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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO SALAZAR,

Defendant and Appellant.

D066546

(Super. Ct. No. SCN320196)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. Kearney, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Arturo Salazar was convicted of the first degree murder of his former girlfriend, Edith Garcia. There is no dispute in the record Salazar cut

Garcia's throat, severing both of her carotid arteries, and that, after she died, he hid her body in the box spring of his bed and lied to her relatives about her whereabouts. In support of its contention that the murder was willful, premeditated, and deliberate, the prosecution presented evidence of statements Garcia made with respect to an earlier domestic violence incident and an earlier statement Salazar made to Garcia's brother to the effect that he would kill her. As we explain more fully below, contrary to Salazar's arguments on appeal, the trial court did not err in admitting this evidence.

#### FACTUAL AND PROCEDURAL BACKGROUND

Salazar and Garcia began dating while Garcia was in high school. When Garcia was 16 and Salazar was 19, Garcia became pregnant with their first child; Salazar moved into a home with Garcia's mother, stepfather, brother and sister. Salazar stayed in the home for four years, during which time Garcia gave birth to two children.

In 2011, Salazar and Garcia moved into an apartment of their own. In October 2011, very shortly after a dispatcher received a 911 "hang-up" call, a police officer responded to the apartment; Garcia told the officer that in an argument over her use of the family car, Salazar had begun acting in a threatening manner and that when she called 911, Salazar grabbed her by the neck and threw her against a wall. The responding officer saw injuries on Garcia's neck consistent with her description of events and stated that when Garcia answered the door she was very upset, shaking and crying. However, Garcia declined to make a complaint against Salazar and no charges against him were ever filed.

In 2013, Salazar and Garcia's relationship began to deteriorate, and Garcia began dating another man. In May 2013, Garcia moved out of the apartment; Garcia's brother

helped with the move and, at one point, Salazar told Garcia's brother that he had watched Garcia sleeping and that he "was going to kill her." Garcia's brother did not think Salazar was joking and told her sister about the threat.

Shortly after she moved out, Garcia discovered she could not afford to live on her own. Salazar then permitted her and the children to move into a garage apartment he had rented. According to Salazar, he permitted Garcia to move in with him because he thought Garcia had ended her relationship with her boyfriend. A few days after she moved in with him, Salazar discovered Garcia had not ended the relationship, and he ordered her out of the garage apartment while the children stayed with him. Garcia came back to visit the children a few days later and again Salazar permitted her to stay on the condition that her relationship with her boyfriend was over.

Very late on the evening of June 11, 2013, Garcia drove to her mother's house in her mother's truck, and her brother brought her back to the garage apartment because her brother needed to use the truck. Around 2:15 a.m. the following morning, neighbors who lived in the home to which the garage was attached, heard a woman scream "wait, wait." Two or three minutes later, they heard a woman scream, "Help me. Someone help me." The neighbors were concerned enough by what they heard that they woke up their landlord, who lived upstairs from them. The landlord knocked on Salazar's door; without opening it, Salazar assured him that everything was alright and that one of his children had been crying.

Around 4:00 a.m., the neighbors heard what they thought was furniture being moved in Salazar's apartment. Around 5:00 in the morning, Salazar called Garcia's mother and told her that he and Garcia had a fight and that at 1:00 a.m. she had left on

foot. Around 7:40 a.m., Salazar spoke with Garcia's mother again and told her his oldest child had an eye infection and that Garcia's mother need not pick the child up for school.

Later in the day, after Garcia's brother, mother and stepfather had driven around the area looking for Garcia, Salazar, along with his two children, met with her family. At that point, Salazar had scratches all over his face, and contrary to his earlier report, his oldest daughter did not have an eye infection. Salazar told Garcia's relatives that Garcia had scratched him during the fight, but he denied hitting her.

The following morning, Garcia's mother and stepfather contacted police and reported that Garcia was missing. Police officers met the family at Salazar's apartment; the officers made an initial search of the apartment with Salazar's permission and found a bloody rug that had been rolled up, bloody clothes, a hair barrette with a long piece of hair attached to it, and a knife with a six-inch blade.

In a later search that day, the officers looked inside the box spring that had been under Salazar's bed and found Garcia's body. Garcia had suffered two knife wounds to her neck; one relatively shallow and a deeper wound which had severed her jugular veins, windpipe, carotid arteries, and esophagus. A postmortem examination also disclosed multiple cuts on the palms of her hands and the front of her fingers, as well as puncture wounds on her chest and five superficial cuts on her face. The medical examiner concluded that a knife had gone across Garcia's neck at least twice.

Salazar was interrogated by police after Garcia's body was found. He admitted that he had killed Garcia and told the officer she had taunted him after he discovered that she had not ended her relationship with her boyfriend. He told the interrogator that he felt Garcia had made a fool of him three times and that he became enraged, grabbed

Garcia from behind, covered her mouth and cut her throat twice.

At trial, Salazar testified that late on the evening before her death, Garcia had driven her mother's truck back to her mother's home because her brother needed to use it and that while Garcia was returning the truck, he examined her cell phone and found texts from her boyfriend which indicated that their relationship was continuing. According to Salazar, when Garcia returned, he confronted her with the discovery and she laughed at him and taunted him. Salazar testified that he felt Garcia had made a fool of him and that he held the knife to her throat and that she told him "Stop, wait. Let's talk." According to Salazar, although he let her go, she continued to taunt him; in his direct testimony, Salazar stated that Garcia then tried to get the knife, that he held it at her throat again, that she was holding the knife so that it didn't cut her and that when she released the knife, it cut her neck.

On cross-examination, Salazar admitted that he covered her mouth to keep anyone from hearing her screams and that he cut her throat twice. On cross-examination, Salazar also admitted that Garcia never tried to grab the knife until he held it against her throat.

The jury convicted Salazar of first degree murder and found that he personally used a knife in committing the offense. The trial court sentenced him to a term of 26 years to life in prison.

## DISCUSSION

### I

As he did in the trial court, on appeal Salazar argues that the trial court erred in admitting statements Garcia made to a law enforcement officer responding to a 911 hang-up call. As we have indicated, Garcia stated that Salazar had become angry because she

used the family car without his permission, that she called 911, and that Salazar had grabbed her by the neck and thrown her against a wall. The officer reported that, at the time of the statements, Garcia was crying and upset and that there were marks on her neck consistent with her description of events. We find no error.

A. Evidence Code Section 402 Hearing

At the Evidence Code section 402 hearing, the following was elicited from the responding officer, Tony Hurst, on cross-examination:

"[Defense Counsel:] Okay. And at that point [after Salazar and Garcia had been separated ] it is fair to say that you were investigating whether or not a crime had been committed?

"[Hurst:] Yes ma'am."

However, after the parties were finished examining Hurst, the trial court examined him:

"[Trial Court:] All right, sir. So you get the call; you show up at the house; she answers the door; she tells you there was some kind of an altercation. Correct?

"[Hurst:] Yes.

"[Trial Court:] All right. How long after that are you talking to her about what happened?

"[Hurst:] Within the first -- within 60 seconds, sir, maybe less.

"[Trial Court:] Okay. So within 60 seconds, you're asking her what happened. At that point in time, were you interviewing her to build a case, or were you trying to figure out what had occurred?

"[Hurst:] I was just trying to figure out what's going on inside the apartment, sir.

"[Trial Court:] All right. Anything additional, [Defense Counsel]? [¶] . . . [¶]

"[Defense counsel:] So now I'm confused. Is it your testimony, then, that Officer Willms was able to get Mr. Salazar out of the house within the first 60 seconds of you arriving?

"[Hurst:] I would say within the first 60 seconds we've already made a determination something's going on. Female's crying. There's a male inside. He's intoxicated. Separation is almost immediate for our safety.

"[Defense counsel:] So when you testified earlier that it was about ten minutes before you completed your interview with Ms. Garcia, help me reconcile that.

"[Hurst:] Separating the people has nothing to do with the investigation. It's all about trying to get home that night. So we separate them. And then at that point, you do a physical -- or you observe the area. You check everything out, make sure nobody's hiding in the kitchen, things like that.

"At the same time you're doing that, you're still speaking with whoever you're speaking with.

"So [O]fficer Willms is outside.

"I'm speaking with her, you know, looking to make sure there's no guns, no knives, things like that going on. At the same time you're doing that, you're still engaged in active conversation with the person. So you're multitasking, basically. So they're going on simultaneously, is what I'm trying to say."

In finding no *Crawford*<sup>1</sup> problem, the trial court then stated: "With regards to

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<sup>1</sup> *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

*Crawford*, at that point in time, he was -- when he was speaking to her after separating out the defendant, he's trying to figure out exactly what happened and what was going on, trying to secure the scene. So I don't think that that was testimonial in nature, pursuant to case law . . . ."

During the course of the trial, Hurst testified that, after he and his backup officer separated Garcia and Salazar, he immediately asked Garcia what was going on and she responded by telling him that: she had gone to the store; Salazar got angry; she called 911; Salazar took the phone from her; and Salazar pushed her into the wall.

#### B. Confrontation Clause

The confrontation clause of the Sixth Amendment prevents admission of out-of-court statements made by a declarant who is not available for cross-examination *if* the statements were testimonial in nature. (*Crawford, supra*, 541 U.S. at pp. 38, 53.) In general, statements recorded by law enforcement officers in the course of investigating a crime are testimonial and subject to the confrontation clause when the statements were elicited in an effort to collect evidence to be used in the later prosecution of a crime. (See *Davis v. Washington* (2006) 547 U.S. 813, 830-831.) However, statements made to law enforcement officers when they are responding to an ongoing event and merely trying to determine what, if any, action they should take, are not testimonial and are not barred by the confrontation clause. (*Id.* at pp. 828-829.) As we stated in *People v. Nelson* (2010) 190 Cal.App.4th 1453, 1464: "[S]tatements in response to police inquiries at the crime scene are not testimonial if the inquiries were designed to ascertain whether there was an ongoing threat to the safety of the victim, the officers, or the public. [Citations.] For example, questioning a victim to identify a perpetrator for purposes of immediate

apprehension of the perpetrator for safety reasons does not yield a testimonial statement. (*People v. Romero* [(2008) 44 Cal.4th 386,] 422 [statements 'are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator'].)"

In *People v. Nelson*, the victim of a shooting was being transported to a hospital, and, in response to a question from a firefighter who was in the ambulance, identified the shooter; shortly thereafter, the firefighter relayed that information to police officers who were trying to identify and apprehend the shooter. We found that the victim's statement to the firefighter was not testimonial and not subject to the confrontation clause because the circumstances under which the statement was obtained reflected "a response to an immediate situation rather than an investigative purpose." (*People v. Nelson, supra*, 190 Cal.App.4th at p. 1468.)

The statements Garcia made to the responding officer in 2011 clearly fall within the category of statements elicited by a law enforcement officer as a means of determining the appropriate response to an ongoing event, rather than statements elicited as a means of collecting evidence in contemplation of a prosecution. In this regard, the most telling and persuasive circumstance is the undisputed fact that the officer was responding to a 911 hang-up call, which left the law enforcement officers with no information about what was occurring at the apartment, including the identity of the occupants. Plainly, in responding to the hang-up call, in order to determine if a crime had even been committed or if anyone needed emergency assistance, the officer needed to know what was happening at the location from which the call originated. In this context, as the trial court clarified in its examination of the officer, the inquiries the officer made

of Garcia and her response were in no sense testimonial within the meaning of the confrontation clause.

### C. Evidence Code Section 1240

Under Evidence Code section 1240,<sup>2</sup> spontaneous statements made about an event while a declarant "was under the stress of excitement" of that event are not subject to the general rule against hearsay. "To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318, accord, *People v. Gutierrez* (2009) 45 Cal.4th 789, 809-810.)

According to the officer who took Garcia's statement describing the abuse Salazar inflicted, at that point she was very upset, shaking and crying. Given those circumstances, the trial court did not err in finding that Garcia's description of the abuse was a spontaneous statement within the meaning of Evidence Code section 1240.

(*People v. Poggi, supra*, 45 Cal.3d at p. 318.)

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<sup>2</sup> Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

D. Evidence Code sections 1109 and 352

Although in general evidence of prior bad acts are barred by Evidence Code section 1101, by way of Evidence Code section 1109, the Legislature has made an exception with respect to acts of domestic violence. Evidence Code section 1109 provides in pertinent part:

"(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. [¶] . . . [¶]

"(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code.

"(c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.

"(d) As used in this section: [¶] . . . [¶]

"(3) 'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.

"(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this

evidence is in the interest of justice."

As Evidence Code section 1109 itself makes clear, even when evidence of domestic abuse is not barred by Evidence Code section 1101, the familiar provisions of Evidence Code section 352 give trial courts the discretion to nonetheless exclude such evidence when its prejudicial impact outweighs its probative value. (Evid. Code, § 1109, subd. (d).) We review the admission of evidence of prior bad acts for abuse of discretion. (See *People v. Catlin* (2001) 26 Cal.4th 81, 122.)

Here, there is no real dispute that the prior domestic abuse falls within the exception provided by Evidence Code section 1109. The conduct Garcia described was domestic abuse within the meaning of Penal Code section 13700<sup>3</sup> and occurred within two years of Garcia's murder. Moreover, with respect to Evidence Code section 352, the evidence was probative in that it not only showed Salazar's propensity for unprovoked violence toward Garcia, but it also explained in part the volatility and deterioration of their relationship. Its prejudicial impact was limited in that the evidence of abuse was not remote in time or nearly as horrific as the brutal homicide that Salazar conceded he

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<sup>3</sup> Penal Code section 13700 provides in pertinent part:

"As used in this title: [¶] (a) 'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.

"(b) 'Domestic violence' means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, 'cohabitant' means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship."

committed. Thus, the trial court did not abuse its discretion under Evidence Code section 352.

## II

As we have noted, Garcia's brother testified that, on the day Garcia was moving out of the apartment she had shared with Salazar in Oceanside, about a month before her death, Salazar told him that he watched Garcia while she slept and that he was going to kill her. According to Garcia's brother, Salazar told him, "it's already fixed." The trial court admitted the testimony over Salazar's hearsay objection.

Although Salazar did not do so in the trial court, on appeal he contends that his earlier statement to Garcia's brother was irrelevant. In a prosecution in which he was alleged to have killed his domestic partner with premeditation, willfulness, and deliberation, a threat to kill the victim, made only a month before the killing, was plainly relevant and admissible. (Evid. Code, § 1220; *People v. Allen* (1976) 65 Cal.App.3d 426, 433.)

## DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.