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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO DANIEL OLIVEROS, Defendant and Appellant.	F066395 (Super. Ct. No. LF9175A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Peter Dodd, 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, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Alejandro Daniel Oliveros guilty of kidnapping (Pen. Code,[1] § 207, subd. (a)), corporal injury to the mother of his children (§ 273.5, subd. (a)), burglary (§ 459, subd. (a)), false imprisonment (§ 237), and child endangerment (§ 273a, subd. (a)). He was sentenced to 10 years four months in state prison.

On appeal, Oliveros raises seven claims of error. He contends (1) there was insufficient evidence of traumatic injury to support the conviction for corporal injury; (2) the out-of-court statement of a police officer, which was admitted to show the victim's state of mind, also should have been admitted to prove the truth of the matter stated; (3) the trial court erred by admitting evidence that had not been provided to the defense at least 30 days prior to trial; (4) the trial court erred by instructing the jury that testimony of one witness is sufficient to prove a fact and not advising the jury that the instruction does not apply to evidence offered under Evidence Code section 1109; (5) there was insufficient evidence to support the burglary conviction; (6) the trial court erred by failing to instruct on self-defense; and (7) the prosecution failed to prove the child endangerment charge.

The Attorney General concedes Oliveros's fifth claim. We agree with the parties and reverse the conviction of burglary. In all other respects, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 20, 2012, the Kern County District Attorney filed a six-count information against Oliveros. He was charged with kidnapping Maria Tapia (§ 207, subd. (a); count 1), corporal injury to Tapia, who was the mother of his children (§ 273.5, subd. (a); count 2), assault by means of force likely to produce great bodily injury upon Tapia (§ 245, subd. (a)(4); count 3), burglary of an inhabited dwelling house (§ 460, subd. (a); count 4), false imprisonment of Tapia (§ 237; count 5), and child endangerment (§ 273a, subd. (a); count 6). As to each count, it was further alleged that Oliveros was

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1 All further statutory references are to the Penal Code unless otherwise noted.

released from custody for two separate felony offenses at the time he committed the offense (§ 12022.1).

A jury trial began on November 27, 2012. Oliveros waived jury trial for the "on bail" enhancement allegations. During trial, count 3, assault by means of force likely to produce great bodily injury, was dismissed on a motion by the prosecution.

Prosecution

Tapia and Oliveros have three children together. In the early morning of August 19, 2012, Tapia and her children were staying at her friend Leticia Barraza's house. Barraza testified that Tapia and her children went to her house the previous afternoon and stayed with Barraza until Oliveros arrived. At 4:00 a.m., Oliveros knocked on Barraza's door and windows. Barraza answered the door, and Oliveros asked for Tapia. Barraza said she was asleep, and Oliveros said to wake her up because he wanted to take her and the children home. Barraza told Oliveros to leave.

Tapia came out of a bedroom and asked Oliveros to leave. Then she went outside to talk to Oliveros. Tapia was holding her son Aiden, who was about 21 months old. Oliveros started yelling at Tapia. He pulled Tapia's hair and pushed her toward a gate. As Oliveros shoved Tapia, Aiden fell to the ground. It appeared that he fell on his head. Oliveros picked Aiden up and pulled Tapia's hair and dragged her to his car. Oliveros put Tapia and Aiden in the car and drove away. As Tapia was being dragged away, she said, "Help me," and asked Barraza to call the police. Barraza called 911. She also called Tapia's sister to let her know what happened.

Kern County Sheriff's Deputy Jaime Alarcon went to a house on Weedpatch Highway at around 6:00 a.m. on August 19, 2012. He found three people in the residence--Oliveros, Tapia, and Aiden. Tapia had dried blood around her nose and mouth, and there was swelling on her cheekbones and around her eyes. Her nose was reddened and swollen. There was blood around her eye, and scratches on her hands and

arms. There was blood on Tapia's pajama pants. Alarcon observed blood on the passenger's side front seat of a car that Oliveros was known to drive.

Alarcon spoke with Tapia that morning. She reported that she spent the previous night at Barraza's house. Around 4:00 a.m., Barraza woke her up and said Oliveros was there. Tapia could see that Oliveros was angry. Tapia picked up Aiden and walked out to speak with him. Tapia told Alarcon that Oliveros then grabbed her and began dragging her to his car by her hair and clothing. She stated that Oliveros punched her 20 times while she was in his car. Tapia said that she told Oliveros to stop the car and let her out but he refused. She further reported that Oliveros pulled her out of the car and into the house on Weedpatch Highway against her will. She did not have a telephone. Tapia said that she lay in bed with Oliveros and that she was afraid if she got up, Oliveros would wake up. Alarcon asked Tapia if she wanted medical aid, and she declined.

Alarcon also spoke with Oliveros. Oliveros said Tapia received her injuries from a fight at a nightclub. He told Alarcon that Tapia called and asked him to pick her up.[2] He denied hitting Tapia. Alarcon told Oliveros that Tapia said Oliveros had hit her. Oliveros responded, "Well, she won't tell you that after I talk to her." Alarcon told Oliveros he was being arrested for spousal abuse against Tapia. Oliveros said Tapia would not show up in court after he telephoned her.

Bakersfield Police Officer Brandon Shankle testified about a previous incident of domestic violence. On May 24, 2010, Shankle responded to a 911 call and met Tapia and Oliveros. Their son Daniel was also present. Shankle observed that Tapia had a wound on the back of her head that was seeping blood. She had an abrasion underneath her left armpit and outside her left ankle. The left side of her dress and bra were ripped by the

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[2] According to Alarcon's report, Oliveros told him, "'Yeah, we were at a club. And she called me and told me to come pick her up.'" Alarcon said, "'So you are at a club with her, and then she telephones you to come pick her up … ?'" Oliveros "'thought about it for a few seconds, and said, "Yeah, I guess."'"

shoulder. Tapia told Shankle her underwear was ripped, too. Oliveros was asked if he was sorry for striking Tapia, and he replied: "Fuck that. That bitch deserved it." Oliveros stated that he was angry at Tapia for taking his car for two days. When she arrived at their apartment, they argued and Oliveros tried to take the car keys away from Tapia. She scratched him, and he pushed her. Shankle observed slight abrasion on Oliveros's ring finger.

Defense

Tapia testified that she went to Barraza's house in the early morning of August 19, 2012. She had been at a night club with Oliveros. Oliveros wanted to leave the club and Tapia wanted to stay. They argued and Oliveros left her. Tapia went to Barraza's house sometime between 2:00 and 3:00 a.m. On her way to Barraza's house, she called Oliveros and told him to pick her up there. Tapia described herself as "making a scene" and "kind of hysterical." She was outside when Oliveros arrived. She denied that Oliveros struck her or pulled her hair. She testified that Aiden was not there; he was with Oliveros's sister. She denied that she told the police that Oliveros had pulled her hair or that Aiden was with her that night. She testified that she and Oliveros were alone in the car. They went to a house on Weedpatch Highway. She wanted to be there. She denied that she told the police that Oliveros punched her.

One of the officers Tapia spoke to on August 19, 2012, said he had to see her son to check if he was okay. Tapia told the officer that he was asleep. The officer looked at Aiden with a flashlight. The officer asked, "'What do you want done about this?'" and Tapia responded, "'Nothing.'" Tapia testified: "[The officer] told me, 'Well, if you are not cooperating, I've seen this in other cases, and they usually call CPS.'"[3]

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[3] The prosecution called Alarcon in rebuttal and asked him if he threatened to take Tapia's children away. He testified that he did not. Alarcon did inspect Aiden for visible injuries.

Tapia used to work with Barraza. Their friendship degenerated because Barraza tried to get her fired. Tapia testified that she had no relationship with Oliveros at the time of the trial.

On cross-examination, Barraza testified that Tapia and Oliveros "were both fighting." Barraza thought Tapia did not want anything to happen, but she defended herself and was "swinging" to try to push Oliveros off. She was blocking herself, trying not to get hit.

Verdict and sentence

On November 30, 2012, the jury found Oliveros guilty of all charges. The court found true the allegations that Oliveros was released from custody in two separate cases at the time he committed the offenses.

At the sentencing hearing, the court imposed the upper term of eight years for count 1. The court imposed one year (one-third the middle term of three years) for count 2 and 16 months (one-third the middle term of four years) for count 6, both terms to be served consecutively, for a total term of 10 years four months. The court imposed the upper terms for counts 4 and 5 and ordered those terms stayed under section 654.[4]

Oliveros filed a notice of appeal on December 20, 2012.

DISCUSSION

I. Sufficiency of evidence to support conviction under section 273.5

Oliveros contends the conviction for count 2, corporal injury to the mother of his child, should be reduced to a conviction of battery because the evidence was insufficient

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[4] The reporter's transcript of the sentencing hearing shows that the trial court imposed upper terms for counts 4 and 5. The abstract of judgment, however, omits any reference to the convictions of counts 4 and 5. We will correct the clerical error in the abstract of judgment with respect to count 5 on our own motion. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-187 [trial court's oral judgment controls over inconsistent abstract of judgment; appellate court may correct errors and omissions in abstract of judgment without any request from parties].)

as a matter of law to prove that Tapia suffered traumatic injury. This contention lacks merit.

In deciding a challenge to the sufficiency of the evidence, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. (*Ibid*.)

Oliveros was found guilty of violation of section 273.5. This statute makes it a felony to "willfully inflict[] upon a person who is … the mother or father of [the offender's] child … corporal injury resulting in a traumatic condition." (Former § 273.5, subd. (a), as amended by Stats. 2011, ch. 129, § 2.)[5] "'[T]raumatic condition'" is defined as "a condition of the body, such as a wound, or external or internal injury, whether of a minor or serious nature, caused by a physical force." (§ 273.5, subd. (c).)

In *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 (*Gutierrez*), the court recognized that the requirement of an "*injury* resulting in a traumatic condition … differentiates this crime from lesser offenses" such as simple assault and misdemeanor battery. The court observed, however, that section 273.5 does not require a high degree of harm. "Some other offenses do require higher degrees of harm to be inflicted before the crime denounced by them is committed: felony battery, section 243, subdivision (d), requires 'serious bodily injury'; and, felony assault, section 245, subdivision (a), requires 'force likely to produce great bodily injury.' But, the Legislature has clothed persons …

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5 Further references to section 273.5 are to the version of the statute in effect at the time Oliveros committed the offenses. The statute also applies to a victim who is a spouse, former spouse, cohabitant, or former cohabitant of the offender, and the offense is often referred to as "spousal abuse." (§ 273.5, subd. (a); e.g., *People v. Abrego* (1993) 21 Cal.App.4th 133, 136 (*Abrego*).)

in intimate relationships with greater protection by requiring less harm to be inflicted before the offense is committed." (*Ibid*.)

In *Gutierrez*, the defendant pushed his wife, and she hit him with a frying pan. He knocked her down and banged her head on the floor. He grabbed her neck, leaving a red mark on her throat. He dragged her by her hair. The defendant's wife lost quite a bit of hair, and her legs were lacerated from being dragged through broken glass. (*Gutierrez*, *supra*, 171 Cal.App.3d at pp. 947-948.) The reviewing court concluded, "The nature of harm depicted by the evidence clearly justified the felony verdict" of violation of section 273.5. (*Id*. at p. 952.)

In *Abrego*, the court held that pain alone does not constitute an injury resulting in a traumatic condition. (*Abrego*, *supra*, 21 Cal.App.4th at p. 138.) Nor is "emotional upset" sufficient to support a conviction of corporal injury under section 273.5. (*Abrego*, *supra*, at p. 138.) In *Abrego*, the defendant's wife testified that when the defendant struck her, she was drunk and did not feel any pain. She testified that she was not injured or bruised. She reported to the responding police officer that her face and head were sore, but the officer did not notice any injuries. (*Id*. at p. 136.) Under those circumstances, the *Abrego* court found "no evidence of even a minor injury sufficient to satisfy the statutory definition." (*Id*. at p. 138.) As a result, the court reduced the defendant's conviction of spousal abuse to a conviction of the lesser included offense of battery. (*Ibid*.)

Here, Tapia told the police she was dragged by her hair and clothes and punched 20 times. Alarcon observed swelling on her cheekbones and around her eyes, her nose was reddened and swollen, and there were scratches on her arms and legs and dried blood on her face and clothing. Alarcon's observation of Tapia's injuries distinguishes this case from *Abrego* and is sufficient to establish injury resulting in a traumatic condition. Oliveros's attempt to minimize Tapia's injuries is unpersuasive. He asserts: "She did not require any medical treatment, and there was no evidence that she experienced any

soreness and tenderness. The only thing unusual that the police noticed was a slight abrasion to arms and hands, some swelling of her nose and around her eyes, and the presence of some blood." We have no difficulty concluding that facial swelling and abrasions are "condition[s] of the body … caused by a physical force." (§ 273.5, subd. (c).) Accordingly, there was sufficient evidence of injury resulting in a traumatic condition to support Oliveros's conviction under section 273.5.

II. Use of Tapia's testimony regarding an officer's out-of-court statement

At trial, Tapia testified that a police officer told her: "Well, if you are not cooperating, I've seen this in other cases, and they usually call CPS." The prosecutor objected to Tapia's testimony about the officer's statement as hearsay. The trial court ruled that the officer's statement would not be admitted for the truth of the matter stated but was admitted for determining Tapia's state of mind.

On appeal, Oliveros contends the trial court erred by not admitting the officer's out-of-court statement for the truth of the matter stated because a police officer-witness should be considered a party of a criminal action for purposes of Evidence Code section 1220.[6] This contention has been forfeited. After the trial court ruled the officer's statement was admissible to show Tapia's state of mind but not for the truth of the matter stated, defense counsel did not assert the hearsay statement should be admitted because the officer was a party to the action. Oliveros may not raise this issue for the first time on appeal. (*People v. Hines* (1997) 15 Cal.4th 997, 1035, 1045 & fn. 7.)

Oliveros argues that if the claim has been forfeited because defense counsel failed to raise the issue, then he received ineffective assistance of counsel. To prevail on an ineffective-assistance-of-counsel claim, a defendant must show that his trial counsel's

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6 Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

performance was deficient and that the deficiency caused him prejudice. (*People v. Cowan* (2010) 50 Cal.4th 401, 493, fn. 31.) We need not decide the merits of Oliveros's claim that police officers should be considered parties under Evidence Code section 1220 because Oliveros cannot demonstrate prejudice. Even if we assume for the sake of argument that the officer's statement could have been admitted for the truth of the matter stated under Evidence Code section 1220 *and* defense counsel was deficient for failing to raise the issue, there was no harm because the truth of the matter stated in the officer's statement was not relevant to the case.

Oliveros argues that Tapia's testimony about the out-of-court statement of the officer (presumed by both parties to be Alarcon) was relevant as follows: "A crucial issue was the persuasiveness of Alarcon's rendition of what Tapia had told him the day of the incident. If Alarcon's story about the circumstances of the interrogation were correct, then Tapia's statement was helpful to the prosecution. But if, as Tapia asserted at trial, her statement was the product of unfair coercion (help us or we will call in CPS, presumably to take custody of your children away), then that [casts] her statement on the day of the incident in an entirely different light. Hence the admission of her contention that the police threatened her with intervention by CPS was crucial to the case." At trial, the statement was admitted for the purpose Oliveros argues is so crucial.

"'Whenever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned.'" (*People v. Roberson* (1959) 167 Cal.App.2d 429, 431, quoting VI Wigmore on Evidence, 3d ed., § 1789, p. 235.) Here, because Tapia's statement was admitted to show her state of mind, the jury could use Tapia's testimony to find that Alarcon *made* the statement, and the statement had an *effect* on Tapia. This evidence, if believed by the jury, could support Oliveros's theory that Tapia was subjected to "unfair coercion" by Alarcon.

The truth of the matter stated, on the other hand, has no tendency in reason to prove or disprove any disputed fact of consequence in this case. (See Evid. Code, § 210 [definition of relevant evidence].) To the extent Alarcon's out-of-court statement may be understood as an assertion (e.g., "In cases where an alleged domestic violence victim does not cooperate by agreeing with the police's version of events, Child Protective Services are usually called"), the truth or falsity of the assertion is not relevant to Oliveros's defense. Whether, in fact, the police usually call Child Protective Services in domestic violence cases has no tendency in reason to prove or disprove that Tapia was telling the truth when she spoke to Alarcon.[7] The only relevance of the statement is the effect it had on Tapia when she heard it and, in particular, whether the statement may have caused her to tell the officer, falsely, that Oliveros hit her because she was afraid she would lose custody of her children if she said otherwise. Likewise, if the out-of-court statement is understood as a threat (e.g., "Say that Oliveros was physically abusive or I will call Child Protective Services"), it does not matter whether Alarcon actually intended to call Child Protective Services if Tapia denied that Oliveros was abusive.

In his reply, Oliveros argues that "by limiting the evidence to the issue of Tapia's state of mind, the trial court precluded the jury from using it as affirmative evidence to reduce Alarcon's credibility." Oliveros points out that Alarcon denied that he threatened Tapia about taking custody of her children. But as we have explained, Tapia's testimony was admitted to show that the statement was made. Thus, Tapia's testimony could be used to impeach Alarcon's testimony that he did not threaten to take her children away.

In sum, Tapia's testimony was admitted to establish the fact that an officer uttered certain words to her. The truth of those words was not probative of any matter relevant in

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[7] Obviously, the truth of the statement is not otherwise relevant to the case. Even if the police have a policy of calling Child Protective Services when alleged domestic violence victims do not cooperate, this does not tend to disprove that Oliveros committed the offenses charged in this case.

this case. As a consequence, there is no reasonable likelihood the result would have been different had the officer's statement been admitted for the truth of the matter stated.

III. Discovery violation

Oliveros next contends the trial court erred by failing to exclude the prosecution's evidence of his prior acts of domestic violence. He argues the trial court should have excluded the evidence based on the late provision of the evidence in violation of the discovery statutes. We disagree.

A. Background

On October 1, 2012, the trial court set the trial to begin on November 19.[8] The record reflects that Oliveros appeared without counsel on October 1 and was referred to the Indigent Defense Program for appointment of counsel. On November 19, the prosecution was not ready, and the trial was trailed to November 26. On November 26, the trial was trailed to the next day.

On November 27, the trial began. The prosecution filed a motion in limine seeking to introduce evidence of Oliveros's prior acts of domestic violence pursuant to Evidence Code section 1109 to prove his propensity to commit domestic violence offenses. Defense counsel objected to admission of evidence of prior acts of domestic violence on the ground the prosecution committed a discovery violation. Defense counsel explained to the court that the prosecution provided evidence of the prior acts of domestic violence on October 29. This was 21 days before November 19, the date set for trial, but disclosures were required 30 days before trial.

The prosecutor responded that he did not know who Oliveros's attorney was until after the date he was required to make the disclosures. The prosecutor stated that he contacted defense counsel and notified him he needed to provide discovery and defense counsel said, "'Don't worry about it. Calm down.'" The prosecutor believed he told

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8 All further dates occurred in 2012.

defense counsel about the discovery materials about a week before they were actually provided to defense counsel.

The trial court allowed the evidence to be admitted. The court noted that the evidence was provided 29 days prior to the date the trial actually began (Nov. 27) and that the prosecutor told defense counsel about the evidence prior to the 30-day limit. The court stated that its ruling was without prejudice to consideration of a request for a jury instruction on late discovery.

B. Analysis

Evidence Code section 1109, subdivision (a), permits the admission of evidence of a defendant's commission of prior acts of domestic violence in a criminal action in which the defendant is accused of an offense involving domestic violence. The prosecution is required to disclose evidence of prior acts of domestic violence in compliance with Penal Code section 1054.7. (Evid. Code, § 1109, subd. (b).)

Section 1054.7 requires that disclosures be made "at least 30 days prior to the trial." Generally, when a party fails to comply with the criminal discovery statutes, the court may make any order necessary "including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (Pen. Code, § 1054.5, subd. (b).) In addition, "the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (*Ibid*.) Courts have recognized, however, that "the exclusion of testimony is not an appropriate remedy absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial." (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358; see *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.)

We review a trial court's ruling on discovery matters for an abuse of discretion. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581; see *People v. Ayala* (2000) 23 Cal.4th

225, 299 ["'[A] trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to [a] violation of a discovery order.'"].)

Here, the trial court overruled Oliveros's objection to the admission of evidence of his prior acts of domestic violence, implicitly finding that the prosecution's late provision of the evidence did not warrant the sanction of exclusion of the evidence. The court indicated that it would consider a request for a jury instruction on the late disclosure as a possible sanction for the discovery violation. We see no abuse of discretion. At trial, Oliveros did not show that the late disclosure would cause him significant prejudice or that the prosecution was trying to gain a tactical advantage.

Further, on appeal, Oliveros has failed to demonstrate prejudice. It is the defendant's burden to establish that the prosecution's failure to comply with discovery requirements in a timely manner was prejudicial and that a continuance would not have cured the harm. (*People v. McKinnon* (2011) 52 Cal.4th 610, 668-669.) Oliveros has made no showing that his defense would have been different had he received timely disclosure of the evidence of his prior acts of domestic violence. He suggests "it is reasonable to assume that the defense simply did not have enough time to secure … witnesses to rebut the prosecution evidence." Defense counsel, however, did not request a continuance, and the prior act of domestic violence presented at trial involved Tapia, the same victim involved in the current case. Oliveros's speculation that there may be other potential witnesses to rebut Shankle's testimony is not sufficient to show he was prejudiced by the prosecution's untimely disclosure of evidence.

IV. Jury instructions and evidence admitted under Evidence Code section 1109

Oliveros also raises a claim of error based on asserted "conflicting directives" in the jury instructions.

The jury was instructed that the testimony of one witness can prove any fact (CALCRIM No. 301) and that, when the People have to prove something, they must

prove it beyond a reasonable doubt, unless the court specifically says otherwise (CALCRIM No. 220).

The jury was also given CALCRIM No. 852, which instructed that prior acts of domestic violence only had to be proved by a preponderance of the evidence and explained how the evidence of such prior acts could be used. Specifically, after defining domestic violence for the jury, the court instructed:

> "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> "If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> "If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit a violation of Penal Code section 273.5[, subdivision](a) or the lesser offense of a violation of Penal Code section 243[, subdivision](e) as charged in Count 2. *The People must still prove each charge beyond a reasonable doubt*.
>
> "If you conclude that the defendant committed uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. *It is not sufficient by itself to prove that the defendant is guilty of a violation of Penal Code section 273.5*[, *subdivision*]*(a) or the lesser offense of a violation of Penal Code section 243*[, *subdivision*]*(e) as charged in Count 2.*
>
> "*Again the People must still prove each charge beyond a reasonable doubt*.
>
> "Do not consider this evidence for any other purpose." (Italics added.)

Oliveros argues the jury was left with "two conflicting directives" because the "jurors could follow CALCRIM [No.] 852, and just treat the Evidence Code section 1109 evidence [of prior domestic violence] as one factor, among many … or [they] could follow CALCRIM [No.] 301, and decide that one witness'[s] testimony (e.g., that of the Evidence Code [section] 1109 witness) was sufficient to prove any fact, such as an element of Penal Code section 273.5."

We see no conflict among the jury instructions. Given the instruction that one witness could prove any fact, a reasonable jury would understand that Shankle's testimony alone could establish the fact that Oliveros previously committed domestic violence. The jury would *not* understand that Shankle's testimony was sufficient to prove the corporal injury charge because it was expressly told that evidence of a prior act of domestic violence "is not sufficient by itself to prove that [Oliveros] is guilty of a violation of Penal Code section 273.5[, subdivision](a) …."

Oliveros suggests the jury may have been confused about the burden of proof. Within CALCRIM No. 852, however, the jury was twice reminded that each charge must be proved beyond a reasonable doubt.[9] "[W]e will presume here that jurors can grasp their duty—as stated in the instructions—to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable-doubt standard for all other determinations." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016.) For these reasons, we reject Oliveros's challenge to the jury instructions given.

V. Sufficiency of evidence to support burglary conviction

Oliveros contends the burglary conviction must be reversed because there was no evidence that Oliveros did not have an unconditional possessory right to enter the house

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9 A similar challenge to CALCRIM No. 852 as inconsistent and confusing to the jury was rejected in *People v. Johnson* (2008) 164 Cal.App.4th 731, 738.

on Weedpatch Highway.[10] The Attorney General concedes the issue. We accept the concession and will reverse the conviction for count 4.

A person is guilty of burglary when he enters a building with intent to commit a felony. (§ 459.) In addition, "the entry must invade a possessory right in the building and it must be committed by one who has no right to be in the building." (*People v. Smith* (2006) 142 Cal.App.4th 923, 930.) "[O]ne cannot be found guilty of burglarizing one's own residence." (*Ibid.*) Therefore, "[t]o sustain a burglary conviction, the People must prove that a defendant does not have an unconditional possessory right to enter his or her family residence." (*People v. Davenport* (1990) 219 Cal.App.3d 885, 892.)

Barraza testified that Oliveros said he wanted to take Tapia and the kids "home." About two hours later, Oliveros, Tapia, and Aiden were found in the house on Weedpatch Highway, which they must have entered sometime very early in the morning (between 4:00 & 6:00 a.m.). Alarcon testified that Oliveros emerged from a bedroom and Tapia was found in the same bedroom. Alarcon did not testify that he observed any evidence of forced entry into the house. There was no evidence suggesting other persons inhabited the house; for example, there was no evidence that anyone reported the house had been broken into. In light of this evidence, it reasonably could be inferred that the house on Weedpatch Highway was Oliveros's residence. The prosecution, however, offered no evidence to prove that Oliveros did not have an unconditional possessory right to enter the house. (See *People v. Davenport*, *supra*, 219 Cal.App.3d at p. 892.) Consequently, there was insufficient evidence to support the burglary conviction, and we will reverse the conviction for count 4.

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10 The burglary charge was premised on Oliveros entering the house on Weedpatch Highway. The jury instruction on the burglary charge specifically referred to entry of "an inhabited house on Weedpatch Highway" and the prosecutor also argued in his closing statement that Oliveros entered "the house on Weedpatch Highway."

VI. Failure to instruct on self-defense

At trial, defense counsel requested jury instructions on self-defense. The trial court denied the request, finding there was not sufficient evidence for a jury to find Oliveros acted in self-defense. On appeal, Oliveros contends the trial court erred. We conclude the trial court properly declined to instruct the jury on self-defense.

The trial court must instruct on all relevant principles of law that are supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) A court must instruct on self-defense only if there is substantial evidence to support the defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) A defendant acts in lawful self-defense when he honestly and reasonably believes he is in danger of bodily injury, the threat of bodily injury is imminent, and the use of force is reasonable under the circumstances. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065.) A fear of imminent bodily injury does not justify "resistance beyond that which would be deemed sufficient by a reasonable [person] to secure his [or her] own safety." (*People v. Moody* (1943) 62 Cal.App.2d 18, 22-23.)

We independently review a trial court's decision not to give a jury instruction requested by a defendant. (*People v. Sisuphan* (2010) 181 Cal.App.4th 800, 806.)

Oliveros argues that, because Barraza testified that Tapia was "swinging" at Oliveros and that Tapia and Oliveros "were both fighting," he was entitled to an instruction on self-defense. A more detailed review of Barraza's testimony demonstrates this argument is without merit.

On cross-examination, defense counsel questioned Barraza as follows:

> "[Barraza:] Well, the minute [Tapia] walked out, that's when [Oliveros] started pushing her.
>
> "[Defense counsel:] When you say 'pushing her,' taking her towards the vehicle?
>
> "A. Pushing her towards the car.

"Q. And apart from the pushing, there was no physically hit [*sic*] at this point?

"A. It was, like I said, pushing her, pulling her hair.

"Q. Pushing and pulling her hair?

"A. Yeah.

"Q. And was there hitting?

"A. Yes, there was. [¶] … [¶]

"A. Yes, pushing her.

"Q. Pushing. [¶] Now, hitting is something we actually when you hit something [*sic*]; correct?

"A. Yes.

"Q. You are saying he hit her then?

"A. Or he was pulling her hair. And like I said, pushing her and—

"Q. Can you—

"A. Do you—okay. To the point where—when they walked towards—when they were towards the car, that's when they were both fighting.

"Q. So they were both fighting?

"A. In my opinion, what I think is he—like I said, she didn't want anything to happen. But he came onto her, and she was defending herself; so she was swinging and—

"Q. So she was swinging?

"A. She was kind of like, you know, like trying to push him off. I don't know. I don't remember.

"Q. In terms of this swinging and pushing him off, did you report any of that to the police?

"A. No, I didn't.…"

Later in cross-examination, defense counsel again asked about the "fighting" between Oliveros and Tapia.

> "Q. … When I have a vision of a fight, I have a vision in my head. But what do you mean when you use the word 'fight'?
>
> "A. 'Fight' is when, like I said, they are just literally fighting, when he is, like I said, pushing her, pulling her hair, and then arguing—them disputing, arguing and yelling. But when I said 'fight,' that's when the physical fighting started.
>
> "Q. Now, fighting involves two people; correct?
>
> "A. It could involve two.
>
> "Q. When you use it, you are meaning it to be two people; correct?
>
> "A. In this case, like I said, he was fighting with her. She was trying to defend herself, and he was the one.
>
> "Q. So at no point [did] she hit him? That's what you are saying now?
>
> "A. The only time—she didn't, like I said, sock him or hit him. She was just pushing him away and asking him to stop with her hands.
>
> "Q. When you do your hand action[s], you are just flailing your hands about in front of you?
>
> "A. Yeah, she was just, basically, blocking herself, trying not to get hit."

Considering Barraza's testimony in context, a reasonable jury could not find that Oliveros acted in self-defense. Barraza did not testify that Tapia initiated the physical contact with Oliveros or that she threatened him physically. Barraza's testimony does not support an inference that Oliveros believed he was in imminent danger of bodily injury from Tapia or that he used no more force than was reasonably necessary to protect himself from Tapia. To the contrary, Barraza's testimony shows that Tapia only acted in response to Oliveros. She swung her arms in an effort not to get hit by him. The trial court did not err by rejecting Oliveros's request for jury instructions on self-defense.

VII. Sufficiency of evidence to support conviction of child endangerment

Finally, Oliveros claims the prosecution failed to prove count 6, child endangerment, by substantial evidence. Specifically, he argues the prosecution did not prove that he had "care or custody" of Aiden as required by the statute.

Section 273a, subdivision (a), provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or *having the care or custody of any child*, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years." (Italics added.)

The jury in this case was instructed: "To prove that the defendant is guilty of [count 6], the People must prove that: [¶] 1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in situation where the child's person or health was endangered; [¶] 2. The defendant caused or permitted the child to be endangered under circumstances or conditions likely to produce great bodily harm or death; [¶] AND [¶] 3. The defendant was criminally negligent when he caused or permitted the child to be endangered."

"The words 'care or custody' are commonly understood terms that have no particularized meaning." (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1475 (*Perez*).) "[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all. 'Care,' as used in the statute, may be evidenced by something less than an express agreement to assume the duties of a caregiver. That a person did undertake caregiving responsibilities may be shown by

evidence of that person's conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so." (*Id*. at p. 1476, fn. omitted.)

Oliveros argues there was no evidence that Aiden was living at Oliveros's house or that Oliveros was a surrogate father for Aiden. He asserts, "All the evidence at trial points to the fact that it was Tapia, and Tapia, alone, who had care or custody of Aiden at the time of the incident." We disagree.

The jury could reasonably determine that Oliveros was Aiden's biological father based on Tapia's testimony that she had three children with Oliveros, including Aiden. The *Perez* court suggested that a parent has a duty to care for his or her children imposed by law, such that the parental relationship would satisfy the "care or custody" element of section 273a. (*Perez*, *supra*, 164 Cal.App.4th at p. 1476 [comparing duties of parents and babysitters with other individuals].) Here, the evidence further showed that Oliveros told Barraza he wanted to take Tapia and "the kids home" and he then drove Tapia and Aiden to a house where Aiden apparently went to sleep. Such conduct by a father would commonly be understood as the father exercising care and custody of his child.

Moreover, even without considering the parental relationship, Oliveros's acts of physically grabbing Aiden, putting him in his car, and driving him to the house on Weedpatch Highway were sufficient for the jury to determine that he assumed care and custody over Aiden. In *People v. Morales* (2008) 168 Cal.App.4th 1075, 1078, the defendant was convicted of child endangerment after he attempted to avoid a traffic stop, ran through a red light, and crashed into a telephone pole with a 16-year-old passenger in his car. The Court of Appeal concluded there was sufficient evidence to support the element of "'care or custody'" because "[t]he jury could reasonably conclude that in taking it upon himself to control [his young passenger's] environment and safety, defendant undertook caregiving responsibilities or assumed custody over her while she was in his car." (*Id*. at pp. 1083-1084.) Similarly, the jury reasonably could find that by

his actions, Oliveros took it upon himself to control Aiden's environment and safety, thereby undertaking caregiving responsibilities and assuming custody over Aiden. We conclude there was sufficient evidence that Oliveros had care or custody of Aiden to support his conviction of child endangerment.

DISPOSITION

The conviction of count 4, burglary, is reversed. The trial court shall prepare an amended abstract of judgment including the term imposed for count 5 (see fn. 4, *ante*) and forward a copy to the proper correctional authorities. The judgment is affirmed in all other respects.

_____
Kane, J.

WE CONCUR:

_____
Gomes, Acting P.J.

_____
Detjen, J.