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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

YAJAIRA DOMINGUEZ,

Defendant and Appellant.

2d Crim. No. B263139  
(Super. Ct. No. 2013030150)  
(Ventura County)

Yajaira Dominguez appeals a judgment following conviction of second degree murder with a finding that she personally discharged a firearm causing death. (Pen. Code, §§ 187, subd. (a), 189, 12022.53, subd. (d).)<sup>1</sup> We order correction of the clerk's minutes and abstract of judgment concerning victim restitution, but otherwise affirm.

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

### *FACTUAL AND PROCEDURAL HISTORY*

On September 27, 2013, Ashley Calanche died from a contact gunshot wound to the head. Dominguez inflicted the wound during an altercation with Calanche in a Santa Paula park. Dominguez and Calanche did not know each other; Dominguez was angry, however, regarding Calanche's "disrespect" of Dominguez's friend, Annie Qualls.

Several weeks earlier, Calanche and Lauren Lee had a dispute. Calanche and her boyfriend, Mark Lugo, appeared at Qualls's home to fight Lee. During the encounter, Lugo motioned toward his waistband as though he carried a firearm. No fighting occurred, however, and Calanche and Lugo left.

Three days later, Dominguez, identifying herself as "La Boxer," sent Calanche a Facebook message regarding the incident. In part, Dominguez stated that her waistband was "pretty crazy" and "strapp[ed] down." Dominguez threatened Calanche that a "war" would ensue unless Calanche took an "ass beating and walk[ed] away." Calanche replied that she was not intimidated by Dominguez and that Dominguez should "catch [her] in the streets not the computer lol."

In the afternoon of September 27, 2013, Dominguez and Qualls walked to nearby Mill Park to use drugs. As they entered the park, they saw Calanche and her sister, Jerickah Holmes, sitting at a table. Calanche and Holmes lived nearby and Calanche, a photography student, was then showing her camera to Holmes. Calanche asked, "What's up?" Dominguez responded, "Do I know you?" Calanche replied, "I'm Ashley." Dominguez or Qualls responded, "The one from Facebook."

Dominguez approached the table and argued with Calanche. Holmes described Dominguez as "really tough" and

"scary." Dominguez held a small gun in her hand as she and Calanche began to fight. Dominguez pulled Calanche's hair and stated that she had a gun. Holmes then heard a gunshot and saw Calanche fall to the ground. Qualls heard Dominguez say, "Oh my God. I'm sorry. . . . It was an accident."

Dominguez rushed to Holmes and pleaded, "Please don't say it was me. They'll take away my kids." Holmes replied that Dominguez should leave. Holmes then telephoned for police and medical assistance.

Dominguez and Qualls walked to the nearby apartment of Dominguez's mother. A neighbor later saw Dominguez and her mother leave in a black-colored pickup truck; Dominguez was lying on the floor of the backseat.

Santa Paula police officers later found Dominguez by locating her cell phone through global positioning software. She was in the home of a friend and initially refused to surrender to police. She later surrendered and was arrested. A laboratory test of her blood sample taken after arrest revealed the presence of morphine, methamphetamine, and methadone.

Police officers did not recover the firearm used in the shooting. At trial, Holmes identified a small firearm as similar to the one that Dominguez used.

On October 7, 2013, Dominguez, who was then incarcerated, spoke with her former husband by telephone. The conversation was recorded by the jail authorities and the prosecutor played the recording at trial. During the conversation, Dominguez inquired regarding "that fucking thing." Her former husband responded that it "went to hell" and "[t]he sea swallowed it." He also stated that according to newspaper accounts, Qualls "spilled the beans" regarding the shooting.

Dominguez replied: "Tell somebody to beat the fucking hell out of her."

#### *Prior Criminal Acts*

Prior to trial, the prosecutor sought evidentiary rulings regarding Dominguez's seven prior acts of violence. The trial court excluded evidence of four prior violent acts. It permitted evidence of the following three prior acts, however, as relevant to Dominguez's intent, lack of mistake or accident, or knowledge of firearm dangers:

#### *Assault of Michael Chavez*

Earlier in the day of Calanche's death, Qualls argued with her boyfriend, Michael Chavez, at the Qualls home. Dominguez was present and also argued with Chavez. Qualls and Chavez then continued the argument outside. Dominguez walked to her truck and fired a firearm at Chavez. Qualls heard a "firecracker" sound and saw Chavez "crouch down." Dominguez and Qualls then left in Dominguez's truck.

#### *Stabbing of Monica Waldron*

On September 17, 2012, Dominguez left voicemails for Waldron regarding the return of a memory card to Waldron's neighbor, Tony Palm. Approximately one hour later, Dominguez left another voicemail stating, "I'll see you in a bit, bitch." A vehicle soon stopped beside Waldron as she was walking. Dominguez and Palm left the vehicle and Dominguez cut and stabbed Waldron's face and hands with a knife. After a time, Palm stated, "That's enough," and he and Dominguez left. Dominguez was charged with attempted murder for this incident.

#### *Threats to Crystal Navarro*

Dominguez and Navarro ended their friendship in June 2012. In voicemails and text messages, Dominguez

threatened to harm Navarro. Dominguez visited Navarro's home, revealed a firearm in her waistband, and yelled, "[T]hat's what rat bitches get." Dominguez also stated that her friends would "take care" of Navarro.

*Dominguez's testimony*

At trial, Dominguez testified that as she and Qualls walked into Mill Park, Calanche saw them and threatened Qualls. Dominguez stated that she then removed her two-shot, double-barrel Derringer from her bra and pulled back the hammer. Calanche grabbed the hand that held the firearm. The two women also pulled each other's hair. Dominguez stated that Calanche attempted to hit her with the gun and "at the same time, [Calanche] was trying to pull it out of her hand." The "gun went off" in direct contact with Calanche's head and she fell to the ground. Dominguez denied placing the gun against Calanche's head.

Dominguez testified that she did not intend to shoot Calanche, only to frighten her. Following the shooting, Dominguez went to the home of a friend and used heroin because she wanted to die.

Dominguez denied brandishing a firearm or threatening Navarro, but admitted that she hit Waldron with her fist and cut her with a knife. Dominguez also admitted firing a firearm near Chavez only to frighten him.

Dominguez also explained her email address – "Laboxer187@hotmail.com" – as a reference to her being "number one" and her former husband's birthdate.

*Conviction and Sentencing*

The jury convicted Dominguez of second degree murder and found that she personally discharged a firearm

causing death. (§§ 187, subd. (a), 189, 12022.53, subd. (d).) The trial court sentenced her to a prison term of 40 years to life; imposed a \$10,000 restitution fine, a \$10,000 parole revocation restitution fine (suspended), a \$40 court security assessment, and a \$30 criminal conviction assessment; and awarded her 537 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.) In part, the court also orally ordered Dominguez to pay \$900 as victim restitution to Calanche's stepsister, Megan Ortega, for expenses concerning Calanche's baby.

Dominguez appeals and contends that: 1) the trial court erred by admitting evidence of her prior violent crimes; 2) the trial court erred by instructing that Dominguez's prior uncharged crimes could support the reasonable inference of lack of accident (CALCRIM No. 375); 3) the trial court erred by admitting evidence of her email address, laboxer187@hotmail.com; 4) the combination of errors rendered her trial fundamentally unfair and denied her due process of law; and 5) the trial court abused its discretion by awarding \$900,000 restitution to Ortega as set forth in the clerk's minute order and abstract of judgment.

## *DISCUSSION*

### *I.*

Dominguez contends that the trial court erred by permitting evidence of her prior crimes against Chavez, Waldron, and Navarro because the evidence was inadmissible propensity evidence that was unduly prejudicial. (Evid. Code, §§ 1101, subd. (a), 352.)<sup>2</sup> She argues that the evidence lacked substantive

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<sup>2</sup> All statutory references in parts I., II., and III., are to the Evidence Code.

probative value because the prior acts were not similar to the charged act, and that any doubts regarding admissibility must be resolved in her favor. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) Dominguez asserts that the evidence was unduly prejudicial in part because the jury may have viewed her testimony with distrust.

Section 1101, subdivision (a) prohibits the admission of character evidence if offered to prove conduct in conformity with that character trait, sometimes described as propensity to act in a certain way. (*People v. Bryant, Smith and Wheeler (Bryant)* (2014) 60 Cal.4th 335, 405-406.) Thus, section 1101, subdivision (a) expressly prohibits use of an uncharged offense if the only theory of relevance is that the defendant has a propensity or disposition to commit the crime charged and that this propensity is circumstantial evidence that he behaved accordingly and committed the charged offense. (*Bryant*, at p. 406.) Section 1101, subdivision (b) provides for the admission of uncharged acts when relevant to prove some other disputed act. (*Bryant*, at p. 406.) The trial court's ruling regarding sections 1101 and 352 is reviewed for an abuse of discretion. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

The trial court properly admitted the prior violent acts evidence to establish Dominguez's intent, knowledge, and lack of mistake or accident.

The prosecutor was required to establish that Dominguez acted with either express malice or implied malice in shooting Calanche. Dominguez's not guilty plea placed her intent in issue and evidence of her prior crimes was relevant to her intent to kill or her intent to commit an act dangerous to human life. (*Bryant, supra*, 60 Cal.4th 335, 407 ["Defendants pleaded

not guilty, placing in issue all the elements of murder"].) Indeed, Dominguez testified that she did not intend to fire the gun and used it only to frighten Calanche. She also denied placing the weapon against Calanche's head.

There is sufficient similarity between Dominguez's prior acts of violence and the shooting of Calanche to support the inference that she acted with the same intent in each instance. Dominguez used concealed weapons to carry out threats of harm that she made in voicemails or social media. She also became involved in disputes that her victims had with Qualls or others, serving as an "enforcer" to right perceived injustices to her friends. (*People v. Cortes* (2011) 192 Cal.App.4th 873, 916 [evidence of three fights defendant engaged in during high school admissible in his prosecution for murder committed at house party].) "Here, the prior fights were sufficiently similar to the charged offense to permit an inference that defendant did not act accidentally, inadvertently, in good faith or in self-defense when he attacked the victim." (*Ibid.*)

The prior crimes evidence was also relevant to establish Dominguez's knowledge of and familiarity with her personal firearm, a Derringer-type weapon without a safety. Dominguez testified that she pulled back the hammer of the gun when she confronted Calanche.

The trial court properly admitted evidence of Dominguez's prior acts to establish intent by negating accident or mistake. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203-205.) "[W]hen a defendant admits committing an act but denies the necessary intent for the charged crime because of mistake or accident, other-crimes evidence is admissible to show absence of accident." (*Id.* at p. 204 [prior acts of child abuse admissible to



prove absence of accident pursuant to section 1101, subdivision (b)].) "Intent" and "absence of accident" are two ways of describing the same issue – that defendant performed the alleged acts intentionally rather than accidentally. (*Ibid.*) The recurrence of a similar result tends, increasingly with each instance, to negative accident or inadvertence or self-defense and tends to establish criminal intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

Moreover, the probative value of the prior crimes evidence was not substantially outweighed by the risk of undue prejudice. (§ 352; *People v. Rogers, supra*, 57 Cal.4th 296, 326.) The prior crimes evidence was relevant to Dominguez's intent and knowledge and the crimes were no more inflammatory than the charged crime. The trial court also instructed with CALCRIM No. 375 regarding the limited use of prior criminal acts.

In view of our discussion regarding intent and accident, it is not necessary to discuss Dominguez's prior crimes and the parameters of the "doctrine of chances," one of several reasons for the trial court's ruling regarding admissibility. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1377.)

## II.

Dominguez argues that the trial court erred by instructing that evidence of her prior crimes could support the reasonable inference that the shooting of Calanche was not accidental. She asserts the error is prejudicial and denied her due process of law because it lessened the prosecutor's burden of proof.

The trial court instructed with CALCRIM No. 375, stating in part: "If you decide that the defendant committed the

uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: . . . The defendant's alleged actions were the result of mistake or accident." CALCRIM No. 375 accurately states the relevant law; we have cited it with approval. (*People v. Davidson* (2013) 221 Cal.App.4th 966, 973.)

The trial court did not err by instructing that evidence of the prior crimes was relevant to the lack of accident. The evidence was neither propensity evidence nor evidence of bad character, but tended to establish that the shooting of Calanche was not an accident. (*People v. Whisenhunt, supra*, 44 Cal.4th 174, 203-205.)

### III.

Dominguez asserts that the trial court erred by admitting evidence of her email address, Laboxer187@hotmail.com, because it was improper character evidence, unduly prejudicial, and thus violated due process of law pursuant to the federal and California Constitutions. (§§ 1101, 352.) She points out that during summation, the prosecutor referred to the email address and its relevance to intent to kill.

The trial court properly admitted the evidence of Dominguez's email address because it was relevant to her state of mind and intent. (*People v. Leon* (2010) 181 Cal.App.4th 452, 461-462 [defendant's moniker "Chucky," a homicidal doll character, relevant to his state of mind or intent when he shot at vehicle].) "The Chucky doll evidence had a tendency in reason to prove that, when appellant shot at the [vehicle], he acted with the specific intent to kill and with both premeditation and deliberation. The evidence showed that appellant knew his

moniker was derived from the Chucky doll and that he took pride in the derivation." (*Id.* at p. 461.)

Here Dominguez previously had been charged with attempted murder and the trier of fact could reasonably infer that a person who identified herself with a "187" following her nickname had the intent to harm or kill others. As such, the evidence was not the inadmissible character evidence that section 1101, subdivision (a) precludes. (*People v. Leon, supra*, 181 Cal.App.4th 452, 461.) Moreover, the rationale of *Leon* does not apply only to crimes committed by criminal street gangs.

The trial court did not abuse its discretion in ruling that the email evidence was probative and not unduly prejudicial. (§ 352.) On review, the court's exercise of discretion will be affirmed unless the court acted in an arbitrary, capricious, or absurd manner. (*People v. Suff* (2014) 58 Cal.4th 1013, 1066.) "Pursuant to section 352, evidence can be excluded only if it is *unduly* prejudicial so as to outweigh its probative value." (*People v. Leon, supra*, 181 Cal.App.4th 452, 460.) The evidence of the email address was relevant to Dominguez's intent and was not unduly prejudicial. (*People v. Edwards* (2013) 57 Cal.4th 658, 713 [evidence is more prejudicial than probative if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome].)

#### IV.

Dominguez contends that a combination of errors rendered her trial fundamentally unfair, requiring reversal. As discussed, *ante*, there is no error that prejudiced Dominguez or denied her a fair trial. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [stating general rule].) In any event, Dominguez was entitled to a fair trial, but not a perfect one. (*United States v.*

*Hasting* (1983) 461 U.S. 499, 508-509 [the Constitution does not guarantee an error-free, perfect trial]; *People v. Anzalone* (2013) 56 Cal.4th 545, 556.)

V.

Dominguez contends that the trial court abused its discretion by awarding \$900,000 restitution to Ortega, Calanche's stepsister, because sufficient evidence does not support the award. Dominguez adds that the oral pronouncement of judgment ordered restitution payment of \$900, not \$900,000, as set forth in the clerk's minute order and abstract of judgment.

The probation officer recommended that Dominguez pay \$900,000 restitution to Ortega as restitution for the care of Calanche's baby. The baby's father also requested restitution for the baby's care, but he was then unsure of any restitution amount. The probation report included a statement from Ortega, stating that she drove the baby to doctors' appointments and purchased the baby's medicine.

The trial court's oral pronouncement of judgment controls the \$900 restitution award to Ortega. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [abstract of judgment may not add to or modify the oral pronouncement of judgment].) The court did not abuse its discretion by ordering \$900 restitution to Ortega for attending to the baby's medical expenses, including transportation and medications. (*People v. Giordano* (2007) 42 Cal.4th 644, 663 [court's restitution order reviewed pursuant to deferential abuse of discretion standard].) Dominguez did not challenge the \$900 award with contrary evidence. (*People v. Collins* (2003) 111 Cal.App.4th 726, 734.)

We express no opinion on the amount of any restitution to be awarded to the family member or members assuming care and custody of Calanche's baby.

The trial court shall correct the clerk's minute order and the abstract of judgment to reflect \$900 victim restitution to Ortega, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Kevin G. DeNoce, Judge

Superior Court County of Ventura

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