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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO ROMERO VELAZQUEZ, Defendant and Appellant.	B263981 (Los Angeles County Super. Ct. No. BA406570)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Kimberly Taylor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ernesto Romero Velazquez appeals from the judgment entered following his convictions by jury of carjacking (count 1) and second degree robbery (count 2), each with a finding he personally used a firearm, and with admissions he suffered a prior felony conviction and a prior serious felony conviction, and served a prior prison term. (Pen. Code, §§ 211, 212.5, subd. (c), 215, subd. (a), 667, subds. (a) & (d), 667.5, subd. (b).)[1] We affirm.

FACTUAL AND PROCEDURAL SUMMARY

This is an appeal following appellant's second trial. Prior to the first trial, appellant filed a motion to quash the identification of appellant by the victim in this case during a photograph lineup and at the preliminary hearing, on the ground the lineup was impermissibly suggestive in violation of appellant's right to due process. However, appellant did not argue the motion or secure a trial court ruling on it. The jury in the first trial deadlocked and, on February 21, 2014, the trial court declared a mistrial. Appellant did not later renew his due process motion to quash or file a new one. At the conclusion of the second trial, the jury deliberated two hours 20 minutes, asked no questions of the court, and, on February 23, 2015, convicted appellant as previously indicated.

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[1] On April 7, 2016, appellant filed a petition for writ of habeas corpus (case No. B271390) and, on April 15, 2016, this court ordered that this appeal and the petition be considered concurrently. The petition will be the subject of a separate order.

1. ***PEOPLE'S EVIDENCE***.

A. Ramirez's Testimony.

(1) ***Ramirez's testimony about the present offenses.***

Yovani Ramirez Martinez (the victim, hereafter, Ramirez), using a Spanish interpreter, testified as follows. Ramirez spoke a little English. About 10:30 p.m. on September 29, 2012, Ramirez, a cook, was driving his Honda Accord (license plate number 6EOD158) and returning home from work. He stopped at a red light at Normandie and Exposition and let a couple, a male and female, cross the street. Ramirez rolled down his window.

Ramirez testified he looked down, then saw that "a person came out with a weapon and pointed it . . . at my head." The weapon was a semiautomatic gun. The gunman, whom Ramirez identified at trial as appellant, told Ramirez to get out of the car or appellant would kill him. The prosecutor asked Ramirez to describe the gunman, and Ramirez replied, "Hispanic. He had a tattoo on his chest, two tattoos on his arm, with one a woman, one with a skull." Appellant's head was shaved and he was wearing a white T-shirt.

Ramirez also testified as follows. Ramirez was inside his car when he saw appellant lift his shirt and pull out the gun. Appellant was two or three feet from the car. Appellant lifted his shirt high enough for Ramirez to see appellant's upper chest. The tattoos were "up in the upper chest." While Ramirez was inside his car, he was able to look at appellant's face and other parts of his body. After appellant pulled his shirt up, he opened the car door.

Appellant grabbed Ramirez by the shoulder, took him out the car, and twisted his arm behind his back. The gun barrel was

touching Ramirez's head. Ramirez did not turn his head but saw appellant's face when appellant took him out the car.

The prosecutor asked Ramirez, "the person that pulled you out of the car . . . the defendant, how long did you have a chance to look at him . . . during that whole time?" Ramirez initially said he did not remember but later said, "Less than 30 seconds." Ramirez also testified that when he was coming out the car, he had about 30 seconds to look at appellant. Appellant's counsel later asked Ramirez how long he had a chance to look at appellant's face and other parts of his body when Ramirez was getting out the car. Ramirez replied he saw him about five to 30 seconds. At one point the court asked Ramirez what was the total number of seconds he saw appellant's face from the time Ramirez was first confronted to the time Ramirez could no longer see him. Ramirez replied, "Initially, it was approximately between five and ten seconds." Ramirez later saw appellant perhaps a minute when appellant and others were leaving in the car and Ramirez was on the sidewalk.

Ramirez testified the tattoos on appellant's arm(s) were above the elbow and "on the inside." Ramirez saw those tattoos when appellant was pointing the gun at his temple. Appellant's counsel asked how, if appellant was "to [Ramirez's] side," Ramirez could identify tattoos on appellant's arm. Ramirez replied he was paying attention "to who he was." At trial, appellant had hair and was fatter than he was on September 29, 2012.

After appellant pulled Ramirez out of the car, appellant called a second person to take Ramirez to the sidewalk. The second person was an African-American man who had a tattoo on his neck and was wearing dreadlocks. The second man put a gun

to the back of Ramirez's head and, walking on Ramirez's right side, held Ramirez's right arm behind his back and pushed him to the sidewalk. Ramirez had a chance to look at the second gunman's face. The second gunman told Ramirez that if he moved, the second gunman would kill him. The second gunman spoke to Ramirez in English. The second gunman took Ramirez's wallet and cell phone.

The second gunman told Ramirez not to turn around or he would be shot. During cross-examination, Ramirez testified that, right after the second gunman told Ramirez not to turn around, Ramirez saw appellant for a minute, driving away in Ramirez's car. Ramirez also testified he turned his head and saw seven people, including the couple who had crossed the street, enter his car and drive away.[2] There were five men and two women. A CD called "Low Profile" was inside Ramirez's car. Ramirez walked away and had a citizen call 911.

(2) Subsequent events.

(a) *Ramirez's 911 call and the arrival of police.*

At trial, the prosecutor played a tape of Ramirez calling 911. Ramirez was nervous and afraid when he called. The tape reflected Ramirez said "there were Hispanic people and that there were four men and two women." Appellant's counsel asked Ramirez whether what happened was fresh in his mind when he made the call. Ramirez replied no and said, "I was nervous, so I forgot." Appellant's counsel asked Ramirez whether he correctly

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[2] Los Angeles Police Detective Enrique Robledo testified Ramirez told him that the second suspect threatened to kill Ramirez if he moved or turned around to see them leave in his car. Robledo testified Ramirez said he "waited until the car left before he turned around because he was in fear for his safety."

told the operator there were "four males and two females, all Hispanic." Ramirez replied, "No. I couldn't explain myself." Ramirez also testified the operator asked if "they" were Black, White, Hispanic, or Asian, and Ramirez replied, "No, it's Hispanic people." Police found Ramirez about 40 minutes after that call and he was still nervous and afraid.

(b) *Ramirez's observations of his car.*

About October 29, 2012, Ramirez saw his car at Vertel's Tow Yard. His stereo system and car parts, such as windshield wipers and seat clips, were missing. A box of CD's was also missing. His cooking utensils that had been in the trunk were missing as well.

(c) *Ramirez's meeting with Detective Robledo.*

In about December 2012, Ramirez met with Detective Robledo, who showed him a photographic lineup containing six photographs (hereafter, six-pack). Ramirez identified photograph No. 1 as depicting the carjacker. (Appellant concedes photograph No. 1 depicted him.) Ramirez also wrote a statement in Spanish. The translated statement was, "I recognize the person in photo number one as the person who took my car with a gun.[3] It was an automatic weapon. [¶] The second person was about six five. His hair was curly. Those were the two people who were carrying weapons and stole my car. [¶] And the other people I didn't see very well." At trial, Ramirez testified photograph No. 1 depicted a person with tattoos and not wearing a T-shirt, and Ramirez did not see tattoos on the persons depicted in the remaining five photographs.

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3 This sentence implies Ramirez made his statement to Robledo after viewing photograph No. 1.

(d) *The preliminary hearing and appellant's first trial.*

Ramirez testified at trial that, at the May 2013 preliminary hearing, he saw appellant in the courtroom and this made Ramirez nervous. Ramirez called Robledo and told him Ramirez feared for his life. Robledo told Ramirez to step outside or stay near someone until Robledo arrived. Robledo quickly arrived.[4]

Ramirez testified at the preliminary hearing as follows. After the incident, University of Southern California police arrived, Los Angeles police arrived about 40 minutes later, and, still later, a third Los Angeles police officer arrived in a patrol car. Ramirez told that third officer that appellant had tattoos on his arms. Ramirez identified appellant at the preliminary hearing as the person who robbed and carjacked him.

During appellant's first trial, Ramirez testified he turned around and looked at appellant's face, and appellant said he was going to kill Ramirez. Ramirez observed appellant probably four or five seconds when appellant made that statement. When Ramirez stepped out the car, he was looking in another direction and not at his assailant. Ramirez identified appellant at the first trial as the person who robbed and carjacked him.

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[4] Robledo testified that on the date of the preliminary hearing, Ramirez called Robledo and told him appellant was in court and Ramirez was afraid. Robledo told Ramirez to leave the building or remain in the courtroom near a deputy. Robledo arrived, entered the courtroom, and saw Ramirez and appellant seated with perhaps two people between them. Ramirez pointed out appellant to Robledo. Robledo took Ramirez out of the courtroom.

B. Officer Jones's Testimony.

Los Angeles Police Officer Chris Jones testified as follows. About 11:50 p.m. on September 29, 2012, Jones and his partner responded to Exposition and Budlong. Once there, Jones contacted Ramirez. Jones did not remember whether Ramirez spoke in English or Spanish. Ramirez seemed "pretty shook up" as a result of what had just happened to him.

Ramirez told Jones that Ramirez was held at gunpoint and taken out of his car. Ramirez gave Jones a brief description of who took his car. Ramirez said he was surrounded by four males and two females. Jones testified the main person who stood out to Ramirez was "a male Hispanic, possibly light skinned male Black, with cornrows and a tattoo on his neck." Ramirez also said the person who pulled Ramirez out of the car and pointed a gun at his head had "tattoos on his neck."[5] Jones testified Ramirez did not mention "other tattoos in other parts of the suspect's body." During redirect examination, Jones testified the neck tattoo was on the "light skinned male Black, possible male Hispanic with cornrows." Ramirez was unable to describe the other males; he was "pretty shocked." At the preliminary hearing, Jones testified the only person Ramirez described was a "male suspect who stuck him up at gunpoint."

C. Officer Escoto's Testimony.

Los Angeles Police Officer Ernesto Escoto testified as follows. About 10:10 p.m. on October 1, 2012, Escoto found the Honda in the rear parking lot of an apartment building at 2464

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[5] Robledo testified, "[Jones's] report describes suspect number one as a male Hispanic, brown, unknown [*sic*], six foot, 200 pounds, 30 to 35, blue shirt, blue jeans, tattoo on the neck, with cornrows, blue steel semiautomatic handgun."

East Lake in Los Angeles. The car's windows were rolled down. Escoto observed that the car's radio, and the back panels of the two front seats, were missing. Escoto ran the car's license plate and was advised the car was stolen and to hold it for prints.[6] Accordingly, Escoto did not enter the car and inspected it only from the outside. Escoto did not remember whether there was a CD on the front passenger seat, but there could have been one there. Escoto eventually called for Vertel's Tow, and a tow truck arrived and towed the car. Neither Escoto nor his partner rolled up the car's windows, nor did the tow truck driver while in Escoto's presence.

D. Fingerprint Evidence.

On October 4, 2012, Los Angeles Police Print Specialist Kentau Moses went to Vertel's Tow Yard and obtained latent prints from the Honda.[7] The prints were placed on 11 print cards. Print card No. 1 contained a fingerprint Moses recovered from the label side of a "Low Profile" CD that was on the front passenger seat. Print card No. 9 contained three palmprints that

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[6] An instruction to hold a vehicle for prints meant an officer was to place a note on it indicating the car was being held for prints so no one would enter the vehicle. If a person conducted a follow-up inspection of such a vehicle, the person would have to sign in with the tow truck company.

[7] Moses testified the Honda was in a locked building where vehicles that were being kept for evidence were housed. The building was only opened for Los Angeles police or experts like Moses. The Honda was apparently unlocked; Moses had not indicated in his notes that the Honda was locked. Moses testified that based on his diagram and notes, the Honda's windows were up.

Moses recovered in the rear trunk area above and to the right of the license plate. Print card No. 10 contained another palmprint Moses recovered from the rear trunk area, just above the license plate.

Los Angeles Police Forensic Print Specialist Ruben Sanchez testified as follows. The 11 print cards were run through a computer that identified appellant as a possible suspect and provided an exemplar of his prints. A comparison specialist compared the print cards with the exemplar and concluded three contained appellant's prints. On October 8, 2013, Sanchez personally obtained a print exemplar from appellant. Sanchez compared that exemplar with the 11 print cards and confirmed print card No. 1 contained appellant's right thumbprint, which was found on a "Low Profile" CD, print card No. 9 contained three left palmprints of appellant, and print card No. 10 contained another left palmprint of appellant.

E. Detective Robledo's Testimony.

(1) ***The six-pack.***

Robledo testified as follows. In November 2012, a fingerprint recovered from the Honda was matched to a suspect and, as a result, the Ramirez report was assigned to Robledo. Robledo testified the December 4, 2012 notes of Robledo's supervisor reflected, "received print hit from [scientific investigation division (SID)] to Ernest Velazquez, his arrest and CII number, assigned to Detective Robledo for . . . further follow-up investigation." On December 5, 2012, Robledo received the SID report "identifying the prints to an Ernesto Velazquez." Robledo did not receive a photograph of appellant with the report. On December 5, 2012, the case was assigned to Robledo. Robledo immediately called Ramirez to meet with him.

On December 6, 2012, Ramirez came to the station and Robledo prepared a six-pack. Robledo indicated the above CII number meant the person to whom it was assigned probably had a prior arrest report. Robledo testified, "[s]o I looked up that CII number, and it brought up the picture of this prior arrest." The photograph depicted appellant.[8] Robledo possessed Jones's report and knew about the suspect description that Ramirez gave to Jones as reflected in the report. However, Jones did not use that report when preparing the six-pack.

Robledo testified that the suspect description in Jones's report (see fn. 5, *ante*) did not match the person depicted in photograph No. 1 of the six-pack, except for the fact the depicted person was a male Hispanic. In the six-pack, photograph No. 1 was the only photograph depicting a person with tattoos and the only photograph depicting a person not wearing a shirt.

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[8] After Robledo so testified, the court indicated outside the presence of the jury that when defense counsel had asked Robledo from where he had obtained the photograph, all Robledo had to say was he obtained it from law enforcement resources, and he did not need to mention the CII number or the probable prior arrest. The court later instructed the jury, "[A]s part of his testimony, [Robledo] talked about the defendant's photo coming from a police computer and that . . . it was likely as a result of a CII number that the defendant had or a prior arrest. [¶] I am striking that from the record." In our assessment of appellant's ineffective assistance claim, we consider *post* the stricken information, not as evidence heard by the jury, but as information appellant's trial counsel reasonably might have considered.

When Ramirez came to the station on December 6, 2012, Robledo had him wait while Robledo accessed a California Department of Justice computer to obtain five remaining photographs for the six-pack. Robledo entered into the computer certain descriptors, i.e., "male, Hispanic, mustache, facial hair" and "25, 20 years old." Information about tattoos was not inputted into the computer. Appellant's counsel asked why not, and Robledo replied, "Sir, I didn't make up the computer system. I don't know." The computer produced photographs based on the descriptors. Robledo testified, "you have to pick through them and try to make some sense of what the computer is spitting out towards you. You can't really hand select them. You have to keep on scrolling through it and try to get a match." The computer generated the remaining five photographs of the six-pack. On December 6, 2012, Robledo showed the six-pack to Ramirez.

(2) ***Robledo's interview of Ramirez.***

Robledo also interviewed Ramirez on December 6, 2012. The conversation was in Spanish. Robledo, relying on his memory and notes, testified that Ramirez described appellant and an African-American male.

Robledo, referring to his notes, testified "[Ramirez described appellant as] a "male Hispanic, black hair, brown eyes, five seven to five eight, 170 to 180 pounds, 28 to 32 years old, white T-shirt, blue jeans, white sneakers, tattoo on either the left or right forearm of either a skull or a female, tattoos on both arms." Ramirez told Robledo that Ramirez saw tattoos "in [the] forearms" of the man who put a gun to his head and ordered him to exit the car. Ramirez told Robledo "the tattoos were either of a

skull or a female." Ramirez never mentioned a chest tattoo to Robledo.

Robledo, referring to his notes, testified Ramirez described the African-American male. Robledo listed him as suspect No. 2. Robledo indicated his notes said, "[suspect No. 2 was a] male Hispanic, slash, Black, black hair, unknown color eyes, about six feet, 200 pounds, 30 to 35 years old. . . . black shirt, blue jeans, tattoo on the neck, and hair in cornrows." Robledo also testified, "I listed [suspect No. 2] as a male Hispanic, and then I put a little line. And it says 'Black' because [Ramirez] says, . . . he might have been Hispanic, most likely Black. And I asked him why. And he said because of his hair." Robledo's notes that he took when he spoke with Ramirez were admitted into evidence.

(3) ***Subsequent events.***

Robledo testified that prior to the 2013 preliminary hearing, he had never met appellant and, at the time of the preliminary hearing, Robledo did not know whether appellant in fact had tattoos on either of his arms. During appellant's first trial, Robledo took photographs of tattoos on appellant. The photographs depicted a tattoo of a female figure on appellant's right arm, a female face on the bicep of his right arm, a devil's head on appellant's left arm, and the devil's head on the outside of appellant's left arm. There was also a photograph of "the chest area showing a chest tattoo and a large red mark towards the center." Robledo opined at trial that a particular photograph, viewed very quickly, could be interpreted as resembling a skull because the photograph depicted sunken eyes, and the photograph could be so interpreted even though the skull was colored orange to resemble a devil. Before Robledo took the photographs, he did not know whether appellant had those

tattoos. When Robledo took the photographs, he saw no tattoos on appellant's forearms.

2. ***DEFENSE EVIDENCE.***

In defense, Salvador Medina testified as follows. Medina was a director of Victory Outreach (Victory), a recovery home. Appellant was involved in Victory's program, and Medina and appellant were friends. On March 12, 2013, the date of the preliminary hearing, Medina brought appellant to the courthouse and sat with him in the courtroom. Ramirez arrived, then sat next to appellant for about 30 to 45 minutes. Ramirez was not nervous and did not behave abnormally. Robledo entered the courtroom and called Ramirez into the hallway. When Ramirez reentered the courtroom, he sat behind and away from Medina and appellant.

ISSUES

Appellant claims (1) he was denied effective assistance of counsel by his trial counsel's failure to move to suppress Ramirez's identification of appellant, and (2) Penal Code section 654 barred multiple punishment on his convictions.

DISCUSSION

1. ***APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.***

Appellant claims he received ineffective assistance of counsel by his trial counsel's failure to move to suppress as violative of due process his identification of appellant on the ground the six-pack was impermissibly suggestive and the identification was unreliable. We reject the claim.

A. Applicable Law.

" 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id.* at p. 217.)

Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In assessing an ineffective assistance attack on trial counsel's adequacy mounted on direct appeal, competency is presumed unless the record affirmatively excludes a rational basis for the trial counsel's choice. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1259-1260.) Moreover, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

Further, " '[a]n attorney representing a criminal defendant generally has the right to control trial tactics and strategy, despite differences of opinion or even open objections from the defendant.' [Citation.] Decisions regarding whether to object to certain evidence or to make motions affecting evidentiary matters fall within the realm of trial tactics and strategy." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1024.)

"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." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*).) As to the first above enumerated consideration, the United States Supreme Court, in previous decisions, has "emphasized . . . that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." (*Perry* v. *New Hampshire* (2012) 565 U.S. 228, 238-239 [181 L.Ed.2d 694] (*Perry*).) Moreover, " ' "[o]nly if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification." [Citation.]' [Citations.]" (*People v. Thomas* (2012) 54 Cal.4th 908, 930-931.)

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' " (*Cunningham*, *supra,* 25 Cal.4th at p. 990.) Moreover, the defendant has the "burden of establishing unreliability in the totality of the circumstances." (*Ibid.*)

B. Application of the Law to the Facts.

We need not decide the due process issues of whether photograph No. 1 was "suggestive and unnecessary" (*Perry, supra,* 565 U.S. at p. 239), or whether the photograph caused appellant " 'to "stand out" from the others in a way that would suggest the witness should select him.' " (*Cunningham*, *supra,* 25 Cal.4th at p. 990.) The ineffective assistance issue before us is whether the record affirmatively excludes a rational basis for a choice by appellant's trial counsel not to challenge photograph No. 1 and the six-pack. In the present case, based on the evidence, appellant's trial counsel *rationally could have concluded* not to renew the motion on due process grounds because: (1) photograph No. 1 was not suggestive, (2) photograph No. 1 was the only photograph of appellant available to Robledo, therefore, its use was necessary, and (3) under the totality of the circumstances, Ramirez's identification was reliable. "Counsel is not ineffective for failing to make frivolous or futile motions." (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

(1) ***Appellant's counsel reasonably could have concluded that photograph No. 1 was not suggestive***.

In the present case, Detective Robledo did not use information about appellant's personal features to produce appellant's photograph. Instead, Robledo simply inputted into a computer a CII number that was associated with the fingerprint match and assigned to appellant, the computer generated the photograph Robledo had of appellant (from a prior arrest), and Robledo made it photograph No. 1 in the six-pack. Thus, Robledo had no control over how appellant's photograph depicted his features or him, had no control over the depiction of appellant's chest tattoos or the depiction of him without a shirt, and had no

control over whether those depictions allegedly caused appellant to "stand out." Prior to seeing this computer-generated photograph, the detective had not met appellant and therefore could not have selected a suggestive photograph of him. Thus, appellant's trial counsel reasonably could have concluded that any alleged suggestiveness of photograph No. 1 was not intentional.

Moreover, photograph No.1 was inconsistent with the description of the suspect in Jones's report, to the extent it described the carjacker as having a tattoo(s) on his *neck* (not on his chest or shoulders) and cornrows. Robledo, in presenting appellant's photograph in the six-pack, was not presenting a photograph of appellant that completely matched Ramirez's description of the suspect to Jones. In fact, the only common factors between the computer-generated photograph and Ramirez's description were Hispanic ethnicity and the mere fact of a tattoo(s). In sum, appellant's trial counsel reasonably could have refrained from making a due process motion because he concluded he would not be able to meet his burden of demonstrating that photograph No. 1 and/or the six-pack were "*suggestive* and unnecessary" (*Perry, supra,* 565 U.S. at p. 239, italics added). The fact that a different trial counsel might have concluded differently does not compel a contrary conclusion.

(2) ***Appellant's counsel reasonably could have concluded that photograph No. 1 was the only available photograph of appellant, therefore, its use was necessary.***

Appellant cites no evidence that any law enforcement officer involved in this case had another photograph of appellant. Nor, for that matter, does the record demonstrate Robledo could have obtained the remaining photographs in the six-pack in any

way other than the way that he did. The computer generated the first and only photograph of appellant. In other words, appellant's trial counsel reasonably could have concluded that use of photograph No. 1 in the six-pack was necessary. Appellant's trial counsel had a rational basis for refraining from filing a suppression motion because he reasonably could have concluded that he could not meet his burden of demonstrating that the six-pack was both "suggestive *and unnecessary*" (*Perry, supra,* 565 U.S. at p. 239, italics added).

(3) ***Appellant's counsel reasonably could have concluded that the identification was reliable under the totality of the circumstances.***

Finally, appellant's trial counsel rationally could have concluded that Ramirez's identification was reliable under the totality of the circumstances, negating the need to suppress the identification.

Ramirez testified at trial that, at the preliminary hearing, he told a Los Angeles police officer on *September 29, 2012*, that appellant had tattoos on his arms. Photograph No. 1 does not depict appellant's arms. Robledo testified at trial that, as late as the preliminary hearing date, he did not know one way or the other whether appellant had tattoos on either of his arms. Thus, Ramirez's testimony concerning tattoos on appellant's arm(s) was based on Ramirez's independent memory.

Similarly, Ramirez's testimony that there were two attackers, appellant and the African-American male, was not suggested by photograph No. 1 and/or the six-pack, but was based on Ramirez's independent memory. Photograph No. 1 (depicting appellant, a Hispanic male) does not suggest the existence of a second suspect, namely, an African-American male. However,

once Ramirez saw photograph No. 1, he consistently maintained he had two attackers, appellant and the African-American male. Ramirez gave Robledo detailed descriptions of both, and Ramirez clarified by his statements to the detective and later testimony that (1) appellant had a shaved head and the arm and chest tattoos, and (2) the African-American male was wearing cornrows and was the person who had the tattoo on his neck. Ramirez clarified there were two gunmen, not one. Photograph No. 1 could not have suggested these additional facts.

During the present trial, Ramirez testified to the effect that he had many opportunities to identify appellant. While still inside his car, he was able to look at appellant's face and other parts of his body. Ramirez testified he saw appellant's face for approximately 30 seconds while being removed from his car and saw appellant for an additional minute while appellant was driving away. Ramirez identified appellant at the preliminary hearing, at appellant's first trial, and at appellant's second trial. In sum, appellant's trial counsel had a rational basis for refraining from filing another due process motion because trial counsel rationally could have concluded he would not have been able to bear his "burden of establishing unreliability in the totality of the circumstances." (*Cunningham, supra,* 25 Cal.4th at p. 990.) No ineffective assistance of counsel occurred.

2. ***PENAL CODE SECTION 654 DID NOT BAR MULTIPLE PUNISHMENT.***

The People's theory was not that Ramirez was physically robbed of his car and/or its contents by appellant. The People's theory as reflected in their opening statement and jury argument was that appellant was not only liable for carjacking, but was liable for robbery because (1) he aided and abetted the robbery of

Ramirez of his wallet by handing him off to appellant's cohort, the African-American man, who then at gunpoint moved Ramirez away from his car to the sidewalk before committing that robbery, or (2) that robbery was the natural and probable consequence of the carjacking.[9] During sentencing, the court indicated that "[e]ven though the carjacking and the robbery are two distinct acts," the court would sentence appellant to concurrent prison terms, and the court later did so.

Appellant claims Penal Code section 654,[10] barred multiple punishment on his convictions. We disagree. " ' "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of [Penal Code] section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." '

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[9] Although the robbery instruction did not specify the property that was taken by force or fear, the People did not argue to the jury that appellant and the African-American were joint perpetrators of the robbery of the wallet. The People did not argue, for example, that (1) appellant used force or fear to remove Ramirez from the car, not only intending to take the car, but intending the African-American man to steal Ramirez's wallet, and (2) the African-American, with that understanding, took the wallet.

[10] Penal Code section 654 states, in relevant part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

[Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 885 (*Capistrano*).)

" 'The purpose of [Penal Code] section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." ' [Citation.] 'It is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.' [Citation.] ' "The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced." ' [Citation.]" (*Capistrano*, *supra,* 59 Cal.4th at p 886, fn. omitted.)

A trial court's imposition of concurrent sentences is treated as an implied finding that the defendant possessed multiple intents or objectives, i.e., as a conclusion Penal Code section 654 does not apply. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) The trial court's findings, including implied findings, will not be reversed on appeal if there is substantial evidence to support them. (*Id.* at pp. 1143, 1147.)

In *Capistrano*, the California Supreme Court rejected the claim that the trial court in that case violated Penal Code section 654 by imposing multiple punishment for carjacking and home invasion robbery. (*Capistrano, supra,* 59 Cal.4th at pp. 885-887.) Despite the temporal proximity of the offenses (*id.* at p. 887), the court found that the defendant and his accomplices "confronted the victims at two points" (*ibid.*) by first accosting them at their

cars and later inside their residences. (*Ibid*.) *Capistrano* stated, "The elevation of the threat to the victims by forcing them into their homes where defendant committed additional crimes amount[ed] to a separate criminal objective. [Citation.]" (*Ibid*.)

Here, as in *Capistrano*, the victim was confronted twice and by more than one assailant. Appellant personally committed an act of violence against Ramirez by pointing a gun at his head, then appellant elevated the threat of harm to Ramirez by handing him over to appellant's cohort who committed a separate act of violence by pointing a different gun at Ramirez's head and robbing him of his wallet (and phone). Had appellant simply intended to commit carjacking, he could have done so at the initial point of contact by driving away with the stolen car and robbing Ramirez of his car's contents. Instead, appellant aided and abetted the armed robbery of Ramirez at a different location by a different assailant wielding a different gun, amounting to a separate criminal objective. (Cf. *Capistrano, supra,* 59 Cal.4th at p. 887.)

The risk Ramirez might be harmed either accidentally, during any effort by him to resist or flee, and/or by the intervention of a third party increased while the cohort was forcing Ramirez away from his car at gunpoint. Once at the sidewalk, the cohort also took Ramirez's cell phone, precluding him from using it to call for help.

In sum, the trial court was not obligated to treat appellant as no more culpable than a standstill strong-arm robber. The purpose of Penal Code section 654 is to insure that punishment is commensurate with a defendant's *culpability*. The trial court reasonably could have concluded that when appellant, as an aider and abettor, robbed Ramirez of his wallet, appellant committed

armed robbery with an elevated threat to Ramirez, and the elevated threat amounted to a separate criminal objective.[11] (Cf. *Capistrano*, *supra,* 59 Cal.4th at p. 887.) Section 654 did not bar multiple punishment of appellant's convictions.[12]

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[11] In light of this theory, the court's implied finding of separate criminal objectives is consistent with the jury's verdict. That is, it cannot be said that the natural and probable consequence theory was the theory of guilt as to the robbery.

[12] None of the cases cited by appellant (including *People v. Bauer* (1969) 1 Cal.3d 368, distinguished by *Capistrano*) compel a contrary conclusion. This also includes *People v. Dominguez* (1995) 38 Cal.App.4th 410 (*Dominguez*), a case in which the defendant placed on the back of the victim's neck an object which, to the victim, felt like a gun and the defendant demanded " 'everything [the victim] had.' " (*Id.* at p. 420; see pp. 414-415.) In response (and unlike what happened in the present case), the victim in *Dominguez* handed over his jewelry and van and fled, resulting in, *simultaneously*, a robbery of *both* items *and* a carjacking. (*Id.* at p. 420.) Moreover, in *Dominguez* (unlike in the present case), the People conceded in the trial court that Penal Code section 654 barred multiple punishment for robbery and carjacking. (*Dominguez,* at p. 419.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOSWAMI, J.*

We concur:

EDMON, P. J.

LAVIN, 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.