

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ISRAEL DANIEL GOMEZ,

Defendant and Appellant.

E054711

(Super.Ct.No. RIF127425)

OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.

Affirmed.

Eric S. Multhaupt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

In December 2005, defendant Israel Daniel Gomez, an 18-year-old gang member, shot and killed a teenage boy and fired on two other victims during an afternoon confrontation on the street. Defendant admitted being a gang member and firing a gun but, at trial, he claimed he acted in self-defense.

A jury convicted defendant of murder in violation of section 187, subdivision (a), (count 1–victim Jesse Velasco) and two counts of attempted murder in violation of sections 664 and 187, subdivision (a) (counts 2 and 3–victims Pedro Torres and Eric Pacheco).² The trial court sentenced appellant to a sentence of life without possibility of parole plus an additional 55 years to life and 40 years in state prison.

On appeal, defendant argues there was *Doyle* error³ and ineffective assistance of counsel because the prosecutor cross-examined him about changing from an alibi defense to self-defense. Additionally, defendant maintains it was prejudicial error not to permit defense counsel to introduce a photograph of one of the victims, illustrating his menacing appearance at the time of the murder. Finally, defendant contends it was ineffective assistance of counsel for defense counsel not to object to the prosecutor’s cross-

¹ All statutory references are to the Penal Code unless stated otherwise.

² The jury also found true the related gang and gun enhancements which are not a subject of this appeal.

³ *Doyle v. Ohio* (1976) 426 U.S. 610.

examination about defendant's purported lack of remorse. We reject all defendant's claims of error and affirm the judgment.

II

STATEMENT OF FACTS

A. Prosecution

1. The Murder and Attempted Murders

Jesse Velasco was 15 years old. His brother, Eric Pacheco, was 18 years old. Velasco attended Ramona High School with his best friend, Pedro Torres, also 15 years old. Gerardo Villegas, another friend, was a year older than Velasco and Torres. Neither Velasco nor Torres were gang members.

On the afternoon of Saturday, December 3, 2005, Pacheco agreed to give Velasco, Torres and Villegas a ride to the mall. All three boys were walking down Streeter Avenue when defendant approached them on a bicycle and began circling around them, "mad-dogging" them. When defendant asked what they were looking at, Velasco or Torres denied looking at anything. Defendant asked if they "gang-banged," and Velasco said no. Villegas got nervous and left. Villegas heard five gunshots shortly after leaving the area.⁴

Defendant continued to harass Velasco and Torres, following them and saying, "Hey" and "Hillside," or, "This is Hillside." Defendant and Velasco began to argue but

⁴ Villegas was an uncooperative witness and testified at trial that he did not recall his prior statements to detectives.

Velasco did not mention any gang affiliation. Neither Torres nor Velasco had any weapons at the time of the shooting.

Defendant dismounted from his bicycle and approached Velasco with his hand in his pants pocket. Velasco asked defendant to back off but defendant continued to approach. Defendant told Velasco and Torres to go to Nichols Park. At first, they agreed but they changed their minds because Hillside gang members congregated there. Defendant said they were wasting his time and he was leaving. However, defendant continued to circle Velasco and Torres on his bike. Then he dismounted his bike again with his hand in his pocket. Defendant mentioned Nichols Park again and said, “Fuck you. . . .” when Velasco and Torres asked him to relax.

Velasco continued to back away from defendant who “kept wanting to go in his face.” Velasco called his brother, Pacheco, on his cell phone but handed the phone to Torres who told Pacheco that “Smiley from Hillside” was arguing with them and looked like he wanted to fight.⁵ Pacheco quickly dressed, jumped in his car and drove to Streeter Avenue. As Pacheco passed the boys, he saw defendant aggressively approaching Velasco who was backing away. Defendant’s right hand was still in his pant pocket while Velasco’s hands stayed at his sides.

Pacheco parked a short distance away and exited his car with the engine running. Defendant yelled, “Hillside” at Pacheco. Pacheco responded by saying something about

⁵ Pacheco knew defendant as “Smiley.” Defendant had once displayed a Hillside gang sign and asked Pacheco, “What’s up?”

Westside Riva or Westside Rubidoux. Meanwhile, Velasco and Torres were standing about five feet from defendant.

According to Torres, defendant pulled a small caliber semiautomatic handgun from his pocket, racked the slide on the gun with his left hand, and fired four or five shots at Velasco from a distance of five or six feet, as Velasco was retreating into the street. Velasco grabbed his chest and yelled out in pain. Meanwhile, Pacheco made his way towards the rear of his car. Torres ran across the street towards Pacheco's car for cover. Defendant remounted his bike and fired additional shots at Torres and Pacheco. Torres entered Pacheco's car and they drove to Velasco who had run towards the railroad tracks. Velasco lay wounded on the sidewalk. Torres tried to call for an ambulance.

According to Pacheco, he parked his car and exited, intending to protect his brother. Defendant looked at him and waited for him to come closer, pulling out a chrome semiautomatic handgun from his pocket when Pacheco was eight to ten feet away from defendant. Defendant pointed the gun directly at Pacheco and fired several shots as Pacheco fled back to his car. Nothing was said between defendant and Pacheco before the shooting, and Pacheco did not yell anything about Westside.⁶ Pacheco had no weapons or anything in his hands.

When Pacheco turned back to help his brother, he observed defendant shoot Velasco in the shoulder and then point the gun directly at the middle of Velasco's chest

⁶ Neighbors in the area heard people arguing and cursing at each other and then five gunshots with a pause after the second and fourth shots. They did not recall anyone yelling "Hillside" or "Westside."

and fire another shot from about a foot away. Velasco ran across the street yelling, “It’s hurting,” and fell to the ground. Pacheco picked up his brother and held him in his arms as Velasco’s eyes rolled back.

Immediately after the shooting, defendant rode his bicycle to the home of Abel and Jaime Velasquez and asked Jaime for a ride. Because defendant looked nervous, Jaime refused to help. He did not want to get involved if defendant was in trouble. Jaime watched defendant place his bike in an unidentified vehicle and be driven away. Several minutes later, Jaime heard police sirens and a commotion coming from Streeter Avenue. Leticia Aguilar, who lived at the Velasquez home, disclosed that Abel had told her defendant had shot “a little boy or a fool,” a statement she recanted at trial.

2. Investigation

The police found five spent casings on the sidewalk and grassy area off Streeter Avenue but no strike marks or spent bullets at the scene. Velasco’s clothing did not have any soot or stippling, indicating a gun shot fired at close range.

A forensic pathologist determined that Velasco suffered a gunshot wound to the left side of his chest. The bullet passed “through the center of the heart, through both of the large pumping chambers of the heart.” The trajectory of the bullet was consistent with Velasco having turned “to his left away from the gun” at the time of the shooting. The cause of Velasco’s death was the gunshot wound which perforated the heart and lung, resulting in significant internal bleeding into the chest cavity. Death occurred within a minute of the gunshot.

A senior criminalist at the Department of Justice testified that all five expended cartridges found at the shooting scene were .25-caliber ammunition by the same manufacturer and fired by the same gun. The bullet recovered from Velasco's body was consistent with .25-caliber automatic ammunition fired by the same weapon as the cartridges.

3. Defendant's Interview

Detectives Steve Shumway and David Smith interviewed defendant on December 6, 2005. After being advised of and waiving his rights to silence and counsel, defendant told the detectives that he was not on Streeter Avenue at the time of the shooting but he was at home with his family and girlfriend the entire day and evening, and never left the house for any reason. Defendant claimed he was "shocked" when he found out about the shooting and was scared that people were trying to say he did it. When confronted with Pacheco's identification of him as the shooter, defendant continued to insist that he was at home and did nothing wrong and that he did not know Pacheco. After the detectives suggested he may have acted in self-defense, defendant continued to deny any involvement in the shooting and repeated that he was at home that day. Defendant admitted he used to hang out with "guys on Hillside" but he denied any affiliation with Hillside gang members.

4. Gang Evidence

In June 2004, defendant admitted to the police that he was a member of the Hillside Riva gang and he used the moniker, "Smiley." He made the same admissions after his arrest on December 6, 2005.

The prosecution presented very detailed evidence about defendant's involvement in the Hillside Riva gang and the Hillside Dukes clique and their rivals, the Casa Blanca, West Side Riva, and 18th Street gangs.⁷ Ultimately, the gang expert, Gary Toussaint, testified, based on a hypothetical question presenting the facts of the Streeter Avenue shooting, that the crimes were committed for the benefit of, in association with or at the direction of the Hillside Riva gang since the violence instilled fear into the community and gained respect for the gang.

While in jail, defendant wrote a letter or "kite" asking the brothers, Abel and Jaime, to back up his alibi. Defendant also had possession of a birthday card for Smiley, decorated with "HSR."

Torres testified that he was not in a gang, although he had previously belonged to a tagging crew called the Color Boys, which did not exist at the time of the shooting. Torres said that Velasco was not a gang member but Velasco's cousins and Pacheco might have been affiliated with West Side Riva. Pacheco and Villegas both testified they were not involved in gangs. No evidence implicated them in gangs.

B. Defense

1. Defendant's Mother

Defendant's mother testified that the family gave defendant the name "Smiley" because he was always smiling and happy as a child. Defendant's mother's boyfriend beat defendant many times, threatened her and caused her to obtain a restraining order.

⁷ We do not summarize the extensive gang evidence because it is not a subject of the appeal.

Defendant's mother initially told detectives that defendant was at home with her at the time of the shooting. She was going to be an alibi witness until Jaime, Abel and Aguilar testified in a prior proceeding.

2. Defendant's Direct Testimony

Defendant testified that he was in fact a Hillside gang member. He fired a handgun in the direction of three guys on December 3, 2005, striking Velasco, but he denied aiming at his heart.

Defendant left a family barbeque that afternoon to hang out and smoke marijuana with other Hillside gang members at a house next to Nichols Park. He tried to visit Abel and Aguilar but they were not home. Subsequently, defendant rode his bike towards Streeter Avenue where he saw Velasco, Torres, and Villegas walking together. Defendant stopped to talk with Torres and, said "what's up" in a non-hostile way. He offered to sell them a "nickel bag" of marijuana. The three boys said they had no money and asked if he was "Pequeños." Defendant said he was from Hillside and asked where they were from. Villegas said he did not gang bang, Torres said he was from Casa Blanca and Velasco said he was from West Side Riva. Defendant was not offended by Torres claiming Casa Blanca. Defendant was not aware of any problems between the Hillside Riva and West Side Riva gangs.

Defendant testified that Velasco became agitated and appeared like he wanted to fight after defendant said he was "Smiley" from the Hillside Dukes. When defendant asked Velasco why he was staring at him, Velasco told defendant, "Fuck you," and called him a "bitch." Defendant argued with Velasco and the three boys whispered to each

other until Villegas left. Defendant advanced towards Velasco and Torres, who backed away from him. Velasco had his hand at his waist like he had a weapon. Defendant continued to argue with Velasco until Velasco said he did not want any problems, they shook hands, and defendant returned to his bike.

At that point, Pacheco drove by at a high rate of speed, stopping as defendant was mounting his bike. Pacheco exited the car and ran around to the trunk. Pacheco looked like a gang member with a shaved head. Velasco and Torres yelled and ran at defendant while Pacheco was crouched by the trunk or backseat of his car. Pacheco also ran towards defendant. Given his experience with gang members, defendant assumed Pacheco had a weapon. Defendant thought he was going to be shot or stabbed. Defendant got off his bike and backed up towards a house or fence. Defendant felt trapped and he pulled a handgun from his front pocket, and fired two warning shots in the air. Defendant fired the first shot in Pacheco's direction, the second shot towards his left, and then "wildly" fired three more shots without aiming at Velasco's chest.

Defendant rode his bike to the Velasquez home where he asked Jaime for a ride home, which Jaime refused to do. Defendant paid someone else at the house for a ride, got in the car and left. Defendant boarded up the windows when he got home because he feared a retaliatory shooting.

Defendant explained that he wanted to leave the scene of the shooting because he did not want to be arrested and that he had possession of a .25-caliber semiautomatic gun to defend his home and his mother. He had also purchased a shotgun for protection.

Defendant claimed he had never seen Pacheco before and denied a prior incident with Pacheco and his niece. Neither he nor Pacheco yelled out the name of a gang.

After a cousin told him that the police were accusing him of killing someone, defendant denied it because he was scared of going to prison. When he was interviewed by the detectives, he intended to tell the truth about being attacked but thought they would not believe him since he was a gang member. Defendant's girlfriend convinced him to tell the detectives he "didn't do it" because she did not want him to go to jail.

Defendant testified that he threatened Pastor Reyes after Reyes threatened to beat him up in front of his mother. Defendant's stepfather beat him all the time and threatened to kill him and his mother. He had the news clipping of the shooting as well as the rest of the newspaper to show to his mother rather than as a trophy. Defendant claimed to feel remorse about Velasco's death but he felt his life was in danger and the shooting was justified.

3. Cross-Examination

The prosecution began cross-examination with a brief reference to defendant's apparent lack of remorse. The prosecutor then proceeded to ask questions about why defendant changed his explanation about what happened after the prosecution found the three witnesses—Abel, Jaime, and Aguilar. Defense counsel objected based on attorney-client privilege regarding prior trial strategy. The prosecutor asserted his questions were based on previous testimony and information obtained from monitoring jail telephone calls made by defendant. The court disagreed that the prosecutor had asked questions about trial strategy and reasoned there was a basis to question defendant's credibility

because he had lied to the police with the encouragement of his girlfriend and changed his story after his jail note, the kite, was discovered. At that point, the court overruled the defense objection and defendant admitted he relinquished his alibi defense after the kite was found and he lied because his girlfriend persuaded him. Defendant testified he was a “different” kind of gang member who shot Velasco only because he felt his life was threatened.

Defendant wrote the kite when he was still relying on an alibi defense and he was worried that Abel or Jaime would say he had come to their house seeking a ride. Defendant originally had not planned to testify while claiming an alibi defense. Defense counsel had never coached defendant.

III

DEFENDANT’S ALIBI DEFENSE AND SELF-DEFENSE

Defendant claims he was deprived of his constitutional rights to due process, a fair trial, and counsel because the prosecutor cross-examined him on his discarded alibi defense and the subsequent change to self-defense and, in closing argument, the prosecutor asserted defendant had recently fabricated the self-defense claim. Principally, defendant contends the prosecutor should not have been allowed to ask him about his original intention to testify falsely about an alibi defense until he decided to switch to self-defense.

Defendant specifically contends this line of cross-examination violated his rights under *Doyle v. Ohio, supra*, 426 U.S. 610, as applied in *People v. Galloway* (1979) 100 Cal.App.3d 551, and intruded upon attorney-client privilege by inquiring about the

changed defense. Finally, defendant asserts that prejudice from the alleged errors requires reversal of the judgment.

We conclude it was proper for the prosecutor to cross-examine defendant about the inconsistencies between his trial testimony, his prior statements in the police interview, and his change of defenses and to argue the reasonable inference of recent fabrication from that evidence. Moreover, defendant waived his *Doyle* claim and any related claim of prosecutorial misconduct, and any alleged error was harmless.

A. Forfeiture

An objection to the prosecutor's questions in the trial court which does not specify the issue raised on appeal forfeits the claim for appellate review. (See *People v. Gonzales and Soliz* 52 Cal.4th 254, 318; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 199.) Likewise, the failure to object to prosecutorial misconduct grounds forfeits a misconduct claim for purposes of appeal. (*People v. Foster* (2010) 50 Cal.4th 1301, 1350-1351.)

At trial defendant objected to the prosecutor's line of questioning on the grounds of relevance, argumentative, improper, violation of constitutional right of defense, and attorney-client privilege. Because defendant did not object on *Doyle* grounds, he forfeited the issue. (*People v. Tate* (2010) 49 Cal.4th 635, 691-692.)

Defendant also cites the prosecutor's closing arguments before the jury as *Doyle* error. However, defendant did not object or request any curative admonitions. Failure to object to prosecutorial misconduct in the trial court and seek a curative admonition forfeits the claim for appeal unless such an objection or request would have been futile.

(See *People v. Silva* (2001) 25 Cal.4th 345, 373.) ““Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.”” (*People v. Wilson* (2008) 44 Cal.4th 758, 800, quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 79.) Because no *Doyle* or related misconduct claim had been previously raised or rejected, the record does not show that any objection or request would have been futile. The claim of prosecutorial misconduct in conjunction with *Doyle* error has not been preserved for purposes of appeal. Having deprived the trial court of the opportunity to address the errors he raises for the first time on appeal, defendant has forfeited his claim.

B. Doyle Error

Notwithstanding forfeiture, there was no *Doyle* error or related prosecutorial misconduct. In *Doyle v. Ohio, supra*, 426 U.S. 610, the United States Supreme Court held the impeachment of a defendant at trial with his postarrest silence after being admonished pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, would violate the Due Process Clause of the Fourteenth Amendment. (*Doyle*, at p. 619; *People v. Clark* (2011) 52 Cal.4th 856, 959.) *Doyle* error can occur during examination of witnesses or closing argument. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256.) However, in either situation, the rule in *Doyle* “prohibits the prosecution from exploiting a defendant’s post-*Miranda*-advisement silence.” (*Ibid*; *Clark*, at p. 959; see also *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1555-1556.)

In *Galloway*, the appellate court found *Doyle* error when the prosecutor asked about and commented on the defendant's silence about an alibi until he testified at trial. Here, defendant expressly waived his rights to silence and counsel following the *Miranda* advisement, agreed to discuss the case with the detectives and, rather than remaining silent, presented his alibi that he was not at the shooting scene. Therefore, *Doyle* does not apply.

An identical *Doyle* claim was rejected by the California Supreme Court in *People v. Osband* (1996) 13 Cal.4th 622, in which defendant waived his *Miranda* rights in a post-arrest interview and offered the alibi that he was not at the crime scenes whereas, at trial, the defendant admitted that he had committed crimes at both locations. (*Osband*, at p. 694.) The court held it was not *Doyle* error to question defendant about his prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all. (*Osband*, at p. 694, citing *Anderson v. Charles* (1980) 447 U.S. 404, 408.)

Defendant did not remain silent in his interview after receiving *Miranda* warnings. He offered an alibi. Then he recanted his alibi and decided to claim self-defense. Thus, the prosecutor's questioning of defendant about the inconsistencies between his prior statement and trial testimony did not constitute *Doyle* error. (*People v. Osband, supra*, 13 Cal.4th at p. 694.)

C. Attorney-Client Privilege

Defendant also challenges the prosecutor's cross-examination of him on the abandonment of his alibi defense, as a violation of the attorney-client privilege as a kind of *Doyle* error. During direct examination, defendant testified that he initially intended to tell the detectives the truth but his girlfriend persuaded him to say he did not do it because she did not want him to go to jail. Defendant also testified that he feared the detectives would not believe him because he was a gang member. When defense counsel asked defendant how he felt about killing Velasco, defendant replied that he was remorseful but he had no choice because he felt he was in grave danger.

During cross-examination, defendant admitted he had maintained his alibi defense until the time when the prosecution identified the three prosecution witnesses—Abel, Jaime, and Aguilar—about a year earlier. Defendant then recognized he would need a different defense. Defense counsel objected on the ground of attorney-client privilege. The trial court reasoned, it “is significant because it goes to show whether he’s a credible witness or not whether he lied before. He’s admitted he lied, but he can go into the fact that he did. So I don’t see anything inappropriate about that. It’s clearly not privileged communications.” After defense counsel argued that protected legal strategy may have been involved, the court responded, it was not a trial strategy because the alibi was proposed by defendant’s girlfriend. Defendant then acknowledged he finally gave up his alibi defense about four and a half years after the shooting and he repeated that his girlfriend had convinced him to lie to the detectives. Although, originally he had planned

not to testify while claiming an alibi defense, defense counsel had never coached defendant about offering a false alibi or changing to self-defense.

The attorney-client privilege protects confidential communications between attorneys and their clients. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) As explained above, the prosecutor's questions were entirely based on matters outside any communications between defendant and his lawyer. At trial, defendant testified that he committed the shooting in self-defense, contradicting the alibi defense he offered detectives at the time of his arrest. Defendant also testified that he lied to the detectives at the behest of his girlfriend. Before any cross-examination by the prosecutor, defendant himself established that his defense theory changed between the initial interview in December 2005 and trial in June 2011. The prosecutor's questions—even as they addressed defendant's original plan not to testify—inquired into defendant's motivations based on admissible evidence rather than any confidential communications with counsel.

In *Tate*, the prosecutor specifically asked the defendant about discussions between his current and former counsel. (*People v. Tate, supra*, 49 Cal.4th at p. 691.) The court found with one exception, “each prosecutorial attempt to probe attorney-client conversations was squelched by a successful defense objection before any answer was forthcoming.” (*Id.* at p. 692.)

Here, there were no attempts to probe into any conversations between defendant and his current or prior counsel. The record does not offer any support for defendant's assertion that the prosecution was “improperly cross-examining [defendant] based on the witness list that defense gave to the prosecutor in accordance with Penal Code section

1054.” According to defendant’s own testimony, it was his own idea to lie and claim self-defense, not his lawyer’s. Since the prosecutor’s cross-examination of defendant did not “presuppose a communication between attorney and client” and was, in fact, “answered without impliedly affirming that such conversation occurred,” there was no violation of defendant’s attorney-client privilege. (See *Mitchell v. Superior Court, supra*, 37 Cal.3d at p. 601.)

Finally, because there was no inquiry into any confidential communications and no violation of defendant’s attorney-client privilege, the underlying premise of defendant’s conflict of interest claim is erroneous and unsupported by the record.

(*People v. Doolin* (2009) 45 Cal.4th 390, 417-422.)

D. Cross-Examination of Defendant’s Credibility

In all other respects, the prosecutor’s cross-examination was proper. Through his direct testimony, defendant established a change of defense from alibi to self-defense, an issue bearing directly on his credibility as a witness and subject to impeachment on cross-examination. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139; *People v. Letner and Tobin, supra*, 50 Cal.4th at p. 199; *People v. Friend* (2009) 47 Cal.4th 1, 35.)

In *People v. Tafoya* (2007) 42 Cal.4th 147, the defendant denied any involvement in two murders but, at trial, the defendant admitted that he shot the two victims and claimed he acted in self-defense. (*Id.* at p. 175.) The appellate court found no abuse of discretion and explained, “Because defendant’s responses raised new issues about defendant’s credibility, the prosecution was entitled to explore these issues.” (*Ibid.*)

Similarly, the prosecutor here was entitled to delve into the credibility issues raised by defendant's direct testimony that he switched defenses. (*People v. Harris* (1981) 28 Cal.3d 935, 953.) Moreover, "[R]ecent fabrication may be inferred when it is shown that a witness did not speak about an important matter at a time when it would have been natural for him to so'" (*People v. Riccardi* (2012) 54 Cal.4th 758, 803.) In defendant's interview, the detectives not only gave appellant an opportunity to claim self-defense but even encouraged him to do so as an interview tactic. Yet, defendant adhered to his alibi.

Accordingly, the trial court instructed the jury on a defendant's false or misleading prior statements about the charged crime as conduct which may show consciousness of guilt (CALCRIM No. 362), as well as fabrication of evidence or testimony as evidence of consciousness of guilt (CALCRIM No. 371). The prosecutor could properly explore these issues in his cross-examination of defendant, amplifying defendant's direct testimony – that he lied to the detectives in his police interview and offered them a categorically different defense than that presented at trial – in order to impeach his credibility as a witness and show recent fabrication. (See *People v. Letner & Tobin, supra*, 50 Cal.4th at p. 199.) There was no trial court error or prosecutorial misconduct.

E. Harmless Error

In any event, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818; *People v. Loy* (2011) 52 Cal.4th 46, 67.) It is not reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Watson*, at p. 836.)

During his direct testimony, defendant readily explained his switch in defenses because he was afraid that the detectives would not believe his claim of self-defense because he was a gang member and his girlfriend persuaded him to deny any involvement in the shooting. Defendant repeated the same explanation on cross-examination.

Defendant's testimony in other material respects lacked credibility in light of the physical evidence and expert testimony. Specifically, defendant testified that he "wildly fired" the shot that killed Velasco without aiming when Velasco was shot point-blank in the heart; that he took no offense to Torres claiming Casa Blanca in Hillside territory when appellant's fellow Hillside gang members would have shot Torres for it; that he carried a gun around while riding his bicycle to protect his home and mother; and that he kept a news clipping of the murder—in his bedroom in a box which was covered and filled with Hillside gang graffiti—in order to show it to his mother rather than as a trophy. The blatant implausibility of his testimony—not the changed defense—undermined his credibility with the jury. It is not reasonably probable that defendant would have received more favorable verdict had the prosecutor been constrained from inquiring about the change in defense.

IV

THE BOOKING PHOTOGRAPH OF PACHECO

Defendant next claims the trial court erred by not permitting him to show the jury a booking photograph of the victim Pacheco with a scowl on his face. No abuse of discretion was shown because the photograph was not relevant and was cumulative of

other evidence. The exclusion of the photograph did not infringe on defendant's constitutional rights and any alleged error was harmless.

A. The Trial Evidence

The booking photograph of Pacheco, taken in December 2009, purportedly showed how Pacheco appeared on the day of the shooting in December 2005. At trial in June 2011, Pacheco's hair had grown out and defense counsel posited that his appearance would be "probably less serious and threatening." The prosecutor offered another photograph of Pacheco, taken within 13 months of the shooting. The trial court reviewed both photographs and noted that the defense photograph showed Pacheco "with a scowl on his face," a shaved head, and was "not a very appealing or flattering photograph." The court denied the use of either photograph without prejudice on relevancy grounds.

During Pacheco's direct examination, the prosecutor asked him about a photograph from late 2009, depicting Pacheco and another brother making hand signs with a caption referring to the "west coast". During cross-examination, Pacheco testified that he was bald in December 2005 and agreed that he looked different than at trial. Pacheco confirmed the photograph of him and his brother showed them making "W" and "S" hand signs and bore a caption reading, "Me and my brother west up wit it." Pacheco explained that they were signifying the "west coast" rather than West Side Riva.

Defense counsel asked to show the photograph of Pacheco with a shaved head and "a sneer on his face or looking unpleasant," demonstrating the circumstances defendant faced at the time of the shooting and relevant to his claim of self-defense. The prosecutor

objected to the photograph as irrelevant and inflammatory. The trial court denied the defense request.

When defendant testified, he described Pacheco as looking heavier, meaner, and with a “shaved head” at the time of the shooting. Although defendant could not see Pacheco’s facial expression, defendant testified that Pacheco looked “mean” and “atrocious.” After further argument by counsel, the court concluded the photograph was not relevant because defendant did not really see Pacheco’s expression. Defendant then offered to testify he did in fact see the expression on Pacheco’s face after Pacheco approached him in an aggressive manner. After more argument, the trial court finally ruled there was a lack of foundation and the evidence was cumulative and irrelevant “to just show a picture of a man that looks angry.”

Defendant testified again that he saw Pacheco’s face when Pacheco was running towards him and Pacheco looked “completely different” than he did at trial, bigger, scowling, and with a shaved head. The trial court continued to sustain the prosecutor’s objections to showing the jury other photographs of Pacheco. Defendant again testified that Pacheco was aggressive, had a shaved head and was “thicker,” at the time of the shooting.

B. Relevance

The test for relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent or motive. Trial courts are vested with wide “discretion in determining the relevance of evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) “[E]xclusion of evidence that produces only

speculative inferences is not an abuse of discretion.” (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) Evidence Code section 352 bars evidence when relevance is substantially outweighed by undue prejudice or the likelihood of undue consumption of time, confusion or misleading the jury. The trial court’s ruling should not be overruled absent “a manifest abuse of that discretion resulting in a miscarriage of justice.” (*People v. Cain* (1995) 10 Cal.4th 1, 33, quoting *People v. Milner* (1988) 45 Cal.3d 227, 239; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

The prosecutor repeatedly objected to the admission of the booking photograph under Evidence Code section 352. In addition to finding lack of foundation, the trial court questioned the relevance and cumulative nature of the photograph. The trial court’s exclusion of the photograph was proper under Evidence Code section 352.

Defendant testified that Pacheco looked “mean” and “atrocious” and was “scowling” on the day of the shooting. The photograph added little to defendant’s testimony and had minimal relevance. The photograph was also cumulative to the other evidence, including defendant’s testimony that Pacheco had a shaved head and was much bigger at the time of the incident and Pacheco’s admission that he was bald and “looked quite a bit different than” at trial. These facts were not in contention. The jury also received the menacing photograph of Pacheco and his brother, apparently throwing apparent gang signs.

The only remaining purpose for offering the booking photograph, as argued by the prosecutor, was to inflame the jury. Accordingly, the photograph created a “substantial

danger of undue prejudice, of confusing the issues, or of misleading the jury” which substantially outweighed any relevance. (See Evid. Code, § 352.) Defendant fails to show the trial court’s exclusion of the booking photograph was a manifest abuse of its discretion resulting in a miscarriage of justice. (See *People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

Furthermore, the “[a]pplication of the ordinary rules of evidence, such as Evidence Code section 352,” does not generally infringe on a defendant’s constitutional right to present a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 90.) Here, the trial court fairly and properly applied the ordinary rules of evidence. As previously argued, defendant was permitted to describe the booking photograph in detail and the jury received another photograph of Pacheco which looked very similar to how he looked on the day of the incident. Defendant’s due process constitutional right to present a defense was not violated.

Additionally, any alleged error was harmless under *Watson*. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.) As already discussed, defendant was able to present the jury with ample testimonial and photographic evidence depicting Pacheco at the time of the shooting as an aggressive, mean, and large gang member with a shaved head. It is not reasonably probable that appellant would have received a more favorable outcome if the jury had seen another mean-looking photograph of Pacheco. In *People v. Harris* (1989) 47 Cal.3d 1047, the California Supreme Court also found the exclusion of cumulative evidence “could not have been prejudicial.” (*Id.* at p. 1093.)

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant protests he was deprived of his constitutional right to effective assistance of counsel because trial counsel failed to object to the prosecutor's cross-examination about defendant's reaction to photographs of Velasco and the absence of remorsefulness. However, defendant put the question of remorse into issue himself in his direct testimony. There were no grounds upon which to object to the prosecutor's questioning and defendant was not prejudiced. Defendant did not establish deficient performance and prejudice required for his ineffective assistance of counsel claim.

In his direct testimony, defendant insisted that he felt remorse for Velasco's death even though he believed the shooting was justified. The prosecutor asked defendant:

"Q: You said that you're sorry and remorseful, and – so there have been pictures up here that have been graphic pictures of a 15-year-old boy that died; right?"

"A. Yes.

"Q. Did you have any reaction to that all, physically?"

"A. I was not looking at those pictures when you showed them on the projector.

"Q. Have you shown any remorse on the stand at all?"

"A. Well, I mean, like, I don't see—" The prosecutor then continued with another line of questioning.

The burden of proving ineffective assistance of trial counsel lies with

the defendant challenging the judgment. (*People v. Haskett* (1990) 52 Cal.3d 210, 248.) Under the two-prong test articulated in *Strickland v. Washington* (1984) 466 U.S. 668, 687-695, the defendant must demonstrate deficient performance as well as prejudice under the federal and state Constitutions. (*People v. Osband, supra*, 13 Cal.4th at p. 700.) To establish deficient performance, defendant must show trial counsel's representation fell "below an objective standard of reasonableness." (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) If the record on appeal does not contain an explanation for the challenged action or omission, the reviewing court must reject a claim of deficient performance unless counsel failed to provide an explanation when asked or there could be no satisfactory explanation for counsel's conduct. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) To establish prejudice, defendant must show a "reasonable probability that counsel's omission resulted in a less favorable verdict" (*People v. Wash* (1993) 6 Cal.4th 215, 271) or "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington, supra*, 466 U.S. at p. 686.) The reviewing court need not reach the question of deficient performance if defendant fails to demonstrate prejudice. (See *Id.* at p. 697.)

Here defendant testified about his remorse, allowing the prosecutor to cross-examine him on the same subject matter. (*People v. Mayfield* (1997) 14 Cal.4th 668, 754; *People v. Letner and Tobin, supra*, 50 Cal.4th at p. 199) It is proper for a prosecutor to cross-examine a defendant and explore his credibility on a subject matter for which the defense previously "opened the door" on direct examination. (See *People v. Friend, supra*, 47 Cal.4th at p. 35; *People v. Tafoya, supra*, 42 Cal.4th at p. 175.) The prosecutor

was entitled to question defendant to refute his claim of remorsefulness. Any further objections by defense counsel would have been meritless and cannot constitute deficient performance. (See, e.g., *People v. Lucero* (2000) 23 Cal.4th 692, 731; *People v. Price* (1991) 1 Cal.4th 324, 387.) Defendant fails to satisfy the first prong of *Strickland*.

Defendant also fails to satisfy the second prong of *Strickland* because the questioning about defendant's viewing of the photographs in court was extremely brief, and any potential prejudice was negated by defendant's answer that he was not looking at the photographs when the prosecutor displayed them. Defendant's ineffective assistance of counsel claim is rejected.

VI

DISPOSITION

We reject defendant's claims of *Doyle* error and ineffective assistance of counsel. There was no error in prohibiting the introduction of Pacheco's photograph or in allowing cross-examination on the issue of remorse.

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

McKINSTER

J.