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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS LANDIN ACEVEDO,

Defendant and Appellant.

E057643

(Super.Ct.No. SWF1201464)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Affirmed in part and reversed in part with directions.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Jesus Landin Acevedo choked and head-butted his girlfriend, Jane Doe. He was charged with one count of assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))<sup>1</sup> and one count of misdemeanor battery upon a cohabitant (§ 243, subd. (e)(1)). Prior to trial, the defense served a subpoena duces tecum on a hospital to obtain psychiatric records regarding Doe. After the prosecutor objected to the release of the subpoenaed documents, the trial court viewed the records in camera, ruled that they would not be disclosed to the defense, and ordered them sealed.

Defendant was convicted as charged and sentenced to a total of two years in prison. The court also issued a protective order restraining defendant from contact with Doe for 10 years. The court cited section 273.5 as the statutory authority for the restraining order.

On appeal, defendant requests that we review the sealed medical records to determine whether the court erred in refusing to release them. We have done so and conclude there was no error.

Defendant also argues that the court erred in issuing the restraining order because section 273.5 authorizes restraining orders only when a defendant is convicted of the crime described in that statute, and defendant did not commit that crime. The Attorney General agrees that section 273.5 does not apply, but contends that the 10-year restraining order is authorized by section 136.2 and that the error can be corrected by

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

amending the abstract of judgment. We disagree with the Attorney General and conclude that the order imposing the restraining order was unauthorized and the restraining order must be vacated.

## II. FACTUAL SUMMARY

Prior to May 28, 2012, defendant and Doe had been dating for about one year. On that day, defendant went inside Doe's house and locked the doors and windows with Doe inside. He appeared to be angry. Defendant grabbed Doe and threw her to the floor. He then pushed Doe into a chair by head-butting her in her nose. Defendant told Doe it was time for her to learn a lesson, that he was Satan, and "[i]t was time to die." Defendant put a hand around Doe's neck and started choking her. Doe could not breathe or scream.

Doe kicked defendant in the groin and freed herself. Defendant then sat in a love seat across from Doe. Doe tried to stay calm and asked defendant, "can I live today?" Defendant said, "Maybe." He told Doe to pray, to get baptized, and not forget that he is Satan.

As they sat there, Doe noticed a change in defendant's behavior. Defendant asked Doe for Tylenol and suggested Doe take a nap. They ate lunch and talked for about two hours. Doe did not try to leave because she was still afraid of defendant. After defendant left the house, Doe called 911.

### III. DISCUSSION

#### A. *Review of Order Denying Disclosure of Doe's Medical Records*

In June 2012, defense counsel issued a subpoena duces tecum to the custodian of records of Hemet Valley Medical Center for the production of “psychiatric records” relating to Doe. The prosecution opposed the release and use of the subpoenaed records.<sup>2</sup> During a hearing on the matter, the court asked defense counsel to make an offer of proof as to the admissibility of the subpoenaed records. Counsel stated, “on information and belief,” that Doe was hospitalized under Welfare and Institutions Code section 5150 on the date of the charged assault. If so, counsel continued, the records could reflect Doe’s mental condition at the time she reported the incident and spoke with police, and would therefore be relevant to the issue of Doe’s credibility.

After some further discussion, counsel for both sides stipulated to have the court review the documents in camera to determine whether, on the date of the incident, Doe was undergoing treatment or taking medication that would affect her ability to recall the events of that day. The court then reviewed the documents and found that they did not contain information consistent with defense counsel’s offer of proof. The court also cited Evidence Code section 352 and found that, “[i]f there was anything that is relevant, . . .

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<sup>2</sup> Among other points, the prosecution argued: (1) the People have standing to participate in the hearing regarding the subpoena on behalf of the victim; and (2) the subpoena is invalid because defendant failed to give notice to the victim. Defendant did not challenge the first point; as to the second point, defendant asserted that although notice to Doe was not required, the defense did provide Doe with notice. Because these issues are not raised by either party on appeal, we do not address them.

the probative value is significantly outweighed by the prejudicial effect to the . . . witness.” The court denied release of the records and ordered them sealed.<sup>3</sup>

On appeal, defendant does not challenge the procedure the court employed to determine whether to release the subpoenaed documents. Indeed, defense counsel stipulated to having the court view the documents in camera to determine their relevance in light of counsel’s offer of proof. His request on appeal is limited to having us review the subpoenaed documents to determine whether the court erred in ruling that the documents were irrelevant or otherwise inadmissible under Evidence Code section 352. The Attorney General does not oppose the request.

We review a court’s evidentiary rulings for abuse of discretion.<sup>4</sup> (*People v. Cooper* (1991) 53 Cal.3d 771, 816; *People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

We have reviewed the records of the trial court proceedings and the sealed documents. There are no records pertaining to the hospitalization or treatment of Doe for

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<sup>3</sup> In his opening brief on appeal, defendant states that an “in camera hearing was held” at which “defense counsel was excluded” and “given no insight as to what transpired during this hearing.” Defendant further states that “a transcript of the proceeding was prepared and has been filed under seal with this Court.” These statements are not supported by the record. Indeed, it appears from the reporter’s transcript of the hearing that, although counsel were not shown the documents, the court viewed the documents in the courtroom with counsel for both sides present. There was no separate transcript prepared, sealed or otherwise.

<sup>4</sup> In discussing the standard of review, defendant points out that the party claiming privilege has the burden of showing that the evidence it seeks to suppress is covered by the privilege. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1208.) Here, however, the court’s ruling was not based on a privilege, but rather on relevance and Evidence Code section 352.

any reason after April 16, 2012—six weeks before the charged incident—and no records suggesting that Doe was ever hospitalized under Welfare and Institutions Code section 5150. In light of defendant’s offer of proof, we conclude that the subpoenaed documents are not relevant and, therefore, the court did not err in denying disclosure.

*B. Erroneous Imposition of Restraining Order*

In sentencing defendant, the court imposed a 10-year restraining order under former section 273.5, subdivision (i).<sup>5</sup> Defendant contends this was error because section 273.5 authorizes restraining orders only when sentencing a defendant convicted of the crime described in subdivision (a) of that statute; and defendant was not convicted of that crime.<sup>6</sup> As the Attorney General concedes, defendant is correct.

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<sup>5</sup> At the time defendant committed his crime, section 273.5, subdivision (i) provided: “Upon conviction under subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court.”

The Legislature subsequently changed subdivision (i) of section 273.5 to subdivision (j). (Stats. 2013, ch. 763, § 1, p. 5462.)

According to the reporter’s transcript, the court referred to section 273.5, subdivision (i) only. The court’s minute order of the proceeding and the abstract of judgment refer not only to that statute but to section 646.9, subdivision (k), which authorizes a restraining order as to someone convicted of stalking. The Attorney General does not contend that this statute can support the court’s order.

<sup>6</sup> At the time defendant committed his crime, section 273.5, subdivision (a) made it a felony to willfully inflict corporal injury resulting in a traumatic condition upon certain classes of persons, including a spouse or cohabitant. (Former § 273.5, subd. (a).) Significantly, the statute did not include victims with the type of dating relationship that defendant and Doe had. In 2013, the Legislature added to the list of victims “someone with whom the offender has, or previously had, an engagement or dating relationship . . . .” (Stats. 2013, ch. 763, § 1, p. 5461.)

The Attorney General, however, asserts that the court had the authority to impose a 10-year restraining order under another statute, section 136.2, subdivision (i), and that we should fix the error by amending the abstract of judgment. We disagree.

Section 136.2, subdivision (i), authorizes a restraining order only when a defendant has been “convicted of a crime of domestic violence as defined in Section 13700 . . . .” (§ 136.2, subd. (i).) “Domestic violence” is defined in section 13700 as “abuse committed against . . . 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.” (§ 13700, subd. (b).) “Abuse” is defined as “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.” (§ 13700, subd. (a).)

Here, defendant was charged in count 1 of the information with violating section 245, subdivision (a)(4), which makes it a crime to commit an assault upon another by means of force likely to produce great bodily injury. Neither the statute nor count 1 refer to the victim of the assault as any of the persons described in the definition of domestic violence. Defendant’s conviction under count 1, therefore, is not a conviction of a crime of domestic violence within the meaning of section 136.2, subdivision (i).

In count 2, defendant was charged with misdemeanor battery under section 243, subdivision (e)(1), against “a spouse, person with whom the defendant is cohabitating, person who is the parent of defendant’s child, non-cohabitating former spouse, fiancée,

fiancee, and a person with whom the defendant currently has, or previously had a dating relationship.” Although this allegation refers to the victim in terms that parallel the persons described in the definition of domestic violence, a battery does not necessarily constitute “abuse.” “Abuse” under section 13700 requires causing or attempting to cause “bodily injury” or placing another in “apprehension of imminent serious bodily injury.” (§ 13700, subd. (a).) A battery, however, “need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark.” (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 13, p. 804.) Therefore, defendant’s conviction under count 2 is not a conviction of a crime of domestic violence for purposes of section 136.2, subdivision (i).

Because neither count, as alleged, constitutes a crime of domestic violence, defendant was not “convicted of a crime of domestic violence” for purposes of section 136.2, subdivision (i).<sup>7</sup> We cannot, therefore, correct the court’s error by amending the abstract of judgment as the Attorney General suggests.

#### IV. DISPOSITION

The order imposing a restraining order against defendant is reversed and the restraining order issued December 4, 2012, is vacated. The trial court is directed to

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<sup>7</sup> We recognize that the jury, in convicting defendant of count 2, necessarily found that Doe’s relationship with defendant is the type of relationship described in the definition of domestic abuse and, in convicting defendant of count 1, necessarily found that defendant committed a crime against Doe that constitutes abuse for purposes of domestic abuse. Nevertheless, the Attorney General has not referred us to any authority that would allow us to combine the finding implicit in one crime with the finding implicit in another to form “a crime of domestic violence.” (§ 136.2, subd. (i).)

prepare (1) a minute order correcting the sentence accordingly and (2) an amended abstract of judgment that omits any reference to the restraining order. The trial court is further directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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KING  
J.

We concur:

McKINSTER  
Acting P. J.

MILLER  
J.