

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND LOPEZ,

Defendant and Appellant.

D059557

(Super. Ct. No. SCN274405)

APPEAL from a judgment of the Superior Court of San Diego County,  
Runston G. Maino, Judge. Reversed in part, and affirmed in part.

A jury convicted Raymond Lopez of one count of committing a corporal injury on a spouse and/or roommate (Pen. Code, § 273.5, subd. (a); count 1) and one count of disobeying a court order (Pen. Code, § 273.6, subd. (a)) after he beat his girlfriend, who is the mother of his child, and then contacted her from jail in violation of a protective order. Lopez appeals his conviction for count 1 only, contending that the trial court incorrectly admitted unfairly prejudicial evidence against him at trial that had negligible

probative value. He also argues that hearsay evidence was admitted for an irrelevant and improper nonhearsay purpose, which resulted in hearsay testimony being admitted for the truth. Finally, he contends that the trial court gave the jury an improper instruction that was not supported by the evidence presented at trial. We agree with Lopez and reverse his conviction for count 1.

### FACTUAL BACKGROUND

Lopez and his girlfriend, Maria Ortega, lived together in a trailer park in Vista next door to Ortega's parents. They had a baby together, born in February 2010.

Lopez and Ortega have dated on and off since 2008, when Ortega was 17 years old. Their relationship was punctuated by Lopez's periodic stays in prison, each one lasting between several days to several months. About two months after they began dating, Lopez went into custody for eight or nine months. Ortega broke up with Lopez while he was incarcerated because he did not trust her to remain faithful to him. By the time Lopez was out of custody, Ortega had become pregnant by another man. Shortly thereafter, Lopez and Ortega reconciled, and Ortega lost the baby. Within a couple of months, she became pregnant with Lopez's child.

Throughout their relationship, Lopez demonstrated a jealous personality and would occasionally become violent or physically abusive. Ortega never reported Lopez. Ortega's parents frequently saw bruises on her arms, but she would not tell them how she got them. Her parents called the police on at least one occasion, but when they arrived, Ortega had no injuries and denied that any abuse had taken place. According to Ortega's

father, on one occasion Ortega attempted to stab Lopez because he tried to break a bottle on her head.

In March 2010, Lopez came to their trailer after being out for the morning. He had carried Ortega's phone with him and said that a man had called her. Ortega said she did not know who it was, and they began to argue. Throughout the rest of the day, Lopez would go outside to drink, then return inside to argue with her and accuse her of cheating on him.

That afternoon, while Ortega washed the dishes, Lopez grabbed her by the neck and threw her on the bed. He began choking and hitting her. She managed to get up and go outside because the baby was crying. Lopez ordered Ortega to get inside or he would hit her. Ortega complied and sat on the bed to breastfeed the baby. Lopez began insulting her and accusing her of cheating. He kicked one of her shins while she breastfed.

Ortega eventually ran outside with the baby to her parents' trailer, which was only a few yards away. Lopez followed her, pulled her hair, punched her on the arm, and told her to get back inside. Ortega's parents saw the exchange and told her to get inside their trailer. Once she did, she called police and reported Lopez.

Police arrived and searched for Lopez but could not find him. His car was found in the parking lot of a nearby strip mall. Within the hour, Lopez returned to his trailer. Ortega called 911 again and Lopez was arrested.

Ortega obtained a protective order against Lopez, prohibiting him from contacting her. She subsequently received several collect phone calls, which went unanswered to

voicemail, from the Vista Detention Facility, where Lopez was awaiting trial. On one message, the caller stated, "You better not be seeing anybody." The calls came from Lopez's cell block, but the PIN numbers used to make the calls matched those of another prisoner. Ortega had changed her phone number after Lopez was arrested, and she did not know how he got her new number.

## PROCEDURAL HISTORY

### *A. Admission of Lopez's Prior Time in Custody*

Defense counsel made a motion to exclude testimony concerning all of Lopez's prior convictions and parole status as unduly prejudicial under Evidence Code<sup>1</sup> section 352. The prosecutor argued that it would be impossible to avoid mentioning his prior convictions because it was related to Lopez and Ortega's relationship: they dated, he went to prison, they broke up, and then reconciled. The court accepted this and offered to substitute the word "custody" for "prison" to cure the prejudice. Defense counsel objected and ask that witnesses be instructed not to mention why the relationship was on-again, off-again, saying, "There could be multiple reasons: him being physically confined, or her being involved with another male, which I think is supported by the preliminary hearing transcript. We can do that without prejudicing my client unduly."

The court responded, "Saying the on-and-off relationship . . . maybe gets the jury to speculate that he abandoned her, which evidently is not the situation." Fearing that the jury would speculate about the nature of the relationship if Lopez's custody status was not

---

<sup>1</sup> All further statutory references are to the Evidence Code.

mentioned, the court held that it was both relevant and not unduly prejudicial. "I won't exclude the idea that he was in some sort of a custodial situation in portions of this relationship."

*B. Prosecutor's Questions Regarding Lopez's Time in Custody*

During his direct examination of Ortega, the prosecutor asked her, "At the time that you met [Lopez] and started dating him, were you aware that he had recently been released from custody? . . . [¶] . . . Did you know that before you started dating him?" He then asked her, "Did you tell your parents that he had recently been released from custody?" Ortega testified that she and her parents moved into a trailer park shortly after she met Lopez, at which point the prosecutor asked, "When you moved in with them, was [Lopez] still in custody?" He followed this up by asking how long Lopez was in custody, whether Ortega continued her relationship with him while he was in custody, and whether she ever visited, called, or sent letters to him. He also asked Ortega, "After you broke up, and he was still in custody, did you have any communication with him at all while he finished off his time?"

The prosecutor continued to reference Lopez's time in prison throughout Ortega's testimony. He asked, "So--can I get this straight? He had just gotten out of custody? And . . . [¶] . . . four days after that he went back?" A reference to Lopez's time in custody preceded nearly every question. He eventually asked, "Did your parents know that he was doing all these different stints of time?" and, "Why is it that you kept off [sic] this relationship with him, even though he kept going into custody? It sounds like he was doing that quite often." Ortega replied that she did not know.

### *C. Officer's Testimony About Searching for Lopez*

Deputy David Ertz testified at the trial about responding to Ortega's 911 call. He stated that while talking to Ortega, he was approached by several residents of the trailer park. When he began to testify about what they told him, defense counsel objected on hearsay grounds, which the court sustained. The prosecutor argued that the evidence was not offered for the truth of the statement, but rather for the effect the statement had on Ertz insofar as where he looked for Lopez. The court asked him to rephrase the question as, "Did you receive information from other people in the area?" but without going into the details of the information he received.

Later, Ertz testified that the other residents told him, "Hey, he was just here and ran that way." Again, defense counsel objected on hearsay grounds and moved to strike the response, but this time the court overruled the objection, stating, "It's not for the truth but only to show why the deputy might do something upon receiving the information." Ertz testified that, upon hearing what the residents said, he went to the area specified but could not find Lopez or anyone else.

Police later found Lopez's car in a strip mall parking lot about 300 yards from the trailer park. When Lopez returned to his trailer an hour later, Ortega called the police and they arrested Lopez. Lopez had grass stains and dirt on his clothing. Police asked Lopez how he got the stains. According to Ertz's police report, "Lopez did not answer but he didn't think that he was hiding." During his own testimony, Lopez stated that he had driven from the trailer park to the strip mall to buy beer and look at movies, and then walked back to the trailer park because his car would not start. Upon further questioning,

he testified that he could not recall what his response had been to Ertz pointing out the stains. He again denied that he had been hiding on the embankment from police and that he possibly got the stains from working in the yard.

#### *D. Jury Instructions*

During a discussion of jury instructions, defense counsel objected to giving CALCRIM No. 362 (Consciousness of Guilt: False Statements).<sup>2</sup> The court asserted that Lopez's statement that the grass stains did not come from hiding could be construed as a consciousness of guilt statement. The prosecutor agreed. Defense counsel objected and submitted on the issue. The court gave the instruction.

### DISCUSSION

#### I

#### *QUESTIONS ABOUT LOPEZ'S TIME IN CUSTODY WERE IRRELEVANT AND UNDULY PREJUDICIAL*

Lopez contends that the prosecutor's multiple questions and references to his time spent in custody throughout his relationship with Ortega were irrelevant and unfairly prejudicial against him. We agree.

---

<sup>2</sup> CALCRIM No. 362 provides: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

- A. Evidence of his time in custody was irrelevant to the issue of whether Lopez committed domestic violence.

All relevant evidence is admissible unless prohibited by statute. (§ 351.) Relevant evidence includes evidence having "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) In domestic violence cases, section 1109 permits evidence of a defendant's prior acts of domestic violence, which is relevant to prove propensity to commit such an act. (See *People v. Frazier* (2001) 89 Cal.App.4th 30, 41.) All other evidence of prior bad acts is governed by section 1101.<sup>3</sup> Section 1101, subdivision (b) permits the admission of a defendant's prior convictions to prove some fact other than a mere disposition to commit such an act such as knowledge, motive, or identity. (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Here, the prosecutor argued that the evidence of Lopez's time in custody was relevant to the history of Lopez and Ortega's relationship and would explain why their relationship was on and off and why Lopez would doubt Ortega's fidelity. The court agreed, saying that the jury would otherwise speculate about the reason. We find this unpersuasive. The relationship between Lopez and Ortega had nothing to do with Lopez's time in custody; it was not relevant to whether he committed a violent act against her. As defense counsel correctly pointed out, it was not necessary to explain the nature

---

<sup>3</sup> "Section 1101 states the general rule that evidence of character to prove conduct is inadmissible in a criminal case . . . . [¶] . . . Section 1101 does not prohibit the admission of evidence of misconduct when it is offered as evidence of some other fact in issue, such as . . . knowledge." (Cal. Law Revision Com. com., 29B Pt.3B West's Ann. Evid. Code (2009 ed.) foll. § 1101, p. 222.)

of their relationship. The relationship could have been described as on and off, that Ortega became pregnant with another man's child during one of their off periods, and that this explained his jealousy and suspicion. His time in custody never needed to be mentioned to accomplish this. It was completely irrelevant to the case at bar.

We also find the volume of references to Lopez's time in custody to be excessive. The prosecutor never missed an opportunity to mention the fact that Lopez went to prison multiple times over the course of his two-year relationship with Ortega. In a single 11-page excerpt of Ortega's testimony, the prosecutor made 22 separate references to Lopez's time in custody. We see no reason why he had to pepper so many of his questions with references to custody, other than to inflame the jury, and therefore we believe Lopez's conviction for count 1 should be reversed.

B. Even if it was relevant, the evidence was unfairly prejudicial against Lopez.

The court, in its discretion, may exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice against the defendant. (§ 352.) Determinations under this section are generally within the trial court's discretion, but the court's power is not absolute and discretion must be exercised by a reasonable balancing of probative value and prejudicial effect. (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.) It is fundamental that where the prejudice from evidence outweighs its probative value, the court should exclude the evidence. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904.)

Section 352 requires the trial court to weigh the probative value of Lopez's time in custody against its potential for unfair prejudice. (*People v. Turner* (1990) 50 Cal.3d

668, 703-705.) Evidence of a defendant's prior time in custody, like evidence of other crimes, suggests criminal propensity and is likely to inflame the jury against the defendant. (*People v. Thompson* (1980) 27 Cal.3d 303, 314.) The trial court's discretion whether to admit the evidence must be exercised with "discerning care" because of the "inherently prejudicial nature of such evidence as constituting a character trait and propensity evidence." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 131.) Any doubts as to admissibility must be resolved in favor of the defendant. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

Here, the probative value, if any, of Lopez's prior time in custody was clearly outweighed by the unfair prejudice to Lopez. His time in custody did nothing to prove or disprove any issue in dispute at the trial, but likely greatly inflamed the jury. Because of the negligible probative value of the evidence, its risk of unfair prejudice substantially outweighs any benefit provided by the references to his time in custody. The trial court correctly held this way initially, but then changed its mind. The court was right the first time, and should have prohibited the references to Lopez's time in custody.

## II

### *THE COURT IMPROPERLY ADMITTED HEARSAY TESTIMONY FOR AN IRRELEVANT NONHEARSAY PURPOSE*

Lopez's counsel objected to Ertz's testimony that other residents of the trailer park told him that Lopez ran away as hearsay. The court allowed it, stating that it was not offered for the truth but rather for the effect it had on Ertz, which was that he went to

look for Lopez in the area. Lopez contends that this was hearsay evidence admitted for an irrelevant nonhearsay purpose. We agree.

Hearsay is evidence of a statement made by someone other than a witness testifying in court that is offered to prove the truth of the matter stated. (§ 1200, subd. (a).) It is inadmissible unless it falls under an exception to the hearsay rule. (§ 1200, subd. (b).) For such evidence to be admissible, it must be relevant to an issue in dispute at trial. (§ 210.) "A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute." (*People v. Armendariz* (1984) 37 Cal.3d 573, 585, superseded on other grounds by statute as stated in *People v. Cottle* (2006) 39 Cal.4th 246, 253.)

Here, the court permitted evidence that residents told Ertz that Lopez was seen running to a separate location to show its effect on Ertz and why he went to that location. Although the location was searched, Lopez was not there. The stated purpose--that Ertz took the information and began searching for Lopez--had no relevance to any issue in dispute at trial because nothing came of his search. Whether he was hiding from police while they responded to Ortega's call was never in dispute, and the fact that Ertz searched the location indicated by the residents but did not find him is not relevant to anything, yet was the reason the court admitted the hearsay statement. We agree with Lopez that this was hearsay evidence that was admitted for an irrelevant nonhearsay purpose, which was improper. It should have been excluded.

III

*FALSE STATEMENT INSTRUCTION*

As we have reversed his count 1 conviction on other grounds, we have no need to discuss the merits of the jury instruction regarding a false statement.

DISPOSITION

The conviction for count 1 is reversed. In all other respects, the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.