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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ANTHONY GUTIERREZ, Defendant and Appellant.	B233724 (Los Angeles County Super. Ct. No. KA086653)

APPEAL from a judgment of the Superior Court of Los Angeles County. David C. Brougham, Judge. Affirmed with directions.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Joseph Anthony Gutierrez appeals from a judgment entered after a jury convicted him of one count of second degree murder (Pen. Code, § 187, subd. (a))[1] and found true the allegation that he personally used and intentionally discharged a firearm that caused great bodily injury and death (§ 12022.53, subds. (b), (c), and (d)). The trial court sentenced appellant to a term of 40 years to life in prison, consisting of 15 years to life for the murder, plus 25 years to life for the firearm enhancement found true pursuant to section 12022.53, subdivision (d). The enhancements found true within the meaning of subdivisions (b) and (c) were stayed pursuant to section 654. The court awarded appellant 779 days of actual custody credit.

Appellant contends (1) the trial court erred in excluding evidence concerning the state of mind of the deceased, (2) the additional term of 25 years to life imposed under section 12022.53, subdivision (d) constituted double jeopardy, and (3) he is entitled to an additional day of custody credit. We modify the abstract of judgment to reflect an additional day of custody credit, but otherwise affirm the judgment.

FACTS

Prosecution Case

In April 2009, appellant and his girlfriend, Yasmeen Hassan, had been dating for approximately one year. They were living together in a house in Covina, with appellant's grandfather, Anthony Ciorlieri. Ciorlieri's friend Daniel Ruiz also lived in the house.

On the morning of April 20, 2009, Ruiz saw Hassan sitting on the couch wearing pajamas. She was smiling and playing with the dogs. Ciorlieri was mopping the floor and also saw Hassan playing with the dogs. Appellant was sleeping in his bedroom. Ruiz left the house to run some errands. He saw Hassan later that morning in the kitchen while he and Ciorlieri were watching television. She was wearing a black dress and had makeup on. She spoke with Ruiz and appeared to be "happy-go-lucky, like always." Hassan retrieved an empty trash bag from the kitchen and went to the bedroom she

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

shared with appellant. She went outside to throw away the trash bag which she had filled and then returned to the bedroom.

Ruiz and Ciorlieri were watching television when they heard a noise and looked toward the hallway. Appellant came out of the bedroom screaming and crying, and was on his knees in the hallway. He yelled "Grandpa, grandpa, she shot herself. I didn't do it, grandpa. She shot herself." Ciorlieri went into the bedroom for a few seconds and then came back out. He told Ruiz to call 9-1-1, and instructed appellant to stay in the house until the police arrived. There was a lot of noise and confusion and Ruiz could not hear clearly so he went to the backyard to call 9-1-1. Ciorlieri also went to the backyard because the 9-1-1 operator insisted on speaking with him. When Ruiz returned to the house, appellant was no longer there.

City of Covina police officers responded to the 9-1-1 call. They searched the residence and surrounding neighborhood for appellant but were unable to locate him. Detective Michael Robison found Hassan lying on her back in the bedroom. Her arms were across her body and her legs were "folded up underneath her." She had a gunshot wound to the head and her right eye was outside her orbital socket and attached only by veins. A pool of blood had formed by her head and it was "obvious" to Detective Robison that she was dead. There was no weapon in sight.

A black .357 revolver with a brown handle was found between the mattress and the box spring, approximately five feet from Hassan's body. The gun was loaded with five live rounds and one spent casing which had recently been fired. Hassan suffered a "through-and-through" gunshot wound and Detective Robison located the bullet above a dresser in the bedroom. A sunglasses case found near the dresser contained 11 more live rounds similar to those in the gun and an identification card bearing appellant's name and picture. A crumpled photograph of appellant and three females was found on the ground by the closet.

Los Angeles County Sheriff's Department senior criminalist Marco Iezza testified that the expended bullet recovered from above the dresser had been fired from the gun

found in appellant's bedroom. He testified that the gun had both a single and double action trigger pull and required significant pressure to fire in either mode. The gun had a built-in safety mechanism and was not the type that went off accidentally.

A press release broadcast on both radio and television on the day of the shooting advised the public that appellant was wanted for questioning in connection with Hassan's murder. The following day, appellant, accompanied by his attorney, turned himself in at the Covina Police Station.

Yolanda Alvarado dated appellant for approximately 11 months in 2006 and 2007. She was afraid of him and described him as possessive and jealous. He was "clingy" and she tried to break up with him about 10 times in the 11 months they were together. On at least six occasions she saw appellant with a gun similar to the one used to shoot Hassan. Appellant pulled out the gun during one argument when Alvarado told appellant she wanted to break up with him and pointed it to his own head. He told her "You know, if you break up with me, you know, this is what can happen." Appellant constantly called Alvarado's cell phone and when she did not answer left voicemail messages calling her "bitch" and "whore."

On March 24, 2007, appellant called Alvarado's phone approximately 80 times while she was at a party with friends. He asked her to contact him. Alvarado left the party and went to appellant's house. Appellant entered the passenger side of Alvarado's car. When she told him that she wanted to end their relationship he hit her in the face and tried to choke her. She got out of the car and ran towards appellant's house. Appellant caught and grabbed her as she was knocking on the door but released her when his aunt opened the door. Alvarado filed a report with the Pomona Police Department. Her injuries consisted of facial bruising, a bloody nose, and scratches on her arms and legs.

Defense Case

Los Angeles County Sheriff's Department senior criminalist Jill Licht tested the gun that caused Hassan's death for the presence of DNA. The gun contained a mixture of DNA from two contributors. The major contributor matched the profile for Hassan.

There was not enough DNA to detect a second entire profile but appellant could not be "conclusively included or excluded as a contributor."

Steven Dowell, a criminalist with the Los Angeles County Coroner's Office, testified that Hassan's hands tested positive for gunshot residue. In his opinion, Hassan "may have discharged a firearm or otherwise had her hands in an environment of gunshot residue." He testified that it was "not uncommon" to find gunshot residue on the victims of shootings especially when the weapon was fired at close range.

Deputy Medical Examiner Yulai Wang of the Los Angeles County Coroner's Office conducted Hassan's autopsy and determined that Hassan died from a single gunshot wound to the head. The gun was in direct contact with the skin when the bullet entered the right temple and exited the left side of the head moving front to back and slightly upwards. Dr. Wang acknowledged that in his experience it is more common than not for a contact wound to be self-inflicted.

Dr. Wang based his opinion that Hassan's death was a homicide rather than a suicide on a number of factors, and after he consulted with the Chief Medical Examiner and discussed the case with a third coroner. He spoke with the investigating officers regarding the circumstances of her death. He concluded that Hassan could not have hidden the gun used to cause her death in the mattress of the bed because her death was immediate. He learned the gun belonged to appellant who had a history of domestic violence, was present during Hassan's shooting, did not call the police, and left the location very quickly. He noted that Hassan was not depressed and did not have suicidal ideation. She had put on makeup and was preparing to go to work. Dr. Wang further opined that "women less likely use a weapon to commit suicide than other means" and "more commonly use []medication."

Hassan's MySpace profile described her mood as "feeling bomb" and contained no references to appellant. But the custodian of records for MySpace testified that e-mails in Hassan's account had been read on April 21, 22, and 30, of 2009, and that someone had logged into the account on August 29, 2009.

Vanessa Amaya knew appellant and Hassan and saw them together quite often. She testified that they had a "tender, loving type of relationship." Amaya and appellant were "very close friends" and she considered him "like family."

Anthony Ciorlieri testified that appellant and Hassan were "always happy" and "always having fun." He did see Hassan upset about a week prior to the shooting. At that time she told him that she was upset with her mother.

At approximately 2:15 p.m. on the day of the shooting Carmelina Ciorlieri, appellant's aunt, received a call that appellant was at her home. Ms. Ciorlieri's residence was approximately seven minutes from her father Anthony Ciorlieri's home.
Ms. Ciorlieri returned home and found her brother-in-law holding appellant who was crying and appeared to be very upset. She called an attorney who advised her to take appellant to a safe place until the following afternoon when the attorney could personally take appellant to the police station. Ms. Ciorlieri drove appellant to his mother in Bellflower.

Catherine Roxanne Gonzalez, appellant's mother, testified that she was cleaning her friend Melissa Marquez's house when her sister, Carmelina Ciorlieri, arrived with appellant. He was screaming and crying in the back seat of the car, and continued to do so when he was brought into the house. Marquez arrived at the house approximately one hour later. Marquez took appellant and Gonzalez to a motel down the street where they stayed until the next morning. Gonzalez testified that she saw no blood on appellant, and that he did not take a bath or wash his clothes while he was with her.

Rebuttal

Hassan worked as a sales agent for Sprint and was described by coworkers as enthusiastic, friendly, and outgoing, and "always positive about everything." Luis Carlos Rivera, Hassan's manager, testified that on Sunday, April 19, 2009, Hassan asked if she could come into work the following day even though she was not scheduled to work until Tuesday. Hassan was planning to get a cell phone when she received her paycheck at the end of April.

Melissa Marquez testified that she drove appellant and his mother to a Motel 6. He appeared to be acting normal and she did not remember seeing appellant crying or hysterical.

Covina Police Officer Michael Taron interviewed Ruiz at the scene of the shooting, shortly after it occurred. Ruiz told Officer Taron that immediately after the shooting, appellant stated, "I don't want to go to jail."

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Excluding the Victim's Statements About Her Mother

A. Contention

Appellant contends that the trial court denied his right to present a defense by not permitting Anthony Ciorlieri to testify regarding statements Hassan made to him approximately one or two weeks prior to her death. Appellant contends that the defense theory of the evidence was that Hassan shot herself and the problems between Hassan and her mother were critical evidence on the issue of her state of mind leading up to her death. He contends the statements were admissible under the state-of-mind exception to the hearsay rule (Evid. Code, § 1250) and were not more prejudicial than probative (Evid. Code, § 352).

B. Standard of Review

The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) This standard is particularly appropriate when, as here, the trial court's determination of admissibility involved questions of relevance and the state-of-mind exception to the hearsay rule. (*Ibid.*) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

C. Legal Principles

Evidence Code section 1200, subdivision (a) provides that '"Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Except as provided by law, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).)

Evidence Code section 1250, subdivision (a) provides that: ". . . evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

Evidence Code section 352 provides, "The court in its discretion may exclude evidence 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." A trial court enjoys broad discretion under Evidence Code section 352, in assessing whether probative value outweighs undue prejudice, confusion, or consumption of time. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.)

D. Proceedings Below

The trial court conducted an Evidence Code section 402 hearing during which the defense called Anthony Ciorlieri to testify. He testified that he had a conversation with Hassan approximately one or two weeks before the shooting. According to Ciorlieri, Hassan was crying and was upset with her mother because her mother always wanted to be the center of attention with Hassan's friends and went after Hassan's boyfriends. Hassan also told Ciorlieri that her mother asked Hassan's friends to obtain methamphetamines for her.

The People called Hassan's grandmother, Julia Salcido. Salcido testified that approximately one month before the shooting Hassan said she wanted to live with Salcido. Salcido agreed on condition that Hassan end her relationship with appellant, return to school to get her high school diploma, and get a job to pay for her cell phone. Hassan agreed, and when she got a job Salcido took her shopping for clothes.

The People also called Cheyanne Andrade who described herself as "a very close friend" of Hassan's who had known her for two years. Andrade testified that Hassan had problems with her mother. She did not like her mother's drug use or her mother's boyfriend. Andrade also testified that Hassan was afraid of appellant and that he had hit her. Appellant threatened Hassan with a gun when she tried to leave him. Andrade last saw Hassan alive on the Wednesday before she died and at that time Hassan was her "happy, normal self."

The trial court denied the defense motion to present Ciorlieri's testimony of the statements made by Hassan concerning her relationship with her mother. The court found that the Evidence Code section 1250 hearsay exception did not apply because Hassan's relationship with her mother was "really not an issue" in the case, and her state of mind in that regard was not relevant. The court also excluded the proffered statements under an Evidence Code section 352 analysis because any potential relevance was outweighed by the potential for prejudice.[2]

E. Analysis

As earlier stated, Evidence Code section 1250 provides that an out-of-court statement to prove the declarant's state of mind, is not made inadmissible by the hearsay rule when the declarant's state of mind "is itself an issue in the action" or if the evidence "is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a)(1)-(2).) The threshold for admissibility of such evidence is its relevance. There

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[2] The trial court also ruled that the statements made by Hassan to Salcido and Andrade were inadmissible under Evidence Code sections 1250, and 352. Only the statements made to Ciorlieri are at issue in this appeal.

was no dispute Hassan and her mother had a poor relationship. But there was no evidence that Hassan's feelings about her mother was a possible cause of a possible suicide. There was no evidence to suggest that Hassan was in fact suicidal. Aside from Ciorlieri's testimony that on the day of the incident appellant claimed that Hassan shot herself and the Coroner's criminalist's testimony that there was gunshot residue on Hassan's hands, there was no evidence that Hassan committed suicide. Furthermore, there was absolutely no evidence that Hassan ever considered suicide in connection with her mother.

Appellant relies on a recent California Supreme Court decision, *People v. Riccardi* (2012) 54 Cal.4th 758 (*Riccardi*), to support his argument for the admission of Hassan's statements to Ciorlieri about her mother. In *Riccardi,* the defendant was convicted of killing Connie Navarro, his ex-girlfriend, and her best friend. (*Id.* at p. 765.) During the trial of the double homicide the prosecution sought to admit evidence of Connie's fear of defendant and evidence of his stalking her. Connie told another friend that "she wanted to end her relationship with defendant, and that defendant was no longer welcome in her condominium" (*id.* at p. 813) and that she had changed her locks and installed an alarm system because she was frightened that defendant would hurt her. (*Ibid.*) Connie also related another incident to her of defendant breaking into her condominium and kidnapping her. (*Ibid.*) The defense sought to exclude this evidence asserting that it was inadmissible hearsay, irrelevant, and prejudicial under Evidence Code section 352. (*Riccardi, supra,* at p. 811.) The trial court ruled that the specific acts identified by the prosecution were admissible to show Connie's fearful state of mind and her actions in conformity with that fear. (*Id*. at p. 812.)

The Supreme Court discussed the threshold requirement of relevance in the context of evidence of a murder victim's state of mind offered under Evidence Code section 1250. The specific question the Court addressed was whether a decedent's out-of-court statements expressing fear of a defendant are relevant under Evidence Code section 1250 to prove the defendant's motive in the crimes against the victim. (*Riccardi,*

supra, 54 Cal.4th at pp. 816–817.) The Court found ample foundational evidence independent of Connie's statements that the defendant was aware that Connie "was fearful of him, no longer desired a relationship with him, and took actions in conformity with her fear. In addition to the eyewitness testimony describing defendant's numerous acts of stalking Connie, all of which would unquestionably cause her to become fearful, defendant admitted he was despondent over the end of the relationship, acknowledged he had disabled her newly installed home alarm, claimed he had stolen a letter describing Connie's fears, and admitted to Connie that, despite her precautions, he could hurt her if he wanted to. Defendant also complained to Young that Connie seemed 'real brave' over the telephone and she appeared willing to 'get mean.' He admitted to Young that he 'couldn't stand it' and that her behavior 'just enrages' him." (*Id.* at p. 819.) The Court held that evidence of a decedent's state of mind can be relevant to a defendant's motive, but only if there is independent, admissible evidence that the defendant was aware of the decedent's state of mind before the crime and may have been motivated by it. (*Id*. at p. 820.)

Appellant argues that if Connie's state of mind was admissible because it had some relevant effect on Riccardi's behavior where Riccardi's motive was at issue, then Hassan's state of mind should be admissible if it has some effect on her own behavior where the defense is that she killed herself. Appellant's contention fails because unlike *Riccardi*, where the court found "ample foundational evidence" that motivated the defendant to act as he did, and thereby support admission of the statements, there is no evidence that Hassan was motivated to commit suicide. The evidence pointed to a contrary conclusion. Hassan had recently started a new job and made plans to get her own cell phone. Rivera testified that Hassan was happy the day before the shooting. Ruiz testified that she was "happy-go-lucky, like always" on the morning she died. Even appellant's grandfather testified that on the day she died she was laughing and giggling while playing with the dogs and he "didn't see nothing that was indicating something was

wrong." Ciorlieri further testified that he "didn't see why [Hassan] had any reason" to take her life.

The statements Hassan made to Ciorlieri concerning her mother's drug use and conduct indicated that Hassan was upset with her mother, but there was no evidence that her mother's conduct had a relevant effect on Hassan's behavior. We are satisfied that the trial court did not abuse its discretion in ruling that Evidence Code section 1250 was inapplicable and excluding the statements.

Appellant also argues that the trial court erred in concluding under section 352 that the statements were inadmissible. "Under . . . section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigue*s (1994) 8 Cal.4th 1060, 1124.) In light of the preceding discussion finding the statements were not relevant, and applying the deferential standard of review applicable to a trial court's evidentiary rulings under section 352, we find no abuse of discretion.

II. The Additional Term of 25 Years to Life Does Not Violate Double Jeopardy by Relying on the Same Fact Pertaining to the Murder Conviction and the Attendant Firearm Enhancement

Appellant contends that the imposition of a 25-years-to-life sentence enhancement imposed pursuant to section 12022.53, subdivision (d), in addition to his sentence for murder, violates principles of double jeopardy. As defendant acknowledges, the California Supreme Court rejected this argument in *People v. Izaguirre* (2007) 42 Cal.4th 126, 133–134. We are bound by the Supreme Court's holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[3] We find no error.

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[3] Appellant acknowledges that this court is bound to follow the Supreme Court's decision, and that he has raised the issue in this court to preserve it for later review.

III. Appellant Should be Awarded One Additional Day of Actual Custody Credit

Appellant contends, and the People concede, that he is entitled to one additional day of actual custody credit.

Pursuant to section 2900.5, subdivision (a), a defendant convicted of a felony is entitled to credit against a state prison term for actual time spent in custody before commencement of the prison sentence, including the day of sentencing. (§ 2900.5, subd. (a); *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Generally, an appellant may not appeal an error in the calculation of presentence custody credit unless the claim is first presented in the trial court, which did not occur here. (§ 1237.1.) However, the Court of Appeal may address a presentence custody credit issue if other claims are also raised on appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100–1101; *People v. Acosta* (1996) 48 Cal.App.4th 411, 420–421.)

As a general rule, the time credited includes the date of arrest, the date of sentencing, and every day in between. (*People v. Smith*, *supra*, 211 Cal.App.3d at p. 526 ["Since section 2900.5 speaks in terms of 'days' instead of 'hours,' it is presumed the Legislature intended to treat any partial day as a whole day"].) The probation report states that appellant was arrested on April 21, 2009 and he was sentenced on June 9, 2011, a span of 780 days. Because the trial court awarded appellant 779 days of custody credit, the abstract of judgment must be amended to reflect 780 days of actual custody credit.

DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect 780 days of actual custody credit and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ