THIRD DIVISION
November 5, 2014

No. 1-12-2924

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	11 CR 8714
	)	
MICHAEL CRUZ,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt where the showup was not impermissibly suggestive and, even if it was, the identifications were reliable. Thus, defendant cannot show that the failure to file a motion to suppress the showup evidence resulted in prejudice and his ineffective assistance claim fails. Defendant waived the issue of whether the trial court erred in questioning certain panel members in chambers, and, in any event, the closure was too trivial to implicate the sixth amendment. The trial court erred in instructing the jury that defendant made a statement relating to the offense charged, but the error was harmless. Finally, the trial court did not err in giving the jury the accomplice instruction.

¶ 2 Following a jury trial, defendant-appellant Michael Cruz was convicted of armed robbery and sentenced to 21 years in prison. On appeal, Cruz contends that (1) he was not proven guilty beyond a reasonable doubt where the eyewitness identification was the result of a suggestive showup; (2) his counsel was ineffective for failing to file a motion to suppress the showup identification; (3) he was denied his constitutional right to a public trial when the trial court conducted part of *voir dire* in chambers; and (4) the trial court erred in instructing the jury that Cruz made a statement relating to the offense charged and in giving the accomplice instruction. We are not persuaded by Cruz's arguments and affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 In the early morning hours of May 14, 2011, Jorge Polendo and Kimberly Rodgers were parked in a vacant lot behind a warehouse at 3939 South Karlov Avenue in Chicago when they were robbed by a group of men. The men took Polendo's cell phone, his wallet with $40 inside, his Chicago Cubs hat, a pack of cigarettes, some loose change and dollar bills from the center console and glove compartment, and the car's license plate.

¶ 5 After the men left, Polendo and Rodgers drove to a gas station and called police, giving them a description of the two vehicles they saw and describing the individuals involved as a white male in a blue sweatshirt with a teardrop tattoo and Hispanic males in dark clothing. Shortly thereafter, the police detained seven men in Archer Park at 50th Street and Kenneth Avenue. Polendo and Rodgers drove to the park and then got in the backseat of a police car for a showup. They each identified six of the men, including Cruz, as the robbers. The police recovered a Cubs hat, a cell phone, a pack of cigarettes and two $5 bills from one of the six individuals, and five $1 bills from Cruz and each of the other individuals who had been

identified in the showup. All six individuals were arrested and Cruz was charged with armed robbery, unlawful vehicular invasion, and burglary.[1]

¶ 6 During jury selection, five potential jurors were brought into chambers and questioned *in camera* by the judge in the presence of counsel for both sides and Cruz. One venire member was questioned about his answer in open court related to his sister's murder. He was excused because his sister's murder trial was held before the same judge in the same courtroom and being in the room brought back painful memories. Another venire member was questioned at the request of defense counsel about being a victim of a robbery 27 years earlier. Although she stated in chambers that she was currently being treated for posttraumatic stress disorder, in part because of the robbery, and continued to have flashbacks, she felt that she could be fair and impartial and was subsequently accepted as a jury member.

¶ 7 A third venire member was questioned in chambers because she said in open court that she had been a victim of a burglary a year earlier and could not be impartial. She was excused after she continued to state in chambers that she could not be impartial and became very emotional. A fourth venire member was questioned further after stating she could not be impartial, but further questioning in chambers revealed that she did not want to be on the jury because she needed to watch her children and she was also excused. Finally, while the judge and the parties were in chambers, a venire member informed the sheriff's deputy that he wished to speak to the judge. He explained that he forgot to mention in open court that he had final exams and he was excused. A jury was impaneled and trial proceeded.

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[1] Prior to trial, codefendants Gustavo Fajardo and Marek Pilch pled guilty to unlawful vehicular invasion and codefendant Alejandro Carteno pled guilty to aggravated vehicular invasion. None of the codefendants are parties to this appeal.

¶ 8 At trial, Polendo testified that sometime around midnight on May 14, 2011, he and his girlfriend, Rodgers, were in her car and Polendo was driving. He drove to an industrial area and parked near some loading docks for privacy. He turned the car off but left the keys in the ignition. Polendo and Rodgers were in the back seat of the car when a maroon SUV approached their car from behind, followed by a beige or silver SUV. The SUVs pulled up behind the car, blocking the only means of egress.

¶ 9 Six individuals got out of the first SUV and approached the car. Four or five people exited the other SUV but remained beside their vehicle. Three of the six men approached the driver's side window, and that is when Polendo realized someone was there. Polendo got out of the car, hoping to draw attention away from Rodgers, and saw the other three men standing at the rear of the car.

¶ 10 A man Polendo later learned was named Gustavo Fajardo asked what they were doing there and then asked, "what you got?" Polendo understood that to mean he was being robbed. Fajardo lifted his shirt so that Polendo could see the butt of a black semiautomatic pistol in his waistband and punched Polendo in the stomach. Polendo told Fajardo he could have whatever he wanted and that they would not cause any problems.

¶ 11 Fajardo and another man remained near Polendo, while the other four managed to get the door open even though Rodgers had locked the doors. The men spoke to Rodgers and then went through the glove box, center console and trunk of the car. Polendo identified Cruz as one of the men who spoke to Rodgers and then rifled through the car.

¶ 12 Polendo gave Fajardo his wallet and cell phone and Fajardo took Polendo's Cubs hat off his head. Polendo also gave Fajardo a total of $40, two $5 bills and the rest singles. Polendo saw the other men taking Rodgers' cigarettes and cell phone. Fajardo appeared to be the ringleader

and the other men were showing Fajardo the items they found in the car. Fajardo removed Polendo's driver's license from his wallet, read his address aloud, and then gave the license back to Polendo. Fajardo also gave Rodgers back her cell phone after she asked for it.

¶ 13 The men in the other SUV said, "We've been here too long. Let's get out of here." After 5 or 10 minutes, the men got back into the two SUVs and left. Polendo and Rodgers also left, but Polendo turned in the opposite direction so the men would not think he was trying to follow them and get their license plate numbers. Polendo called 911, gave a description of the vehicles and their occupants, including a description of their clothing, and his location.

¶ 14 The police officers arrived within minutes and while Polendo and Rodgers were talking to the police, a call came over the radio and he and Rodgers were asked to go to a nearby park for a showup of some individuals who had been detained. At the park, Polendo and Rodgers got into the back seat of the police car and the officers shone a spotlight on seven individuals. Polendo and Rodgers identified six of them from the robbery.

¶ 15 Polendo explained that he did not recognize the seventh person and that individual had nothing to do with the robbery. Fajardo was wearing Polendo's Cubs hat and one of the other individuals had a distinctive tear drop tattoo on his face and was wearing a baby blue sweater that Polendo remembered. Polendo also recognized the silver SUV that was parked nearby. The Cubs hat, $35 and Rodgers' cigarettes were all returned. On cross-examination, Polendo testified that there were bright lights behind the factory where they parked the car.

¶ 16 Rodgers testified that on the night of the robbery, she and Polendo were sitting in the back seat of her car talking when she saw three men she did not recognize outside the driver's side window and told Polendo someone was there. Polendo got out of the car and Rodgers

hopped over the center console to the front passenger seat. Rodgers saw two SUVs in her side mirror, one maroon and one silver, that were parked at angles blocking their car.

¶ 17 While Polendo was talking to three men on the driver's side of the car, Rodgers initially looked straight ahead but then some of the other men somehow got in the car and took the car keys out of the ignition. Two men came and stood outside Rodgers' window, which was slightly open, and one of them put his hand in the window and touched her hair. Both men made lewd comments to Rodgers. She identified Cruz as one of the two men. Cruz also went through the glove compartment and center console, taking dollar bills and cigarettes. Someone took her cell phone from the cup holder. The men also opened the trunk and someone removed the license plate from the back of the car.

¶ 18 After the men finished searching the car, Rodgers continued to look straight ahead so that the men who were talking to Polendo would not come over to her side of the car. She eventually locked the doors and rolled her window all the way up. Rodgers asked Fajardo if she could please have her phone back and he returned it but said he was not going to return Polendo's phone. Rodgers also recounted calling police, going to the park and identifying six of the seven individuals there as those who had participated in the robbery.

¶ 19 On cross-examination, Rodgers was asked whether she and Polendo selected an area that was well lit or less lit, and she stated they selected an area that was less lit. She was not sure who took her cigarettes, and was not sure if the person who took the cigarettes was the same person who went through the glove compartment. Rodgers also stated that although she thought the keys were in the ignition, they might have been in Polendo's pocket and that could have been how the men were able to get in the car even though the doors were locked.

¶ 20 On redirect, Rodgers explained that there were lights in the parking lot and it was not pitch black, but it was also not all lit up. Rodgers was able to see Cruz's face when he was standing outside her window saying things to her, and when the doors were opened, the interior light went on in the car. Cruz was not the person who touched her hair, but he was standing with that person and he was making crude comments. Rodgers looked at Cruz for approximately two seconds while he was standing outside her window, and looked at him two or three more times while he was going through her car.

¶ 21 Officer Ivan Lopez and his partner Michael Flores responded to the armed robbery call and toured the area in search of the offenders. They observed seven individuals near the tennis courts in Archer Park who matched the description of the offenders. The seven men were detained and Polendo and Rodgers came to the scene and identified six of them as the men who robbed them.

¶ 22 Lopez recovered five single dollar bills from Cruz. The other individuals each had five single dollar bills and Fajardo had two $5 bills, a Cubs hat, a pack of cigarettes and Polendo's cell phone. A gray SUV owned by Fajardo was also recovered.

¶ 23 On cross-examination, Lopez explained that when Polendo and Rodgers arrived at the park in the police car, he opened the back door and asked, "Are these the individuals?" Polendo immediately said, "Yes, they are." Rodgers was then asked and she also said yes. The seven men were handcuffed during the showup. The officers had been told that the offenders were a white male in a blue sweatshirt with a teardrop tattoo and Hispanic males in dark clothing. Although Lopez testified on direct that Polendo's cell phone was recovered from Fajardo, he admitted on cross-examination that no cell phone was recovered.

¶ 24 Fajardo, testifying on behalf of Cruz, stated that Cruz was not in a gang. Fajardo testified that he pled guilty to unlawful vehicular invasion in connection to the events of May 14, 2011. He drove to the parking lot in a Suburban with Carteno and a white male whom he refused to identify. Fajardo stated that the parking lot was "pretty dark."

¶ 25 When they got to the parking lot, they saw a car parked there and Fajardo and the white male walked over to the driver's side of the car while Carteno went to the passenger side. Cruz, Guzman, Aguilar and Pilch arrived in a beige vehicle. Cruz did not do anything and was not standing by the car. At one point, Fajardo handed Cruz Polendo's state ID and Cruz gave it back to Fajardo.

¶ 26 On cross-examination, Fajardo testified that he arrived at the parking lot in a maroon SUV that belonged to someone who was not caught by the police. He acknowledged that he did not want to provide that person's name because he was not a snitch and did not want to give up one of his friends.

¶ 27 Fajardo denied punching Polendo in the stomach and claimed he never touched him. Fajardo also denied having a gun and showing it to Polendo. Fajardo asked Polendo if he had any money because he thought at first that Polendo had a prostitute in the car, but when he realized that was not the case, he thought it would still be a good opportunity to get some cash. Polendo only had $7 and Fajardo asked him for his ID and read Polendo's address out loud to intimidate him. Fajardo took Polendo's hat, cell phone, and some cigarettes.

¶ 28 When the other SUV arrived, the people inside approached the car and asked Fajardo what was going on. However, the only people who went through the car were Fajardo, Carteno and the white male in the maroon SUV. All of them got back into the two SUVs and drove to a nearby park. The police arrived and the unidentified male left in the maroon SUV.

¶ 29 Fajardo acknowledged that he had been a member of the Satan Disciples street gang for 11 years, since he was 13 years old. The trial court then interrupted the proceedings to instruct the jury that the testimony regarding gang membership was being offered for the limited purpose of evaluating the credibility of the witness and his motivation to testify. Fajardo testified that Pilch, Aguilar and Guzman were also Satan Disciples and Carteno was a Two-Six member. The number one rule in a gang is that you do not snitch on your fellow gang members. Fajardo repeated that Cruz was not in a gang, that he was a "neutral" and just hung out with the rest of them.

¶ 30 Marek Pilch testified that he pled guilty to vehicular invasion in connection with the events of May 14, 2011. Pilch was familiar with the parking lot because he had been there many times at night and the lot was dark. That night, Pilch arrived at the parking lot with Guzman, Cruz and Aguilar. Fajardo had arrived at the lot in a different car and Fajardo, Carteno and a white male were already ransacking a car that was in the parking lot when Pilch and the others arrived. But video surveillance footage introduced at trial showed the two SUVs arriving in the loading dock area within seconds of each other. Pilch testified that Fajardo gave Cruz an ID, and that Cruz gave the ID back to Polendo.

¶ 31 On cross-examination, Pilch acknowledged that he had been a member of the Satan Disciples for four or five years. Fajardo and Guzman were also Satan Disciples, Pilch did not know if Carteno was a Satan Disciple, and Aguilar and Cruz were not Satan Disciples. The number one rule of the gang was not to snitch and Pilch's tear drop tattoo was a gang tattoo. Pilch testified that he had not taken anything from the car, that Fajardo, Carteno and the white male were the only ones who had, and that although he pled guilty to vehicular invasion, the witnesses had confused him with the other white male who participated.

¶ 32 Alejandro Carteno testified that he was friends with Cruz and that Cruz was not a gang member. Carteno pled guilty to aggravated vehicular invasion in connection with the events of May 14, 2011. He drove to the parking lot with Fajardo and a white male he met for the first time that night.

¶ 33 On cross-examination, Carteno stated that Cruz, Guzman, Pilch and Aguilar arrived in another SUV while he, Fajardo and the white male were searching the car. Nobody in the second SUV approached the car but "stayed behind and just stood there." Fajardo took some items and Carteno went through the car because he wanted to see what was there but did not take anything. Carteno stated that he was a member of the Two Six gang, a rival of the Satan Disciples, but was not active and so did not abide by the rule that gang members do not snitch on each other.

¶ 34 In rebuttal, the State called Detective Freeman, who interviewed Fajardo after the arrest. Fajardo told Freeman that he and the other five individuals who had been arrested were Satan Disciples. The State also recalled Officer Lopez, who testified that when the six individuals who had been arrested were processed, all six of them, including Cruz, admitted to being members of the Satan Disciples.

¶ 35 Two instructions were given to the jury over Cruz's objection. The first instruction was that the jury had before it evidence that the defendant made a statement relating to the offense charged in the information and was responsible for determining whether the defendant made the statement and, if so, what weight should be given to that statement. The second instruction, known as the accomplice instruction, was that when a witness says he was involved in the commission of a crime, the testimony of that witness is subject to suspicion and should be considered with caution.

¶ 36 The jury found Cruz guilty of armed robbery. Cruz's motion for a new trial was denied and he was sentenced to 21 years in prison. Cruz timely filed this appeal.

¶ 37 ANALYSIS

¶ 38 Cruz first contends that the State failed to prove him guilty beyond a reasonable doubt because the eyewitness identification was unreliable and based on a suggestive showup. When a defendant challenges the sufficiency of the evidence, the reviewing court must consider 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*, 443 U.S. 307, 319 (1979); *People v. Jordan*, 218 Ill. 2d 255, 269 (2006). A criminal conviction will not be reversed unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the guilt of the defendant. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). It is not the function of the reviewing court to retry the defendant, nor will we substitute our judgment for that of the trier of fact. *Id.*

¶ 39 Cruz argues that the showup was unduly suggestive because Polendo and Rodgers viewed the suspects in each other's presence and because the seven individuals were handcuffed at the time. He also claims that the danger of suggestion was increased because Cruz was presented along with multiple suspected accomplices, including Pilch, who had a distinctive teardrop tattoo and was wearing a blue sweatshirt, and Fajardo, who was wearing the Cubs hat. Finally, Cruz contends that the in-court identifications by the two witnesses after being shown mug shots of Cruz prior to trial lacked an independent reliable basis because the parking lot was dark, neither witness paid much attention to the man they later identified as Cruz, and neither witness gave a description of Cruz to the police before the showup.

¶ 40 It is well established that a single witness's identification is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). In assessing identification testimony, Illinois courts rely on the factors set out by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Lewis*, 165 Ill. 2d at 356. Those factors are: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Id.*

¶ 41 A showup identification near the scene of a crime is proper police procedure under certain circumstances, including where prompt identification is necessary for the police to determine whether to arrest those individuals they have apprehended or continue their search for suspects. *People v. Manion*, 67 Ill. 2d 564, 569-70 (1977). Showup identification evidence should only be excluded when such evidence is impermissibly suggestive such that a substantial likelihood of irreparable misidentification exists. *People v. Smith*, 274 Ill. App. 3d 84, 89 (1995). Even where identification evidence is suggestive, it is admissible if the identification is shown to be reliable under the totality of the circumstances. *Manion*, 67 Ill. 2d at 571; *People v. Williams*, 118 Ill. 2d 407, 412-13 (1987). In assessing the reliability of the identification, we consider the *Biggers* factors set forth above. *Manion*, 67 Ill. 2d at 571; *Williams*, 118 Ill. 2d at 413.

¶ 42 We disagree with Cruz's assessment that none of these factors favor the State. In fact, the only factor that does not favor the State is the accuracy of the prior description, as neither Rodgers nor Polendo described any of the offenders other than Pilch with any significant detail, merely describing them as "male Hispanics wearing dark clothing." The last two factors

definitely favor the State where both witnesses immediately identified six of the seven men and the showup took place within minutes of the robbery.

¶ 43 Regarding the first two factors, Cruz argues that it was too dark for either witness to get a good look at the offenders, Polendo was focused primarily on Fajardo, and Rodgers by her own admission mostly looked straight ahead. However, the testimony established that although it was fairly dark, there were some lights in the parking lot and it was "not pitch black." The offenders were in close proximity to the witnesses throughout the robbery, which lasted for several minutes, with two offenders standing just outside the passenger window and then going through the car while Rodgers sat in the passenger seat and Polendo stood just outside the car. Rodgers further testified that when the men opened the car doors, the interior light went on in the car. Rodgers identified Cruz as one of the people who leaned into the car and looked through the glove compartment and center console, meaning that his face would have been fully illuminated by the interior car light and in very close proximity to Rodgers, who was still seated in the passenger seat.

¶ 44 Moreover, although Rodgers acknowledged that she mostly stared straight ahead during the robbery, she testified that she looked at Cruz for approximately two seconds while he stood outside her window saying things to her and two or three more times while he was going through the car. The fact that Rodgers only looked briefly at the offender several times and deliberately looked ahead during most of the robbery in an attempt to avoid drawing attention to herself was a matter for the jury to consider in weighing her testimony, but it does not render her identification of Cruz insufficient. See *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (opportunity to observe assailant's face for "a few seconds" from two feet away sufficient to support reliable identification); *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998) (identification sufficient to sustain conviction where victims had only several seconds to observe

their attackers); *People v. Parks*, 50 Ill. App. 3d 929, 930-33 (1977) (encounter of 5 to 10 seconds sufficient to support a reliable identification). Thus, the eyewitness identifications of both Rodgers and Polendo were sufficient to sustain a conviction.

¶ 45 A showup conducted with a suspect in handcuffs does not automatically weaken the veracity of the identification. See *People v. Howard*, 376 Ill. App. 3d 322, 331-32 (2007) (showup with suspect in handcuffs and flanked by police appropriate where all three witnesses had ample opportunity to observe the suspect closely and the identification took place shortly after the crime); *People v. Frisby*, 160 Ill. App. 3d 19, 32-34 (1987) (one-person showup of suspect in handcuffs appropriate where alley light illuminating darkened room was sufficient to support identification).

¶ 46 The fact that there were seven individuals in the showup but the victims identified only six of them as having participated in the robbery enhanced the reliability of the procedure. See *People v. Ramos*, 339 Ill. App. 3d 891, 898 (2003) (two-person rather than one-person showup enhanced the reliability of the procedure). Moreover, it was appropriate for the witnesses, who were both present during the robbery, to view the showup together. See *Manion*, 67 Ill. 2d at 573 (three witnesses accompanied a police officer to the parking lot and identified the suspect sitting in the police car); *Howard*, 376 Ill. App. 3d at 332 (two victims who were together in the vehicle being shot at viewed the suspect at the same time); *Ramos*, 339 Ill. App. 3d at 898 (two witnesses were taken together to view the suspect).

¶ 47 Here, both Polendo and Rodgers had the opportunity to observe Cruz during the robbery, both while he stood outside the passenger window and while he went through the car with the interior lights on. The showup took place within minutes of the robbery and was necessary so the police could determine whether to arrest those they had apprehended or continue looking for suspects. Finally, the fact that Polendo and Rodgers immediately identified six of the individuals

but were just as certain that the seventh individual had not taken part in the robbery, even though the seventh individual was also handcuffed and in the company of Fajardo and Pilch, further enhances the reliability of the identifications. Therefore, we conclude that the showup was not impermissibly suggestive.

¶ 48 Even if the showup identification was suggestive, as previously noted under our discussion of the *Biggers* factors, the identifications were reliable and therefore the evidence of the showup was properly admitted. We cannot say that the evidence is so improbable or unsatisfactory that it creates a reasonable doubt regarding Cruz's guilt and therefore we reject his challenge to the conviction based on the claimed insufficiency of the evidence.

¶ 49 Given our conclusion above, Cruz's argument that his counsel provided ineffective assistance in not filing a motion to suppress the showup evidence also fails. To prevail on a claim of ineffective assistance, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that he was so prejudiced by the deficient performance that he was denied a fair trial. *People v. Perry*, 224 Ill. 2d 312, 341 (2007) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Because both prongs of the *Strickland* test must be satisfied, we need not consider whether counsel's performance was deficient before determining whether the defendant was so prejudiced that he is entitled to a new trial. *Id*. at 342.

¶ 50 When an ineffective assistance claim is predicated on the failure to file a motion to suppress evidence, in order to establish the prejudice prong a defendant must show that the unargued motion would have been granted and that there is a reasonable probability that the verdict would have been different if the evidence had been suppressed. *People v. Henderson*, 2013 IL 114040, ¶¶ 12, 15. We have concluded that the showup evidence was admissible and that the identifications were reliable; therefore, Cruz has not established prejudice under *Strickland* because he has not demonstrated that a motion to suppress the showup evidence

would likely have been granted or that the verdict would have been different even if the evidence had been suppressed.

¶ 51 Cruz next contends that his constitutional right to a public trial was violated when the trial court conducted part of *voir dire* in chambers without making any findings regarding the necessity of such a measure or considering alternatives. Cruz argues that this resulted in a total closure of the trial proceedings in violation of the sixth amendment.

¶ 52 During *voir dire*, the trial judge called Cruz and attorneys for both sides back to chambers, on record, and asked if either side wanted to bring any venire member back for questioning. Cruz did not object and both sides participated in suggesting venire members who were then questioned in chambers. Four of the five venire members questioned were stricken for cause.

¶ 53 This court recently rejected a similar argument in *People v. Jones*, 2014 IL App (1st) 120927, ¶¶ 39, 45, concluding that the issue was forfeited because a trial court must have an objection before it to consider alternatives to closure and, in any event, such a closure was too trivial to implicate the sixth amendment. We agree with the reasoning in *Jones* and reach the same conclusion here.

¶ 54 As in *Jones*, defense counsel did not object to the questioning of certain members of the venire in chambers so this issue has been forfeited on appeal. However, Cruz asks that we review this issue for plain error. The plain error rule bypasses normal forfeiture principles and allows review of an unpreserved error where either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the

evidence. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Cruz claims the second prong is applicable here.

¶ 55 The right to a public trial is not absolute and a temporary closure that is deemed trivial does not violate the sixth amendment. *Jones*, 2014 IL App (1st) 120927, ¶ 42. Under the triviality standard, the trial court's acts and the effects upon the trial are examined to determine whether (1) the defendant has been denied a fair trial, (2) the prosecution and the trial court carried out their duties responsibly, (3) witnesses were encouraged to come forward, and (4) perjury was discouraged. *Id*. ¶¶ 41-42.

¶ 56 Illinois Supreme Court Rules 431 (eff. July 1, 20120) and 234 (eff. May 1, 1997) grant a trial court the discretion to conduct *voir dire* outside the presence of the venire. The trial court's actions here merely prevented other members of the venire panel from hearing certain responses of five venire members, a common practice utilized to prevent comments by one prospective juror from tainting the remainder of the venire. This does not violate the right to a public trial. *Id*. ¶ 44 (citing *United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011) ("[W]e are aware of no case holding that such procedures violate the Sixth Amendment."); *United States v. Ivester*, 316 F.3d 955, 959 (9th Cir. 2003) ("Because a trial judge may question a juror alone in chambers, *** the judge may do so with the parties and counsel present.")).

¶ 57 There is nothing in the record to indicate that Cruz's trial was less fair or that the trial court and prosecutor did not carry out their duties responsibly as a result of the brief *in camera* questioning of five venire members in chambers. Therefore, this claim has no merit.

¶ 58 Finally, Cruz contends that the trial court erred in (1) instructing the jury that Cruz made a statement relating to the offense charged, and (2) giving the accomplice instruction to the jury. Cruz argues that his statement to police that he was a gang member had nothing to do with the

offense of armed robbery. Cruz also claims that because the testimony of his codefendants exonerated him, the accomplice instruction was not applicable.

¶ 59 Instructions convey the legal rules applicable to the evidence presented at trial and the determination of whether an instruction should be given is reviewed for an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53, 65-66 (2008). There must be some evidence in the record to justify an instruction. *Id*. at 65. An abuse of discretion will be found if the jury instructions are not clear enough to avoid misleading the jury. *Id*. at 66. " 'An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed.' " *Id*. at 69 (quoting *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003).

¶ 60 Over Cruz's objection, the trial court gave the State's requested jury instruction No. 9, based on Illinois Pattern Jury Instructions, Criminal, No. 3.06-3.07 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.06-3.07), which concerns statements by a defendant. This instruction provides:

> "You have before you evidence that the defendant made a statement relating to the offense charged in the information. It is for you to determine whether the defendant made the statement, and, if so, what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made."

¶ 61 At trial, Cruz's three codefendants testified that Cruz was not a gang member. In rebuttal, the State recalled Officer Lopez, who testified that when Cruz was arrested, he told Lopez that he was a gang member. We agree with Cruz that this is not a statement related to the offense charged, but is merely impeachment evidence. Indeed, the trial court gave a limiting instruction

to the jury, both during the trial and immediately prior to deliberations, that there was no evidence that the robbery was gang-related and evidence of gang membership was introduced solely for purposes of determining witness credibility and motivation. Thus, because IPI Criminal 4th No. 3.06-3.07 instructed the jury that Cruz's statement regarding gang membership was related to the offense charged, in direct contradiction to the limiting instruction, the instructions were not clear enough to avoid misleading the jury and it was error to give IPI Criminal 4th No. 3.06-3.07.

¶ 62 However, we cannot say that the result of the trial would have been different had the court not given this instruction. Cruz's statement regarding gang membership was not introduced as part of the State's case and was only offered as rebuttal evidence after Cruz's three codefendants testified that he was not a gang member. The jury was instructed twice that the gang membership evidence was being offered for a limited purpose, and the State did not refer to Cruz's statement at all in closing argument. The prosecutor only briefly mentioned gang membership in connection with arguments related to the credibility of Cruz's witnesses on rebuttal, choosing instead to refer to the six individuals as friends rather than fellow gang members. There is nothing in the record to support Cruz's contention that the outcome of the trial would have been different if the instruction had not been given; therefore, the error is harmless.

¶ 63 The trial court also gave a modified version of Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17), which concerns the testimony of an accomplice. The instruction given was: "When a witness says he was involved in the commission of a crime, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." The words "with the defendant" were omitted after "commission of a crime" from IPI Criminal 4th No. 3.17.

¶ 64 Cruz concedes that the accomplice instruction should be given whether an accomplice testifies for the defense or prosecution, citing *People v. Rivera*, 166 Ill. 2d 279, 292 (1995). But Cruz argues that because his codefendants testified that he did not participate in the crime, they were not accomplices and the instruction should not have been given. We disagree.

¶ 65 In *Rivera*, our supreme court effectively settled a split that had developed in the appellate court over whether the accomplice instruction should only be given when the witness testifies on behalf of the State. See *People v. Dodd*, 173 Ill. App. 3d 460, 466 (1988) (and cases cited therein). In refusing to limit the instruction to the State's witness, the supreme court explained, "We can think of no reason why [the testimony of defendant's witness] should not be scrutinized as cautiously and strictly as [the testimony of the State's witness]." *Rivera*, 166 Ill. 2d at 293.

¶ 66 Cruz's attempt to distinguish *Rivera* on the grounds that the witness in that case had implicated the defendant in testimony he gave at his own trial is unavailing. The supreme court merely listed that as one of several reasons why the witness's credibility was suspect. *Id*. We find nothing in the reasoning in *Rivera* that would limit the giving of the accomplice instruction only to those situations where a witness for the defendant previously implicated the defendant in the crime.

¶ 67 Just as in *Rivera*, the credibility of the witnesses here was suspect. All three of them pled guilty to charges in connection with the robbery, and yet two of them denied taking anything. All three witnesses placed Cruz at the scene and testified that he did not participate and stayed back, and yet two of them testified that at one point during the robbery Fajardo handed Cruz Polendo's ID, and Pilch testified that Cruz was the one who gave the ID back to Polendo. Thus, the testimony of these witnesses deserved strict scrutiny and the trial court did not err in giving the accomplice instruction.

¶ 68 Cruz's reliance on *People v. Szydloski*, 283 Ill. App. 3d 274 (1996) is misplaced. In attempting to distinguish *Rivera*, this court determined in *Szydloski* that where a witness does not testify that she was involved in the commission of a crime with the defendant, the accomplice instruction should not be given. *Id*. at 277. While we could quibble with the reasoning in *Szydloski*, which we find questionable because a witness who is testifying on a defendant's behalf is not likely to testify that he or she committed a crime *with* the defendant, given the clear pronouncement in *Rivera*, we find no error in the giving of IPI Criminal 4th No. 3.17.

¶ 69 Moreover, even if the instruction was given in error, we cannot say that the result of the trial would have been different had the jury not been given the accomplice instruction. The evidence presented at trial was sufficient to allow the jury to conclude that, rather than being a mere bystander, Cruz participated in the crime.

¶ 70 CONCLUSION

¶ 71 We conclude that the evidence was sufficient to support Cruz's conviction where the showup was not impermissibly suggestive and, in any event, the identifications were reliable. Thus, Cruz cannot show that the failure to file a motion to suppress the showup evidence resulted in prejudice and his ineffective assistance claim fails. Cruz waived the issue of whether the trial court erred in questioning certain panel members in chambers and, in any event, the closure was too trivial to implicate the sixth amendment. The trial court erred in instructing the jury that defendant made a statement relating to the offense charged, but the error was harmless. Finally, the trial court did not err in giving the jury the accomplice instruction.

¶ 72 Affirmed.