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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. ARMANDO ROCHA et al., Defendants and Appellants.	B270706 (Los Angeles County Super. Ct. No. BA409258)

APPEAL from judgments of the Superior Court of Los Angeles County, Jose I. Sandoval and Robert Perry, Judges. Affirmed.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant Armando Rocha.

Jeralyn Keler, under appointment by the Court of Appeal, for Defendant and Appellant Javier Trujillo.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Paul M. Roadarmel, Jr., David A. Wildman and David Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Armando Rocha and Javier Trujillo appeal from their judgments of conviction of first degree murder, with gang and firearm use enhancements. Rocha argues the court incorrectly instructed the jury that exculpatory testimony by an accomplice required corroboration. He also argues the prosecutor engaged in misconduct in rebuttal. Trujillo challenges the introduction of evidence of prior bad acts and the lack of a limiting instruction on the use of such evidence. He also challenges an in-court identification of him as a person armed with a gun during an uncharged robbery and a witness's opinion about his gang membership. Both appellants ask us to review the sealed record of the in camera hearing held on a discovery request, and both argue cumulative error. We find no error requiring reversal and affirm the judgments.

FACTUAL AND PROCEDURAL SUMMARY

Appellants are members of the Rose Hills gang, which operates in the area of the Rose Hills housing project in Los Angeles. Rocha is an older gang member, who uses the moniker "Giant" and has visible gang-related tattoos, including a "Rose Hill" tattoo on his neck. Trujillo is a younger recruit, known as "Sparks" or "Sparky."

On the evening of January 13, 2013, appellants, in the company of Oscar Garcia and Richard Garcia[1] (a Rose Hills gang member known as "Malo"), threatened several individuals at the housing project. Trujillo carried a gun, which he had shown Rocha earlier that day. Ariana Rebollar noticed the men when fresh graffiti appeared under her window. She continued to watch them throughout the evening and took photographs on her cell phone. Oscar identified Trujillo as the man wearing shorts in one photograph, and Rocha as the man with a stripe on his clothing. Witnesses also identified Trujillo as the man with the gun who wore a beanie or a knit hat with braids.

The four men approached Christian Garcia and his wife, and Trujillo pointed the gun at them. He asked Christian where he was from, and announced: "It's my gang. It's my hood. . . . [¶] This is Rose Hills gang." Rocha, who knew Christian, told Trujillo: "Don't shoot him. . . . That's the homie." The situation was diffused, and Trujillo and Christian shook hands.[2]

The men also approached Luis Quezada, whose car radio was loud. Rocha introduced himself as "Giant from Rose Hills," demanded to know who Quezada was, and told him to turn down

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[1] For concision and clarity, individuals whose surname is Garcia are referred to by their first name.

[2] Christian did not originally identify Trujillo as the person who pointed the gun at him and his wife, and did so only after having seen appellants in custody. At trial, Oscar testified that "Malo and Giant . . . disrespect[ed]" Christian, and that Trujillo was to the side. Oscar could not recall if Trujillo displayed the gun.

the volume. Oscar explained Quezada was "cool" because he lived in the housing project, and that appeared to calm Rocha down.

Trujillo stopped a van driven by Gonzallo Maravilla, a AAA locksmith who had been called to start up Samuel Arenivar's car. Trujillo approached the passenger's side of the van, opened the door, and pointed the gun at Maravilla. He asked Maravilla where he was from and announced this was "Rose Hills." He then asked Maravilla for money, threatened to kill him, took Maravilla's company cell phone, and told him to go.[3]

Rebollar observed appellants briefly approach an elderly couple. Trujillo was holding something in his pocket. Rebollar heard Rocha tell him, "Not them. They're seniors," before both turned around.

At about 7:30 p.m., appellants and their cohorts surrounded the car of 17-year-old victim Fred Munguia, who had visited his girlfriend in the project.[4] Munguia was not a gang member. Rocha stepped in front of the car and walked to the passenger's side.[5] Trujillo went to the driver's side, asked

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[3] Maravilla described his assailant as a Hispanic man weighing about 160 pounds; 5 feet, 6 inches tall; chubby; with a thin mustache; and wearing a knit hat. Although he could not pick Trujillo from a six pack and in a lineup, during a break at trial Maravilla volunteered that he recognized Trujillo and was allowed to identify him in court. Oscar testified that Malo had stopped Maravilla's van, but he had earlier told detectives he did not remember the robbery.

[4] In parts of the record, the victim is referred to as Freddy Mungia.

[5] At trial, Oscar's testimony about the shooting was consistent with that of the other two eyewitnesses, Rebollar and

Munguia where he was from, told him to lift his shirt, and started shooting. Nine casings fired from the same gun were recovered from the scene. The car was hit seven times, and Munguia died of four gunshot wounds.

After the shooting, Rocha and Oscar went to Christian's apartment. Rocha told Christian that "his homie shot some dude." Rocha and Oscar were arrested and interviewed, and a fugitive search was conducted for Trujillo, who eventually was arrested in Georgia.[6]

Appellants were charged with the murder of Munguia (Pen. Code, § 187, subd. (a)),[7] with gang and firearm use allegations. (§§ 186.22, subd. (b)(1)(C)), 12022.53, subds. (b)-(e).) Personal use and intentional discharge of a firearm causing death was alleged as to Trujillo. (§ 12022.53, subds. (b)-(d)). One prior serious felony, also a strike conviction, was alleged as to Rocha. (§ 667, subds. (a)(1) & (b)-(j), 1170.12.)

Oscar pleaded to being an accessory after the fact, and was given immunity to testify at trial in exchange for time served. He testified he had felt threatened by appellants while in custody and had to be housed away from them. In response to a hypothetical based on the facts of this case, officer Rivera, the

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Arenivar. All testified Rocha stopped Munguia's car. However, Oscar had told the detectives that Trujillo alone had stopped Munguia's car, that Rocha had not been around the car, and that after the shooting Rocha had said he did not know what was wrong with Trujillo.

[6] Trujillo's girlfriend testified they had decided to move to Georgia because of the lower cost of living there.

[7] Unless otherwise indicated, statutory references are to the Penal Code.

gang expert, opined that the murder and the confrontations that preceded it were for the benefit of the Rose Hills gang.

The jury convicted appellants of first-degree murder and found the gang and firearm use allegations to be true. The court found the prior serious felony allegation as to Rocha to be true. Rocha was sentenced to 80 years to life in prison, consisting of 25 years to life for the murder conviction, doubled, plus 25 years to life for the gun use enhancement, and a five-year enhancement under section 667, subdivision (a)(1). No term was imposed for the gang enhancement. Trujillo received a sentence of 50 years to life, consisting of 25 years to life for the murder, plus another 25 years to life for the gun use enhancement, with a 15-year parole eligibility under the gang enhancement. Appellants were given custody credits and assessed various fines and fees.

This appeal followed.

DISCUSSION

I

Rocha challenges CALCRIM No. 301, as given, and a portion of the prosecutor's rebuttal.

A. CALCRIM No. 301

The trial judge, Robert Perry, instructed the jury with a modified version of CALCRIM No. 335 that stated Oscar was an accomplice, and appellants could not be convicted of murder on his testimony unless it was supported by other evidence, however slight. The instruction further told the jury to be cautious of any accomplice testimony that tended to incriminate appellants. On the other hand, CALCRIM No. 301, as modified, told the jury that the testimony of a single witness could prove any fact "except for the testimony of Oscar Garcia, which requires

supporting evidence. . . ."

Rocha argues that these two instructions created the impression that even exculpatory accomplice testimony had to be corroborated, depriving him of the benefit of Oscar's prior inconsistent statements to detectives that Rocha had not stopped Munguia's car, was not around the car at the time of the shooting, and later had said he did not know what was wrong with Trujillo.[8]

We review claims of instructional error de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Young* (2005) 34 Cal.4th 1149, 1202, internal quotations and citations omitted.) We presume the jurors are intelligent persons, capable of understanding and correlating the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) The instructions "'should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ibid.*) If an instruction appears "'ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.' [Citations.]" (*Young*, at p. 1202.) The arguments of counsel bear on "the probable impact of the instruction on the jury. [Citations.]" (*Ibid.*)

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[8] Contrary to Rocha's representation, Oscar did not say that Rocha was not telling Trujillo what to do. Rather, Oscar said he did not know because "they had their conversations . . . a little distance from me."

Rocha concedes that CALCRIM No. 335, as given, correctly instructed the jury that only incriminating accomplice testimony required corroboration. But he contends that CALCRIM No. 301 left the impression that all of Oscar's testimony had to be corroborated. The two instructions, read together, are reasonably susceptible to an interpretation that would support the judgment. Since CALCRIM No. 301 did not specifically mention exculpatory evidence, it did not create an irreconcilable conflict with CALCRIM No. 335, and the latter instruction may reasonably be interpreted to limit the scope of the former. (Cf. *People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [irreconcilable conflict where some instructions required general intent and others specific intent for malice element of assault].)

In a supplemental letter, Rocha's counsel draws our attention to a recent case, *People v. Smith* (2017) 12 Cal.App.5th 766. In that case, a reversible instructional error was found on a record that showed the jury sent a note during deliberations indicating it was considering an accomplice's exculpatory trial testimony regarding the defendant, and only one juror believed the testimony did not require corroboration. That juror was dismissed. The record affirmatively showed that both the trial court and the jury actually were under the mistaken impression that all testimony by an accomplice (including exculpatory testimony) needed corroboration. (See *id*. at p. 782–784 & fn. 10.) There is no indication that the jury in this case considered Oscar's statements to the detectives to be exculpatory but rejected them for lack of corroboration.

The accomplice's trial testimony in *Smith*, *supra*, 12 Cal.App.5th 766 was clearly exculpatory of the defendant. (*Id*. at pp. 777, 781.) Oscar's trial testimony was not exculpatory of

Rocha, and contrary to Rocha's representation, his defense did not center on Oscar's statements to the detectives. Rocha claims that his defense "relied heavily on Oscar's exculpatory statements," citing to his trial counsel's closing argument that "Oscar Garcia himself told you that it wasn't my client that stopped the car, it was Malo. Oscar Garcia was the closest person to see that and he said Malo stopped the car, not my client." This portion of trial counsel's argument contains an apparently erroneous reference to Oscar's trial testimony regarding the stopping of Maravilla's van, in which Oscar implicated Richard, also known as Malo. Rocha was not implicated in the stopping of the van since Maravilla identified Trujillo, not Rocha, as his assailant. Rocha's trial counsel did not refer to the interview with the detectives, in which Oscar had said that Trujillo, also known as Sparky, alone had stopped Munguia's car.

Rocha also cites to his trial counsel's insinuation that the prosecutor had urged the jury to "ignore Oscar," its main witness. Trial counsel's statement did not fairly represent the prosecutor's closing argument. The prosecutor told the jurors they could credit Oscar's entire testimony or reject it, which was consistent with the instruction under CALCRIM No. 226 that they could "believe all, part, or none of any witness's testimony." The prosecutor maintained that Oscar was generally believable despite the inconsistencies in his testimony. She did not mention the portions of Oscar's interview with the detectives on which Rocha relies on appeal, and did not suggest that any exculpatory statements by Oscar needed to be corroborated. Rather, the prosecutor relied on Oscar's trial testimony, which (consistently

with the testimony of Rebollar and Arenivar) placed Rocha in front of Munguia's car.

In short, Rocha has not shown that the exculpatory statements on which he relies on appeal were central to his defense at trial, or that either the court or the prosecution misled the jury to ignore those statements as uncorroborated by other evidence. Nor are we convinced by Rocha's argument that any potential ambiguity in CALCRIM No. 301, as given, is comparable to the clearly erroneous instruction in *Cool v. U. S.* (1972) 409 U.S. 100. In *Cool*, the jury was unambiguously instructed to ignore exculpatory testimony of an accomplice "unless it believes beyond a reasonable doubt that the testimony is true." (*Id*. at p. 100.) Here, CALCRIM Nos. 301 and 335, when read together, do not instruct the jury to disregard exculpatory evidence. On the record before us, there is no reasonable likelihood the jury misapplied CALCRIM No. 301; hence, we find no reversible instructional error.

B. The Rebuttal

Rocha argues the prosecutor committed misconduct when she said in rebuttal: "[W]e have this saying. It's kind of among attorneys that do this criminal work. And one of it is, you know, when you're in a criminal case like this and you're in trial and you get in there and you're standing in front of a jury, you want to argue . . . first of all, if you're in there and you're thinking, all right. The law is on your side, you're going to really start arguing the law and you're going to disregard the facts; right? [¶] And then if it's the opposite, you think the facts are really on your side, then you get up and you argue those facts, but you stay away from the law; right? You don't get into that because that's not on your side. But when both the facts and the law are not on

your side at all, then you get up and you start attacking the prosecutor. And when you hear argument—"

At this point, an objection by Rocha's counsel was overruled, and the prosecutor continued: "—about what the D.A. asked and didn't ask and the smoke and mirrors and these misconceptions, you've got to be very careful because now what he's doing is attacking really me and the case and he's not really getting everyone focused on the point. He's trying to make you all believe it wasn't his client. That's his argument." The prosecutor then told the jury to focus on the evidence "as it came out" at trial.

Rocha argues the prosecutor suggested his defense counsel was aware the facts and the law did not support his position but tried to "trick the jury . . . by attacking the prosecutor instead," implying that even defense counsel knew Rocha was guilty. Where a claim of misconduct rests on the prosecutor's comments to the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202–1203.)

What Rocha fails to acknowledge is that the prosecutor's comments were made in rebuttal to the closing argument of Trujillo's counsel, who had stated: "The People are trying to prove this case using smoke and mirrors. I'm sure you've all seen magicians who have made things disappear right in front of your eyes. They have you looking over here while they do something over here. It's called misdirection. That's what the People are doing in this case. And as I get into my argument, I'll point out to you how I believe that they're using misdirection to try to prove my client guilty." Trujillo's counsel repeatedly accused the

prosecutor of not asking witnesses questions relevant to the identification of his client as the shooter, and closed his argument with a parable about a wolf. The prosecutor repeatedly objected, and her references to "smoke and mirrors," "what the D.A. . . . didn't ask," and "who's the wolf" in rebuttal were direct quotations from the argument of Trujillo's counsel, whom she also mentioned by name.

The issue Rocha raises has been described as "an all too common occurrence in criminal trials—the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments—two apparent wrongs—do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the 'invited response' or 'invited reply' rule . . . ." (*U.S. v. Young* (1985) 470 U.S. 1, 11.)

"It is settled that 'even otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, does not constitute misconduct.' [Citatios.]" (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1313.) The prosecutor's brief commentary on the tactics of defense counsel did not constitute an egregious pattern of conduct that violated due process. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1218.) On similar facts, in *People v. Breaux* (1991) 1 Cal.4th 281, the court found it was not misconduct to refer to a law school trial tactics class where students are taught that if

they do not have either the law or the facts on their side, they should "'try to create some sort of a confusion with regard to the case because any confusion at all is to the benefit of the defense.'" (*Id*. at p. 305.) Read in context, the prosecutor's comments "could only have been understood as cautioning the jury to rely on the evidence introduced at trial and not as impugning the integrity of defense counsel." (*Id*. at p. 306.)

Moreover, "[e]ven where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. [Citation.]" (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564.) Here, Trujillo's attorney and the prosecutor each suggested to the jury that the other had no case. It is difficult to find "any undue advantage to the People or disadvantage to" the defense from an exchange that resulted in a wash. (See *People v. Hill* (1967) 66 Cal.2d 536, 561.) Nor was the exchange prejudicial to Rocha personally since the jury, which heard the exchange, was not reasonably likely to view rebuttal comments directed at the closing argument of Trujillo's attorney as impugning Rocha's defense. As to him, there was no prejudicial prosecutorial misconduct.

II

Trujillo argues that the evidence of appellants' conduct preceding the shooting of Munguia was impermissible character evidence. He argues further that defense counsel should have objected to this evidence, and that either the court should have given a limiting instruction on its use *sua sponte*, or counsel should have requested such an instruction. Trujillo also argues that Maravilla's in-court identification of him was unduly suggestive and that Oscar's opinion that he was a gang member was improper lay opinion.

A. Evidence of Prior Acts

Trujillo acknowledges that his attorney failed to object to the introduction of evidence about incidents leading up to the murder. His arguments based on the introduction of evidence of these prior acts are forfeited because they were not raised in the trial court. (See Evid. Code, § 353; *People v. Alexander* (2010) 49 Cal.4th 846, 912; *People v. Partida* (2005) 37 Cal.4th 428, 433–437; *People v. Kipp* (2001) 26 Cal.4th 1100, 1124.)

"To show ineffective assistance of counsel, [Trujillo] has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. [Citations.] A mere failure to object to evidence . . . seldom establishes counsel's incompetence. [Citations.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 747.)

Although evidence of prior bad acts is not admissible to establish a defendant's propensity to commit crime, it may be used to prove identity, common design or plan, or intent if sufficiently similar to the charged crime to support a rational inference on any of those issues. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393, 402–403; *People v. Kipp* (1998) 18 Cal.4th 349, 369 (*Kipp*).) To be relevant on the issue of identity, the uncharged acts must be highly similar to the charged crime and must share with it a high degree of distinctiveness. (*Id*. at pp. 369–370.) A lesser degree of similarity is required to establish a common scheme or plan, and even less similarity is required to establish intent. (*Id*. at p. 371.) The uncharged acts and the charged crime must share common features sufficient to show that they were not "'a series of similar

spontaneous acts' [citation]," and that the defendant "'"'probably harbor[ed] the same intent in each instance.' [Citations.]'" [Citations.]" (*Ibid*.) The probative value of uncharged bad acts must not be outweighed by the risk of undue prejudice, confusion of the issues, or misleading the jury. (*Ibid*.)

Motive, although not itself an ultimate fact, is relevant to both intent and lack of justification for the crime. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 14.) To establish motive, the prior acts evidence need not be similar to the charged crime, so long as there is a direct logical nexus between the prior acts and the crime. (*Id*. at p. 15.) Prior gang-related acts are relevant to establish motive and intent, when the charged crime was committed under circumstances indicating it was gang related as well. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211 [confrontation between gang members wielding mace and baseball bats in which defendant brandished a handgun showed motive and intent in charged crime of murder].)

Trujillo deemphasizes the similarities between the various events that took place on the evening of the shooting. The evidence indicates that in three of the four incidents before the shooting (those involving Quezada, Christian, and Maravilla), either Rocha or Trujillo announced the name of the Rose Hills gang and issued a gang challenge by asking a stranger to identify himself, or state where he was from, or what gang he was from. In two incidents (those involving Christian and Maravilla), Trujillo pointed a gun at the individual and either threatened to shoot or was told not to shoot by Rocha. In the incident involving the elderly couple, it was reasonable to infer that a similar confrontation was averted when Rocha decided not to accost seniors. Trujillo's shooting of Munguia followed a similar gang

challenge, made in the company of the same group of four men, three of whom (Trujillo, Rocha, and Malo) were Rose Hills gang members. The challenge, as in the previous incidents, was directed at a male Hispanic, perceived to be a stranger in the neighborhood. The probative value of the prior acts evidence is further enhanced by the proximity of the incidents in time and place (they all occurred on the same evening and in the area of the housing project controlled by the Rose Hills gang). (See *Kipp*, *supra*, 18 Cal.4th at p. 371.)

The incidents preceding the murder were, therefore, highly probative on the issues of a common plan or scheme, motive, intent, and even identity, to the extent that Trujillo had consistently been identified as the individual holding a gun in these distinctive gang-related confrontations with strangers. They raised a reasonable inference that these confrontations were motivated by appellants' desire to intimidate individuals they did not know, who happened to come onto their gang's territory, to show them that Rose Hills was a violent gang, and to validate their own status as gang members.

On the other hand, since none of the prior acts had resulted in an actual shooting, they were not unduly prejudicial and "not significantly more inflammatory" than the charged crime. (See *Kipp*, *supra*, 18 Cal.4th at p. 372.)

Trujillo argues that the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 375, a limiting instruction on the permitted use of prior acts evidence. But the court has no such duty except in the "extraordinary case" where the prior acts evidence was "both highly prejudicial and minimally relevant to any legitimate purpose," and was "a dominant part of the evidence against the accused." (*People v.*

Collie (1981) 30 Cal.3d 43, 64; see also *People v. Valdez* (2012) 55 Cal.4th 82, 139.) This was not an extraordinary case in which the evidence of appellants' prior acts was both highly prejudicial and minimally probative.

To the extent Trujillo argues his trial counsel was ineffective in not requesting a limiting instruction, he has failed to show that counsel's choice was not tactical. (See *People v. Hinton* (2006) 37 Cal.4th 839, 878 [failure to request a limiting instruction on a prior conviction not ineffective assistance because "counsel may have deemed it unwise to call further attention to it"].) CALCRIM No. 375 would have explicitly told the jury that, if it found Trujillo had committed the uncharged acts, it could consider them as evidence of motive, intent, or identity. Defense counsel may have concluded that in linking the prior acts to the murder, the instruction would not help Trujillo.

Even were we to assume that defense counsel should have requested CALCRIM No. 375, we find no prejudice because the prosecutor did not use the prior acts as character evidence. The prosecutor did not insinuate, as Trujillo suggests, that he was a bad person or "a bully." Rather, she argued that the evidence was relevant to motive and intent. The specific theory she advanced was that appellants were gang members asserting their authority on their gang's territory, particularly over young male Hispanics they thought did not belong in the neighborhood. The prior acts evidence was offered for a proper purpose.

B. Maravilla's Identification of Trujillo as the Gunman

Trujillo argues that Maravilla's in-court identification of him as the person who had assaulted and robbed Maravilla at gunpoint was tainted because the prosecutor and investigating detective "coached" Maravilla during a trial recess.

"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 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. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) "We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive. [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)

The record does not support Trujillo's speculative claim that the detective and prosecutor influenced Maravilla to identify him. The prosecutor told the court that, during a recess after Maravilla's direct examination, the interpreter had notified her that Maravilla had said "he's essentially recognizing someone in court," and that "he was embarrassed, but that the detective had told him in the past that if he comes to court and he should recognize anyone that actually put a gun on him, to say something." The prosecutor double-checked if Maravilla had recognized the gunman, and Maravilla confirmed he was "the guy in the blue shirt . . . with hair," pointing to Trujillo. The prosecutor had Maravilla repeat what he had told her in front of the detective; then, she notified defense counsel.

Initially, the court was concerned about the prosecutor's off-the-record conversation with a witness during trial, but the prosecutor explained that both Maravilla and the interpreter could testify to it, and the court agreed her explanation made "it sound a lot more innocent" than what the court initially thought might have happened. The court allowed the prosecutor to re-open Maravilla's direct examination to introduce the identification, over objection.

Maravilla testified he had told the interpreter he "was ashamed to say that the guy that had robbed me looked like the detective." He then identified Trujillo as the robber. On cross-examination, it was elicited that Maravilla had not recognized anyone from a six pack and that he had picked the wrong person from a lineup. Maravilla explained that at the lineup he had picked a person who had been fidgeting a lot. He insisted that he could not correctly estimate Trujillo's height in comparison to his attorney's unless both stood next to his van. On redirect, Maravilla agreed with the prosecutor that Trujillo could have grown in the years since the shooting. On recross, Maravilla agreed with defense counsel that Trujillo had been in the lineup, but could not say in what position.

Trujillo has not shown Maravilla's identification was the result of a suggestive pretrial procedure, as there is no evidence the six pack or the lineup were unduly suggestive. Nor is there any evidence supporting his speculation that the in-court identification was suggested by the prosecutor or the detective during recess at trial. Trujillo argues that Maravilla recognized him from the lineup, but that also is speculative.

Even were we to assume that Maravilla's in-court identification of Trujillo was somehow tainted, we are not

convinced it was unreliable under the totality of the circumstances. Maravilla saw his assailant at close proximity, and provided a description of him. Trujillo argues that the sketch prepared with Maravilla's help bears little resemblance to Trujillo's actual appearance. However, Maravilla did not describe Trujillo's facial features beyond noting that the assailant was a Hispanic man with a thin mustache. That may explain the generic appearance of the face on the sketch.

While it is true that Maravilla had been unable to identify Trujillo before trial, he explained that he had been distracted at the lineup. He rejected the suggestion that his memory had faded over the years, asking rhetorically, "[W]ould you forget a person who is pointing a gun at your head?" His trial testimony indicates that Maravilla was overly focused on the robber's knit hat, which appears prominently on the sketch, and that he was unable to determine the robber's height except in relation to the van. We have no evidence of Trujillo's actual height and weight. However, other witnesses had described Trujillo, or the man with the gun, as the only one who wore a hat (a beanie) on the evening of the shooting.

C. Oscar's Opinion that Trujillo Was a Gang Member

The trial court struck Officer Rivera's testimony that Trujillo was a gang member after the officer acknowledged he had not spoken to Trujillo. Oscar then testified he had met Trujillo in 2011 and had "hung out" with him "a lot" before Trujillo became a member of the Rose Hills gang in 2012. Oscar was not asked how he learned Trujillo had joined the gang, and no objection to his testimony was interposed.

On appeal, Trujillo argues that Oscar's testimony about his gang membership was impermissible lay opinion, not based on

personal knowledge. He also acknowledges that the issue is forfeited absent an objection (see *People v. Hamilton* (2009) 45 Cal.4th 863, 917), and argues in the alternative that counsel was ineffective for failing to object.

Oscar's testimony suggests he was quite close to Trujillo at the time Trujillo reportedly joined the gang, and the events on the day of the shooting show Oscar continued to "hang out" with Trujillo even after that. It is reasonable to infer he had heard Trujillo announce his gang membership before, especially since on the evening of the shooting, Trujillo did so repeatedly—when he told Christian and his wife, "It's my gang. It's my hood. . . . [¶] [T]his is Rose Hills gang," and when he told Maravilla that this was "Rose Hills." Trujillo also addressed Munguia with a gang challenge, asking him where he was from, before opening fire on him. Thus, Trujillo's gang membership was independently established through his own admissions, in addition to Oscar's testimony. An objection to Oscar's testimony would not have resulted in a more favorable outcome for Trujillo.

III

Both appellants request that we examine the record of an in camera hearing conducted under section 1054.7 and argue cumulative error.

A. In Camera Hearing

The names and addresses of prosecution witnesses are subject to disclosure under section 1054.1, but section 1054.7 gives the trial court discretion to deny, restrict, or defer such disclosure for good cause. Good cause includes "threats or possible danger to the safety of a victim or witness." (*Ibid.*) A showing of good cause may be made in camera, and a "verbatim

record" of the in camera hearing must be made available on appeal. (*Ibid.*)

Orders under section 1054.7 are subject to review for abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 458 [good cause based on credible allegations defendant had conspired to kill witness]; see also *People v. Williams* (2013) 58 Cal.4th 197, 263 [good cause based on evidence witness's life had been threatened and detective declared disclosure would compromise witness's safety and integrity of investigation].) The argument that fear of the defendant does not prevent disclosure to defense counsel has been rejected. (*Id.* at p. 262.)

Oscar's trial counsel made an overly broad pretrial motion to discover the prosecution witnesses' unredacted personal information, including birth dates, phone numbers, and addresses. Appellants' attorneys orally joined in the motion. At the open hearing, Oscar's attorney argued there was no evidence the witnesses believed he was a gang member or were afraid of him, and there was no danger to the witnesses' safety if their personal information was disclosed to defense counsel. Appellants' attorneys made no argument. The deputy district attorney in charge of the case at the time asked to be allowed to have the investigative officer testify at an in-camera hearing to establish good cause under section 1054.7. Judge Jose Sandoval, who heard the motion, presumed that witnesses in a murder case may be in fear and held an in camera hearing on the issue of good cause.

We have reviewed the sealed record of the in camera hearing and find that the court did not abuse its discretion in denying disclosure of the requested personal information of prosecution witnesses.

B. Cumulative Error

Appellants contend that the cumulative prejudice of the claimed errors mandates reversal of their convictions. Since we reject their other claims of error, the claim of cumulative error also fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J. COLLINS, J.