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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL EUGENIO GOMEZ,

Defendant and Appellant.

B281785

(Los Angeles County  
Super. Ct. No. BA422780)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted defendant Samuel Gomez of willful infliction of corporal injury upon a spouse or cohabitant and making criminal threats. (Penal Code, §§ 273.5, 422.) Gomez argues his judgment of conviction must be reversed because: (1) the trial court erred in concluding that certain statements the victim made to a police officer were admissible under the hearsay exception for prior consistent statements; (2) defense counsel provided ineffective assistance by failing to test whether there was blood on the knife that was allegedly used to commit the domestic abuse offense. We affirm.

## **FACTUAL BACKGROUND**

### ***A. Investigation and Filing of the Information***

On March 20, 2014, Los Angeles County Deputy Sherriff Manuel Navarro responded to an incident at a restaurant located in the City of Commerce. When Navarro arrived, security personnel directed him toward a woman, later identified as Militza M., sitting in the kitchen area. Navarro observed blood “all over [Militza’s] hands, . . . feet [and] dress, and . . . a towel wrapped around her left forearm.” Militza was “very distraught,” and appeared to be in pain. Navarro examined Militza’s injuries, which included a two-inch cut on her forearm, and a small puncture wound in the area of her abdomen. Militza told Navarro her boyfriend, Samuel Gomez, had “cut her,” and then driven away in her car. Militza received on-scene treatment from paramedics, and was then transported to a hospital.

During an interview at the hospital, Militza informed Navarro that she and Gomez had driven to the restaurant together to celebrate her birthday. Several hours after they arrived, a male patron bumped into Gomez, who had consumed

numerous alcoholic drinks, and the two men got into a dispute. Militza tried to calm Gomez, and then went outside to her car. Gomez followed her outside, and entered the passenger seat of the vehicle. Gomez then grabbed Militza's cell phone out of her hand, and started to search for numbers of other men. When Militza tried to take the phone back, Gomez slapped her, pulled her hair and then told her he was going to cut her. Militza suddenly felt a sharp pain in her arm and abdomen, and saw blood. Militza told Navarro she suspected Gomez had stabbed her with a foldable pocketknife he frequently carried with him, but clarified that she had not actually seen the object that caused her injuries. Militza got out of the car, and screamed for help. Gomez drove away in her vehicle.

After the interview, Navarro called Gomez on a cell phone number that Militza had provided. When Navarro asked Gomez what occurred at the restaurant, Gomez stated that "nothing had happened, that he got in an argument, that he tried to have [Militza] leave with him, but she refused so he left." Gomez also stated that Militza did not have any injuries when he left the restaurant parking lot.

The next morning, police officers traveled to Gomez's apartment, took him into custody and impounded Militza's car, which had substantial amounts of what appeared to be blood on the driver's seat, the driver-side door, the steering wheel, the central console and the passenger seat. Inside the apartment, Gomez's roommate identified a backpack that belonged to Gomez. Officers found a pocketknife in the backpack that made a clicking noise when the blade was opened.

During a subsequent custodial interrogation, Gomez acknowledged that he got into an altercation at the restaurant,

and then followed Militza outside. Gomez claimed he had little memory of what occurred after he left the restaurant because he was drunk. Although he remembered arguing with Militza and driving away in her car, he could not recall assaulting her. Throughout the interrogation, Gomez repeatedly stated, “I really messed up this time.”

On May 22, 2014, the District Attorney for the County of Los Angeles filed an information charging Gomez with one count of willfully inflicting corporal injury on a spouse or cohabitant (see Pen. Code, § 273.5<sup>1</sup>), and one count of making criminal threats. (§ 422, subd. (a).) As to count one, the information further alleged Gomez had personally used a deadly or dangerous weapon, “to wit a knife” (see § 12022, subd. (b)(1)), and had personally inflicted great bodily injury under circumstances involving domestic abuse. (See § 12022.7, subd. (e).)

## ***B. Trial***

### *1. Witness testimony*

#### *a. Testimony of Militza M.*

At trial, Militza M. provided testimony that was substantially consistent with the statements she had made to Navarro shortly after the attack occurred. According to Militza, Gomez was “pretty drunk” when he got into a dispute with two other men at the restaurant. After trying to calm Gomez, Militza decided to leave the restaurant. Gomez followed her outside, approached the driver-side window of the vehicle and asked whether she was really going to leave him there. When Militza responded yes, he entered the passenger side of the vehicle and

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<sup>1</sup> Unless otherwise noted, all further statutory citations are to the Penal code.

grabbed her cell phone. She attempted to take her phone back, and Gomez then slapped her in the face. Militza began crying and asked why he had done that. She then heard Gomez pull out what she believed was a pocketknife. She clarified that she had not seen the weapon, but heard a “snap” that was similar to the sound Gomez’s pocketknife made when the blade was opened. Gomez told her he would stab her and kill her if she tried to run.

Militza immediately opened the car door, yelling for help. Gomez called her a “stupid bitch,” and then pulled her hair. Militza then felt something press against her abdomen. She saw blood on her body, and began running from the car. Shortly thereafter, Militza observed a small cut on her abdomen, and “blood . . . splashing all over the place” from a cut on her left forearm. She was transported to a hospital, where she received stitches.

Militza also testified about a prior assault Gomez had committed against her in October of 2010. According to Militza, Gomez came home extremely drunk, and began urinating on the bedroom floor. He then attempted to get into bed with Militza and her daughter. When Militza would not let him enter the bed, he tried to take her pillow. Gomez then struck her in the mouth with a closed fist, resulting in injuries to the interior of her mouth and lips. The following morning, Militza called the police, and an officer came to the home. Militza confirmed that several photographs the police had taken on the day of the incident accurately showed the injuries inside her lip and mouth.

On cross-examination, Militza acknowledged she was currently applying for a type of nonimmigrant visa available to

victims of domestic abuse known as a “U Visa.”<sup>2</sup> Militza also admitted that she knew about this type of visa before the incident at the restaurant occurred, but had never previously applied for one.

*b. Testimony of Tibor Naray*

The prosecution also called Tibor Naray, the officer who had responded to the domestic violence incident that occurred in October of 2010. Before Naray took the stand, defense counsel moved to exclude as hearsay “any testimony regarding . . . statements” Militza had made to Naray regarding the 2010 incident. The prosecution, however, argued that Militza’s statements were admissible under the hearsay exception for prior consistent statements. (See Evid. Code, §§ 791, 1236.) The prosecution explained the exception applied because the defense had previously implied Militza fabricated or exaggerated her testimony about Gomez’s domestic abuse to aid her application for a U visa. The court granted the motion, explaining that although the defense had clearly challenged the accuracy of Militza’s testimony regarding the more recent restaurant incident, the defense had not yet challenged the truthfulness of her description of what occurred during the October 2010 incident.

Following the court’s ruling, Naray testified on direct examination that he had responded to a domestic abuse call at

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<sup>2</sup> A “U Visa” is a form of temporary nonimmigrant visa that Congress created to provide legal status for noncitizens who assist in the investigation of serious crimes in which they have been victimized. (See 8 U.S.C. § 1101(a)(15)(U); *People v. Morales* (2018) 25 Cal.App.5th 502, 506; *Fonseca-Sanchez v. Gonzales* (7th Cir. 2007) 484 F.3d 439, 442, fn. 4.)

Militza's residence in October of 2010. Naray stated that when he arrived at the premises, Militza appeared "disheveled and afraid," and had multiple injuries inside her mouth. Naray stated that he took Gomez into custody, and then questioned him. According to Naray, Gomez admitted he had come home drunk and slept on the floor, but could not recall whether he hit Militza. Gomez claimed that when he woke up, Militza started yelling at him "about how he had injured her mouth."

On cross-examination, defense counsel asked Naray whether Gomez had denied urinating on the floor and striking Militza. Naray confirmed Gomez had specifically denied committing either of those acts. Naray also acknowledged that Gomez had said he tried to avoid getting into a physical altercation with Militza, and that she had prevented him from leaving the home.

Following the defense's cross-examination, the prosecution renewed its request to ask Naray about the statements Militza had made to the officer about the October 2010 incident. The court agreed to the request, noting that the defense had now elicited testimony from Gomez implying that Militza had not been truthful when she testified that he had urinated on the floor and struck her in the mouth.

On re-direct examination, the prosecution asked Naray what Militza had told him when he arrived at the residence. Naray testified that Militza told him Gomez had come home drunk, urinated on the floor and then, after she refused to give him her pillow, struck Militza in the face with a closed fist.<sup>3</sup>

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<sup>3</sup> The prosecution called several additional witnesses during its case-in-chief, including Officer Navarro, a second police officer who had interviewed Gomez, an officer who had searched

*c. Testimony of defendant Samuel Gomez*

Gomez, testifying in his defense, stated that on the night of March 19, 2014, he had traveled to a restaurant with Militza, and then gotten into a dispute with her because she had been talking to another man. Militza became upset and decided to leave. Gomez then went outside to have a cigarette, and saw Militza sitting in her car writing a text on her phone. Gomez approached Militza's vehicle, and asked whether she was really going to leave him there. She allowed him into the passenger side of the vehicle.

Gomez asked to see her phone, and she complied. As Gomez began to open her messages application, Militza suddenly hit him in the forehead with a closed fist. He then slapped her face, and said she had to stop "disrespecting" him. Gomez claimed Militza retrieved a metal-colored object from the center console that appeared to be either a "knife" or a "cardboard cutter[]." Militza threatened to stab Gomez if he did not return her phone. Gomez struggled with Militza, trying to get the object away. She then opened the door, exited the vehicle and started yelling "help." Gomez moved into the driver's seat, and tried to convince Militza to get into the car. When she refused, he drove away. Gomez asserted that he did not possess a knife at the time of the incident, and had not seen any blood in the car.

Gomez acknowledged that he had told interrogating officers he could not recall what happened in the restaurant parking lot. Gomez claimed, however, that he had denied any recollection of what had occurred because he was trying to protect Militza, who he described as "the aggressor and the attacker." Gomez further

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Gomez's apartment, Gomez's roommate and a physician who had treated Militza's injuries at the hospital.



stated that he had decided to testify as to what really occurred because he “didn’t want to do time for something [he] didn’t do.”

Gomez also admitted telling Navarro he had “really messed up this time,” but claimed he had made that statement in reference to taking Militza’s car without her permission. He also admitted that when another officer showed him pictures of the Militza’s injuries, he put his head in his hands and said, “This is going to fuck my life.”

Regarding the October 2010 incident, Gomez testified that he had not urinated on the floor or struck Militza, and asserted that she had “lied” about that. Gomez claimed Militza was responsible for starting the fight, and had not allowed him to leave the house. He also stated that he was uncertain how Militza had sustained the injuries inside her mouth.

### ***C. Closing argument and sentencing***

At closing argument, the defense posited that Militza had either fabricated or exaggerated her testimony about the March 2014 and October 2010 incidents to strengthen her case for a U visa. The defense argued that if Gomez had actually struck Militza in 2010, she could have applied for a U visa at that time. The fact that she had failed to do so showed her current description of what occurred “was a lie.”

The jury found Gomez guilty of inflicting corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)), and making criminal threats. (§ 422.) With regard to the corporal injury count, the jury further found that Gomez had personally used a deadly or dangerous weapon during the commission of the offense, and had inflicted great bodily injury under circumstances involving domestic violence. (See §§ 12022, subd. (b)(1)12022.7, subd. (e).)

The court sentenced Gomez to an aggregate term of 10 years in state prison.<sup>4</sup>

## DISCUSSION

### ***A. Militza's Statements to Officer Naray Were Admissible Under the Prior Consistent Statements Exception to the Hearsay Rule***

Gomez argues that Officer Naray's testimony describing the statements Militza made to him regarding the October 2010 domestic violence incident constituted hearsay, and should have been excluded. The Attorney General, however, contends the trial court properly concluded Naray's testimony was admissible pursuant to the hearsay exception for prior consistent statements. We review the trial court's decision to admit prior consistent statements for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725 ["an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question"].)

Any out-of-court statement made by a testifying witness, offered to prove the truth of the matter asserted, is inadmissible hearsay unless the statement falls within one of the recognized exceptions to the hearsay rule. (Evid. Code, § 1200, subds. (a) & (b); *People v. Alvarez* (1996) 14 Cal.4th 155, 185.) Evidence Code

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<sup>4</sup> The ten-year sentence consisted of the upper term of four years for the infliction of corporal injury count (§ 273.5, subd. (b)), plus a one-year enhancement under section 12022, subdivision (b)(1), and an additional five-year enhancement under section 12072.7, subdivision (e). The court imposed a term of three years in state prison for the criminal threats count (§ 422), but stayed that portion of the sentence under section 654.

sections 791 and 1236 set forth an exception for a testifying witness's prior consistent statements.<sup>5</sup> "To be admissible as an exception to the hearsay rule [under section 791], a prior consistent statement must be offered [(a)] after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement, or [(b)] when there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive." (*People v. Riccardi* (2012) 54 Cal.4th 758, 802 (*Riccardi*) [disapproved on another ground in *People v. Rangel* (2016) 62

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<sup>5</sup> Evidence Code section 1236 provides, in relevant part: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

Section 791 states: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

- (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
- (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

Cal.4th 1192, 1216].) In this case, the trial court found Militza's statements were admissible under subdivision (b) because the defense's cross-examination of Militza and Naray impliedly charged that Militza had fabricated her testimony regarding the October 2010 incident. We find no abuse of discretion in the trial court's decision.

As summarized above, Militza testified on direct examination that in October 2010, Gomez came home drunk, urinated on the floor and then struck her in the mouth after she refused to give him her pillow. On cross-examination, defense counsel elicited testimony in which Militza admitted she was currently applying for a type of visa available to victims of domestic abuse. She further admitted that although she previously knew about this type of visa, she had not tried to obtain one after the October 2010 incident. When cross-examining Officer Naray, defense counsel elicited testimony that Gomez told Naray he did not urinate on the floor or strike Militza during the 2010 incident, which directly contradicted Militza's trial testimony about that event. Considered together, the defense's cross-examination of Militza and Naray raise an implied charge that Militza fabricated her testimony about the October 2010 incident to support her recent visa application, a motive that arose long after she had made the statements to Naray.<sup>6</sup> The trial court was therefore justified in admitting Militza's prior consistent statements to Naray pursuant to section 791, subdivision (b).

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<sup>6</sup> During closing argument, the defense explicitly raised this exact argument, asserting that Militza's pending U visa application provided a motive to "lie" about what occurred during the 2010 incident.

In his appellate brief, Gomez does not directly refute that the cross-examination of Naray and Militza contained an implied charge that Militza had fabricated her testimony regarding the 2010 incident. He argues, however, that the exception for prior consistent statements is nonetheless inapplicable because his attorney was “entitled” to cross-examine Naray about what Gomez said to him regarding the October 2010 incident “without opening the door to [Militza’s prior consistent statements].” In support, Gomez cites Evidence Code section 773, which sets forth the permissible scope of cross-examination.<sup>7</sup> Thus, Gomez appears to contend that testimony elicited through questions that fall within the permissible scope of cross-examination cannot give rise to an implied charge of fabrication for purposes of the consistent prior statement exception.

Gomez cites no legal authority in support of that position. The case law is replete with decisions affirming the application of the prior consistent statement exception under circumstances where the implied charge of fabrication arose through cross-examination testimony.<sup>8</sup> Indeed, our Supreme Court has

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<sup>7</sup> Evidence Code section 773 states, in relevant part: “A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.”

<sup>8</sup> See, e.g., *Riccardi, supra*, 54 Cal.4th at pp. 802-803 [prior consistent statement admissible after defense counsel suggested on cross-examination that the witness had failed to tell the police “important facts and was thus fabricating her testimony”] [disapproved on another ground by *People v. Rangel, supra*, 62 Cal.4th 1192]; *People v. Kennedy* (2005) 36 Cal.4th 595, 614 [prior consistent statement admissible based on “cross-examination . . .

emphasized that when “evaluating the admissibility of prior consistent statements,” courts normally “focus . . . on [the] . . . inducement *suggested by cross-examination* as supporting the witness’s improper motive.” (*Crew, supra*, 31 Cal.4th at p. 843 [emphasis added.]) Simply put, nothing in Evidence Code section 1236 or section 791 suggests the prior consistent statement exception is inapplicable when the evidence giving rise to a charge of fabrication was elicited through permissible cross-examination.

***B. Gomez’s Ineffective Assistance Claim Is More  
Appropriately Resolved in a Habeas Proceeding***

Gomez argues his attorney provided ineffective assistance when he failed to “have the knife found in Gomez’s backpack tested for blood.” In his appellate brief, Gomez asserts that post-conviction testing showed there was no blood on the blade. He further asserts that the absence of blood on the knife “would have helped the defense’s case, even if that fact was not completely dispositive.”

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[that] sought to impeach [witness] by . . . suggesting that her statements implicating defendant were the result of threats of prosecution”] [disapproved on another ground by *People v. Williams* (2010) 49 Cal.4th 405]; *People v. Crew* (2003) 31 Cal.4th 822, 843-844 (*Crew*) [prior consistent statement admissible based on cross-examination raising inference of fabrication based on an “immunity agreement with the prosecution”] *People v. Williams* (2002) 102 Cal.App.4th 995, 1011 [video-taped statements admissible after “defense counsel implied during cross-examination that [the witnesses] had fabricated portions of their trial testimony”].

“““In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.””” (*People v. Johnson* (2016) 62 Cal.4th 600, 653 (*Johnson*)). “[C]ounsel has wide discretion in choosing the means by which to provide constitutionally adequate representation.” (*Ibid.*)

“An appellate court’s ability to determine from the record whether an attorney has provided constitutionally deficient legal representation is in the usual case severely hampered by the absence of an explanation of an attorney’s strategy.’ [Citation.] For this reason, [the Supreme Court] long ago adopted the rule that, “[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citations.]” [Citations.] The merits of such claims are more appropriately resolved, not on the basis of the appellate record, but rather by way of a petition for writ of habeas corpus.” (*Johnson, supra*, 62 Cal.4th at p. 653; see also *People v. Nguyen* (2015) 61 Cal.4th 1015, 1051; *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009.)

In this case, the record does not reveal why Gomez’s trial counsel chose not to test the knife. Moreover, Gomez has failed to show there is no conceivable satisfactory explanation for the decision. (See *People v. Centeno* (2014) 60 Cal.4th 659, 675 [“When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, the defendant must show

there was ““no conceivable tactical purpose”” for counsel’s act or omission”].) Given that the prosecution did not introduce any evidence that blood was found on the knife, defense counsel may well have concluded that testing the knife for blood was unnecessary. Gomez’s ineffective assistance claim is therefore inappropriate for resolution on direct appeal.<sup>9</sup>

### **DISPOSITION**

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.

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<sup>9</sup> Gomez additionally argues that if we conclude his trial counsel’s cross-examination of Militza and Naray “did actually open the door to Militza’s [prior inconsistent statements],” then “[he] received ineffective assistance of counsel.” The record does not reveal why trial counsel chose to cross-examine Militza and Naray in the manner that he did. Moreover, Gomez has not shown there is no conceivable satisfactory explanation for the decision. We therefore conclude this claim is more appropriately resolved by way of a petition for writ of habeas corpus.