed on the back of his neck. The shooter then ran away.

Christian Torres testified he attended the party and witnessed the shooting. The shooter had tattoos on his hand, neck and legs. Torres could not identify the shooter because he could not "recall the face."

Los Angeles County Deputy Sheriff Fernando Galvan testified he responded to a radio call regarding shots being fired at Areli's residence. When Galvan arrived at the location, he observed Fredy and Hoffman being taken into custody by other officers. Hoffman's weapon, a nine-millimeter handgun, was recovered, and Galvan booked it into evidence.

Los Angeles County Sheriff's Department Sergeant Gina Eguia testified that after Hoffman was arrested, she monitored the calls placed by Hoffman from jail. Sergeant Eguia obtained a search warrant for an address associated with a phone number Hoffman had dialed. When the residence was searched on June 3, Acosta was found hiding in a compartment located behind a refrigerator.

Mike Hoffman testified for the prosecution.<sup>4</sup> He stated that he had known Acosta for 20 years, and became

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<sup>4</sup> Hoffman originally was charged with the murder of Antonio. Pursuant to a cooperation agreement with the district attorney's office, Hoffman agreed to testify. He also



acquainted with Fredy during the past three or four years. Although Hoffman was not a member of the HMOV gang, he knew Acosta and Fredy were members, with the monikers “Silent” and “Chuco,” respectively. Hoffman also knew Randy Casillas, and Casillas had identified himself as a member of the same gang.<sup>5</sup>

On May 25, 2013, at around 8:00 p.m., Fredy picked up Hoffman and took him, along with another gang member, Sabino Rosas, to Fredy’s cousin’s house. Hoffman was armed with a loaded nine-millimeter handgun. About 20 minutes later, Acosta and Casillas arrived at the house. At one point, Fredy left the group to get some beer. Hoffman heard the DJ give a shoutout to HMOV. Later, a fight broke out involving a large group of people, and Hoffman heard a gunshot. Hoffman tried to leave, but was stopped by some people who beat him until he lost consciousness.

The police arrived and arrested Hoffman and Fredy. Hoffman’s weapon was taken from him. After his arrest, Hoffman was interviewed by Sergeant Eguia. He told her that Acosta carried a .22-caliber handgun, and that he had seen Acosta with the gun a few days before the shooting.

While in custody, Hoffman called Acosta’s girlfriend, and was able to speak with Acosta. In the recorded call,

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pled guilty to voluntary manslaughter and admitted a gang enhancement.

<sup>5</sup> Randy Casillas was subpoenaed as a trial witness, but invoked his Fifth Amendment right not to testify.

Acosta told Hoffman “not to say nothing.” Hoffman advised Acosta to “try to get out of there” and go “somewhere else.” Acosta responded, “Yeah, yeah, yeah.”

After Acosta was arrested, he was placed in a holding cell with Hoffman. Acosta told Hoffman he shot the victim in “self-defense.” Acosta also told Hoffman to claim that Casillas -- who had a less extensive criminal history than Acosta -- was the shooter. Subsequently, Hoffman contacted Detective House and told him Casillas was the shooter.

After the interview, Hoffman returned to his cell. Unaware that he was being recorded, Hoffman told several people in the cell that he saw Acosta shoot the victim with a .22-caliber handgun. After agreeing to cooperate with the prosecution, Hoffman acknowledged that he had lied when he said Casillas was the shooter. Hoffman also said the victim was shot with Acosta’s .22-caliber handgun.

Los Angeles County Deputy Medical Examiner Pedro Ortiz conducted the autopsy on Antonio, and opined that Antonio died as a result of a gunshot wound to the chest. Marco Iezza, a senior criminalist, testified that the bullet that killed Antonio was fired from a .22-caliber handgun. It could not have been fired from a nine-millimeter handgun. Detective House testified he recovered a .22-caliber cartridge case at the crime scene.

Sergeant Eguia testified as the prosecution’s gang expert regarding HNV. She testified that HNV is a criminal street gang claiming territory in East Los Angeles that included Areli’s residence. The gang’s primary activities

included robberies, assaults with firearms, possession of narcotics and weapons violations. According to the sergeant, if a member of the community were to ignore or defy a gang member's demands, she could expect a violent consequence.

Sergeant Eguia opined that Acosta was an active member of HMY based on his self-admission and gang tattoos. Acosta had "Hoyo Maravilla" tattooed above his lips and on his stomach, "HMY" and "El Hoyo Maravilla" on his neck, and "Maravilla" on his upper chest as well as his back. Similarly, Sergeant Eguia opined that Fredy was a member of HMY, based on his self-admission and his actions at the party -- directing the DJ to give a shoutout to the gang. Eguia also opined that Hoffman and Casillas were members of HMY based on their gang tattoos.

Given a hypothetical question that mirrored the evidence, Sergeant Eguia opined that the shooting was committed in association with a criminal street gang and for the benefit of that gang. She explained that the shooting bolstered the gang's reputation for violence and showed that gang members would act in concert.

B. *Defense Case*

Neither appellant testified.

Dr. Kathy Pezdek, a professor of cognitive psychology, testified to problems with eyewitness memory and identification, including the adverse impact from the complexity and stress of a situation, time delay and "cross-talk" with other witnesses. Asked about in-court identification, she stated that although "there are legal

reasons why this has to happen in a courtroom,” it was not “a reliable source of information because there is not an array of people from which to make a selection in court.” According to Dr. Pezdek, “often you get people doing and saying very different things in court than [what] they had said in the previous year, and what’s more reliable is what they said previously.”

Jose Domingo Rojas Perez (Domingo), Fredy’s father, testified that his brother, Jose, had invited him to the party. Domingo, in turn, invited his son Fredy. However, he left before Fredy arrived.

Eric Nunez lived next door to Areli and had attended the party before leaving early. As he was getting ready to sleep, he heard what he thought was “fighting going on at the party next door.” The next morning, Nunez encountered Casillas, whom he had known for eight or nine years. When Nunez asked what had happened at the party, Casillas said he was at the party and “he was the one that shot him; he was the one that . . . killed him.” Casillas, who appeared intoxicated, threatened to kill Nunez if he told anyone. Nunez admitted he did not take anything Casillas said seriously. He also tried to avoid Casillas whenever possible because Casillas had “lost his mind” due to drugs.

## **DISCUSSION**

### *A. Substantial Evidence Supported Fredy’s Conviction for Voluntary Manslaughter.*

Fredy was charged with the murder of Antonio as an aider and abettor. The jury was instructed on two theories

of aiding and abetting: (1) Fredy directly aided and abetted the shooting of Antonio, and (2) Fredy aided and abetted an assault, and the death of Antonio was a natural and probable consequence of that same assault. The jury instruction did not specify a particular assault. The jury also was instructed that if Fredy's acts were "done in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, the offense is manslaughter." It convicted Fredy of voluntary manslaughter.

Fredy first contends there was insufficient evidence to support giving an instruction on the natural and probable consequences doctrine, as no evidence showed that he aided and abetted Acosta in the homicide of Antonio or that he aided and abetted Acosta in an assault that led to the shooting of Antonio. We conclude there was no reversible instructional error.

We find *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*) instructive on this issue. There, three gang members (Mora, Olguin, and Hilario) had an argument with the victim, Ramirez. Mora then punched Ramirez in the face, knocking him down. Two of Ramirez's companions came to his assistance and he walked toward Mora's group. Olguin then shot and killed Ramirez. (*Id.* at p. 1367.) Mora was convicted of second degree murder as an aider and abettor in the shooting of Ramirez. (*Id.* at pp. 1366 & 1375.) On appeal, Mora argued that his conviction could not stand because he did not aid and abet the only preshooting

criminal conduct -- his own one-punch knockdown of Ramirez. The appellate court rejected Mora's argument. Although agreeing that Mora was not an aider and abettor in the assault on Ramirez, the court observed that he was the perpetrator of the assault: "Both the perpetrator and the aider and abettor are principals, and *all* principals are liable for the natural and reasonably foreseeable consequences of their crimes." (*Id.* at p. 1376.) Thus, Mora could be convicted of murder.<sup>6</sup> A contrary result, the court observed, would be absurd. If Mora's position were adopted, "Hilario, who did nothing but stand by and watch, could be convicted of murder if the jury were convinced he was there to back up his homeboys and thereby encouraged Olguin and Mora in the assault on Ramirez. But Mora, who actually perpetrated the assault, would escape liability on the basis that he was the party who initiated the action. [¶] Fortunately, that is not the law." (*Ibid.*)

The court further determined that any instructional error was harmless beyond a reasonable doubt, as Mora could only have benefitted from being tried as an aider and

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<sup>6</sup> This broad principle has since been modified in *People v. Chiu* (2014) 59 Cal.4th 155, where our Supreme Court held that a defendant cannot be convicted of first degree premeditated murder as an aider and abettor under the natural and probable consequences doctrine. (*Id.* at pp. 166-167.) The jury here was properly instructed on this point. In any event, *Chiu* is inapplicable, as Fredy was convicted of voluntary manslaughter.

abettor. (*Olguin, supra*, 31 Cal.App.4th at p. 1377.) “The concept of natural and probable consequences was fully explained to the jury, and its verdict [that] Mora was criminally responsible for the shooting of Ramirez as an aider and abettor necessarily includes responsibility as the perpetrator. Put more simply, there is no conceivable way the jurors could have analyzed Mora’s criminal liability and found him guilty as an aider and abettor which would have led to a different result if they had analyzed his liability as a perpetrator of the assault.” (*Id.* at p. 1378.)

Similarly, here, the evidence showed that Fredy threw the first punch at Antonio, and thus perpetrated an assault on him. After Fredy and Antonio began to fight, Fredy called to his fellow gang members for assistance. The subsequent shooting of Antonio by a fellow gang member (Acosta) during the ensuing fight was a natural and probable consequence of Fredy’s actions. Moreover, the giving of an instruction on the natural and probable consequences theory in connection with aiding and abetting liability was harmless beyond a reasonable doubt. The jury was properly instructed on the concept of natural and probable consequences doctrine. Had the jury found Fredy criminally liable as an aider and abettor under that doctrine, it also would have found him liable under the same doctrine as the perpetrator of the initial assault on Antonio.

Fredy next contends there was insufficient evidence to support his conviction for voluntary manslaughter under an

aiding and abetting theory.<sup>7</sup> An aider and abettor is generally liable for the same crime as the principal. As noted above, there was substantial evidence to support Fredy's liability for second degree murder under the natural and probable consequences doctrine as the perpetrator of the assault on Antonio. (See *Olguin*, *supra*, 31 Cal.App.4th at p. 1378 [affirming conviction for second degree murder because jury's verdict that "Mora was criminally responsible for the shooting of Ramirez as an aider and abettor necessarily includes responsibility as the perpetrator"].) Thus, Fredy could have been liable for second degree murder as an aider and abettor. However, the jury convicted Fredy of voluntary manslaughter, not murder. It may have believed that Fredy called his fellow gang members for assistance against Antonio because he had an actual but

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<sup>7</sup> In determining whether the evidence is sufficient to support a conviction, "the reviewing court 'must review the whole record in the light most favorable to the judgment below 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.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] . . . Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)



unreasonable belief he needed to defend himself from imminent harm. Fidel's testimony -- that Fredy called for assistance as he was being beaten up by Antonio -- supported this finding of imperfect self-defense. In short, substantial evidence supported Fredy's conviction for voluntary manslaughter.

B. *Acosta's In-Court Identifications by Several Witnesses was Properly Admitted.*

At trial, Baltazar, Fidel, and Jose all identified Acosta as one of the men who came to the party with Fredy. Baltazar and Fidel further identified Acosta as the person who shot and killed Antonio. Acosta challenges their in-court identifications of him, arguing that they lacked personal knowledge about who fired the fatal shot based on their failure to identify him on prior occasions, such as photographic lineups. He further challenges Fidel's identification on the basis that it was tainted by his prior in-court identification of Acosta as the shooter at the preliminary hearing. According to Acosta, that prior identification was unduly suggestive because he was the only defendant of the five at the hearing (including Fredy, Hoffman, Sabino and Casillas) who had visible tattoos. We disagree that the in-court trial identifications were inadmissible.

First, "[t]he mere fact that a witness is unable to identify a defendant from photographs shown him does not render a subsequent in-court identification inadmissible." (*People v. Contreras* (1993) 17 Cal.App.4th 813, 822.) A

witness's "failure to make a positive identification of appellant based on photographic displays merely goes to the weight of the evidence, not its sufficiency." (*People v. Prado* (1982) 130 Cal.App.3d 669, 674.) Here, Baltazar, Fidel and Jose were all present when Antonio was shot. All three men placed Acosta at the scene of the shooting. Baltazar and Fidel testified that they saw the shooting, and identified Acosta as the shooter. As percipient witnesses, all three had personal knowledge of the events establishing a foundation for their testimony. Additionally, Fidel and Jose both testified they had seen Acosta before. The jury was informed of the witnesses' prior failures to name Acosta, and heard Dr. Pedzek testify to the lack of reliability of in-court identifications, but neither fact rendered the in-court identifications inadmissible.

As to the allegedly unduly suggestive pretrial identification by Fidel at the preliminary hearing, we are unaware of any case holding that an in-court identification at a preliminary hearing taints a subsequent in-court identification at trial. The cases cited by Acosta deal with out-of-court pretrial identifications such as lineups. (See *Manson v. Brathwaite* (1977) 432 U.S. 98, 101 [single-photo pre-indictment identification]; *Foster v. California* (1969) 394 U.S. 440, 442 [lineups].) We conclude there is no legal basis for Acosta's challenge on this ground.<sup>8</sup>

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<sup>8</sup> We observe, moreover, that Fidel's in-court trial identification had an independent basis unrelated to the

C. *Substantial Evidence Supported the Jury's Finding that Acosta was the Shooter.*

Acosta challenges the sufficiency of the evidence to support his murder conviction, arguing that the evidence was insufficient to show he was the shooter. As noted, “unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young, supra*, 34 Cal.4th at p. 1181.) Here, two witnesses (Baltazar and Fidel) who were present at the party identified Acosta as the shooter. Their testimony was neither physically impossible nor inherently improbable. As discussed above, their in-court identifications were admissible. Accordingly, substantial evidence supported the murder conviction.

D. *Any Instructional Error was Harmless.*

Finally, Acosta contends the trial court committed reversible error by failing to instruct the jury, sua sponte, that it must separately consider the evidence as it applied to each defendant and must separately determine whether each defendant was guilty. (See *People v. Mask* (1986) 188 Cal.App.3d 450, 457.) He contends that the absence of the

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preliminary hearing. (Cf. *People v. Martin* (1970) 2 Cal.3d 822, 831 [although witness identified defendant at a showup without his counsel present, “the admission of an in-court identification which has a source or origin ‘independent’ of the illegal pretrial confrontation is not error”].) Fidel, like Jose, recognized Acosta because he had seen him on a prior occasion at another party.

instruction lowered the prosecution's burden of proof, as "the prosecution sought to bolster the weak identification of [Acosta] with the strong identification of Fredy Rojas."

We conclude any instructional error was harmless. Acosta's liability for murder was predicated on his being the shooter. Whether Fredy was present at the party or was a member of HMOV did not implicate Acosta's status as the shooter. Additionally, the jury was given separate verdict forms for each defendant. The jury's subsequent verdicts -- finding Acosta guilty of murder, but acquitting Fredy of murder -- confirms that the jury separately considered the evidence and separately determined each defendant's guilt.

#### **DISPOSITION**

The judgments are affirmed.

#### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.