Filed 9/20/12 P. v. Luna CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMUNDO LUNA, JR., Defendant and Appellant.	F062644 (Fresno Sup. Ct. Nos. F11900008 & F09905285) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In this consolidated case, appellant appeals from a judgment of conviction of attempted second degree robbery (Pen. Code,[1] §§ 211, 664) and false imprisonment by violence (§ 236) with personal use of a deadly weapon (§ 12022, subd. (b)(1)) and a violation of probation following a guilty plea to possession of a deadly weapon (§ 12020, subd. (a)).

STATEMENT OF THE CASE

On May 2, 2011, a jury returned verdicts in Fresno County Superior Court case No. F11900008 finding appellant Raymundo Luna, Jr., guilty of attempted robbery (§§ 211, 664) and false imprisonment by violence (§ 236) with personal use of a deadly and dangerous weapon (§ 12022, subd. (b)(1)).

On the same day, the court determined the judgment of conviction in case No. F11900008 constituted a violation of probation in appellant's 2009 case, No. F09905285, for possession of a deadly weapon (§ 12020, subd. (a)).

On June 1, 2011, the court sentenced appellant to a total term of three years, consisting of the middle term of two years for the attempted robbery and a consecutive term of one year for the personal use enhancement. The court stayed sentence on the false imprisonment by violence count (§ 654).

On June 2, 2011, appellant filed a timely notice of appeal (No. F062644). On August 2, 2011, appellant filed an amended notice of appeal (No. F062998) to reference the contested violation of probation (§ 1237, subd. (b)). On September 20, 2011, this court consolidated appellate case Nos. F062644 and F062998 under case No. F062644.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

STATEMENT OF FACTS

Case No. F11900008

On the evening of December 29, 2010, Gerardo Lopez left his house and walked to a friend's home for a visit. Lopez proceeded south on Chestnut Avenue in the direction of Ashlan Avenue. He testified it was dark outside and it was sprinkling rain. As Lopez walked down the street, he pulled out his iPod and headphones to listen to some music. Lopez heard footsteps behind him, turned around, and saw an individual at the end of the sidewalk.

The individual was a moustached Hispanic male between five feet six inches and five feet nine inches tall. The individual was dressed in a tracksuit with an Adidas-type jacket that had two white stripes. When Lopez initially encountered the individual, he could not hear what the man was saying because Lopez was wearing his headphones. Lopez removed the headphones, and the man pointed to a nearby fence and directed Lopez to move there. When Lopez failed to respond, the man repeated his directions. Lopez asked the man what was going on and the man repeated his directions again.

The man approached Lopez, placed his hand in his pocket, and pulled out a knife. Lopez became afraid and did not obey the man's command to move near the fence. The man eventually grabbed Lopez by the right arm and pulled him to the fence. He released Lopez's arm when they reached the fence. The man asked Lopez for his identification and his money. Lopez smelled the odor of alcohol on the man's breath. The man then guided Lopez from the fence to a street sign and directed Lopez to look at it. The man placed Lopez's hands behind his head and told Lopez he was an officer leading some kind of investigation. The man also said he was going to "Taser" Lopez. He told Lopez, "I'm going to give you a big break and I'm going to let you go." The encounter lasted less than 15 minutes.

After the assailant let Lopez go, Lopez moved from the westbound side to the eastbound side of Chestnut Avenue. He walked north on Chestnut Avenue toward Gettysburg Avenue and then called his friend to explain the situation. Lopez saw the assailant enter a smaller apartment complex in the area. Lopez eventually walked to his friend's home near the intersection of Cedar and Ashlan Avenues and called 911. He told the dispatcher the assailant was wearing white shoes and that he tried to stab Lopez. The call took place approximately 43 minutes after the encounter with the assailant. The mother of Lopez's friend drove him back to the area of the encounter. They passed by the smaller apartment complex two times. On the second drive-by, Lopez saw a person wearing a tracksuit similar to the one worn by his assailant. The individual was knocking on the front door of apartment No. 109.

Lopez said he and his friend's mother eventually made contact with a female police officer in the vicinity. He told the officer his assailant was between five feet five inches and five feet nine inches with combed-back hair and a black tracksuit with two white stripes on the jacket. Lopez also told the officer he had just seen a person wearing a tracksuit near apartment No. 109 at the smaller complex. Lopez and the officer headed back to the smaller complex and the officer asked another officer to go into apartment No. 109.

Lopez said the officers produced two males from apartment No. 109. Lopez said the first person was not his assailant. Appellant told officers the second person would be the assailant "if you smelled the alcohol on his breath and if you were to find a knife in the right hand pocket of his jacket." At trial, Lopez described the knife as a folding pocket knife with a three to four-inch blade. Lopez said the assailant used the knife in his right hand. Lopez identified the second person as the assailant. Lopez told officers he had the same facial features as the assailant, including a moustache and uniquely shaped eyes, and he had a bigger build and short height, like the assailant. Lopez said appellant

was the person who approached him on Chestnut Avenue but was not wearing the jacket with stripes at the time Lopez identified him. Lopez said the law enforcement officers showed him a jacket before showing him appellant. Lopez said he identified the jacket before seeing appellant and said he told officers that the assailant was wearing sweatpants in addition to the jacket. Appellant also said he identified the knife from apartment No. 109 as the knife appellant used during their encounter. Appellant said he saw the assailant's face during their encounter and that appellant was the individual who brandished a knife at him on December 29, 2010.

Fresno Police Officer Daniel Godwin testified he was working with the northeast district crime suppression team on the evening of December 29, 2010. He received a call for service from the area of Ashlan and Chestnut Avenues. Officer Godwin proceeded to the area and contacted a crime victim. The victim said he had been robbed, pointed out an apartment complex on East Austin Way, and said the robber had gone into the complex. Godwin said the complex consisted of 15 apartments in a single level shaped like a horseshoe. Officer Godwin contacted Officers Dalbec and Galaviz at the complex, and Galaviz said the victim had seen the robber go into apartment No. 109.

Godwin and Dalbec knocked on the door of apartment No. 109. A woman named Antonia Alvarez opened the door. A gentleman was inside the apartment with her. Godwin explained why he and Dalbec were at the complex and asked whether anyone aside from Alvarez and the gentleman were inside the apartment. Alvarez said no one else was present; Godwin asked whether he could enter and check to make sure, and Alvarez granted him permission to search the apartment. Godwin walked through the studio-type apartment and found appellant hiding in the corner of the shower with the curtain closed. Godwin drew his pistol, ordered appellant to show his hands, placed appellant in handcuffs, and led him to the living room. Appellant was not wearing a blue Nike tracksuit. When Godwin returned to the living room he saw a silver folding pocket-

type knife on a television stand. Godwin took possession of the knife and gave it to Officer Dalbec.

Fresno Police Officer Amanda Galaviz testified she was on duty with the northwest policing district on December 29, 2010. During the 7:00 p.m. hour, she responded to an attempted robbery call in the area of Ashlan and Chestnut Avenues. She contacted Gerardo Lopez in the area, and he advised her about an apartment complex at the southwest corner of Chestnut Avenue and Austin Way. Officer Galaviz gave the information to Officers Dalbec and Godwin, who checked the premises. Galaviz testified that Lopez appeared nervous and scared when they spoke. Lopez told Galaviz his assailant was a Hispanic male adult between 30 and 40 years of age. Lopez said the man was dressed in exercise clothes, including a black jacket with two white stripes on the arm. He also said the man was five feet six inches tall, of medium build, and had a moustache. Lopez said the subject entered an apartment with a security door illuminated by an adjacent light.

Officers Dalbec and Godwin went to the apartment, and Galaviz could see the apartment from her vantage point on the corner of Austin Way and Chestnut Avenue. Galaviz said Dalbec and Godwin made contact with two males and conducted in-field identifications at the apartment complex. Galaviz gave Lopez an in-field identification admonition and then drove Lopez to the apartment complex parking lot in her patrol car. Lopez looked at the two males from the backseat of her patrol car. Galaviz said Lopez identified appellant as the perpetrator based on his facial features, build, height, and weight. Lopez did not hesitate in making his identification. After officers conducted two in-field showups and Lopez made the identification, officers showed Lopez the folding knife and black jacket with the two white stripes. Lopez said the jacket was the garment that the subject was wearing at the time of the robbery. Lopez also said the folding knife was the weapon used in the robbery.

Officer Patrick Dalbec testified that he contacted Lopez after the offense. Lopez said he had been robbed, pointed to some apartments west of Chestnut, and said his assailant had gone there. Dalbec said Officer Galaviz directed Officer Godwin and him to the apartment complex. Dalbec and Godwin made contact with Antonia Alvarez and Manuel Corona at one of the apartments. Alvarez and Corona stood near the doorway of the apartment. Dalbec explained that a robbery had occurred, and the victim believed the suspect went inside their apartment. Alvarez and Corona said no one else was inside the apartment. Dalbec asked Corona if he could step out of the apartment. Corona participated in an in-field showup with Lopez but Officer Galaviz advised by radio that Corona was not related to the crime.

As Dalbec and Corona returned to the apartment, Godwin told Dalbec to come inside the apartment. Dalbec entered and saw Godwin pulling appellant out of the shower area. Godwin handcuffed appellant in the bathroom. Dalbec observed a jacket hanging on the back of the front door. The jacket was black with white stripes and it was wet to Dalbec's touch. Dalbec asked Lopez if the jacket could have been the one worn by his assailant. Lopez said that was the jacket the robber was wearing. Lopez identified the jacket after he identified appellant as his assailant during a second in-field showup. Lopez described the robbery weapon as a small, silver, pocket-type knife. After Lopez provided that description, Dalbec showed him a knife that Godwin had seized from the apartment. Lopez said the knife was the weapon used during the robbery.

Defense Evidence

Testimony of Maria Sandoval

Maria Sandoval, appellant's girlfriend, testified she and appellant lived in an apartment in the complex at Austin Way and Chestnut Avenue. Sandoval said appellant's sister, Antonia Alvarez, lives with her boyfriend, Manuel Corona, in the same complex. Sandoval said she arrived home from school around 4:00 p.m. on December

29, 2010. Sandoval said appellant arrived home from work between 6:00 and 6:30 p.m. Appellant had been drinking and he and Sandoval had an argument. Appellant claimed he had one beer and Sandoval believed he had consumed more. Appellant left their apartment and went to his sister's apartment. He called appellant from his sister's apartment and apologized. Sandoval said she watched appellant go from their apartment to Alvarez's apartment and noted that he had consumed alcohol and gone to his sister's place on multiple prior occasions. She also said that appellant went back and forth between their apartment and Alvarez's apartment 10 or 15 times during a 40-minute span.

Sandoval said that she heard the sound of a police car outside right after she spoke with appellant on the phone. She heard appellant yelling, "Maria, why?" Appellant was dressed in a white thermal undergarment with a black T-shirt on top, blue jeans, and shoes. Sandoval went outside and saw a police officer pulling the handcuffed appellant from his sister's apartment and placing him in a patrol car. Sandoval wanted to tell appellant that she had not called the police, but an officer asked her to stay away from the car. She went back to the apartment and an officer contacted her a little later. Sandoval said appellant had a cleft lip on the right side of his face.

On cross-examination by the prosecutor, Sandoval said she did not allow appellant to carry knives because he had a prior record, and she did not want him to get into trouble. Sandoval said appellant found a knife while "dumpster diving" the week before Christmas, and he gave it to his sister. Sandoval said she would not allow appellant to leave their apartment with a knife or any kind of weapon. Sandoval said the knife seized by police was the knife appellant found a week before Christmas and gave to his sister.

Testimony of Antonia Alvarez

Antonia Alvarez testified that appellant is her brother and that they reside in the same apartment complex in Fresno. On December 29, 2010, she first saw her brother "towards the afternoon." He came over to her apartment after he had an argument with

Sandoval about his drinking. Alvarez said appellant went back and forth between his apartment and her apartment at least four times. At some point, the police knocked at Alvarez's door and said they were looking for an attempted robbery suspect. Alvarez said appellant was on probation, was not allowed to drink, and was afraid that Sandoval had "called the cops on him." Appellant hid in the apartment, and Alvarez told officers there was no one else present. When the officers found appellant, Alvarez explained, "[H]e's my brother. He's hiding from the girlfriend, because the girlfriend [is] always [] calling the cops. And he always be taken to jail, because he's not allowed to drink."

Alvarez said the officers took the jacket from her apartment even though she explained it belonged to her previous boyfriend of 11 years. She also said that she wore the jacket but her current boyfriend, Manuel Corona, rarely did so. Alvarez said she and Corona "were barely getting to know each other" on the evening in question. Alvarez said neither she nor Corona walked outside with the jacket after 5:00 p.m. on December 29, 2010, and the jacket was never taken out of the apartment that day. She admitted the jacket was wet but explained, "The day before or two days before it was raining. It was pouring and the jacket got wet [from the earlier rainfall]."

Alvarez said appellant was wearing dirty jeans, black tennis shoes and socks, and some sort of T-shirt on the day of the incident. She explained that appellant worked at a recycling facility at Cedar and Ashlan Avenues and the employees did "dirty work with the cans and stuff like that." Alvarez said she and her boyfriend had gone out to eat and returned to their apartment between 5:00 and 5:30 p.m. to spend time together. She said appellant came over between 5:30 and 6:00 p.m., as it was getting dark. She said appellant went back and forth between her apartment and appellant's apartment. She said appellant would spend 20 minutes with Corona and her and then go back to Sandoval "trying to make things work." According to Alvarez, this back-and-forth behavior spanned an hour to 90 minutes. Alvarez said she did see appellant consume one beer at

her apartment. She did not know that appellant had consumed beer at work but heard Sandoval say that appellant did. Alvarez admitted lying for appellant but explained, "It's just my brother was scared because [of] the fact that he is on probation. And he constantly gets taken in. And I've been there. I constantly see him being taken in."

Testimony of the Appellant

Appellant testified on his own behalf. He said he wore a "Coyote Ugly" T-shirt over a thermal shirt when he went to work at his recycling job on December 29, 2010. Appellant also wore baggy jeans with "monster graffiti" on the back pocket and black tennis shoes.[2] Appellant said he worked from 9:00 a.m. to 5:15 p.m., went to a liquor store, and drank a 40-ounce beer. He then took the bus home to the intersection of Chestnut and Ashlan Avenues. When appellant got off the bus, he spoke to a longtime friend named John and asked whether he smelled like beer. The friend agreed that he could smell beer on appellant. Appellant nevertheless walked from the bus stop to his apartment in the complex at East Austin Way and Chestnut Avenue. Appellant said his girlfriend, Maria Sandoval, and her mother were present on his arrival. Appellant got into an argument with Sandoval and left to go to his sister's apartment. Appellant said he asked his sister, Alvarez, for relationship advice and went back and forth between his apartment and Alvarez's apartment. Appellant admitted that he was on probation and the terms of his probation included no drinking and no possession of weapons.

While appellant was seated in Alvarez's apartment, he heard a loud bang on the door. Appellant thought that Sandoval had called the police. Appellant said he was not supposed to be drinking and asked his sister not to tell officers that he was present in her apartment. Appellant ran to the restroom, closed the shower door, and tried to conceal

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[2] Appellant admitted that he owned a pair of white tennis shoes but said he did not wear them on December 29, 2010.

himself inside the shower. Appellant said he was fully clothed and did not turn the water on. Appellant added that he did not keep a jacket or any other clothes at his sister's apartment.[3]

Appellant eventually heard footsteps and saw a gun pointed at him. Appellant turned around and raised his hands. The officer asked whether appellant was on probation or parole, and appellant admitted he was on probation. Appellant said the officer handcuffed him and "ran his name." As the officer escorted appellant from Alvarez's apartment, he reached toward an entertainment center and asked about a knife. Appellant said the knife was his.[4] Appellant explained that he had found the knife in a dumpster, but Sandoval did not want him to have it. Appellant gave the knife to Alvarez because she worked in a warehousing area.

When appellant went outside with the officer, he yelled out, " 'Maria why?' " Appellant said he thought Sandoval had called the police. As to the field showup, appellant said, "[I]t's all hazy. And I was getting hit with a spotlight. And the officers – and you are also being accused of attempted robbery. I go what? I was surprised. [S]ome officer asked the victim if this is the suspect. And he says well, you fit the description. Let's go. And next thing you know I'm in the car being brought down to downtown."

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[3] Appellant acknowledged that it had been raining on December 29, and that it was drizzling during the time he went back and forth between his apartment and his sister's apartment. Appellant said he wore a jacket during his work hours on December 29 but left that jacket and his iPod device at his apartment before going to his sister's apartment.

[4] Later in his testimony, appellant said he gave the knife to his sister but claimed ownership when he spoke to the police officer "[b]ecause my sister … was an ex-con. I didn't want her to take any kind of rap on it. I said it's mine."

Appellant said he went to work at the recycling center at Cedar and Ashlan Avenues at 9:00 a.m. on December 29. He said Sandoval customarily did a "pat down search" of him before he departed for work. Appellant said Sandoval would direct him to turn over any weapons if she discovered them on his person.

Case No. F09905285

On September 8, 2009, Fresno police officers went to Lafayette Park after receiving a report about a man who was intoxicated and in possession of a pair of brass knuckles. Upon arriving at the park, the officers made contact with the appellant. Appellant consented to a search of his person for weapons. Officers found the brass knuckles and appellant voluntarily gave them to the officers. On December 2, 2009, appellant was placed on felony probation for possession of a dangerous weapon (§ 12020, subd. (a)). The terms of probation prohibited appellant was possessing alcohol or weapons. On January 3, 2011, the Fresno Superior Court revoked appellant's probation after he was arrested in case No. F11900008.

DISCUSSION

I. THE TRIAL COURT PROPERLY DENIED A DEFENSE MOTION TO ADMIT A HEARSAY STATEMENT BY MANUEL CORONA TO POLICE OFFICERS AS A DECLARATION AGAINST PENAL INTEREST.

Appellant contends the trial court committed reversible evidentiary error by denying his motion to admit an out-of-court hearsay statement by Manuel Corona as to his ownership of the jacket found in Alvarez's apartment. Appellant maintains the statement of jacket ownership was a declaration against penal interest within the meaning of Evidence Code section 1230.

A. Procedural History

On April 29, 2011, the court conducted proceedings outside the presence of the jury, and the prosecutor moved to exclude Corona's statements to law enforcement officers that the black jacket with white stripes was his garment. Defense counsel

responded, "I'm thinking … the only possible hearsay exception would be a declaration against penal interest. Otherwise I agree with his position, it's hearsay and inadmissible. I don't really think I would need it to establish what I need to establish, … I think I can get … that information in some other way other than through the hearsay."

The court questioned counsel, "How would Mr. Corona's statement 'that's my jacket' be a declaration against penal interest[?] The statement on its face is not a declaration against penal interest. However, it's possible … that the circumstances in which the statement was made could imply a declaration against penal interest." After the court asked this question, the following exchange occurred:

> "[THE COURT:] … For example, if the cops came in in Mr. Corona's presence, [and said] this was the jacket worn by the perpetrator, and in response he made that statement -- do you have that situation?
>
> "MR. DULCE [deputy public defender]: I don't think that's the situation.
>
> "THE COURT: Or anything like it?
>
> "MR. DULCE: The best I have is that the complaining witness led the cops to this particular location which was the residence of Mr. Corona and Antonia Alvarez.
>
> "THE COURT: And the bare statement from Mr. Corona that the jacket belonged to him, who did he say that to?
>
> "MR. DULCE: … Ms. Galaviz.
>
> "THE COURT: My understanding [is] the two of you really don't know how this was said or –
>
> "MR. DULCE: It's more like the officers asked whose jacket is this? Mr. Corona says that's my jacket, that's not Raymond's.
>
> "THE COURT: And that's it?
>
> "MR. DULCE: That's it.

"THE COURT: That's right Mr. Terrence?

"MR. TERRENCE [deputy district attorney]: Yes, Your Honor.

"THE COURT: Is there any theory for that being a declaration against penal interest, Mr. Dulce?

"MR. DULCE: Honestly, not that I can see. [¶] … [¶]

"THE COURT: … But if you are asking the court to have Mr. Dulce tell his witnesses that they are not to say that [i.e., that the jacket belonged to Corona], then I'm going to direct him to do that.

"MR. TERRENCE: That is my request, Your Honor. I want to be clear on my request, because it is very narrow what I'm asking the court to order.

"THE COURT: Right. I understand. Just that statement by Mr. Corona. Nothing more.

"MR. TERRENCE: The jacket -- they can testify to whatever they want with the jacket with the exception of the small statement. [¶] … [¶]

"THE COURT: We're recognizing here that leaves completely open anybody could say well, they saw Mr. Corona wearing that jacket that day.

"MR. TERRENCE: Absolutely. They could have seen him wear it for the last 700 days in a row. They could say whatever they want."

B. <u>Applicable Law</u>

Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

With respect to the penal interest exception to the hearsay rule, the proponent of the evidence "must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611; *People v. Lucas* (1995) 12 Cal.4th 415, 462.) A court may not, applying this hearsay exception, find a declarant's statement sufficiently reliable for admission " '*solely because* it incorporates an admission of criminal culpability ….' " (*People v. Duarte*, *supra*, at p. 611, quoting *People v. Campa* (1984) 36 Cal.3d 870, 883, original italics.) As the high court reasoned in interpreting the analogous exception to the federal hearsay rule, " '[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory nature. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self- inculpatory nature.' (*Williamson v. United States* (1994) 512 U.S. 594, 599-600 [].) Whether a statement is self-inculpatory or not can only be determined by viewing the statement in context. (*Id*. at p. 603 [].)" (*People v. Lawley* (2002) 27 Cal.4th 102, 153.)

The exception to the hearsay rule set forth in Evidence Code section 1230 is " 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.' " (*People v. Duarte*, *supra*, 24 Cal.4th at p. 612.) We review a trial court's decision as to whether a statement is against a defendant's penal interest for abuse of discretion. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1250-1253; *People v. Lawley*, *supra*, 27 Cal.4th at pp. 153-154.) Where a trial court's ruling does not constitute a refusal to allow the defendant to present a defense, but merely rejects certain evidence concerning the defense, the ruling does not constitute a violation of due process. The appropriate standard of review is whether it is reasonably

probable the admission of the evidence would have resulted in a verdict more favorable to defendant. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.)

C. <u>Appellant's Specific Contention</u>

Appellant contends Corona's statement of jacket ownership took place when Officer Galaviz showed him the garment. He submits "it was apparent to Corona, based on the jacket seizure and the officer's question about its ownership, that whoever owned the jacket might be charged with the crime currently under investigation." Appellant further contends, " … Corona's statement does not show any particularized knowledge of the crime being investigated, but it does show ownership of a key piece of prosecution evidence. And Corona was shown that key piece of evidence in the context of a police investigation in which appellant had been arrested, and the police asked who owned the key piece of evidence. Corona's hearsay statement admits to jacket ownership, as stated by defense counsel at the [Evidence Code] section 1230 hearing. The ownership of the jacket directly linked its owner to the crime committed in the present case."

D. <u>Analysis</u>

The question presented is whether it is reasonably probable the admission of the evidence would have resulted in a verdict more favorable to defendant. (*People v. Espinoza, supra,* 93 Cal.App.4th at p. 1317.) Appellant presented evidence that the black jacket did not belong to him. Alvarez testified that the jacket was a garment once owned by her former boyfriend of 11 years. Alvarez said both she and Manuel Corona, her current boyfriend, wore the jacket but added that Corona rarely did so. Alvarez said she and Corona "were barely getting to know each other" on the evening in question. Alvarez said neither she nor Corona walked outside with the jacket after 5:00 p.m. on December 29, 2010, and the jacket was never taken out of the apartment at all that day. She admitted the jacket was wet but explained, "The day before or two days before it was raining. It was pouring and the jacket got wet [from the earlier rainfall]."

Given Alvarez's version of events, the jury could have reasonably inferred from the admitted evidence that either (1) no one in the apartment wore the jacket on the day of the robbery and the garment was still wet after someone wore it on an earlier day in the rainstorm; (2) Alvarez or Corona wore the jacket on the day of the robbery; or (3) appellant wore the jacket on the day of the robbery. As respondent points out, Lopez's description of the assailant matched appellant's physical characteristics. Officers conducted several in-field showups, first of Corona and then of appellant. Lopez said Corona was not his assailant because he was taller than the assailant and had shorter hair. Lopez testified at trial that his assailant "was a short person, between five five, five six, five nine. He had his hair like combed back." Lopez also said the assailant was shorter than Lopez himself. Lopez said appellant had the characteristics of his assailant in that he had a moustache, had a bigger build than Corona, and was shorter. Lopez also said that appellant was dressed in the black jacket with white stripes and held a knife on him.

Lopez told Officer Galaviz that appellant's facial features, build, height, and weight were the same as those of his assailant. Officer Galaviz testified that appellant did not show any hesitation when he identified appellant. According to Galaviz, "He [Lopez] immediately stated that that was the subject involved." Lopez also told officers his assailant could be identified by virtue of the smell of alcohol on his breath and the presence of a knife in his pocket. Appellant confirmed that he drank alcohol that day. Moreover, investigating officers found appellant, not Corona, hiding behind the bath curtains of an apartment in the complex to which Lopez's assailant fled. Appellant hid in the apartment and both Alvarez and Corona told Officer Dalbec there was no one else present. When officers finally found appellant on the premises, Alvarez explained, "[H]e's my brother. He's hiding from the girlfriend, because the girlfriend always be calling the cops. And he always be taken to jail, because he's not allowed to drink." As respondent points out, Corona's statement about ownership of the jacket lacked

credibility because both he and Alvarez denied to officers that appellant was present in the apartment.

Given the foregoing factual setting, it is not reasonably probable the admission of the evidence would have resulted in a verdict more favorable to defendant. Reversal for alleged evidentiary error is not required.

II. DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE.

Appellant contends his trial counsel was ineffective by failing to investigate the available evidence to fully support the defense motion to admit Corona's statement about the jacket as a declaration against penal interest (Evid. Code, § 1230).

A. Specific Contention

Appellant contends that his trial counsel failed to pursue two avenues of investigating the Evidence Code section 1230 claim. He initially claims that counsel could have proceeded under Evidence Code section 405, presented the testimony of Officers Dalbec, Godwin, and Galaviz regarding the evening of the arrest, and used the testimony of the officers to show that Corona's statement about the jacket constituted a declaration against penal interest. Appellant further claims that once the three officers testified at trial for the prosecution, trial counsel could have sought reconsideration of his evidentiary motion under the principles of Code of Civil Procedure section 1008, subdivisions (b) and (e).

B. Law Governing Effectiveness of Counsel

In order to prevail on an ineffective assistance of counsel claim, appellant must demonstrate that trial counsel's performance fell below the standard of reasonableness and that there is a reasonable probability the result would have been more favorable had his counsel provided adequate representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Bolin* (1998) 18 Cal.4th 297, 333.) Appellant must also show that the omission was not the result of a reasonable tactical decision. (*People v. Gurule* (2002) 28

Cal.4th 557, 611.) However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.… If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington, supra*, at p. 697.)

C. <u>Analysis</u>

On direct appeal, a claim of ineffective counsel cannot be established by mere speculation regarding the likely testimony of potentially available witnesses. We cannot assume from a silent record that particular witnesses were ready, willing, and able to give mitigating testimony, nor can we speculate concerning the probably content or substance of such testimony. (*People v. Medina* (1995) 11 Cal.4th 694, 773.) Even if assume that the three officers would have testified about Corona's claim of ownership of the wet jacket, it is not reasonably probable a result more favorable to appellant would have occurred. (*In re Neeley* (1993) 6 Cal.4th 901, 908-909.)

The prosecution presented considerable evidence to inculpate appellant, including the results of separate in-field show ups of Corona and appellant, Lopez's immediate identification of appellant as the assailant, and Lopez's detailed recitation of the physical characteristics that differentiated Corona from his assailant. Lopez said he smelled alcohol on the breath of his assailant, and appellant acknowledged that he drank a 40-ounce beer after he finished work at 5:15 p.m. on the day in question. Officers found appellant hiding behind the shower curtain in the bathroom of the apartment. In the face of these incriminating facts, the defense presented Alvarez's testimony that the black jacket belonged to her and that both she and Corona wore the jacket on occasion. Alvarez acknowledged the jacket was wet but explained, "The day before or two days before it was raining. It was pouring and the jacket got wet [from the earlier rainfall]."

Given this testimony, it is not reasonably probable that appellant would have obtained a more favorable result had the court admitted Corona's statement about ownership of the wet jacket. Reversal for alleged ineffective assistance of trial counsel is not required.

III. THE REVOCATION OF APPELLANT'S PROBATION NEED NOT BE REVERSED.

We need not address appellant's request for reversal of his revocation of probation (case No. F09905285) because reversal of the judgment of conviction in the substantive case (case No. F11900008) is not required.

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Franson, J.