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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL SOLIS et al., Defendants and Appellants.	B261806 (Los Angeles County Super. Ct. No. BA417000)

APPEALS from judgments of the Superior Court of Los Angeles County, David M. Horwitz, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel Solis.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant Kristhian Perez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Paul M. Roadarmel, Jr. and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Gabriel Solis and Kristhian Perez appeal from judgments of conviction entered after a jury trial. The jury convicted defendants of second degree robbery (Pen. Code, § 211)[1] and found true the allegation that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced Solis to the lower term of two years plus 10 years for the criminal street gang enhancement. It sentenced Perez to the upper term of five years plus 10 years for the criminal street gang enhancement.

On appeal, Solis contends that the gang enhancement must be reversed because there was insufficient foundation for the prosecution's gang expert's testimony concerning the gang's primary activities. Solis also claims that the trial court erred in failing to obtain a probation officer's report before sentencing.

Perez contends that the trial court erred by admitting irrelevant expert testimony regarding witness intimidation. He also claims that the trial court erred by failing to obtain a supplemental probation officer's report before sentencing.

We affirm.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crime*

At about 10:00 p.m. on July 8, 2013, Erik de la Cruz was sitting on a bench in the parking lot at Los Angeles City College, doing homework and listening to music while he waited for his brother to pick him up. Three men approached, talking among themselves, and de la Cruz heard the names "Risky" and "Vandal." Two of the men approached him and demanded his Beats headphones. De la Cruz gave them the headphones because he felt threatened.

The following day, de la Cruz reported the robbery to the police. He told the police that three Hispanic men were involved. They were in their late 20s and dressed like "wanna be" gang members. De la Cruz said he heard the names "Risky" and "Vandal." He thought that the men were from a gang in the neighborhood.

B. *The Investigation*

On October 3, 2013, the police showed de la Cruz two six-pack photographic lineups. He identified Solis (also known as Risky) and Perez (also known as Vandal) from these lineups.

The following day, the police executed a search warrant at a house at 629 North Juanita in Los Angeles. There were approximately 10 people at the house, including Solis. Perez had been at the house the previous day. The police recovered some Beats headphones wrapped in a black or blue cord at the house. De la Cruz tentatively identified them as his, although his had a red cord and less damage when they were taken.

C. *Identification Evidence*

At the time of the robbery, it was dark, and de la Cruz was not wearing his glasses. He had difficulty seeing without his glasses.

De la Cruz testified that in January 2014, he was interviewed by a deputy district attorney and a police officer before the preliminary hearing. He told them the men who robbed him never spoke to each other. He later clarified that he told them "that the individuals that went up to me, that they talked amongst themselves and then they came up to me." They talked to "some other guy right there." He also told them that he had never before seen the two men who robbed him.

At trial, de la Cruz identified Perez/Vandal and Solis/Risky as the individuals who robbed him. He recognized Perez as someone he had seen at his high school.

On cross-examination, de la Cruz was impeached with his preliminary hearing testimony. He testified at the preliminary hearing that he was "blind" without his glasses. Also at the preliminary hearing, he testified he did not tell the police that he thought the men who robbed him belonged to a gang, that they lived in the area, or that he had seen one of them in the past. He further claimed that he did not tell the police that he heard the men call each other "Risky" and "Vandal." And he testified at the preliminary hearing that he told the police he did not remember what clothes the men were wearing and could not identify them because he did not see their faces.

On redirect examination, de la Cruz testified that even without his glasses he could see well enough to attend class, read, see that three men were approaching him, and see that they were Hispanic. He clearly heard the men say the names "Risky" and

"Vandal." He also testified that he did not tell the whole truth at the preliminary hearing and did not want to be there. He confirmed that Risky and Vandal—Solis and Perez—were the men who robbed him.

De la Cruz additionally testified at trial that "[l]ike three weeks ago, some homeless guy came up to me." It was dark and de la Cruz could not see his face. The man "said something about are you going to court," then de la Cruz "said maybe, and that was it." The man "just looked at" de la Cruz. De la Cruz believed the man "was Vandal, but it was dark, and I didn't get too close. So I can't really be sure." De la Cruz was not scared, explaining, "I've had so many people go up to me and nothing new. Been dealing with this all my life."

Kimberly Perez was defendant Perez's former girlfriend. She knew Perez as "Vandal" and Solis as "Risky." She testified that about two weeks before trial, Perez told her that he had approached de la Cruz and told him not to say anything in court. Kimberly acknowledged that she told the prosecution about this conversation only after she got upset with Perez over a personal problem.

D. *Gang and Witness Intimidation Evidence*

Los Angeles Police Officer Calvert Tooley is assigned to the Rampart Division gang enforcement detail and is familiar with the gangs in the northwest corner of the division, including the La Mirada Locos, which is the largest gang in the area and "probably occupies the majority of [his] time." The parking lot across Vermont Avenue from Los Angeles City College is inside the gang's territory.

Officer Tooley testified that the La Mirada Locos has about 130 documented members, including about 60 active members. Their gang sign is an "L," and their members frequently wear blue sports jerseys. Their primary activities are vandalism, robberies, and weapons possession; they also commit assaults and narcotics sales. La Mirada Locos member Derek Sida, known as "Soldier," was convicted of a 2012 attempted murder, and member Christopher Joseph Sanchez, known as "Oso," was convicted of a 2011 attempted murder.

Officer Tooley was familiar with Solis, having spoken to him twice on the street in La Mirada Locos territory in 2013. Solis had admitted to Tooley—as well as to other officers—that he was a La Mirada Locos member. Solis had tattoos consistent with membership in the La Mirada Locos. Solis told Tooley that his gang moniker was "Leche." Field interview cards prepared by other officers also identified Solis as "Leche"; one card, however, listed both "Leche" and "Risky" as Solis's gang monikers. Based on conversations with other officers, Tooley believed Solis's gang moniker was actually "Risky." The officer noted that gang members frequently give the police fake monikers.

Officer Tooley had also spoken to Perez on the street on several occasions. Perez admitted that he was a La Mirada Locos member, and Tooley had seen Perez in the company of other La Mirada Locos members, though not Solis. Perez also had La Mirada Locos tattoos. Perez had indicated that his gang moniker was "Infant." He had other monikers listed on different field interview cards; only one identified his moniker as "Vandal." Based on conversations with other officers as well as other information he had obtained, Tooley believed that Perez's gang moniker was actually "Vandal."

In response to a hypothetical question based on the facts of this case, Officer Tooley opined that the robbery was committed for the benefit of a criminal street gang. Committing the crime in the gang's territory creates an atmosphere of fear and intimidation, allowing the gang to keep operating and making people less likely to testify against gang members. Additionally, when gang members commit crimes together, it enhances their status in the gang and the gang's status in the neighborhood. Tooley added that people testifying against gang members may face retaliation, including assaults, vandalism, and shots fired into their homes.

E. *Defense Evidence*

Dr. Mitchell Eisen testified as an expert regarding eyewitness identification, focusing on memory and suggestibility. He discussed the factors affecting a person's memory of an event. He also discussed the factors affecting the accuracy of eyewitness identification.

Martin Flores testified as a gang expert. He explained that gang members gain respect for crimes targeting rival gang members, not people who are not members of a gang. In response to a hypothetical question based on the facts of this case, Flores opined that the robbery appeared to be a crime of opportunity by gang members acting for their own benefit, not that of the gang. This was based on the facts that the victim was not a gang member and the robbers did not call out their gang name. That the robbers used their gang monikers did not make it a gang crime, because those were the names by which they knew one another.

Solis testified on his own behalf. Since high school, his friends had called him "Leche." He gave himself the name "Risky" in high school, and he had continued using that name. He joined the La Mirada Locos after graduating from high school. He lived on his own for a while, but eventually he moved in with his father in San Bernardino because of financial issues. He returned to Los Angeles to help out other family members but would move back to San Bernardino when things got better.

Solis experienced some personal crises in 2013 and as a result started using crystal methamphetamine and losing his family. He also sold the drugs to support his habit. He never robbed or assaulted anyone to support his habit and had no criminal record other than one drug case. He had no tolerance for thieves and never got into a fight or used violence against someone who was not a gang member.

On July 20 and August 8, 2013, Officer Tooley stopped Solis. Solis answered his questions and was not arrested. Solis met Perez about September 4, 2013, at Perez's birthday party. Solis saw him a couple of times after that but did not hang out with him, because Perez is younger than Solis.

Solis testified that he did not rob de la Cruz and did not go to the area around Los Angeles City College, because law enforcement patrolled the area and he wanted to avoid them. He had been to 629 North Juanita on one occasion, when he dropped off some drugs and ended up staying and getting high. When interviewed by the police, he told them he was not Risky or a member of the La Mirada Locos. He also said he did not remember committing the robbery. He explained that he had been asleep after using methamphetamine for about a week; the

officers woke him up, and he did not really understand what they were asking him.

DISCUSSION

A. *Sufficiency of the Evidence that the La Mirada Locos Are a Criminal Street Gang*

Section 186.22, subdivision (b)(1), mandates additional punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The statute defines "'criminal street gang'" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (*Id.*, subd. (f).) The enumerated criminal acts include robbery. (*Id.*, subd. (e)(2).)

"We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction." (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) In determining whether the evidence is sufficient, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find [the necessary facts] beyond a reasonable

doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

Solis claims the evidence is insufficient to support the criminal street gang enhancement because there was no adequate foundation for Officer Tooley's testimony concerning the primary activities of the La Mirada Locos. In his reply brief, Solis clarifies that he is not arguing that Tooley's opinion testimony was inadmissible.

Solis's argument is based on *In re Alexander L.* (2007) 149 Cal.App.4th 605, in which the court found that a gang enhancement was not supported by substantial evidence because the prosecution's gang expert's testimony "lacked an adequate foundation." (*Id.* at p. 612.) The expert had testified vaguely that the gang in question had "'been involved in murders'" as well as "'auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) The expert "did not directly testify that criminal activities constituted [the gang's] primary activities," and he said nothing about "where, when, or how [he] had obtained the information" about the gang's criminal conduct. (*Id.* at p. 612.)

In re Alexander L. is distinguishable because Officer Tooley did directly testify that vandalism, robbery, and weapons possession are the primary activities of the La Mirada Locos, and

he also provided more than sufficient foundation for that testimony. Tooley testified that he is assigned to the gang enforcement detail in the Rampart Division, that the La Mirada Locos are the largest gang in the area to which he is assigned, that they "probably occup[y] the majority of [his] time," and that he speaks with "at least one" La Mirada Locos member "[n]early every day."

In his reply brief, Solis argues that because Officer Tooley did not specifically state that his opinion concerning the gang's primary activities "was based on his conversations with [La Mirada Locos] members, his arrests of [La Mirada Locos] members for those particular crimes, or reading reports of other officers who had arrested [La Mirada Locos] members for such crimes," the foundation for his opinion was inadequate. The cases cited by Solis (such as *In re Alexander L.*) do not support his argument, and we are aware of no authority that does. Tooley testified that most of his time at work focuses on the La Mirada Locos and that he speaks with that gang's members almost every day. The jury could reasonably infer that Tooley's opinion concerning the gang's primary activities was based on his experience with the gang and its members—Tooley did not have to *say* that the opinion was based on that experience in order for the opinion to have a sufficient foundation.

Tooley's testimony describing his extensive familiarity with the La Mirada Locos and his near daily personal interaction with its members provided ample foundation for his opinion concerning the gang's primary activities. That opinion constitutes substantial evidence that one of the gang's primary activities is robbery. We accordingly conclude that Solis's

challenge to the sufficiency of the evidence for the gang enhancement lacks merit.

B. *Admission of Evidence Regarding Witness Intimidation*

Perez argues that the trial court abused its discretion by admitting evidence of witness intimidation by members of the La Mirada Locos and other gangs, because de la Cruz testified at trial, identified Solis and Perez, and stated that he was not afraid. Perez further argues that the admission of this evidence was prejudicial, it violated his constitutional rights to due process and jury trial, and his trial counsel rendered ineffective assistance by failing to object to all of it. We conclude that all of those arguments lack merit because the evidence was admissible.

At the preliminary hearing, de la Cruz testified that (1) he was "blind" without his glasses, (2) he did not tell the police that he thought the men who robbed him belonged to a gang, that they lived in the area, or that he had seen one of them in the past, (3) he did not tell the police that he heard the men call each other "Risky" and "Vandal," and (4) he told the police that he did not remember what clothes the men were wearing and could not identify them because he did not see their faces. All of that prior testimony was used to impeach de la Cruz at trial.

De la Cruz's credibility thus was very much a disputed issue at trial, as the closing arguments reflected. Counsel for Solis argued that de la Cruz "lied under oath." He asked the jury if they wanted to convict Solis "with a witness lying under oath, with a witness having a bunch of different stories." Counsel for Perez questioned de la Cruz's ability to see and identify the robbers, noting that "he has testified differently every time he's been in court or spoken to the [district attorney]." She noted that

at the preliminary hearing, de la Cruz did not identify defendants, and his testimony "was almost opposite of what we heard, what he testified to." Counsel questioned how the jury could determine what testimony was the truth and what they could believe. The prosecution argued that de la Cruz had lied at the preliminary hearing ("Yes, he lied.") and that de la Cruz was obviously still scared at trial, notwithstanding his testimony to the contrary ("Still lives in the neighborhood. You saw his size. Does anybody here really believe he's not scared? Did everybody see his lips shaking or quivering and his hands shaking when he was up here and trying to give the tough guy act?").

Evidence of threats and a basis for a witness's fear of retaliation is admissible because it bears on the issue of credibility. (*People v. Harris* (2008) 43 Cal.4th 1269, 1288; *People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) It may be relevant where there is a discrepancy between a witness's testimony and previous statements, helping to explain why a witness "might repudiate earlier truthful statements." (*Gonzalez*, *supra*, at p. 946; see *Harris*, *supra*, at pp. 1288-1289.) Here, it was relevant to explain the inconsistency between de la Cruz's preliminary hearing testimony, on the one hand, and his trial testimony and statements to police, on the other, notwithstanding de la Cruz's testimony that he was not afraid. (We note that at the preliminary hearing too de la Cruz denied that he was scared.) Perez's argument that the witness intimidation evidence should have been excluded as irrelevant therefore lacks merit. Consequently, his constitutional claims and ineffective assistance of counsel claim fail as well.

C. *Failure To Obtain Probation Officer's Reports*

1. *Perez*

Perez argues that his sentence must be vacated and the matter remanded for resentencing because the trial court erred by failing to obtain (1) a "complete" probation officer's report, and (2) a supplemental probation officer's report. We are not persuaded.

The probation officer's report for Perez was prepared on October 17, 2013, two weeks after Perez was arrested and long before trial. Pursuant to a court order that defendants not be interviewed for pre-plea probation officer's reports, Perez was not interviewed for the report. Rule 4.411.5(a)(4) of the California Rules of Court (rule 4.411.5(a)(4)) provides that the probation officer's report must include "[a]ny statement made by the defendant to the probation officer, or a summary thereof, including the defendant's account of the circumstances of the crime."

Perez was sentenced on January 28, 2015, more than one year after preparation of the probation officer's report. Rule 4.411(c) of the California Rules of Court (rule 4.411(c)) provides that "[t]he court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." Eight months is a significant period of time within the meaning of the rule. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 181 (*Dobbins*).)

Perez argues that because the probation officer's report did not include any statement from him, he "was deprived of his statutory right to a complete probation report that included his statement." We disagree. Rule 4.411.5(a)(4) requires that the

report include "[a]ny statement made by the defendant," but it does not require that the defendant be interviewed for the report. Perez does not identify any statement by him that was not included. Moreover, the advisory committee comment to rule 4.411 of the California Rules of Court states that "pre-conviction, pre-plea reports as authorized by section 1203.7" are not prohibited. Perez was not interviewed for his pre-conviction report because a court order sensibly prohibited such interviews. For all of these reasons, we reject Perez's argument that the probation officer's report was incomplete.

Perez did not object in the trial court to the court's failure to obtain a supplemental probation officer's report, and there is case law indicating that he therefore forfeited the issue for purposes of appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 352, fn. 15; *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1433; *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1556, fn. 7.)[2] In any event, we conclude that Perez has failed to show that he was prejudiced by either the failure to obtain a supplemental report or the putative incompleteness of the original report. The original report described the current offense and Perez's criminal history and recommended probation or, if probation were denied,

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[2] Perez argues that two of these cases are inapposite because they predate the statutory requirement that a probation officer's report be prepared unless both the prosecution and the defense stipulate to the contrary either in writing or orally on the record. (§ 1203, subd. (b)(4).) We disagree because the statutory requirement applies only to the original probation officer's report, not to a supplemental report under rule 4.411(c). And we have already rejected Perez's argument that his original report was not complete, so any argument that he did not forfeit his right to a complete report is moot.

the "low-base term" for the charged offense. Perez does not identify any additional information that would have been included in a supplemental report (or a more complete original report). Perez has made no showing of a reasonable probability that he would have obtained a more favorable recommendation, a more robustly supported recommendation, or a more favorable result at sentencing if a supplemental report (or a more complete original report) had been prepared. We therefore must conclude that any error was harmless.[3] (*Dobbins*, *supra*, 127 Cal.App.4th at p. 183 [evaluating failure to obtain a supplemental probation officer's report for harmlessness under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

2. *Solis*

Solis argues that the trial court erred by failing to obtain a probation officer's report before sentencing. Respondent concedes the error but argues that it was not prejudicial. We agree with respondent.

Solis was represented by counsel at the sentencing hearing. Through counsel, he waived "arraignment for judgment and time for sentencing" and conceded there was "[n]o legal cause for

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[3] Perez argues that the prejudice analysis should be governed by *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], "because the failure to follow a state sentencing law also violated [Perez's] federal right to due process." We disagree. Erroneous failure to obtain a supplemental probation officer's report "implicates only California statutory law" and is not a matter of "federal constitutional right," so it is reviewed for harmlessness under *Watson*. (*Dobbins*, *supra*, 127 Cal.App.4th at p. 182.)

delay" in sentencing. Counsel described Solis's criminal history, personal background, and the circumstances of the charged offense, and counsel asked that the court strike or stay the gang enhancement and impose the mid or low term. Counsel conceded that probation was not "a realistic option in this case." The court imposed the low term but declined to strike or stay the enhancement. Solis does not identify any additional information that a probation officer's report would have contained or that would have made it reasonably probable that he would have obtained a more favorable result at sentencing. We accordingly conclude that the court's error in failing to obtain a probation officer's report was harmless. (See *Dobbins*, *supra*, 127 Cal.App.4th at p. 182.)[4]

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[4] Solis argues that erroneous failure to obtain a probation officer's report is reversible per se or, in the alternative, should be reviewed for harmlessness under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24. We disagree. Although *Dobbins* involved failure to obtain a supplemental probation officer's report rather than an original probation officer's report, its rationale applies here: The error "implicates only California statutory law" and is not a matter of "federal constitutional right," so it is reviewed for harmlessness under *Watson*. (*Dobbins*, *supra*, 127 Cal.App.4th at p. 182.) That holding is consistent with contemporary case law concerning reversible error and harmless error analysis. (See, e.g., *People v. Anzalone* (2013) 56 Cal.4th 545, 554-555; *People v. Vasquez* (2006) 39 Cal.4th 47, 66.)

DISPOSITION

The judgments are affirmed.

MENETREZ, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.