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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS JAVIER LOPEZ,

Defendant and Appellant.

H037700

(Monterey County

Super. Ct. No. SS102176)

Following a jury trial, defendant Carlos Javier Lopez was convicted of stalking Veronica H. in violation of Penal Code section 646.9, subdivision (a).¹ The court found true allegations that defendant had prior convictions for stalking and battery on a spouse or cohabitant (see § 646.9, subs. (c)(1) & (c)(2)) and had served three prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to an eight-year prison term.

The information alleged that the stalking occurred from September 29, 2007 through August 2010. The stalking charge was based on a series of letters and voice mail messages from defendant to Veronica. The prosecution also admitted evidence of an uncharged offense, during which defendant threatened Veronica with a rifle.

On appeal, defendant contends the trial court erred by also admitting evidence that a rifle was found near Veronica's residence two days after the uncharged threat. He

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

further contends the trial court should not have admitted evidence that Jesus Lopez, Jr., who was arrested in connection with the rifle, claimed to be defendant's nephew. Finally, defendant claims that he is entitled to additional presentence conduct credit. We will modify the award of presentence conduct credits but otherwise affirm.

BACKGROUND

Prosecution Case

Defendant and Veronica began corresponding in 2005, when defendant was in prison. After he was released, their relationship continued, and it became serious in January 2007, when defendant left his wife and moved in with Veronica. Veronica had a young daughter from a previous relationship. Defendant called Veronica's daughter "Mija," meaning my little girl or my daughter.

A. Uncharged Incident²

On July 4, 2007, Veronica was planning to attend a family barbeque. Defendant, who had been drinking, did not want to go and he did not want Veronica to go without him.

While Veronica was getting ready, defendant left the apartment and returned carrying a rifle. Veronica had previously seen defendant talking to his nephew and some other people outside the apartment in the front yard.

Veronica asked defendant what he was going to do with the rifle. Defendant placed the barrel against her forehead and said, "I'm going to fuckin kill you." Veronica kept her eyes shut, but defendant told her to "look at the fucking gun."

Veronica pushed the rifle away and called her mother, Juanita H. Veronica told Juanita that defendant was trying to kill her and that he had pointed a gun at her forehead. She was terrified and crying. Juanita told Veronica to go upstairs and lock herself in the

² The uncharged incident was admitted pursuant to Evidence Code section 1109 and to show Veronica's state of mind.

bedroom. Juanita asked to talk to defendant. When defendant got on the phone, he told Juanita that Veronica was crazy and hung up.³ Juanita left the barbeque and went to the apartment.

Meanwhile, Veronica attempted to open the front door, but defendant slammed the door shut. Veronica ran upstairs and locked herself in her room. She heard a gun go off, then heard defendant knock on the door. Defendant stated he had taken the bullets out of the rifle and asked Veronica to open the door so he could show her. Veronica refused. She then heard a toilet flush.

Juanita arrived at the house about three minutes after receiving Veronica's call. Defendant was sitting on the living room sofa. When Veronica heard Juanita arrive and begin speaking to defendant, she came downstairs. Veronica rushed to Juanita and hugged her, crying, then got her keys and left for the barbeque. When Veronica returned to the house that night, defendant was gone.

The following day, Veronica and Juanita saw a bullet hole in the leg of one of their kitchen chairs. Juanita found a bullet casing, and she found four small bullets in a toilet.⁴ Prior to this incident, neither Juanita nor Veronica had ever seen a firearm in the house while defendant was living there.

B. Charged Offense

The stalking charge was based on a series of letters defendant sent to Veronica, plus several telephone messages he left on her home answering machine.

³ Juanita later testified that defendant had simply hung up the phone without saying anything. He made the statement about Veronica being crazy after she arrived at the home.

⁴ Juanita's testimony about where she found the casing and bullets was somewhat inconsistent. In particular, it was unclear whether she found the bullets in the upstairs or downstairs bathroom. In addition, Veronica and Juanita both testified that they found the bullets.

1. Letters

Veronica had no contact from defendant for several months following the July 4, 2007 incident. Then, in September of 2007, she began receiving letters from him. The letters were all sent from jail or prison and came at a rate of one or two per month for the next two years.

In a letter dated September 29, 2007, defendant indicated that he had been calling Veronica but that she had “never called back.” He referred to Veronica’s daughter as “my daughter.” He apologized, saying “sorry for everything.”

In a letter dated November 19, 2007, defendant referred to Veronica as having a “new husband” and asked if he was living with her. Defendant further commented, “I hope not. That would be pretty messed up of you.” He called himself Veronica’s daughter’s “only dad” and said that he would “continue seeing her” when he got out.

In a letter sent on December 5 or 6, 2007, defendant wrote that when he got out he was going “to go straight looking for” Veronica. He stated that if she was with someone else, he would “take [her] away from anybody in front of their face. Because you and Mija are mine. That I promise you on N!” According to the investigating officer, the reference to “N” likely meant Norteños (or Northerners), a criminal street gang.

In the same letter, defendant warned Veronica that she “better not be going out with anyone.” He stated: “Because I swear, Vero, on N that I’m not holding back. There will be one of my homies going to the Gardens checking up on things for me.” According to the investigating officer, the reference to “homies” likely meant fellow gang members. The “Gardens” referred to Veronica’s apartment complex.

In a letter dated December 19, 2007, defendant told Veronica he was “not going to stop fighting for you,” said he loved Veronica and her daughter, and promised he was “getting you both back.”

In a letter dated January 14, 2008, defendant told Veronica that she “better not be seeing” anyone else. Along with the letter, defendant sent a drawing of the character

Tinkerbelle. The character had one dot drawn on one hand and four dots drawn on the other hand. According to the investigating officer, this likely indicated the number 14, which is used by Norteño gang members.

In a letter dated February 14, 2008, defendant told Veronica: “[Y]ou better be prepared, cause I’m going to go straight to see you and Mija. So if you’re seeing someone, you better get rid of him, because I know I will.”

In a letter dated February 24, 2008, defendant asked Veronica why she had not “fuckin answered” him, “[w]hy in the fuck” she had not written to tell him that her daughter was in T-ball, and “What the fuck is wrong with you?” Defendant also told Veronica, “I am truly sorry on what I did to you. I do regret it with all my heart.”

In a letter dated March 12, 2008, defendant told Veronica again that he was going to continue fighting for her. He wrote: “And when I get out, I’m going to go see you and Mija and you better not be with no one, cause I’m not going to hold back. I don’t know why you don’t want to write back to me. But I’m letting you know right now, Vero, you’re going to go back with me one way or the other. I’m fuckin tired of your stupid shit. So I’m dead serious about this, Veronica. So by God, you better not be seeing anyone. Cause this time for real, Veronica, you’re going to be mine forever. Por las buenas O por las malas.^[5] Either way I only want us to be happy, Mija. And I know we can be happy this time. So I’m asking you with all my heart, you better not be seeing nobody because shit is going to happen.”

Defendant also wrote: “I’m just telling you what’s going to happen when I get out, Vero, and for damn sure you better not be with no one. Listen carefully to what I’m telling you, Veronica. Don’t take it as a joke, because it’s not. You better start seeing life as a full adult now. You’re not a little girl anymore, and I’m going to come around very often to see you and Mija, and that’s that. Mija, I really do need you and want us to

⁵ This sentence translates roughly to “one way or another.”

be together. I really want you to give me a baby and be a family, Vero. I don't want to have babies with no one else, Mija. I want you to have my baby. Come on, Vero, please. We can do it. You're going to give me a baby like it or not. So that's that." Defendant also told Veronica he would "be out soon."

Defendant wrote a letter to Veronica's daughter, in which he stated that he would "get out of here in two months" and that Veronica "better not have a boyfriend." Defendant instructed the child to have Veronica write to him and send pictures of all three of them. He also instructed her not to call anyone else "dad."

In a letter dated April 14, 2008, defendant stated that he would be out on June 22, 2008. He asserted he would "go straight to see you" and that "like it or not, you're going to be mine." He told Veronica, "And if you're seeing someone when I get out, I'll make sure he leaves you."

In a letter dated April 17, 2008, defendant commented on the fact that Veronica had not written back to him. In a letter dated April 25, 2008, defendant said it was "fucked up" that Veronica had not responded to him. In a letter sent to Juanita, defendant noted, "I've sent many letters to Vero and she doesn't respond to even one."

In a letter dated May 19, 2008, defendant wrote that he would be out soon. He told Veronica he would make sure she was not happy with anyone else. He stated, "I'm going to make your life a living hell," underlining that sentence. He further stated, "Since you know me, you know me, how I am. This time it won't be nothing nice. I'll make sure you remember that 4th of July. This time it won't be any nice." Defendant also wrote, "I swear to God, I'll deal with you when I get out, bitch."

In the same letter, defendant told Veronica that she better not be telling her daughter "to call that mother fucker dad. Cause like I said before, Vero, I will always be her dad and know for sure I'm going to force you to be with me." Defendant said, "I put that on ... N." He told Veronica, "I'm not afraid of going back to prison. And if I'm going back, I'll make sure it will be worth it." He stated, "I'm coming to see you the

very first day I get out. Be prepared or you better hide with your faggot dude, cause I'm coming down on you hard."

In another part of the letter, defendant told Veronica, "that when I get out, you be prepared. Because I'm taking you with me, like it or not, one way or another." He stated that he was getting out in a week and a half and was "going straight to your house." He told Veronica, "If you're not going to be mine, remember what I always told you. You ain't going to be [with] no one else and that I promise you on everything. I'm dead serious about all this, Vero."

In a letter dated April 28, 2009, defendant told Veronica she was "going to be [his] woman again."

In a letter dated October 26, 2009, defendant told Veronica he had called her several times. He apologized: "I'm very sorry for everything I did to you when we were together." He instructed her to answer the phone when he called and to not "be scared."

Veronica testified that she never wrote back to defendant. The letters made her concerned for her safety. She was particularly fearful after the letter referring to defendant's "homies" and the letter in which defendant stated he would make her "life a living hell." She was terrified by the letter saying that "shit is going to happen" and the letter stating that she had better "be prepared" and "hide." She believed defendant would kill her so that she could not be with anyone else.

Whenever Veronica received a letter from defendant, she would cry. She and her family began shutting and locking their outside gate at night, and Veronica talked about moving out of state. She was always aware of her surroundings, and she had her parents wait at the front door for her every night.

2. Phone Calls

Veronica went to the police in August 2010, after receiving an increasing number of phone calls from defendant. Officer Jorge Luna listened to three messages on her home answering machine. In the first message, defendant told Veronica to call him back

“at this number,” saying “[t]his is my phone.” In the second message, defendant stated that he wanted Veronica to send him a cell phone picture of his daughter. In the third message, he told her to “pick up,” claiming to know she was there. He told her to “call me back here at this number or else I’m gonna keep calling you again until you pick up the damn phone.”

After hearing the voicemail messages, Officer Luna contacted a correctional officer at the facility where defendant was housed. The correctional officer searched defendant’s cell and found a cell phone.

C. Domestic Violence Expert

Julia Garcia, a domestic violence social worker, testified that it is common for domestic violence victims to exhibit a lack of self-esteem, a lack of confidence, guilt, and fear. Few victims report domestic violence to the police. The victims who do not report typically are afraid of retaliation or fearful that no one will believe them. Some fail to report abuse because the person has left their life and they do not want to deal with the person any more.

Defense Case

Defendant denied putting a gun to Veronica’s head or possessing any kind of weapon on July 4, 2007. He also denied knowing that a gun was hidden in the landscaping of the apartment complex. Defendant testified that he was the one who wanted to go the barbeque, and that Veronica was the one who did not want to go. While arguing, defendant told Veronica he was going to leave her, saying that her behavior reminded him of his ex-wife. He tried to leave with all his clothes, but Veronica grabbed them from him. He ultimately left with his nephew.

Following the July 4, 2007 incident, defendant went to live with his mother. He called Veronica a week or so later and, after they discussed their argument, they agreed to keep seeing one another. Veronica would come to his workplace to bring him lunch or

go out for lunch with him. Manuel Lopez, defendant's cousin, likewise testified that Veronica came to their workplace several times following the July 4, 2007 incident.

Defendant was taken into custody in September 2007. Veronica visited him in jail about four times. She also wrote him letters while he was in jail and continued to write after his transfer to state prison. In 2008, her letters began to get shorter and shorter, which made him frustrated and angry. Although in some letters he complained about Veronica not responding, what really happened was that her response to one letter would come after he sent a subsequent letter.

Defendant testified about his intent in writing certain portions of the letters to Veronica. For instance, when he wrote "I'm taking you with me," he did not mean he was going to kidnap her. He did not intend to cause her fear when he wrote he would make her life "a living hell."

Defendant did not intend the use of the letter "N" to have gang significance. Although he had been classified as a Northerner in prison, he denied being a gang member. The letter "N" simply replaced the word "and," so that one letter would have read "I promise you on and!" He claimed he was "just being dumb" and wrote it "to be crazy." He denied putting the dots on the Tinkerbelle drawing.

Defendant denied that his reference to July 4 was an admission that he had pointed a rifle to Veronica's head. He asserted he simply meant that he would leave her again if she displayed a similar attitude. Also, defendant denied having any intent to threaten Veronica when he called her and left the messages on her answering machine in August of 2010.

Defendant's mother testified that defendant sent her photographs of Veronica from jail or prison and instructed her to take good care of them. According to defendant, these were photographs that Veronica had sent to him while he was in prison.

Defendant admitted having several prior felony convictions: a 2004 conviction of driving under the influence with three priors; a 2008 conviction of inflicting corporal injury on a spouse; and a 2008 conviction of stalking in violation of a restraining order.

Rebuttal Evidence

A. Jail Logs

Deputy Nicholas Reyes brought visitor logs from the Monterey County jail, where defendant was housed from late September 2007 to late October 2008. The logs showed no visits from Veronica. A visitor must show identification in order to visit an inmate, although it is possible someone could use a false identification.

B. Discovery of Rifle

On July 6, 2007, Officer Jerry Hunter was investigating an incident that had occurred the day before. He went to an apartment complex and found a loaded .22-caliber rifle in a bush behind one of the apartments. Veronica's apartment was two doors down.

Two people were arrested in connection with the July 5, 2007 incident, including Jesus (also known as Jesse) Lopez, Jr. (hereafter Lopez). Lopez stated that he was defendant's nephew.

Surrebuttal Evidence

Defendant testified that his ex-wife used a different last name when she visited him in jail. Also, the log showed that a woman named Arlene H. had visited him four times, and he did not know such a person.

DISCUSSION

A. Discovery of Rifle

As noted above, the prosecution introduced evidence that police discovered a rifle hidden in the bushes near Veronica's apartment two days after the uncharged July 4, 2007 incident. The evidence came in during the prosecution's rebuttal case.

Defendant contends that the discovery of the rifle on July 6, 2007 was irrelevant because there was no evidence it was the rifle he had used to threaten Veronica. Defendant also contends that any probative value of the evidence was outweighed by its prejudicial effect, that admission of the evidence violated due process, and that the error was prejudicial.

The People argue that discovery of the rifle was relevant because it tended to support Veronica's credibility (in testifying that defendant threatened her with a rifle) and undermine defendant's credibility (in denying that he possessed any weapon that day).

1. Background

After the defense rested, the prosecutor indicated she would put on evidence in rebuttal, including the discovery of the rifle. Defendant objected to this evidence as irrelevant and more prejudicial than probative under Evidence Code section 352. He argued that there was no connection between the rifle and the July 4, 2007 incident. Defendant argued that since "we can't say that this is the rifle," the evidence was speculative. He argued that admission of the evidence would violate due process and result in an unfair trial.

The prosecutor admitted she could not prove that the rifle discovered in the landscaping was the one defendant used on July 4, 2007, but she argued that the evidence showed that defendant "had the opportunity and the access to use a gun that day and also to hide the gun that day in a very quick manner." The prosecutor pointed out that Veronica had seen defendant outside with his nephew on July 4.

The trial court noted that defendant had denied having a rifle and found that the evidence was "admissible as corroborative evidence." Further, the evidence was "very probative" because defendant had testified about being with his nephew, who was ultimately was tied to the rifle. The trial court also pointed out that the ammunition found in Veronica's house was .22-caliber, the same as the rifle. Finally, the trial court noted that the evidence had been limited and did not take up a significant period of time.

In his motion for a new trial, defendant argued that the trial court erred by admitting evidence of the rifle. The trial court denied the motion for a new trial, explaining that the evidence became relevant “when the defendant took the stand and stated that there had not been any gun drawn on July 4th.” The trial court found that the discovery of the rifle was “corroborative” of the fact that defendant had used a gun.

2. Standard of Review

On appeal, a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code section 352 are reviewed for abuse of discretion. (*People v. Streeter* (2012) 54 Cal.4th 205, 237.)

3. Relevance

Evidence Code section 350 provides that “[n]o evidence is admissible except relevant evidence.” Relevant evidence is defined as “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.)

Defendant claims that any connection between the rifle found in the bush and the July 4, 2007 incident was purely speculative. He relies primarily on *People v. Henderson* (1976) 58 Cal.App.3d 349 (*Henderson*). We find that case readily distinguishable. In *Henderson*, the defendant shot at two officers, but he claimed one of the shots was fired accidentally. (*Id.* at p. 353.) At trial, the prosecution introduced evidence that the defendant had a second loaded gun in the home and argued that it showed he fired both shots intentionally. (*Id.* at p. 359.)

The *Henderson* court found that the discovery of the second firearm was irrelevant. (*Henderson, supra*, 58 Cal.App.3d at p. 360.) The court explained: “Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one’s home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon.

Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons – a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant. [Citations.]” (*Ibid.*)

In the instant case, the issue was not defendant’s intent in using the rifle – it was whether or not he possessed and used a rifle at all. Moreover, in *Henderson* it was undisputed that the defendant had not used the second weapon. In this case, the evidence at least suggested the possibility that defendant had used the rifle discovered on July 6, 2007. Case law holds that it is proper to “admit into evidence weapons found in the defendant’s possession some time after the crime that *could have been* the weapons employed.” (*People v. Riser* (1956) 47 Cal.2d 566, 577 (*Riser*), italics added, overruled on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98, and *People v. Morse* (1964) 60 Cal.2d 631, 648-649 & fn. 2; see also *People v. Mills* (2010) 48 Cal.4th 158, 197 [“Because defendant was accused of killing the victim by cutting her throat and shortly after the crime was found in possession of several cutting devices, any one of which could have been the murder weapon, the trial court acted within its discretion in finding the evidence to be relevant.”].)

Here, the weapon used on July 4, 2007 was the same type of weapon found on July 6, 2007. It was found close to the site of the July 4, 2007 incident – in some bushes near the back of Veronica’s apartment. Defendant had obtained the rifle he used to threaten Veronica from somewhere outside the apartment. Thus, the rifle found in the bushes “could have been the weapon[] employed” by defendant. (*Riser, supra*, 47 Cal.2d at p. 577.) Since Veronica testified that defendant put a rifle to her head, but defendant denied possessing a weapon and did not have the rifle when Juanita came home several minutes after the incident, the trial court did not abuse its discretion by finding it relevant that a rifle was discovered nearby two days later.

4. Evidence Code Section 352

Trial courts have the discretion to exclude otherwise admissible evidence pursuant to Evidence Code section 352 “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

As explained above, we disagree with defendant’s claim that the rifle had little or no probative value simply because it could not be definitively connected to the July 4, 2007 incident. It was relevant to show that defendant had access to the same type of weapon used in the incident. (See *Riser, supra*, 47 Cal.2d at p. 577.)

Further, we find distinguishable *People v. Benavides* (2005) 35 Cal.4th 69 (*Benavides*), on which defendant relies. In *Benavides*, the defendant was convicted of murdering and sexually assaulting a 21-month-old girl. He had a relationship with the girl’s mother. At trial, the prosecution introduced evidence that the mother associated with a child molester after the defendant’s arrest. The Supreme Court agreed that this evidence was not relevant, since nothing in the record showed that the mother suspected the defendant had been abusing her daughter. The fact that the mother subsequently kept company with a known child-molester was “of limited probative value to the determination of defendant’s guilt.” (*Id.* at p. 91.)

Unlike in *Benavides*, where the evidence concerned a third party’s association with a known criminal, the issue here was defendant’s own association with Lopez and a rifle that defendant may have used on July 4, 2007. This evidence was, as we have explained, relevant to show his access to a rifle around the time that he used a rifle to threaten Veronica.

We also disagree with defendant’s claim that the evidence had significant potential for prejudice because it invited the jury to convict him based on speculation and his association with Lopez who was arrested for assault with a firearm.

The “undue prejudice” referred to in Evidence Code section 352 “is not synonymous with ‘damaging,’ but refers instead to evidence that ‘ “uniquely tends to evoke an emotional bias against defendant” ’ without regard to its relevance on material issues.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) In this case, evidence that defendant had access to a rifle that may also have been used by Lopez was not the type of evidence that would tend to “ ‘evoke an emotional bias” ’ ” against him. (*Ibid.*) The trial court did not abuse its discretion by finding that the probative value of the evidence was not “substantially outweighed” by any “danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

5. Due Process

Because we find that the trial court did not abuse its discretion under state law in admitting the evidence of the rifle over defendant’s objection, his contention that the admission of the evidence violated his constitutional right to due process is also without merit. (See *People v. Riggs* (2008) 44 Cal.4th 248, 292.)

B. Evidence that Lopez Claimed to be Defendant’s Nephew

Defendant contends that the trial court should not have allowed Officer Hunter to testify that defendant was “Jesse Lopez’s uncle according to Jesse Lopez.” Defendant contends this was hearsay, that its admission violated his federal constitutional right of confrontation, that trial counsel was ineffective for failing to object on confrontation grounds, and that the error was prejudicial.

The People implicitly concede that the statement was inadmissible hearsay. They argue that the statement was not testimonial and, thus, that its admission did not violate the confrontation clause. The People further argue that any error was harmless and that defendant was not denied the effective assistance of counsel.

Like the People, we will assume that the statement was inadmissible hearsay, and we will proceed to consider defendant’s additional contentions.

1. Confrontation

In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), the high Court held that the admission of a “testimonial” out-of-court statement violates a defendant’s confrontation clause rights unless the declarant is unavailable at trial and the defendant has had a prior opportunity for cross-examination. Although the *Crawford* court declined to provide a comprehensive assessment of what kinds of hearsay will be testimonial for Sixth Amendment purposes, it did hold that testimonial statements include those “taken by police officers in the course of interrogations.” (*Id.* at p. 52.) In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the high court clarified that statements in response to police interrogation “are testimonial when the circumstances objectively indicate ... that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Id.* at p. 822, fn. omitted.)

Defendant asserts that Lopez was responding to police interrogation when he made the statement identifying defendant as his uncle. However, the circumstances of Lopez’s statements are not clear on this record. Officer Hunter testified that he investigated the July 5, 2007 incident and that Lopez was arrested and convicted in connection with that incident. Officer Hunter further testified that he knew that defendant was the uncle of Lopez “according to Jesse Lopez.” However, nothing in the record establishes the circumstances under which Lopez made the statement in question – i.e., whether he made the statement to an investigating officer under circumstances objectively indicating “that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis, supra*, 547 U.S. at p. 822, fn. omitted.)

With the sparse record concerning the circumstances of Lopez’s statement, it was clearly incumbent upon defendant to raise the confrontation clause claim below. Contrary to defendant’s argument, his hearsay objection did not necessarily preserve his right to raise the confrontation clause claim on appeal. Failure to object on constitutional

grounds will be excused only where “ ‘it appears that (1) the appellate claim is the kind that required no trial court action to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court’s act or omission, in addition to being wrong for reasons actually presented to that court, had the legal consequence of violating the Constitution.’ ”
(*People v. Gutierrez* (2009) 45 Cal.4th 789, 809.)

Here, the confrontation clause argument is dependent on the development of facts that were not critical to the hearsay objection: namely, whether Lopez’s statement was made in response to police interrogation under circumstances objectively indicating “that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis, supra*, 547 U.S. at p. 822, fn. omitted.) Thus, defendant’s hearsay objection did not preserve the confrontation clause argument for appeal.

As a back-up claim, defendant asserts that trial counsel was constitutionally ineffective for failing to raise the confrontation claim below. “A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction ... has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).

The California Supreme Court has “repeatedly stressed ‘that “[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be

rejected.’ [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) This is such a case, since the record on appeal does not provide any specific facts about the circumstances under which Lopez made his statement. It is possible that if the facts concerning the statement had been further developed below, they would have been fatal to defendant’s confrontation clause claim. (See *id.* at p. 267.)

Nevertheless, we will assume, *arguendo*, that reasonable trial counsel would have raised a confrontation clause objection and established that Lopez’s statement was made in response to police interrogation under circumstances objectively indicating “that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis, supra*, 547 U.S. at p. 822, fn. omitted.) As explained below, we find that admission of the statement was not prejudicial and did not deprive defendant of a fair trial.

2. Prejudice

Defendant contends that Lopez’s statement was critical to the prosecution’s case because without it the prosecution would not have been able to establish a connection between defendant and the rifle found on July 6, 2007.

Defendant has failed to meet his burden of establishing that “there is a reasonable probability that,” but for admission of the challenged statement, “the result of the proceeding would have been different.” (*Strickland, supra*, 466 U.S. at p. 694.) Importantly, defendant was not charged with possessing a rifle or with any other crime based on the July 4, 2007 incident. The stalking charge was based on the letters and phone calls only; the July 4 incident was admitted under Evidence Code section 1109 as a prior incident of domestic violence. While the July 4 incident was relevant to certain issues, such as Veronica’s fear and particularly to one letter’s reference to July 4, the

prosecution was not required to prove beyond a reasonable doubt that defendant used a rifle during that incident.⁶

Even without the statement attributed to Lopez, the jury had overwhelming evidence to support the stalking charge. Stalking is committed by a person who “willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.” (§ 646.9, subd. (a).) “ ‘[H]arasses’ means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.” (§ 646.9, subd. (e).) “ ‘[C]redible threat’ means a verbal or written threat ... or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family.” (§ 646.9, subd. (g).)

Defendant’s series of letters to Veronica were harassing and implied a credible threat intended to place Veronica in reasonable fear for her safety. Defendant repeatedly told her that she had better not be going out with anyone else and he repeatedly referred to the repercussions if she disobeyed him: he would take her away from anybody else; he would not hold back; she would give him a baby like it or not; he would make sure she was not happy with anyone else; and he would make her life a living hell. Defendant also referred to the July 4, 2007 incident, saying that “[t]his time it won’t be nothing nice.” He also indicated he did not care if he went back to prison as a result of what he was

⁶ The jury was instructed, pursuant to CALCRIM No. 852, that it could consider the uncharged offense if the People proved, by a preponderance of the evidence, that defendant committed it.

going to do. Defendant continued to send these letters even though Veronica did not respond to any of them. Defendant's testimony to the contrary was unconvincing in light of the letters in which he complained that she never wrote back.

Thus, even without Lopez's statement about being defendant's nephew, the evidence overwhelmingly established that defendant committed stalking. It is not reasonably probable that a juror would have had a reasonable doubt about defendant's guilt but for hearing the statement. Thus, trial counsel was not constitutionally ineffective for failing to challenge the statement on confrontation clause grounds, and any error in admitting the statement was harmless.

C. Custody Credits

Defendant claims he is entitled to additional presentence conduct credits. In the opening brief, his argument was based on the equal protection clause of the federal and state constitutions. In his supplemental opening brief, he relied on the current statutory language of section 4019. Respondent opposed awarding defendant additional credits on either ground. We requested supplemental briefing on the issue of whether defendant's presentence conduct credits should have been calculated under two alternative theories: (1) the amendments to section 4019 that became operative on January 25, 2010; or (2) the amendments to section 2933 that became operative on September 28, 2010.

1. Background

The information alleged that defendant committed stalking between September 29, 2007 and August 2010. Defendant began serving time in custody for this case on October 8, 2011. At sentencing on November 29, 2011, the trial court awarded defendant 53 days of actual custody credit and 26 days of conduct credit, for a total of 79 days of credit.

The trial court appears to have applied the version of section 4019 in effect prior to January 25, 2010, under which a criminal defendant was entitled to "two days of conduct credit for every four days spent in local custody." (*People v. Brown* (2012) 54

Cal.4th 314, 318 (*Brown*), fn. omitted; see former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7.)

The statutes regarding presentence custody credit have undergone numerous amendments in the past few years. As noted, prior to January 25, 2010, a prisoner could earn conduct credits at a two-for-four rate, such that if all possible days were earned, six days were deemed served for every four days of actual local custody. (Former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7; see *Brown, supra*, 54 Cal.4th at p. 318.)

Effective January 25, 2010, section 4019 was amended to allow certain eligible prisoners to earn two days of conduct credit for every two days of actual local custody. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50; see *Brown, supra*, 54 Cal.4th at p. 318.) Unlike subsequent amendments to section 4109, the January 25, 2010 amendment did not limit its application to crimes committed after its effective date. In *Brown*, the California Supreme Court held that the January 25, 2010 amendment “applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute’s operative date.” (*Brown, supra*, 54 Cal.4th at p. 318.)

Effective September 28, 2010, section 4019 was amended again. (Stats. 2010, ch. 426, § 2; see *Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) Pursuant to the September 2010 amendments, the local conduct credit scheme was returned to the two-for-four rate, but only for prisoners who committed crimes after September 28, 2010. (Stats. 2010, ch. 426, § 2.)

An amendment to section 2933 that also became effective on September 28, 2010 allowed certain eligible prisoners to earn one day of presentence conduct credit for each

day of actual local custody.⁷ (Stats. 2010, ch. 426, § 1.) The September 28, 2010 amendment to section 2933 did not limit its application to crimes committed on or after the effective date. (*Ibid.*)

Most recently, section 4019 was amended again to restore the two-for-two conduct credit scheme. Section 4019 currently provides that if all possible days are earned, four days will now be deemed served for every two days of actual local confinement. (§ 4019, subds. (b), (c) & (f).) The Legislature specified that this change applied prospectively and only “to prisoners who are confined to a county jail ... for a crime committed on or after October 1, 2011.” (§ 4019, subd. (h).)

Section 2933 was amended at the same time as section 4019, with an operative date of October 1, 2011. Section 2933 no longer contains any provision relating to local presentence conduct credits. (See Stats. 2011, 1st Ex.Sess. 2011-2012, ch. 12, § 16.)

2. Defendant is Entitled to Additional Conduct Credits

Since defendant’s crime was committed before October 1, 2011, the current version of section 4019 is not applicable to him. (§ 4019, subd. (h).) Likewise, since his crime was committed before September 28, 2010, that version of section 4019 is not applicable to him. (Stats. 2010, ch. 426, § 2.) We must determine what statutory formula *does* apply.

The People contend that defendant is not eligible for two-for-two credits under the January 25, 2010 version of section 4019 because it was only in effect between January 25, 2010 and September 28, 2010 – i.e., a period of time during which defendant was not in custody on this case. However, the September 28, 2010 amendment to section 4019 did not completely terminate the two-for-two credit scheme that had become effective on January 25, 2010. The September 28, 2010 amendment to section 4019 only changed the

⁷ “Prisoners who were required to register as sex offenders, had been committed for serious felonies, or had prior convictions for serious or violent felonies were not eligible for credit at the increased rate.” (*Brown, supra*, 54 Cal.4th at p. 319, fn. 5.)

rate of conduct credit for defendants who committed their crimes after September 28, 2010. (Stats. 2010, ch. 426, § 2.) Prisoners whose crimes were committed before the January 25, 2010 amendment but served time after that date continued to earn two-for-two conduct credits even after the September 28, 2010 amendment. (See *Payton v. Superior Court* (2011) 202 Cal.App.4th 1187, 1192 (*Payton*) [defendant whose crime was committed in 2008 but served time in May of 2011 should have received two-for-two credits under January 25, 2010 version of section 4019].)

The People also assert that defendant is not eligible for one-for-one credits under the September 28, 2010 version of section 2933 because that statute was superseded, and thus no longer in effect, by the time defendant was sentenced. However, just as the September 28, 2010 amendment to section 4019 did not completely eliminate the January 25, 2010 conduct credit formula (*Payton, supra*, 202 Cal.App.4th at p. 1192), the October 1, 2011 amendment to section 2933 did not mean that prisoners could no longer earn one-for-one credits, since the amendment effectively applied only to defendants who committed their crimes on or after October 1, 2011. (§ 4019, subd. (h).)

We agree with defendant that the September 28, 2010 and October 1, 2011 amendments to sections 4019 and 2933 did not completely terminate the conduct credit formulas provided by prior versions of those statutes. In fact, section 4019 specifically contemplates that some prisoners will have their conduct credits calculated under “the prior law.” (§ 4019, subd. (h); see *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 52.)

Here, defendant’s offense was committed during the period September 2007 through August 2010. He served all of his custody and was sentenced after the January 2010 amendment to section 4019 became effective and after the September 28, 2010 amendment to section 2933 became effective. Neither of those amendments limited their application to crimes committed on or after their effective dates; thus, they both “applied prospectively, meaning that qualified prisoners in local custody first became

eligible to earn credit for good behavior at the increased rate beginning on the statute's operative date." (*Brown, supra*, 54 Cal.4th at p. 318.)

Under "the prior law" before the October 1, 2011 amendments to section 4019, defendant was eligible to earn presentence conduct credits at a one-for-one rate. (§ 4019, subd. (h); see former § 2933, subd. (e); Stats. 2010, ch. 426, § 1.) We will order the judgment modified to reflect defendant's entitlement to conduct credit at that rate.

DISPOSITION

The judgment is modified to reflect that defendant is entitled to 53 days of actual custody credit and 53 days of conduct credit, for a total of 106 days of presentence credit. As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.