**PEOPLE v. CEJA**

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*THE PEOPLE, Plaintiff and Respondent, v. ESTEBAN CEJA, Defendant and Appellant.*

Court of Appeals of California, Second District, Division Eight.

Filed January 30, 2020.

***Attorney(s) appearing for the Case***

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**WILEY**, *J.*

Ceja shot and killed one rival gang member and tried to shoot a second gang member for spraying graffiti in an area he claimed for his gang. On appeal, he argues his counsel was ineffective, he challenges the admission of four pieces of evidence, and he disputes his fines and fees. We affirm.

All references are to the Penal Code unless stated otherwise.

**I**

On September 23, 2015, fifteen-year-old Francisco Bautista and nineteen-year-old Cristian Zuniga went to spray graffiti in an alley. Bautista and Zuniga belonged to a gang called Indo.

An enemy gang of Indo, called DNA, claimed the alley as its territory. As they entered the alley, Zuniga saw a man, whom he later learned was DNA gang member Esteban Ceja, standing nearby. Zuniga kept watch while Bautista used green paint to cross out DNA graffiti and to spray Indo graffiti. Zuniga saw the shooter come into the alley, run toward them, and pull something from his right hip. Zuniga told Bautista to run. Zuniga heard gunfire as he too began to run away. Zuniga got away, but two fatal shots hit Bautista.

Video showed a man with hand tattoos matching the location of Ceja's tattoos enter the alley and extend his arm toward the place police found Bautista's body.

Two witnesses saw Ceja near the alley just after the shooting. One witness saw Ceja in her mother's apartment, which is adjacent to the alley. Ceja looked pale and scared. The witness told Ceja to leave and Ceja responded, "shh." Another witness heard someone running and saw Ceja, who looked pale and surprised, in that same apartment.

From that apartment, Ceja called his sister to ask for a ride to a medical marijuana dispensary. His sister complied. Ceja got in the back seat of her car, rather than the open front seat, which she found "weird." After dropping him off, Ceja's sister called Ceja and said police were investigating the shooting. Ceja directed his sister to tell police "that you don't know nothing and you don't know nothing about me."

Later that day, a witness called 911, told the operator what she saw, and said she thought Ceja was the shooter.

Just after midnight, police showed Zuniga photographs of six men, including Ceja. Zuniga said Ceja's photo "look[s] something like" the shooter.

Ceja's mother told him police were looking for him, so he fled to Texas in the days after the shooting. Police found and arrested Ceja in March 2016 and brought him back to Los Angeles.

Ceja was charged with murder (§ 187, subd. (a)) by using a firearm (§ 12022.53, subd. (d)) and attempted murder with premeditation (§§ 664, subd. (a); 187, subd. (a)) by using a firearm (§ 12022.53, subd. (c)). The prosecution alleged Ceja committed both offenses to benefit a criminal street gang. (§ 186.22, subd. (b)(1)(C)).

Trial lasted 14 days. Ceja took the stand. After less than two days of deliberation, the jury found Ceja guilty of second degree murder and attempted murder and found the firearm and gang allegations true.

**II**

Ceja contends his trial counsel rendered ineffective assistance by failing to object at three points during trial.

To establish ineffectiveness, a defendant must show counsel's efforts fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) [466 U.S. 668](https://www.leagle.com/cite/466%20U.S.%20668), 688.) In reviewing ineffective assistance claims, we defer to counsel's reasonable tactical decisions and presume counsel acted within the wide range of reasonable professional assistance. (*People v. Mai* (2013) [57 Cal.4th 986](https://www.leagle.com/cite/57%20Cal.4th%20986), 1009 (*Mai*).) Typically, claims of ineffective assistance are more appropriately raised in a habeas corpus proceeding. (*Ibid.*) On direct appeal, we reverse a conviction only if (1) the record shows counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) no satisfactory explanation could exist. (*Ibid.*)

Failure to object will rarely establish ineffective assistance. (*People v. Hillhouse* (2002) [27 Cal.4th 469](https://www.leagle.com/cite/27%20Cal.4th%20469), 502.)

The ineffectiveness, according to Ceja, arose from counsel's failure to object to:

1. a pre-trial out of court photo identification;2. expert testimony about the meaning of graffiti and tattoos; and3. a statement by the prosecutor during rebuttal argument about reasonable doubt.

Ceja's three arguments fail each prong of the *Mai* test. Ceja has not asked his trial lawyer to defend the three inactions, so he cannot satisfy prong two (counsel was asked and failed to provide a reason). Prongs one (no rational purpose) and three (no possible satisfactory explanation) lead to the same result.

We take each instance in turn.

**One—the photo identification**

Ceja argues the pre-trial photo identification by Zuniga was unreliable and therefore his trial counsel should have objected. Ceja argues Zuniga only got a "glimpse" of the shooter's face, was only 20 percent sure the photo showed the shooter, did not identify Ceja at the preliminary hearing or at trial, could not describe the shooter's race, estimated the shooter's height as much shorter than Ceja, and said the shooter did not have tattoos while Ceja did have tattoos.

Objection would have been futile because the photo identification was admissible. To determine if admission of identification evidence violates due process, reviewing courts consider 1) whether the identification procedure was unduly suggestive and unnecessary, and if so, 2) whether the identification was nevertheless reliable under the totality of the circumstances. (*People v. Cunningham* (2001) [25 Cal.4th 926](https://www.leagle.com/cite/25%20Cal.4th%20926), 989.)

The photo identification in this case was not unduly suggestive. Police videoed the identification process. The jury saw that video, which is in the record. The detective showed Zuniga six different photos of men. Each photo was on a separate 8½-by-11 inch piece of paper. Nothing about Ceja's photo made him stand out. The six men appear similar in race and age. Ceja has face tattoos but, for consistency, police blacked out the areas of the tattoos on each photo. The detective told Zuniga the photos might or might not include a picture of the shooter. Zuniga said he understood.

Ceja claims "police had separated" his photo from the others. Neither video of the identification nor witness testimony supports this claim. To fit the six pages on the table, the detective placed them in two rows: a top row with two photos and bottom row with four photos. Ceja's photo was in the bottom row, third from Zuniga's left side. Zuniga looked at the photos for less than a minute and said "I don't recognize any of these guys." The detective thought Zuniga may not have looked at all of the photos. Without telling Zuniga to look at Ceja's photo in particular, the detective responded, "Okay. And you looked at all of them?" Zuniga continued looking, moved Ceja's photo toward himself, pointed at it, and said, "He looked something like this guy." Zuniga said he was "not a very good speller," so the detective offered to write what Zuniga told him. Zuniga confirmed the photo of Ceja "looks like the shooter," the detective wrote a sentence to match Zuniga's statement, and the detective wrote his own name and badge number beneath it. The facts do not support Ceja's claim the identification was suggestive.

Ceja incorrectly says this case is like *Foster v. California* (1969) [394 U.S. 440](https://www.leagle.com/cite/394%20U.S.%20440), 443 (*Foster*), a case where the United States Supreme Court found an identification suggestive. There, police showed a robbery witness a three-man lineup in which the defendant stood out based on his height and because he wore a leather jacket similar to that worn by the robber. (*Id.* at pp. 442-443.) Police then used a "showup," in which the witness was asked to identify the defendant one-on-one. (*Id.* at p. 443.) When even that did not lead to a definite identification, police used yet another lineup with the defendant as the only repeat participant, which made it "all but inevitable" the witness would identify the defendant, regardless of his guilt. (*Ibid.*) The suggestive procedures in *Foster* were absent from Zuniga's identification of Ceja: there was only one photo identification procedure, there is no evidence Ceja's photo stood out, and there is no evidence the detective steered Zuniga toward selecting Ceja.

In his reply brief, Ceja asks us to focus not on whether the identification was suggestive but on whether the identification was "nevertheless reliable." He points to evidence Zuniga was not sure Ceja was the shooter: Zuniga only got a "glimpse" of the shooter's face, he said later he was only 20 percent sure the photo depicted the shooter, and so on. We cannot, however, skip the threshold question of whether the identification procedure was unduly suggestive. If, as is the case here, the identification procedure is not impermissibly suggestive, the inquiry into the due process claim ends. (*People v. Ochoa* (1998) [19 Cal.4th 353](https://www.leagle.com/cite/19%20Cal.4th%20353), 412.)

This rule is fair and logical because defendants can attack a questionable identification during cross-examination and in closing argument. (See *People v. Gordon* (1990) [50 Cal.3d 1223](https://www.leagle.com/cite/50%20Cal.3d%201223), 1243, disapproved on other grounds in *People v. Edwards* (1991) [54 Cal.3d 787](https://www.leagle.com/cite/54%20Cal.3d%20787), 835.) Defendants are entitled to extra protection against suggestive identifications, on the other hand, because suggestive identifications are insidious and because limiting their admissibility deters police from employing suggestive procedures.

Ceja's trial counsel questioned the reliability of Zuniga's identification during extensive cross-examinations of both Zuniga and the detective, and again in closing argument. The jury saw video of police interviewing Zuniga and video of the identification. Well-equipped to weigh the identification and the rest of the evidence, the jury found Ceja guilty.

There is no error in failing to request what is futile to seek. Ceja's trial counsel did not render ineffective assistance by failing to object to an admissible photo identification.

**Two—expert testimony about graffiti and tattoos**

Ceja challenges his counsel's failure to object to testimony from one police officer and one gang expert about the meaning of graffiti and tattoos.

Ceja had a tattoo with the letters `FK' and the alley had graffiti with the letters `FK,' `bK,' and `18K,' which the police officer testified were code for the names of gangs and the word `killer,' — that is, `FK' stood for `Florencia gang killer.' By writing graffiti or having tattoos of this sort, gang members communicated they had killed a member of the coded gang or were willing to kill other members of that gang. The gang expert corroborated the police officer's testimony, as did Ceja in his trial testimony.

Ceja says the testimony about the tattoos and graffiti constituted inadmissible evidence of uncharged crimes that were unnecessary to establish any disputed factual issue. This argument fails. Even assuming testimony defining the likely meaning of tattoos and graffiti rose to the level of "evidence of uncharged crimes," the testimony was admissible.

Ceja concedes gang evidence, including gang tattoos, can be admissible, but he argues it was inadmissible here because it was offered *only* to show Ceja's criminal disposition or bad character and thus to imply his guilt.

Ceja's argument is incorrect because this evidence helped prove identity and motive. (See *People v. Williams* (1997) [16 Cal.4th 153](https://www.leagle.com/cite/16%20Cal.4th%20153), 193 [evidence of gang affiliation and activity admissible to prove identity and motive].)

Throughout his briefs, Ceja contends the only "live" issue at trial was identity. According to Ceja, motive, intent, and the truth of the gang allegation were uncontested and established by other evidence.

Ceja did testify he belonged to DNA. But he does not show us where in the record he conceded intent, motive, or the truth of the gang allegation. Indeed, Ceja's counsel reserved opening statement until after the prosecution presented its case, so the prosecution had to assume all issues could be contested. Furthermore, the prosecution's burden to prove every element of a crime remains, even if a defendant decides not to contest an element. (*People v. Jones* (2011) [51 Cal.4th 346](https://www.leagle.com/cite/51%20Cal.4th%20346), 372 (*Jones*).) Evidence tending to prove motive, intent, and the truth of the gang allegation was relevant.

The tattoo and graffiti evidence helped prove identity. Ceja's `FK' tattoo matched the `FK' in the alley and Bautista was in the middle of tagging his gang name beside `FK' graffiti when the shooter approached. This was circumstantial evidence of identity.

This evidence also tended to narrow the shooter's identity. The prosecution's theory of the case was the shooter was a member of the gang whose graffiti Bautista crossed out. This evidence helped establish the graffiti at issue was DNA graffiti, because the coded gangs in graffiti next to where Bautista was tagging, like Florencia in `FK' and Barrio Mojados in `bK,' were rivals of DNA. The probative value was high because DNA was a small gang — it had just 20 to 25 members at the date of the crimes at issue — so evidence tending to show the shooter was from DNA created an inference about the shooter's identity.

This evidence went to motive as well by suggesting DNA gang members made the graffiti and a DNA gang member like Ceja had a motive to shoot someone crossing it out.

The police and expert testimony also supported the gang enhancement, which required a showing that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).) By admitting his membership in DNA, Ceja provided evidence to buttress the enhancement. The prosecution still needed to show DNA was a criminal street gang and the crime was committed for the gang, though, and the testimony here helped to do so. For example, during cross examination of a police officer, Ceja's counsel asked if DNA was merely a "tagging crew," which is a term for a small group that primarily sprays graffiti but is not responsible for more serious crimes. Ceja thus questioned whether DNA was a criminal street gang. In response, the prosecution elicited this graffiti and tattoo testimony, which tended to refute Ceja's theory by showing DNA proclaimed, through graffiti, involvement in more serious crimes.

The testimony about the tattoos and graffiti was admissible and Ceja's counsel was not ineffective by failing to object.

**Three—the prosecutor's statement about reasonable doubt**

Ceja says two sentences from the prosecution's rebuttal argument constituted prosecutorial misconduct and, in the alternative, he argues it was ineffective assistance of counsel for Ceja's trial counsel not to object.

The prosecution discussed reasonable doubt in rebuttal. The portion Ceja challenges is in italics: "[s]o the defense also talked about reasonable doubt. And the defense is trying to make it seem like it's this massive hurdle that can never be found, and that you can never have enough evidence to [get] there. Well, reasonable doubt is the standard for criminal cases across the country. *Reasonable doubt is found by juries every day in every county across this country. In every courtroom in this building, including this courtroom, people have found there was more than enough evidence to get beyond this burden of proof.* And with the mountain of evidence that you [sic] has been presented to you, not just the facts — remember, it's not just the facts, but the significance of those facts, it shows that of [sic] the defendant in this case is guilty."

Ceja says this argument "improperly invoked the prosecutor's depth of experience with his knowledge of the facts and verdicts in other cases to vouch for the strength of his case," encouraged the jury to consider irrelevant facts outside the record, diminished the jury's responsibility for the verdict, and "trivialized" the burden of proof.

The prosecution's two-sentence statement was general. It provided neither facts nor verdicts of other cases. Reminding one jury that different juries have found different criminal defendants guilty would not logically diminish the jury's perception of responsibility for their own verdict.

The prosecution's point that juries routinely find guilt beyond a reasonable doubt was not a dominant theme. Ceja points to only two sentences from the prosecution's lengthy closing and rebuttal. The prosecution itself reminded the jury, "every fact that you rely on as a jury has to be proven to you, by the prosecution, beyond a reasonable doubt."

Because the prosecutor did not commit misconduct, trial counsel did not render ineffective assistance by failing to object to the prosecutor's remarks. (See *People v. Osband* (1996) [13 Cal.4th 622](https://www.leagle.com/cite/13%20Cal.4th%20622), 700.)

**III**

Ceja says the admission of four pieces of evidence individually or cumulatively deprived him of due process and a fair trial. This argument fails.

We review the admission of evidence for an abuse of discretion. (*People v. Booker* (2011) [51 Cal.4th 141](https://www.leagle.com/cite/51%20Cal.4th%20141), 170.)

First, Ceja challenges the admission, over defense objection, of his uncharged misconduct at a Halloween carnival in 2008. At that event, Ceja lunged at people and was "highly aggressive." He yelled at one person, "Fuck you, puta. This is my neighborhood. DNA. DNA." Police told Ceja to leave the carnival and Ceja replied, "This is my neighborhood. DNA, puta. I'm not going anywhere, fool." Police apparently attempted to arrest Ceja. Ceja resisted. Ceja complained police embarrassed him in his neighborhood, shouted his gang name again, and threatened to kill a police officer. The court admitted evidence of the uncharged misconduct but sanitized it by barring the prosecution from introducing either Ceja's threat to the police officer or evidence that Ceja resisted arrest.

The prosecution may bring in evidence of an uncharged offense for certain specified purposes, such as to prove intent or motive. (Evid. Code, § 1101, subd. (b).) There must be *some* similarity between the charged crime and the other crime, but only the "least degree of similarity" is required for evidence offered to prove intent. (*Jones, supra,* 51 Cal.4th at p. 371).

The evidence was admissible to show Ceja's intent to commit crimes to benefit a gang, which was required to prove the gang allegation. The uncharged incident was similar enough to the charged crime that the jury could reasonably infer similar intent. During the uncharged misconduct, Ceja was hypersensitive to perceived threats to DNA territory and used aggression to assert his gang's dominance. This uncharged offense tended to show Ceja acted with a similar intent to defend DNA territory and to benefit DNA when he shot at Bautista and Zuniga for spraying graffiti.

The uncharged offense was also admissible to establish Ceja's motive. Murder may seem a disproportionate response to graffiti. Evidence of Ceja's gang allegiance and territoriality tended to explain what otherwise might seem improbable or incomprehensible.

The trial judge excised parts of the uncharged misconduct that were overly prejudicial and admitted the rest. This was sound judgment, not an abuse of discretion.

Nor was it an abuse of discretion for the trial court to admit two items a Deputy Sheriff found among Ceja's jail possessions: quotes from the book "Art of War" by Sun Tzu and a drawing of a clown pointing a gun at someone else. The court admitted both pieces of evidence over defense objection.

The quotes were handwritten. The prosecution identified factual similarities between the quotes and the case. The quote "[g]o forth where they do not expect it, attack where they are not prepared," for example, matched the apparently surprising nature of the shooting. The quotes were probative of Ceja's intent and motive and refuted defense arguments. The trial court did not abuse its discretion by admitting them.

The drawing of a clown pointing a gun was probative of identity because Ceja's gang moniker was "clown," or in Spanish, "payaso," which was written many times in graffiti in the alley where the shooting occurred. The drawing showed a clown with diamonds around its eyes, which matched a diamond tattoo Ceja had around his own left eye to depict a clown. In the drawing, the clown was pointing a gun at someone beneath him.

This drawing tended to prove Ceja shot Bautista. Ceja was on trial for shooting a person. Ceja's gang moniker was clown. Ceja had a drawing of a clown shooting a person. The jury was entitled to consider the inference that Ceja's drawing told the story of his guilt.

The court admitted the picture only after acknowledging and considering its prejudicial and probative value. This considered decision was not an abuse of discretion.

Ceja's final evidentiary challenge is against the admission of three of his tattoos: an outline of a pistol, the Grim Reaper, and a clown with a gun. Ceja concedes he did not object to the evidence about the tattoos at trial. He has forfeited this argument. He says also that failure to object to the tattoos was ineffective assistance of counsel. Ceja does not demonstrate his lawyer's conduct fell below an objective standard of reasonableness, so this claim fails. Moreover, this evidence was relevant and more probative of identity than it was unfairly prejudicial.

**IV**

Ceja alleges cumulative error. There was no error, thus no cumulative error.

**V**

Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Ceja says his court security fee and criminal conviction assessment must be reversed and his $5,000 parole revocation restitution fine must be stayed until he has a hearing to determine his ability to pay. He did not challenge the fines and fees in the trial court. He thereby forfeited these arguments. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.)

He claims his counsel's failure to object to a restitution fine in excess of the statutory minimum was ineffective assistance of counsel. Ceja retained private counsel to represent him at trial, he had over $700 in cash when police stopped him in Texas, and nothing in the record suggested anything akin to the defendant's plight in the *Dueñas* case. Ceja has not demonstrated ineffectiveness of his counsel.

**DISPOSITION**

The judgment is affirmed.

GRIMES, Acting P. J. and STRATTON, J., concurs.