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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN PASILLAS et al.,

Defendants and Appellants.

D053109

(Super. Ct. Nos. SCD205930)

APPEALS from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, David M. Gill, Judges, and Bernard E. Revak (Retired Judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Affirmed.

## I.

### INTRODUCTION

A jury found Adrian Pasillas and Jorge Lopez guilty of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),<sup>1</sup> (counts 1 & 2). The jury also found that both Pasillas and Lopez committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The court sentenced Pasillas to eight years in prison, consisting of the middle term of three years on count 1, plus an additional term of five years for the gang enhancement. The court imposed an identical eight-year sentence as to count 2, and ordered that the sentence on count 2 run concurrently with the sentence to count 1. The trial court placed Lopez on formal probation for a period of three years.

On appeal, Pasillas claims that the trial court erred in denying his motion to suppress. Pasillas contends that the police illegally detained him during their investigation into the charged offenses, and that the trial court erred in refusing to suppress all evidence stemming from the illegal detention. Lopez claims that the trial court erred in denying his motion for a pretrial lineup. In addition, Lopez claims that there is insufficient evidence to support the jury's findings of guilt on the charged offenses and on the related gang enhancements, and that the trial court erred in denying his motion for a new trial on the ground that the jury's verdicts were contrary to the evidence. We affirm the judgment as to both defendants.

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<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Penal Code.

## II.

### FACTUAL BACKGROUND

#### A. *The assaults*

On April 13, 2007, 15-year-old Jesus C. (Jesus) and 17-year-old Jonathan F. (Jonathan) were walking across a street in the City Heights neighborhood of San Diego. A red car and a white car stopped near the intersection. There were several men inside each of the two cars. A man got out of the red car and moved quickly toward Jesus and Jonathan. As the man approached Jesus and Jonathan, he asked them, "How's the East Side treating you?" Jesus knew that he and Jonathan were in an area that the East Side gang claimed as their territory, and thought that the man's question indicated that the man was a member of the San Diego gang. Jesus replied, "I don't bang," signifying that he was not involved in any gang.

The man responded by swinging his fist at Jesus. The man's fist came within approximately two to three inches of Jesus. Jesus and Jonathan began running.<sup>2</sup> At least two of the men from the cars chased Jesus. One of the men attempted to stab Jesus with a knife, and yelled, "Stop running or I'm going to shank you." Jesus ran about a block before the men stopped chasing him. After the chase, Jesus saw a man who was holding a black baseball bat run back to one of the cars.

Several men chased Jonathan as well. One of the men was carrying a baseball bat and a second man was armed with a knife. The man with the bat hit Jonathan in the head,

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<sup>2</sup> At some point before Jesus began to run, all of the other men from both cars also got out of the cars.

knocking him to the ground. Shortly thereafter, the attackers went back to the cars in which they had arrived and left the scene.

B. *The investigation*

A woman who lived near the scene of the attack called the police at approximately 5:00 p.m. that evening. A police officer responded to the scene and interviewed Jesus. Jesus told the officer that the assailants were Hispanic males in their teens to twenties, and that some of them had shaved heads. Jesus also described the cars in which the assailants had been travelling.

At approximately 6:00 p.m. that evening, San Diego Police Officer Nestor Hernandez, together with his partner, drove around the area where the assaults had occurred, looking for possible suspects or witnesses. Near a residence that was approximately two to three blocks from the scene of the assault, Officer Hernandez saw a red car that matched Jesus's description of one of the cars used in the attack. Officer Hernandez also noticed four Hispanic males in front of the residence. As Officer Hernandez pulled his police car up to the residence, two of the males ran inside.

Officer Hernandez briefly contacted the two males who remained outside the residence—codefendant Joaquin Mena, and Lopez. The men were sitting in chairs on which East Side gang graffiti was written. Officer Hernandez knocked on the door of the residence. A woman answered the door and permitted Officer Hernandez to enter the house and look for the men who had run inside. In a bedroom, Officer Hernandez found Pasillas hiding in a bed, under the covers, pretending to be asleep. Pasillas was sweating profusely. He had abrasions on his face and dried blood on his face, neck and shirt.

Officer Hernandez also encountered codefendant Ricardo Sanchez<sup>3</sup> and a man named Robert Ferguson inside the residence. Officer Hernandez recognized Ferguson as one of the men who had initially been in front of the residence, and who had run inside. While at the residence, police found a steak knife in Mena's pocket and two freshly painted black baseball bats. Officer Hernandez detained Lopez, Pasillas, Mena, Sanchez, and Ferguson.

Police brought Jesus to the residence. Jesus identified Mena, Lopez, Pasillas and Sanchez as having being involved in the incident. Jesus said that Ferguson had not been involved. As to Pasillas, Jesus said, "Yes, he was the one with the blade." As to Lopez, Jesus said, "Yes, he was there too."

Approximately one month later, police showed Jonathan four arrays of photographs. Each contained one photograph of one of the suspects whom Jesus had identified—Pasillas, Mena, Lopez, and Sanchez—as well as photographs of five other men. Jonathan was unable to identify anyone in the arrays that contained the photographs of Pasillas, Lopez, and Sanchez. In the series that contained Mena's photograph, Jonathan pointed to Mena's photograph and said, "I think he was in the Focus, but I'm not sure."<sup>4</sup>

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<sup>3</sup> During his testimony, several of the witnesses referred to Sanchez by the alias Jesus Valle.

<sup>4</sup> At trial, Jonathan testified that some of the assailants had arrived at the scene in a red Ford Focus.

### III.

#### DISCUSSION

A. *The trial court did not err in denying Pasillas's motion to suppress*

Pasillas claims that the trial court erred in denying his motion to suppress. Pasillas argues that the police illegally detained him on the day of the incident, and that the trial court should have suppressed all evidence stemming from the illegal detention.

1. *Standard of review*

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Sardinias* (2009) 170 Cal.App.4th 488, 493.) "We may sustain the trial court's *decision* without embracing its *reasoning*. Thus, we may affirm the superior court's ruling on [Pasilla's] motion to suppress if the ruling is correct on any theory of the law applicable to the case. . . ." (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529 (*McDonald*).)

2. *Factual and procedural background*

In July 2007, Pasillas filed a motion to suppress pursuant to section 1538.5.<sup>5</sup> Under that section, a defendant may "move . . . to suppress as evidence any tangible or

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<sup>5</sup> The motion to suppress contained in the record does not bear a legible file stamp. However, the motion is dated July 27, 2007. We assume that the motion was filed on or about July 27.

intangible thing obtained as a result of a search or seizure" (§ 1538.5, subd. (a)(1)), on the ground that the search or seizure was unreasonable. (§ 1538.5, subd. (a)(1)(A), (B).) In a memorandum in support of his motion, Pasillas provided a summary of the facts pertaining to his detention on the day of the incident. Among other arguments, Pasillas contended that law enforcement officers lacked reasonable suspicion to search and seize him. Pasillas claimed that all evidence obtained as a result of the officers' unlawful detention was inadmissible and should be suppressed.

The People filed a brief in opposition to Pasillas's motion. After providing a summary of the facts relating to the detention, the People argued, "The location near the crime scene, proximity in time, resemblance to the description given by the victims, presence in [East Side] gang territory[,] and the flight from police—all these facts gave officers reasonable suspicion to detain . . . Pasillas." The People argued further, "Once the officers observed [Pasillas's] attempt at hiding, appearance of recently being involved in a fight and the dried blood on his head, officers would have been remiss in their duties had they not detained [Pasillas], pending the curb[side] lineup."<sup>6</sup>

The People further argued that Pasillas's detention was not "unduly prolonged." The People noted that the curbside showup was conducted less than an hour after the

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<sup>6</sup> Although the People refer to the procedure by which Jesus identified Pasillas as a "lineup," it is more properly referred to as a "showup." In *People v. Dampier* (1984) 159 Cal.App.3d 709 at pages 712-713, the court explained the difference between the two procedures as follows: "A 'lineup' is a relatively formalized procedure wherein a suspect, who is generally already in custody, is placed among a group of other persons whose general appearance resembles the suspect. . . . An in-the-field showup, on the other hand, is generally an informal confrontation involving only the police, the victim and the suspect."

officers first encountered Pasillas. The People asserted that during this time, the police had to obtain Jesus's parents' permission to allow him to attempt to make the identification, and had to transport Jesus to the residence at which Pasillas was detained.

The trial court held a hearing on the motion. At the hearing, Officer Hernandez testified regarding the circumstances of his detention of Pasillas. Officer Hernandez testified that on April 13, 2007, at approximately 5:00 p.m., he received a radio call regarding an alleged assault that had occurred near the intersection of Van Dyke Street and Polk Street. According to the radio call, several Hispanic males with either bald heads or short hair, claiming to be East Side San Diego gang members, had beaten a male with baseball bats, hands, and fists. According to the call, some of the suspects were wearing dark clothing, and others were wearing light clothing. Officer Hernandez and his partner responded to the area of the assault at approximately 6:00 p.m. that evening. Officer Hernandez drove around the area in an attempt to locate possible witnesses or suspects. He noticed four Hispanic males in the front yard of a house located approximately five blocks from the scene of the assault. The house was located in an area that was considered to be within the territory of the East Side San Diego gang.

Officer Hernandez stopped his police car in front of the residence. As he did so, two of the men who had been in the front yard "took off running . . . ." The men ran through the side door of the house. The other two men stayed in the front yard. One of the men who remained outside was wearing a black shirt, and the other was wearing a white shirt. Officer Hernandez and his partner walked up to a fence that surrounded the yard and asked the two men who had remained in the yard whether the officers could



speak with them regarding the assault. The men agreed. The officers then entered the yard, and spoke briefly with the men. The men were sitting on wooden chairs. Officer Hernandez noticed that references to the East Side San Diego gang were etched into the chairs.

After speaking with the two men in the front yard, Officer Hernandez knocked on the door of the residence. A woman named Karina Aguilar answered the door. Officer Hernandez asked Aguilar if he could speak to the two men who had just run inside the house. Aguilar responded that no one had come inside the house. Another man, later determined to be Robert Ferguson, then came to the door. Officer Hernandez recognized Ferguson as one of the men who had run inside the house. Officer Hernandez asked Ferguson if he lived there, and Ferguson responded that he did not. Another man, Ricardo Sanchez, came to the door and told Officer Hernandez that he lived at the house. Officer Hernandez asked Aguilar if he could come inside the house to look for the men who had entered the house. Aguilar agreed, stating, "Nobody came in here. But no problem. Come on in and look around."

Upon entering the house, Officer Hernandez saw two women in the living room. Aguilar walked to the door of one of the bedrooms in the house and said, "This is my bedroom. Go ahead and take a look." Officer Hernandez walked into the bedroom and saw someone lying on the bed, under several blankets and some clothing. Officer Hernandez could see the persons' legs from approximately the calves to the feet. Officer Hernandez said to the person, "Police Department . . . let me see your hands" at least three times, but received no response. Another police officer then came into the room.

Officer Hernandez pulled back the covers and recognized the man in the bed as one of the two males who he had seen run inside the house earlier. The man, who Officer Hernandez identified at the suppression hearing as Pasillas, was fully dressed and sweating profusely. Pasillas had abrasions on his face and dried blood on the top of his head. It appeared to Officer Hernandez that Pasillas may have recently been in a fight. Officer Hernandez asked Pasillas if he was on probation or parole, and Pasillas responded that he was on gang probation. Officer Hernandez then handcuffed Pasillas. Officer Hernandez explained, "I detained him until we could determine his probation status. At that point I had him go to the living room with everyone else so that we could secure the rest of the residence in a safe manner."

After securing the residence, Officer Hernandez looked around inside and outside the house. Officer Hernandez and another officer found two freshly painted black baseball bats. There was an empty can of black spray paint next to the bats, and one of the bats was wet to the touch. In addition, Officer Hernandez testified that police found a knife in the possession of one of the men whom the officers had initially contacted in the front yard.<sup>7</sup>

After hearing argument from Pasillas's counsel and the prosecutor, the trial court denied the motion, ruling:

"Motion is denied. It appears to the court, based upon the testimony, that the officers were involved in an active investigation, that the suspects, the persons in the front yard, clearly came within the

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<sup>7</sup> It is not clear from Officer Hernandez's testimony precisely when the officers found the knife.

class—not the class but within the description of the potential suspects. They went and Ms. Aguilar did give consent to come in. In coming in, finding the defendant hiding in the bed, after a discussion with him finding out he was on gang probation, and for officer safety there was a detention, and I think subsequent information that came to light justified the show-up. Therefore the motion will be denied. . . ."

### 3. *Governing law*

"When a police officer has an objective, reasonable, articulable suspicion a person has committed a crime or is about to commit a crime, the officer may briefly detain the person to investigate. The detention must be temporary, last no longer than necessary for the officer to confirm or dispel the officer's suspicion, and be accomplished using the least intrusive means available under the circumstances. [Citations.]" (*People v. Stier* (2008) 168 Cal.App.4th 21, 26-27 (*Stier*)). "Although circumstances short of probable cause to arrest may justify an officer's investigative detention, a detention may not be premised on mere curiosity, rumor, or hunch that the detainee is involved in criminal activity. [Citation.] Instead, an investigative detention must be justified by specific and articulable facts, measured by facts known to the officer at the time he or she detains the suspect [citation], that make it objectively reasonable for an officer in a like position, drawing on training and experience, to suspect (1) a crime has occurred or is occurring and (2) the detainee is involved in that activity. [Citations.] If the facts known to the officer at the time of the detention make the detention objectively reasonable, the officer's subjective intent will not vitiate the detention. [Citations.]" (*Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 320 (*Giovanni B.*)).

"The scope of the intrusion permitted during a detention will vary with the particular facts and circumstances of each case and the prosecution has the burden of establishing a detention was lawful. [Citation.] Handcuffing substantially increases the intrusiveness of a detention and is not part of a typical detention. [Citation.]" (*Stier, supra*, 168 Cal.App.4th at p. 27.) "Circumstances in which handcuffing has been determined to be reasonably necessary for the detention include when (1) the suspect is uncooperative; (2) the officer has information the suspect is currently armed; (3) the officer has information the suspect is about to commit a violent crime; (4) the detention closely follows a violent crime by a person matching the suspect's description and/or vehicle; (5) the suspect acts in a manner raising a reasonable possibility of danger or flight; or (6) the suspects outnumber the officers. [Citation.]" (*Id.* at pp. 27-28.)

"[T]he length of a detention must be reasonably related in scope to the circumstances which justified the interference in the first place." (*People v. Brown* (1998) 62 Cal.App.4th 493, 499.) "Circumstances which develop during a detention may provide reasonable suspicion to prolong the detention. [Citation.] . . . [T]he question is whether the police diligently pursued a means of investigation reasonably designed to confirm or dispel their suspicions quickly. [Citation.]" (*People v. Russell* (2000) 81 Cal.App.4th 96, 102 (*Russell*)).

#### 4. *Application*

Pasillas claims that Officer Hernandez detained him in the absence of specific articulable facts that would support a reasonable suspicion that he had been engaged in the charged offenses. We disagree. Prior to detaining Pasillas, Officer Hernandez knew

the following facts: The suspects in the gang assault that Officer Hernandez was investigating had claimed to be East Side San Diego gang members. The residence was near the crime scene and in East Side San Diego gang territory. Chairs that bore references to East Side San Diego were located in front of the residence at which Pasillas was detained. Officer Hernandez responded to the residence approximately an hour after having received the call regarding the assault. Men who matched the description of the suspects in the assault were in the front yard of the residence. Pasillas engaged in furtive conduct by running inside the house, hiding under the covers on a bed, and failing to respond to Officer Hernandez's repeated demands to show his hands. Pasillas's physical appearance was consistent with having very recently participated in an assault in that he was sweating profusely, and had abrasions on his face and dried blood on his head. Pasillas admitted to Officer Hernandez that he was on gang probation. In light of these facts, we conclude that Officer Hernandez had an objective, reasonable, articulable suspicion that Pasillas had committed the charged offenses.<sup>8</sup>

We reject Pasillas's arguments that the detention was legally invalid because Officer Hernandez did not act reasonably in handcuffing him and because the length of the detention was excessive. Several circumstances supported Officer Hernandez's decision to handcuff Hernandez. Pasillas acted in uncooperative manner by failing to

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<sup>8</sup> In light of our conclusion, we need not consider whether the detention was also justified to ensure Officer Hernandez's safety. (*McDonald, supra*, 137 Cal.App.4th at p. 529.) Further, in light of our conclusion that the facts known to Officer Hernandez made the detention objectively reasonable, Officer Hernandez's subjective intent in detaining Pasillas is not a basis for concluding that the detention was unreasonable. (See *Giovanni B., supra*, 152 Cal.App.4th at p. 320.)

respond to the officer's repeated demands to show his hands. In addition, Officer Hernandez harbored a reasonable suspicion that Pasillas had recently participated in a violent crime. Further, Pasillas had demonstrated that he was a flight risk by running from the yard of the residence when the police officers arrived. Finally, there were a number of other suspects located in or near the residence. Under these circumstances, Officer Hernandez acted reasonably in handcuffing Pasillas. (*Stier, supra*, 168 Cal.App.4th at p. 27.)

With respect to the approximately one hour length of the detention, the "police diligently pursued a means of investigation reasonably designed to confirm or dispel their suspicions quickly," by arranging for a curbside showup. (*Russell, supra*, 81 Cal.App.4th at p. 102.) Further the period of approximately one hour that it took for the officers to arrange the curbside showup was not excessive, particularly in light of the fact that during this hour, the police found incriminating evidence—freshly painted baseball bats—that could reasonably have increased their suspicion that Pasillas had committed the charged offenses. (*Ibid.*)

B. *Lopez's claims*

1. *The trial court did not commit reversible error in denying Lopez's motion for a pretrial lineup*

Lopez claims that the trial court committed reversible error in denying his motion for a pretrial lineup.

a. *Factual and procedural background*

On May 21, 2007, Lopez, moved for an order directing the People to arrange and conduct a live physical lineup, as provided under *Evans v. Superior Court* (1974) 11

Cal.3d 617 (*Evans*), to determine whether Jesus would identify Lopez as a participant in the charged offenses. In an accompanying declaration, defense counsel stated that eyewitness identification was a material issue in the case and asserted that there was a reasonable likelihood that Jesus had misidentified Lopez at the curbside showup. In a brief in support of his motion, Lopez contended that Jesus's curbside identification of Lopez was "essentially . . . the People's entire case and theory against [him]." Lopez further claimed that there were several circumstances that supported the conclusion that it was reasonably likely that Jesus had misidentified Lopez at the curbside showup, including that Jesus had only a minimal opportunity to observe the attackers, and that the description he had provided to police of the attackers was vague.

The People opposed the motion, arguing that there was no reasonable likelihood that Jesus had misidentified Lopez as a participant in the assaults, and that conducting a lineup would substantially burden the court, the police, the prosecution, and the witnesses.

On May 27, the trial court denied the motion, ruling that there was no reasonable likelihood that there had been a mistaken identification that a lineup would resolve.

b. *Governing law*

In *Evans, supra*, 11 Cal.3d 617, the California Supreme Court considered whether a defendant has a right to have the trial court order the People to arrange for police to conduct a pretrial lineup at which eyewitnesses to a crime can attempt to identify the defendant as the perpetrator of the crime. The *Evans* court stated:

"We conclude . . . that due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve. [Fn. omitted.]

"The questions whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries which necessarily rest for determination within the broad discretion of the magistrate or trial judge. [Citations.] We do not hold, accordingly, that in every case where there has not been a pretrial lineup the accused may, on demand, compel the People to arrange for one. Rather, as in all due process determinations, the resolution here to be made is one which must be arrived at after consideration not only of the benefits to be derived by the accused and the reasonableness of his request but also after considering the burden to be imposed on the prosecution, the police, the court and the witnesses." (*Evans, supra*, at p. 625.)

c. *Application*

We assume for the purposes of this decision that a defendant may seek reversal of a judgment on appeal on the ground that the trial court erred in denying a motion for a pretrial lineup, pursuant to *Evans*.<sup>9</sup> We further assume that the trial court in this case abused its discretion in denying Lopez's motion for a pretrial lineup. However, for the

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<sup>9</sup> In *People v. Mena* (2009) 93 Cal.Rptr.3d 845, 850, review granted August 26, 2009, S173973 (*Mena*), in a prior appeal involving codefendant Mena, this court held, "Because of the uniquely ephemeral nature of the rights conferred by *Evans*, we conclude the requirement of timely pursuit of a lineup includes timely review of an adverse ruling by writ proceedings, and failure to pursue writ relief waives the claim of error." In light of the Supreme Court's grant of review in *Mena*, we may not, and do not, rely on that decision in this appeal. (Cal. Rules of Court, rules 8.1105(e), 8.1115(a).)



reasons stated below, we conclude any such error was harmless beyond a reasonable doubt.<sup>10</sup>

(i) *Lopez's contentions as to prejudice*

In his opening brief, Lopez argues that the trial court's denial of his motion for a pretrial lineup was prejudicial because there was a "lack of any other evidence to connect appellant Lopez to these crimes. . . ." In addition, Lopez claims that it is likely that Jesus would not have identified him at a pretrial lineup, and that evidence of such inability to identify him as a participant in the charged offenses would have had significant probative value at trial. Lopez reasons:

"This is because the prosecution was able to argue to the jury that part of the reason Jesus C. did not identify [Lopez] at trial, while he did identify him at the showup, was because the incident had occurred months earlier and his memory was not as clear at the time of trial. [Citation.] If a live lineup had been conducted and appellant Lopez had not been identified by the witnesses especially by Jesus C. in this lineup the prosecution could not have made this argument to the jury as the lineup would've been much closer in time to the incident [than] was the trial."

In his reply brief, Lopez contends that the trial court's refusal to order a lineup was prejudicial because the prosecutor asserted during closing argument that Jesus had not identified Lopez at trial because Jesus was afraid to have Lopez see him make the

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<sup>10</sup> The parties have not cited, and we are not aware of, any citable authority concerning the appropriate standard of prejudice to be applied in this context. In light of the fact that the *Evans* court based its holding on federal constitutional principles (*Evans, supra*, 11 Cal.3d at p. 625), we apply the *Chapman v. California* (1967) 386 U.S. 18, 24 standard of prejudice, which is applicable to claims of federal constitutional error.

identification. According to Lopez, evidence that Jesus had failed to identify him during an anonymous pretrial lineup would have "thwarted this argument."

Lopez argues that the proper remedy for the claimed error would be for this court to reverse the judgment and direct the trial court on retrial to instruct the jury that Jesus would not have identified Lopez in a pretrial lineup if one had been conducted.

- (ii) *Any error that the trial court may have committed in denying Lopez's motion for a pretrial lineup was harmless beyond a reasonable doubt*

Even assuming that the jury should have received evidence that Jesus would not have identified Lopez in a pretrial lineup, for the reasons discussed below, in light of the fact that the jury received evidence that Jesus was unable to identify Lopez either at trial or at the preliminary hearing, we conclude that any such evidentiary omission did not prejudice Lopez.

Jesus testified at trial that he did not recognize Lopez as one of his attackers, and that he had not been able to identify Lopez as one of his attackers in June of 2007 when he saw Lopez at the preliminary hearing. The prosecutor acknowledged during his closing argument that Jesus had not identified Lopez "in June of 2007"—when the preliminary hearing was held—or at trial. During his closing argument, Lopez's counsel argued, at length, that Jesus's identification of Lopez at the curbside showup was unreliable, and noted that Jesus had not been able to identify Lopez in either a photographic lineup or a physical one.

Thus, notwithstanding the "inherently suggestive" nature of the in-court identification process (*People v. Palmer* (1984) 154 Cal.App.3d 79, 88), Jesus did not

identify Lopez as a perpetrator of the charged offenses at either the preliminary hearing or at trial. Further, in light of Jesus's testimony and the closing arguments of both the prosecutor and Lopez's counsel, the jury was clearly aware of this fact, but nevertheless, convicted Lopez of the charged offenses. Under these circumstances, we do not see how informing the jury that Jesus would not have identified Lopez at a pretrial lineup could have affected the outcome of the case.

We reject Lopez's arguments to the contrary. First, Lopez's primary argument as to prejudice is that the lineup would have been conducted closer in time to the attack, and that, if a lineup had been conducted, the People would not have been able to attribute Jesus's failure to identify Lopez in court to the passage of time. The June 2007 preliminary hearing was held less than a week after the denial of Lopez's motion for a pretrial lineup. Thus, the jury learned that Jesus had not identified Lopez in court at or near the time that a pretrial lineup would have been conducted.<sup>11</sup> Further, during his closing argument, the prosecutor argued that Jesus's identification of Lopez at the curbside showup was more reliable because it was made near the time of the crimes rather than "four months later in court in June [at the preliminary hearing]. . . ."

With respect to Lopez's contention that evidence that Jesus had failed to identify him during an anonymous pretrial lineup would have "thwarted" the prosecution's argument that Jesus was not willing to identify Lopez due to fear, the prosecution could have persuasively argued that Jesus's inability to identify Lopez during a pretrial lineup

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<sup>11</sup> The prosecutor and Lopez's counsel stipulated before the jury that the preliminary hearing occurred on June 6, 2007.

was based on his fear that Jesus would later be required to testify in front of Lopez at his trial.

In sum, the probative value of evidence that Jesus could not have identified Lopez at a pretrial lineup would have been exceedingly marginal under the circumstances of this case. Further, contrary to Lopez's contention in his brief, there was considerable circumstantial evidence of Lopez's guilt on the charged offenses, apart from Jesus's out-of-court identification of him. (See pt. III.B.2.c.(i)., *post.*) Accordingly, we conclude that any error that the trial court may have committed in denying Lopez's request for a pretrial lineup was harmless beyond a reasonable doubt.

2. *There is sufficient evidence to support the jury's guilty verdicts; the trial court did not err in denying Lopez's motion for a new trial on the ground that the jury's verdicts were contrary to the evidence*

Lopez claims that there is insufficient evidence to support the jury's findings of guilt on the charged offenses and on the related gang enhancements. Lopez also claims that the trial court erred in denying his motion for a new trial on the ground that the jury's verdicts were contrary to the evidence.

- a. *Standards of review*

In determining the sufficiency of the evidence to support a guilty verdict, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to

determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

We review a defendant's claim that the trial court erred in denying his motion for a new trial on the ground that the verdict was contrary to the evidence pursuant to the abuse of discretion standard of review. (*People v. Staten* (2000) 24 Cal.4th 434, 466 [" " "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." " " [Citation.]".])

b. *Governing law*

(i) *The charged offenses and the gang enhancements*

The jury found Lopez guilty of two counts of assault with a deadly weapon (§ 245, subd. (a)(1).) As to each count, the jury found that Lopez committed the offense in association with a gang under the circumstances described in section 186.22, subdivision (b)(1).

Section 245, subdivision (a)(1) prohibits committing "an assault upon the person of another with a deadly weapon . . . ." Section 186.22, subdivision (b)(1) provides for an enhanced sentence 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 . . . ."

(ii) *Aiding and abetting*

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime, although these are factors the jury may consider in assessing a defendant's criminal responsibility." (*People v. Garcia* (2008) 168 Cal.App.4th 261, 272-273.)

(iii) *The sufficiency of a testifying witness's out-of-court identification of a criminal defendant to support a jury's guilty verdict*

In *People v. Gould* (1960) 54 Cal.2d 621 (*Gould*) overruled by *People v. Cuevas* (1995) 12 Cal.4th 252 (*Cuevas*), the Supreme Court held that a testifying witness's out-of-court identification "that cannot be confirmed by an identification [of the defendant] at the trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime." (*Gould, supra*, 54 Cal.2d at p. 631.) In *Cuevas, supra*, 12 Cal.4th at page 257, the Supreme Court overruled *Gould's* holding that an out-of-court identification is, as a matter of law, insufficient by itself to sustain a conviction. The *Cuevas* court held that the sufficiency of an out-of-court identification to support a conviction should be determined by applying the ordinary substantial evidence test outlined in *People v. Johnson, supra*, 26 Cal.3d 557. (*Cuevas*,

*supra*, 12 Cal.4th at p. 257.) Thus, pursuant to *Cuevas*, "the probative value of the identification and whatever other evidence there is in the record are considered together to determine whether a reasonable trier of fact could find the elements of the crime proven beyond a reasonable doubt." (*Cuevas, supra*, 12 Cal.4th at p. 274.)

The *Cuevas* court noted that the probative value of an out-of-court identification will depend on many circumstances related to the out-of-court identification, including:

"(1) the identifying witness's prior familiarity with the defendant; (2) the witness's opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime." (*Cuevas, supra*, 12 Cal.4th at p. 267.)

In addition, the *Cuevas* court noted various circumstances relating to a witness's failure to identify the defendant at trial may be relevant in assessing the probative value of the out-of-court identification, including:

"(1) whether the identifying witness admits, denies, or fails to remember making the out-of-court identification; (2) whether the witness remembers the underlying events of the crime but no longer believes in the accuracy of the out-of-court identification; (3) whether, if the witness claims the identification was false or erroneous, the witness offers an explanation for making a false or erroneous identification; (4) whether, if the witness claims a failure of recollection, there are reasons supporting the loss of memory; (5) whether there is evidence that the witness's failure to confirm the identification in court resulted from the witness's appreciation that doing so would result in the defendant's conviction; or (6) whether there is evidence that, as the Attorney General suggests occurred here, the witness's failure to confirm the identification arises from fear or intimidation." (*Cuevas, supra*, 12 Cal.4th at pp. 267-268.)

- (iv) *A motion for new trial on the ground that the jury's verdict is contrary to the evidence*

Section 1181 provides in relevant part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 6. When the verdict or finding is contrary to law or evidence. . . ."

In *Porter v. Superior Court* (2009) 47 Cal.4th 125, the Supreme Court described the manner by which a trial court is to rule on a motion for new trial made pursuant to section 1181(6):

"[The trial court] independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to the . . . evidence.' [Citations.] In doing so, the judge acts as a 13th juror who is a 'holdout' for acquittal." (*Porter, supra*, at p. 133.)

c. *Application*

- (i) *There is sufficient evidence in the record to support the jury's guilty verdicts on the charged offenses*

Lopez claims that the evidence in the record is insufficient to support the jury's guilty verdicts because Jesus's out-of-court identification of him was unreliable, and there was no evidence that Lopez "did anything more than exit from and stand outside of one of the cars from which some of the people who chased Jesus C. and Jonathan F. came out of."



At the outset, we reject Lopez's argument that the circumstances of the out-of-court identification (*Cuevas, supra*, 12 Cal.4th at p. 267), demonstrate that the probative value of the identification was "minimal or nonexistent." While Jesus had no prior familiarity with Lopez, he also had no motive to falsely implicate Lopez in the charged offenses. (*Ibid.*) In considering the other circumstances that the *Cuevas* court cited as relevant in determining the probative value of an out-of-court identification (*ibid.*), Jesus had at least some opportunity to observe Lopez during the crime and he gave a moderately detailed description of his assailants to the responding officers, including stating that the attackers were Hispanic males in their teens to twenties, some of whom had shaved heads. Jesus was also able to describe the cars in which the perpetrators arrived at the scene.

Lopez argues that Jesus was undoubtedly under a significant amount of stress at the time he made the out-of-court identification because "he had just been through a very traumatic experience." While this may be so, one could argue with equal plausibility that the timing of Jesus's identification of Lopez increased its reliability because it was made near the time of the commission of the charged offenses. (See *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071 ["a prompt identification shortly after the commission of a crime will be more accurate than a belated identification days or weeks later"].) Further, while Lopez argues that certain environmental factors are likely to have impacted Jesus's ability to observe Lopez during the curbside showup, he has not demonstrated that any of these factors rendered the curbside showup so inherently unreliable that the jury could

not have reasonably relied on the identification in considering whether Lopez committed the charged offenses.

In considering the circumstances of Jesus's failure to identify Lopez at trial, the jury could have reasonably concluded that the failure arose from fear or intimidation.<sup>12</sup> (See *Cuevas, supra*, 12 Cal.4th at p. 268.) In addition, at trial, Jesus admitted to having made the out-of-court identification, and also testified regarding the underlying events of the crime, thereby bolstering the probative value of the out-of-court identification. (*Id.* at pp. 267-268.)

We reject Lopez's claim that the only evidence of his participation in the charged offenses was that he got out of one of the cars at the scene of the incident. At trial, Jesus testified that the people whom he identified during the April curbside showup had chased him and had been involved in the attack:

"[The prosecutor]: The people that you identified to the police back in April, if you can remember, when you identified them[,] were those the people that had gotten out of the cars or do you know what they did? [¶] Were those people that had actually gotten out of the cars?"

"[Jesus]: Yes.

"[The prosecutor]: Do you know if those people that you pointed them out, when you pointed them out were these the people that were involved in the chase?"

"[Jesus]: Yes.

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<sup>12</sup> At trial, Jesus testified that he did not want to be at the trial and that he was worried about something happening to him based on his appearing in court.

"[The prosecutor]: Were any of these people saying anything else to you while they were chasing you?"

"[Jesus]: I don't remember."<sup>13</sup>

Further, Jesus's identification of Lopez was not the only evidence of Lopez's guilt on the charged offenses. (See *Cuevas, supra*, 12 Cal.4th at p. 274 [reviewing court must consider all of the evidence of the defendant's guilt in the record, in determining whether it contains substantial evidence to support the jury's verdict].) Police encountered Lopez a short time after the assault, at a residence a few blocks from the scene of the assault, sitting in a chair that had the initials of the gang (ESD) responsible for the attack etched into it.<sup>14</sup> Three of the other persons who Jesus identified at the curbside showup were also at the residence, including codefendants Pasillas and Mena, and Jonathan separately tentatively identified Mena in a photographic lineup. Pasillas was a documented ESD gang member. Prior to his detention and eventual arrest for the charged offenses, Lopez had twice previously been contacted by police while in the presence of documented ESD gang members. Just outside of the residence, police found freshly painted baseball bats. Both Jesus and Jonathan testified that that they saw one of their attackers wielding a baseball bat at some point during the attack.

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<sup>13</sup> At another point in Jesus's testimony, the prosecutor asked him, "The people that you identified, did they look like the people that *were involved in the attack*?" (Italics added.) Jesus responded in the affirmative.

<sup>14</sup> Jesus testified that one of the attackers stated the name of their gang prior to initiating the assault.

In sum, considering the record as a whole, and analyzing both the probative value of the out-of-court identification as well as the other evidence of Lopez's guilt, we conclude that there is sufficient evidence in the record to support the jury's guilty verdicts on two counts of assault with a deadly weapon.<sup>15</sup>

(ii) *The trial court did not abuse its discretion in denying Lopez's motion for a new trial*

Lopez's claim that the trial court erred in denying his motion for new trial is based on the premise that the "probative value of the evidence connecting Lopez to these crimes was extremely weak and insufficient as a whole to sustain the verdict." We concluded in part III.B.2.c.(i)., *ante*, that there is sufficient evidence in the record to support the jury's guilty verdicts. We further note that the trial court carefully reviewed the evidence bearing on Lopez's guilt before it exercised its discretion to deny his motion for a new trial.<sup>16</sup> Under these circumstances, we conclude that the trial court did not abuse its

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<sup>15</sup> Lopez also claims that there is insufficient evidence to support the jury's true findings on the gang enhancements. However, Lopez's claim is based solely on his contention that there is insufficient evidence to support the guilty verdicts on the charged offenses. In light of our conclusion that the record contains sufficient evidence to support the guilty verdicts on the charged offenses, we reject Lopez's claim regarding the gang enhancements.

discretion in denying Lopez's motion for a new trial. (See *People v. Staten, supra*, 24 Cal.4th at p. 466 [rejecting defendant's claim that trial court erred in denying motion for new trial because "[a]s discussed, there was sufficient evidence to support the guilt and penalty verdicts"].)

IV.

DISPOSITION

The judgment is affirmed.

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AARON, J.

WE CONCUR:

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McCONNELL, P. J.

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McDONALD, J.

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16 In denying Lopez's motion for a new trial, the court stated: "Okay. Well, having presided over this trial, my observation is that it was definitely a close case as to some of these defendants. And I think there was sufficient circumstantial evidence to tie Mr. Lopez in with the offense, based on the testimony of Jesus. ¶ Plus, within a very short period of time, perhaps just coincidentally, [Lopez] is found sitting . . . out [in] front of a house with some of the very same people that were also involved in that assault. ¶ And I think this is what the jury really hung their hat on, and that is the testimony of Jesus. Obviously, his reluctance, justifiably, to identify anybody based on his fear of retaliation . . . . [T]hese young boys were reluctant to identify anybody because of retaliation and their fear of retaliation. ¶ Not only that, a bat was found nearby where [Lopez] and his companions were seated on the lawn in front of this house. One of them fled into the house upon the police showing up. So you have not only proximity of space, but also of time. ¶ So I'm going to, on balance, deny the motion for a new trial."