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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY LEE CRISWELL,

Defendant and Appellant.

B229762

(Los Angeles County
Super. Ct. No. BA354698)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Clifford L. Klein, Judge. Modified and, as modified, affirmed with directions.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and John
Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Tommy Lee Criswell appeals from the judgment entered following his conviction by jury of first degree murder (Pen. Code, § 187) with personal use of a firearm (former Pen. Code, § 12022.53, subd. (b)), personal and intentional discharge of a firearm (former Pen. Code, § 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury and death (former Pen. Code, § 12022.53, subd. (d)), and with a finding he committed the murder for the benefit of a criminal street gang (former Pen. Code, § 186.22, subd. (b)(1)). The court sentenced appellant to prison for 40 years to life. We affirm the judgment with directions.¹

FACTUAL SUMMARY

1. Background and the Testimony of Lorena Hernandez.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established about 11:00 p.m. on March 9, 2009, Jorge Rodriguez (the decedent) and his wife Lorena Hernandez were in their house located behind the house at 912 East Adams (hereafter, 912 Adams). The address of 912 Adams was on the south side of Adams between Griffith and Paloma. Griffith was west of Paloma. Hernandez testified Rodriguez left his home, entered his Honda, and began backing it out of his driveway. Hernandez heard probably about nine or ten gunshots. The shots mortally wounded Rodriguez, who was still in the Honda.

2. The Testimony of Eduardo Penaloza.

a. Direct Examination Testimony.

Eduardo Penaloza testified that about 11:00 p.m. on the above date, he was on the northeast corner of Adams and Griffith at a taco cart. Penaloza had known Rodriguez for five years. People's exhibit No. 2a is a photograph of the house and driveway at 912 Adams and another house in back.² Rodriguez lived in the house in back.

¹ On February 14, 2012, appellant filed a petition for a writ of habeas corpus (B239047) and, on February 21, 2012, this court ordered that this appeal and the petition be concurrently considered. The petition will be the subject of a separate order.

² All exhibits referred to in this opinion were admitted into evidence at trial.

Penaloza, at Griffith and Adams, saw Rodriguez exit Rodriguez's house and enter Rodriguez's car. Penaloza heard gunshots. While the shots were firing, Penaloza turned and saw appellant shooting. Penaloza knew appellant as Tony and had seen appellant many times at a nearby liquor store.

According to Penaloza, appellant was between two to five feet from Rodriguez's stationary car and was shooting at it.³ Penaloza heard about seven gunshots. Appellant stood shooting at Rodriguez's car about eight seconds before appellant ran. According to Penaloza, a streetlight depicted in People's exhibit No. 2a (i.e., a streetlight in front of 912 Adams) was not operating when Rodriguez was shot. Penaloza did not see any light where Rodriguez's car was. The prosecutor asked how Penaloza was able to see who was shooting, and Penaloza replied, "I saw him running."

Penaloza saw a truck parked on the north side of Adams, facing Griffith. When Penaloza was on the northeast corner of Adams and Griffith, the truck was closer to Penaloza than to Rodriguez's car. When Penaloza saw the shootings, he ran to the south side of Adams to a location one house from Rodriguez's car to see what was happening. Penaloza was also one house from the truck. At some point, Penaloza who was behind an apartment building, peeked out to see what was happening. The car exited Rodriguez's driveway, turned in a circle, and crashed into a tree on the south side of Adams.

³ Although appellant, citing to pages 919, 920, and 922 of the reporter's transcript, asserts in his opening brief that Penaloza testified the shooter was on the driver's side of the vehicle, Penaloza did not so testify at those pages. However, Penaloza testified People's exhibit No. 2b, a photograph, depicted where Rodriguez's car was stopped in the driveway at the time the shooter shot at the car, and the exhibit depicts numerous particles of broken glass on the east side of the driveway, i.e., on the driver's side of Rodriguez's car if Rodriguez had been backing it out of the driveway as Hernandez testified. People's exhibit Nos. 2a and 2b depict different views of the glass and driveway. Each photograph depicts glass on the east side of the driveway and none on the west side.

Penaloza saw appellant, carrying a small gun, run towards the truck.⁴ The truck was directly across the street from where Rodriguez's car had crashed. Penaloza told Los Angeles Police Detective Jose Calzadillas that the suspect was wearing a black sweater, light blue pants, and red and white shoes. Penaloza testified at trial appellant was wearing a black sweater and black pants. Appellant entered the passenger side of the truck; another person was in the driver's seat. The truck made a U-turn, went to Paloma, then made a right turn onto Paloma.

Penaloza selected photograph No. 2 from a photographic lineup that Calzadillas showed to him. Penaloza wrote concerning the person depicted in that photograph, "I saw him running with the gun in his hand after Jorge was killed." Appellant concedes photograph No. 2 depicted appellant. At trial, Penaloza identified appellant as the shooter.

b. *Cross-examination Testimony.*

During cross-examination at trial, Penaloza testified he was helping to serve food at the taco cart when he heard gunshots. He ducked about 12 seconds, then went east to the other side of "Griffith" and stayed behind an apartment building on the southeast corner of Adams and Griffith. Penaloza was looking east towards Rodriguez's driveway.

Penaloza spoke to an officer at the scene and Penaloza provided his correct name to the officer. Penaloza testified he did not tell the officer, " ' I know who that was. It was Tony' " because if Penaloza had said that, police would have taken Penaloza to appellant's house and would have told Penaloza to look for appellant, and Penaloza did not know where appellant lived.

A few days later, Penaloza spoke with Calzadillas at the police station. Penaloza told Calzadillas that Penaloza did not know how many people were present when Rodriguez was shot. Although, as indicated, Penaloza testified he had provided his correct name to police at the scene, Penaloza also testified that Calzadillas asked him

⁴ Penaloza testified during further redirect examination that when he ran across the street, appellant was running onto the truck.

why Penaloza had given a different name on the night of the shooting and that Penaloza replied he was nervous. Calzadillas told Penaloza that all Calzadillas wanted was the truth.

Penaloza also testified during cross-examination that he told Calzadillas the following. The people who entered the truck were Black, covered up, and wearing caps. Penaloza thought they were Blacks because every time there was a shooting, “ ‘it has always been Blacks.’ ” Penaloza really did not know if they were Black or Mexican, and it was dark. Penaloza further testified Calzadillas asked if Penaloza saw “ ‘who ran over there’ ” and Penaloza replied no.

Penaloza testified during cross-examination at trial that, at the preliminary hearing, he was asked how far he was from the shooter when Penaloza saw him. Penaloza replied, “ ‘Very -- not too far’ and that Penaloza was one house from the shooter. At trial, looking at an aerial map of the area (People’s exhibit No. 1), Penaloza testified he misspoke and that “it was a much further distance than one house[.]” Although, as mentioned, Penaloza identified appellant as the shooter during direct examination at trial, Penaloza also, during cross-examination, testified his preliminary hearing testimony – that he was unable to identify the gunman in court – was true.

The following colloquy then occurred between Louisa Pensanti, appellant’s trial counsel, and Penaloza: “Q Because you knew Tommy. You knew Tommy from the liquor store. And when you were shown those photographs by Officer Calzadillas, you circled it because it was somebody you knew? [¶] A Yes.”

c. Redirect Examination Testimony.

During redirect examination, Penaloza testified as follows. Penaloza did not initially tell Calzadillas that Penaloza “knew who it was.” The prosecutor asked why and Penaloza replied he did not know and did not know what to say. Penaloza was afraid, not of Calzadillas, but of “someone else from the gang.” Penaloza believed gang members retaliated by killing people. The prosecutor asked Penaloza whether appellant was Black or Hispanic, and Penaloza replied appellant was Black. Although, prior to the shooting, Penaloza had seen two Black males that day, neither of them shot Rodriguez. During

recross-examination, Penaloza testified the people in the neighborhood who scared him were Black people. The Hispanic gangs in the neighborhood did not scare Penaloza.

3. The Testimony of Jose Robles.

Jose Robles lived on Adams across the street from Rodriguez's house. Robles's house was east of Rodriguez's house and closer to Paloma than Rodriguez's crashed car. Most of the below evidence provided by Robles was his preliminary hearing testimony introduced during direct examination at trial as prior inconsistent statements to impeach his trial testimony that he failed to remember certain events.

About 11:00 p.m. on March 9, 2009, Robles was in his living room when lights from an SUV illuminated his living room. Two people were inside the SUV. Robles closed his curtains and ducked. Two to three minutes later, Robles heard about six to eight shots that sounded like they were coming from the direction of Griffith. Robles looked out the window and saw Rodriguez's car crashing. Robles could see through the window of the SUV. Robles saw someone using a small gun to shoot Rodriguez's car. The gunman was shooting from the passenger seat of an SUV on Adams.⁵

Robles recognized the gunman as someone Robles previously had seen near the liquor store on Adams and Griffith. The gunman was an African-American male about five feet nine inches to about six feet in height and in his mid-twenties or mid-thirties. The gunman and Robles had been students at Jefferson High School. Robles was afraid while testifying at trial, was afraid of a person in the courtroom, but declined to identify

⁵ As mentioned, most of the evidence provided by Robles consisted of his preliminary hearing testimony introduced during direct examination at trial as prior inconsistent statements. However, during direct examination at trial, Robles indicated there was an inoperative streetlight in front of his house. He did not remember whether he saw anyone when he looked out his window and saw Rodriguez's crashed car. When the prosecutor asked Robles whether he saw anyone shooting after Robles heard the gunshots and looked out his window, Robles replied, "No. I don't know. I don't remember. Didn't even see nobody. It was too dark." However, Robles testified at the preliminary hearing that when he looked out the window, he saw someone shooting.

the person. Robles did not identify appellant at trial.⁶ However, Calzadillas testified at trial that Robles identified appellant during the preliminary hearing.

4. Investigation and Crime Scene Evidence.

Rodriguez suffered three gunshot entry wounds on the back left side of his body. He also suffered three gunshot entry wounds on the front right side of his pelvic area. Four bullets were recovered from his body.

Detectives arrived at the shooting scene. Rodriguez's car was on the south curb of Adams between 912 Adams and Griffith. The driver's door window was smashed, there were bullet holes in the driver's door, and there were a total of five bullet marks on the car. Eight .45-caliber casings were at the shooting scene, indicating a semiautomatic gun had been used. The position of the casings was consistent with a person who had begun shooting at or near Rodriguez's driveway and had continued shooting while moving into the street.⁷ As depicted in photographs of the crime scene (People's exh. Nos. 2a, 2b, & 17), the shooter would have traveled in a northwesterly direction from the driveway.

Los Angeles Police Sergeant Rudolfo Chong testified there was lighting in the area. He testified to the effect there was a streetlight in front of 912 Adams and another on the north side of Adams, two to three houses east of 912 Adams. Both streetlights were operating. The distance from the northeast corner of Adams and Griffith to the crash site was probably over 100 feet. Calzadillas testified there were streetlights on the northeast and southeast corners of Adams and Griffith.

5. The Detectives' Testimony Concerning Robles's Statements.

Calzadillas testified that on March 24, 2009, he interviewed Robles. Robles was afraid, did not want to talk, and was afraid of being called a snitch. Robles indicated to

⁶ During cross-examination, Robles testified that on the night of the shooting he repeatedly told an officer that Robles did not know "who did this." Robles also testified that, at the preliminary hearing, he identified someone who might have been innocent.

⁷ People's exhibit Nos. 2a and 2b depicted the casings. All of the casings except one are in the street a few feet north of the east side of the driveway at 912 Adams. A single casing is northwest of the other casings, and west of the west side of that driveway.

Calzadillas the following. Robles looked out his window and saw Rodriguez's car crashed. Robles also saw an SUV, facing eastbound, directly next to Rodriguez's car. A male passenger extended a gun from the window of the SUV and shot towards Rodriguez's car. The shooter was a dark-skinned Black male between 20 and 30 years old.

On March 24, 2009, Calzadillas conducted a photographic lineup which included a photograph of appellant. Calzadillas obtained the photograph of appellant based on an anonymous tip from a transient who, on March 11, 2009, had provided police with the name of a suspect and information about where the suspect lived. The transient told police the suspect had a tattoo. Robles identified appellant's photograph (photograph No. 2), stating, " 'Yeah, that's the guy, straight out, I saw. It wasn't them. It was him. It was him.' " Robles told Calzadillas, " 'You might be calling people I'm a snitch.' "

Chong testified as follows. Robles told Chong that, after the shooting, Robles had seen the shooter every day near the liquor store. Chong asked if Robles had seen the shooter "prior to the shooting on that day," and Robles said he had not seen him prior to the shooting. Appellant was arrested on March 29, 2009. Appellant was thin, about six feet one inch tall, and about 190 pounds.

6. The Testimony of Detective Ronald Berdin.

Los Angeles Police Officer Ronald Berdin, a gang expert, testified as follows. Gang rivalries and retaliation were important parts of gang culture, and the victim could be a particular person within the gang's territory. The Rolling 20's Outlaw gang (Rolling 20's), a Bloods gang, claimed territory in which the present offense occurred. The gang's members wore red items of clothing, including red shoes. Appellant was a hardcore member of the gang, meaning he would commit brazen acts of crime for the gang. Appellant's gang moniker was Tony. He had the numerals two and eight tattooed on his right and left forearms, respectively. These tattoos signified 28th Street, the primary street claimed by the gang. He also had his gang's tattoo on his face. After the preliminary hearing, appellant had the letter B tattooed between his eyes.

The Eastside 13 gang, a rival Hispanic gang, claimed territory overlapping Rolling 20's territory, and a gang would shoot a real or perceived member of a rival gang. Rodriguez was not a gang member. However, an Eastside 13 gang member, one of Rodriguez's relatives, lived at 912 Adams. Berdin opined the present offense was committed for the benefit of, at the direction of, or in association with the Rolling 20's gang. Appellant presented no defense witnesses.

ISSUES

Appellant claims (1) the trial court erroneously allowed the prosecutor to ask Penalzoa leading questions, (2) the trial court erroneously overruled appellant's asked and answered objection to a question the prosecutor posed to Penalzoa, (3) the trial court erroneously excluded appellant's impeachment evidence Penalzoa feared deportation, (4) the trial court erroneously limited appellant's cross-examination of Calzadillas concerning Robles's exact location when he observed the shooting, (5) appellant was denied effective assistance of trial counsel, (6) cumulative prejudicial error occurred, and (7) appellant is entitled to additional custody credit and correction of the sentencing record.

DISCUSSION

1. The Allegedly Leading Questions the Prosecutor Asked Penalzoa Were Appropriate.

As previously discussed, during cross-examination of Penalzoa, appellant attacked Penalzoa's credibility, including Penalzoa's evasiveness in providing a false name to Calzadillas, Penalzoa's selection of a photograph of appellant because allegedly it depicted someone Penalzoa knew, and Penalzoa's failure to identify appellant at the preliminary hearing.

Penalzoa testified during redirect examination to the effect when Calzadillas first interviewed him, Penalzoa did not immediately identify appellant. The prosecutor asked why Penalzoa did not tell Calzadillas. Penalzoa replied, "I don't know. I didn't know what to say." The prosecutor then asked, "*Well, were you scared?*" After the court overruled appellant's subsequent objection the question was leading, Penalzoa replied yes.

The prosecutor asked, “Why were you scared?” Penaloza replied, “Well, I don’t know. I couldn’t answer that question.” The prosecutor then asked, “*Well, are there people in the neighborhood that scare you?*” After the court overruled appellant’s subsequent objection the question was leading, Penaloza replied yes. Penaloza then testified the kind of people they were were Black people, some Black people scared him, and appellant scared Penaloza “before this happened.”

The prosecutor then asked “Why did [appellant] scare you?” and Penaloza repeatedly testified he did not know. The prosecutor then asked, “. . . *did you see him with people that scared you?*” After the court overruled appellant’s subsequent objection the question was leading, Penaloza replied yes.

Appellant claims “the trial court erred when it overruled the defense objections to leading questions on redirect that were designed to elicit the witness’s fear of gang retaliation.” The three alleged leading questions are italicized above. We reject appellant’s claim.

Evidence Code section 764 states, “A ‘leading question’ is a question that suggests to the witness the answer that the examining party desires.” Evidence Code section 767, subdivision (a)(1), states, “(a) *Except under special circumstances where the interests of justice otherwise require:* [¶] (1) A leading question may not be asked of a witness on . . . redirect examination.” (Italics added.) Trial courts have broad discretion to decide when such special circumstances exist. (*People v. Williams* (1997) 16 Cal.4th 635, 672.) For example, “A leading question is permissible on direct examination when it serves ‘to stimulate or revive [the witness’s] recollection.’ ” (*Id.* at p. 672.)

In the present case, prior to each of the three challenged questions, Penaloza testified, in response to a preceding question, that he did not know. Each challenged question was therefore proper to stimulate or revive Penaloza’s recollection.

Moreover, under the circumstances, the trial court reasonably could have believed Penaloza’s claimed lack of knowledge was evasive and untruthful. At a sidebar conference during the direct examination of Penaloza, the prosecutor commented Penaloza would testify he had seen appellant “hang out with people he believed to be

Rolling 20's gang members." The trial court reasonably could have believed the prosecutor would impeach Penaloza's professed lack of knowledge with prior inconsistent statements from Penaloza that he in fact had knowledge but did not want to testify concerning it because he was afraid of gangs. The trial court would not have abused its discretion in permitting the prosecutor to lay the foundation for the inconsistent statements through leading questions. (Cf. *People v. Collins* (2010) 49 Cal.4th 175, 215.)

Further, even if the challenged questions were impermissibly leading, there was independent evidence of Penaloza's fear of gang retaliation. The prosecutor easily could have rephrased the challenged questions to elicit the same testimony. Appellant concedes the alleged trial court error was not independently prejudicial. No reversible error occurred. (Cf. *People v. Watson* (1956) 46 Cal.2d. 818, 836 (*Watson*).)

2. The Trial Court Properly Overruled Appellant's Asked and Answered Objection to the Prosecutor's Question to Penaloza.

Evidence was presented at trial that appellant, a member of the Rolling 20's gang, committed for the benefit of that gang the murder of Rodriguez, a relative of a member of the rival Eastside gang. Appellant cites the below colloquy as evidence that, allegedly, after the prosecutor unexpectedly elicited testimony from Penaloza that appellant associated with Eastside members (testimony which would have undercut the prosecutor's theory the murder was gang-related), the prosecutor sought by way of an asked and answered question to elicit testimony from Penaloza that, instead, appellant associated with Rolling 20's members.

During redirect examination of Penaloza, the following occurred: "Q . . . Did you believe that the people [appellant] hung out with were gang members? [¶] A Yes. Q Why did you believe that? [¶] A Because there can be shootings -- shootings can be there at any time. [¶] Q And do you believe that they belong to a particular gang whose name you know? [¶] . . . [¶] The Witness: Yes. [¶] Q What gang did you believe they belonged to? [¶] A Eastside. [¶] Q So you saw Tony hanging out with Eastside gang members, or who you believed to be? [¶] A Could you ask that again, please? [¶]

Q You said that you saw Tony hanging out with people you believed to be gang members; correct? [¶] A Yes. [¶] Q *Do you know what or do you believe they belong to a particular gang?*” After the court overruled appellant’s subsequent objection the question was asked and answered, Penaloza replied no. The prosecutor then asked, “Just gang members in general?” and Penaloza replied yes.

Appellant claims “the trial court erred when it overruled the defense objection to a question that was asked and answered to allow the prosecutor to elicit a different answer from her key witness.” Appellant argues in essence (1) when the prosecutor asked Penaloza, “What gang did you believe they belonged to?” the antecedent of “they” was “the people [appellant] hung out with,” (2) Penaloza replied “Eastside,” (3) the prosecutor expected Penaloza to reply “Rolling 20’s gang,” therefore, (4) the prosecutor asked the previously italicized question to elicit the expected reply, even though that question had been asked and answered. We reject the claim.

Notwithstanding appellant’s suggestion to the contrary, it is not clear that when the prosecutor asked Penaloza “What gang did you believe they belonged to?” the antecedent of “they” was “the people [appellant] hung out with.” At the time, the trial court reasonably could have believed the prosecutor’s question was ambiguous because the antecedent of “they” might have been, by implication, *the people* who committed the “shootings.” That is, the trial court reasonably could have believed “they” referred to rival gang members (such as those from Eastside) who committed “shootings” *against* “the people [appellant] hung out with.”

Penaloza’s answer confirmed the ambiguity. He answered “they” belonged to Eastside. The reasonable interpretation of Penaloza’s answer was that “they”--the people who committed the shootings--were Eastside members. An interpretation of Penaloza’s answer as indicating “they”--“the people appellant hung out with”--were Eastside members would be unreasonable because that interpretation would have had appellant, a Rolling 20’s member, associating with members of Eastside, a rival gang.

The ambiguity is further confirmed by the fact that when the prosecutor later asked the challenged question, which clearly focused on the “particular gang” to which

the people “hanging out” with appellant belonged, Penaloza appeared to answer no, he did not know, and that they were just gang members. He did not again answer Eastside, as he would have been expected to do if Penaloza had believed appellant associated with Eastside members.

Because the word “they” in the prosecutor’s question “What gang did you believe they belonged to?” was ambiguous and might have referred to rival gang members (i.e., Eastside members) who committed shootings, and because Penaloza’s answer to that question was Eastside, the later challenged question, which referred to people who were hanging out with appellant and whom Penaloza believed were gang members, was not asked and answered. The trial court did not abuse its discretion by overruling appellant’s objection to the challenged question. (Cf. *People v. Ramey* (1924) 70 Cal.App. 92, 93.)

3. *Evidence of Penaloza’s Alleged Fear of Deportation Was Irrelevant.*

During appellant’s recross-examination of Penaloza, the following occurred:

“Q You said you were scared, but you couldn’t answer that question. Is it because you were scared that you would be deported? [¶] [The Prosecutor]: Objection. Relevance. [¶] The Court: Sustained. [¶] [By Appellant’s Counsel]: Were you worried about your status here in the United States? [¶] [The Prosecutor]: Objection. Same question. [¶] The Court: Sustained. It’s the same question. I already sustained the objection. [¶] Q . . . when the detective told you he didn’t care what your -- whether you had a driver’s license or whether you were here or not, was it that you were scared that you’re here illegally? [¶] [The Prosecutor]: Objection. [¶] The Court: Sustained. You keep asking the same question.”

Appellant claims the trial court erred by precluding him from impeaching Penaloza with his fear of deportation. We conclude otherwise. Appellant failed to explain the anticipated substance, relevance, and purpose of the above questions; therefore, he waived the issue he now raises. (Cf. *People v. Morrison* (2004) 34 Cal.4th 698, 711; *In re Mark C.* (1992) 7 Cal.App.4th 433, 444; Evid. Code, § 354.) Similarly, appellant failed to raise the issue below of whether the alleged preclusion violated

appellant's right to confrontation; therefore, he waived that issue. (Cf. *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, fn. 30.)

Even if the above issues were not waived, the burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102 (*Kathy P.*); *People v. Garcia* (1987) 195 Cal.App.3d 191, 198 (*Garcia*).) Fairly read, the record reflects the trial court sustained the prosecutor's objections on the ground, at a minimum, appellant's questions were irrelevant. Appellant has failed to cite any evidence in the trial record that Penaloza was an alien, illegal or otherwise. Absent a demonstrated basis for an inference Penaloza was an illegal alien, appellant's questions concerning Penaloza's alleged fear of being deported as an illegal alien were irrelevant. (Cf. *People v. Dyer* (1988) 45 Cal.3d 26, 50; see *People v. Steele* (2000) 83 Cal.App.4th 212, 223; *People v. Viniegra* (1982) 130 Cal.App.3d 577, 580.) The trial court did not abuse its discretion by sustaining the prosecutor's relevance objections. Moreover, the application of ordinary rules of evidence, as here, did not violate appellant's right to confrontation. (Cf. *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

Finally, for all appellant has demonstrated, even if Penaloza had been asked the questions at issue, he might have simply testified he was not an alien, he was not an illegal alien, or he was an illegal alien who did not fear deportation. Appellant has failed to demonstrate any error was prejudicial. (Cf. *Watson, supra*, 46 Cal.2d at p. 836.)

4. *The Trial Court Did Not Erroneously Limit Appellant's Cross-Examination of Calzadillas Concerning Robles's Exact Location When He Observed the Shooting.*

Appellant claims "the trial court erred when it prevented the defense from learning the exact location of [Robles] when he observed the shooting." Appellant argues "The trial court's ruling sustaining the prosecutor's objection to having Calzadillas mark on his drawing where Robles lived prevented the defense from introducing evidence of Robles's exact location from where he saw the shooting." (*Sic.*) We conclude otherwise.

To the extent appellant argues the trial court's alleged error constituted a violation of his right to confrontation, appellant waived that issue by failing to raise it below.

(Cf. *Rodrigues, supra*, 8 Cal.4th at p. 1126, fn. 30.) Even if appellant did not waive any issues, appellant's claim is without merit. During appellant's cross-examination of Calzadillas, appellant's counsel asked, "Using this diagram, where did Mr. Robles live?" The court sustained the prosecutor's objection to that question.

However, appellant's counsel later explained he was not asking for addresses. From that point forward, the trial court did not sustain any objection to Calzadillas marking on his drawing where Robles lived, nor did the court prevent appellant "from introducing evidence of Robles's exact location from where he saw the shooting." (*Sic.*) In fact, appellant, having ample opportunity to do so, subsequently cross-examined Calzadillas on the issue of Robles's location and where he lived, and appellant used the diagram. Appellant conceded below some limitation on his cross-examination was appropriate, namely, he acknowledged it was important for Calzadillas not to reveal Robles's address.

The burden is on appellant to demonstrate error from the record; error will not be presumed. (*Kathy P., supra*, 25 Cal.3d at p. 102.) Appellant has failed to demonstrate the trial court erred, constitutionally or otherwise.

Finally, People's exhibit No. 1, the aerial map, depicts a lamppost essentially in front of the fifth house east of Adams and Griffith and on the north side of Adams. Robles testified there was a streetlight in front of his house. Chong testified a streetlight was on the north side of Adams, two to three houses east of 912 Adams. The People, referring to said testimony of Robles and Chong, and to People's exhibit No. 1, commented to the effect said fifth house was Robles's house, and there is no dispute that the prosecutor's comment was correct. People's exhibit No. 25, the diagram, depicted the location of Robles's house as near the halfway point between Griffith and Paloma. The jury had ample evidence of the location of Robles's house, and thus where Robles was when he made his observations, even if the jury did not have evidence as to his address. No prejudicial error occurred. (Cf. *Watson, supra*, 46 Cal.2d at p. 836.)

5. *Appellant Was Not Denied Effective Assistance of Counsel.*

Appellant claims his trial counsel provided ineffective assistance of counsel by (1) failing to investigate the facts concerning Rodriguez's death and failing to argue the coroner's testimony the bullets entered both sides of Rodriguez's body suggested two shooters, thereby impeaching Penaloza's account of the murder and the prosecutor's lone gunman theory of the case, (2) eliciting testimony during cross-examination of Penaloza that he had described the gunman as wearing red and white shoes (when a photograph of appellant taken three days after the killing depicted him wearing such shoes), (3) eliciting testimony from Calzadillas that appellant's photograph was placed in a photographic folder based on information from an unnamed transient, (4) failing to bring pretrial motions and failing to raise discovery issues, (5) failing to request funds for an eyewitness identification expert, (6) failing to present evidence concerning various factors relating to eyewitness identification, (7) failing to ask whether, before Penaloza told police the gunman was wearing red and white shoes, police showed Penaloza a photograph of appellant wearing such shoes, and (8) failing to make motions in limine concerning cross-examining Penaloza about his status as an illegal alien and cross-examining Calzadillas about the exact location from which Robles observed the shooting.⁸

However, the record sheds no light on why appellant's trial counsel allegedly acted or failed to act in the manner challenged, the record does not reflect appellant's counsel was asked for an explanation and failed to provide one as to any challenged alleged act or failure to act, and we cannot say, as to any such act or failure to act, there simply could have been no satisfactory explanation. Accordingly, we reject appellant's ineffective assistance claim. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)⁹

⁸ Except for the above enumerated seventh argument, appellant's arguments are the same as those raised in his petition for a writ of habeas corpus and addressed in our separate order. (See fn. 1, *ante*.)

⁹ We also conclude no prejudicial cumulative error occurred.

6. *Appellant is Entitled to Additional Custody Credit and Correction of the Record.*

Appellant was arrested on March 29, 2009, and remained in custody until the court sentenced him on November 16, 2010, a total of 598 days, inclusive. At the sentencing hearing, the court failed to award appellant 598 days of custody credit. Respondent effectively concedes appellant was entitled to same. We accept the concession. (*People v. Smith* (1989) 211 Cal.App.3d 523, 525-527; Pen. Code, § 2900.5, subd. (a).) We will modify the judgment, and direct the trial court to correct its sentencing minute order, and the abstract of judgment, accordingly. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466, fn. 3; *People v. Solorzano* (1978) 84 Cal.App.3d 413, 415, 417.)

DISPOSITION

The judgment is modified by the addition of 598 days of custody credit pursuant to Penal Code section 2900.5, subdivision (a) for a total precommitment credit award of 598 days and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modification, and the trial court is directed to correct its November 16, 2010, sentencing minute order to reflect said modification.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.