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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. ABRAHAM LOPEZ, Defendant and Appellant.	B263519 (Los Angeles County Super. Ct. No. VA121880)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul Sahagun, Judge. Affirmed as modified.

Neil Rosenbaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Beccera and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Margaret E. Maxwell, Deputy Attorneys General, William Shin, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Abraham Lopez of first degree murder, multiple counts of aggravated assault, one count of false imprisonment and two counts of possession of a weapon on a secondary school campus. On appeal Lopez contends the court made several evidentiary and instructional errors, including admitting into evidence the murder victim's extrajudicial statements, excluding a defense expert's proffered testimony on adolescent brain development, providing inapplicable jury instructions and failing to instruct the jury on simple assault, a lesser-included offense of assault with a deadly weapon on a peace officer. Lopez also contends the People presented insufficient evidence in their case-in-chief that the airsoft gun he brought to his high school was capable of expelling a metallic projectile and the court erred in denying his motion for acquittal on that count. We reverse Lopez's conviction for bringing and/or possessing the airsoft gun on a school campus and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

An information filed May 10, 2012 and amended by interlineation on February 23, 2015 charged Lopez with murder (Pen. Code, § 187, subd. (a)) (count 1);[1] three counts of assault with a deadly weapon, a knife (§ 245, subd. (a)(1)) (counts 2, 3 and 4); three counts of assault with a deadly weapon on a peace officer (§ 245, subd. (c)) (counts 5, 6 and 7); two counts of bringing or possessing a weapon on a kindergarten, elementary or secondary school campus (§ 626.10, subd. (a)(1)) (counts 8 and 9);

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[1] Statutory references are to this code unless otherwise stated.

false imprisonment by violence (§ 236) (count 10); making a criminal threat (§ 422) (count 11); and two counts of resisting an executive officer in the performance of his or her duties (§ 69, subd. (a)) (counts 12 and 13). It was specially alleged that Lopez had committed the murder with premeditation and deliberation and had personally used a deadly weapon, a knife (§ 12022, subd. (b)(1)). It was also specially alleged Lopez had inflicted great bodily injury in committing the aggravated assault offenses charged in counts 2 and 3 (§ 12022.7, subd. (a)). Lopez pleaded not guilty and denied the special allegations.

2. *The Evidence at Trial*

a. *The People's case*

During the weekend of September 23-24, 2011 Cindi Santana, accompanied by her mother, reported Santana's former boyfriend Lopez to the police for threatening Santana and members of her family. That report led the police to interview and then arrest Lopez. He was released from custody on September 27, 2011. On Friday, September 30, 2011 Lopez, then 18 years old, arrived at South East High School in South Gate to confront Santana. Both Lopez and Santana were students at the school.

Christine Ordonez, a dean at the school, saw Santana and Lopez at the locker area. Santana looked afraid and called out to Ordonez for help to get away from Lopez. When Ordonez walked over, Lopez grabbed Santana around her neck and chest, refusing to let her go. Ordonez demanded Lopez release Santana and attempted to pry Santana from his grip. Jorge S. and Alejandra M., two other students, heard yelling and saw Ordonez struggling to pull Santana away from Lopez. Jorge ran to help Santana and Ordonez. He tackled Lopez from behind and placed

him in a headlock so he would release Santana. (Jorge had described his maneuver as a chokehold to police officers during interviews but insisted at trial he meant a headlock.) In response Lopez opened his pocket knife, which had a three and one-half-inch blade, and stabbed Jorge in the shoulder three times. Jorge screamed and let go of Lopez. Once released, Lopez crawled several feet to reach Santana, who had fallen and was lying face down on the ground. He straddled her body, raised the knife in the air and stabbed her at least twice in her back. Santana screamed.

Los Angeles Unified School District Police Officer Luis Barraza responded to Ordonez's emergency calls for help. He saw Lopez on top of Santana making downward stabbing motions with his arm. Barraza, who was in his police uniform, identified himself as a police officer and ordered Lopez to drop the knife. Lopez failed to comply. School District Police Officers Ernesto Reyes and Sergio Salas ran to help Barraza. They, too, were in uniform and identified themselves as police officers. Lopez swung his knife back and forth at the three officers as they tried to restrain him. Ultimately, the officers managed to handcuff Lopez. They found an airsoft pistol in the open backpack Lopez carried with him.

Santana was transported to the hospital in critical condition. She suffered medical complications and died. Both Jorge, who suffered stab wounds to his shoulder, and Ordonez, who suffered a large cut on her left wrist, required stitches.

While waiting in the back of the police car following his arrest, Lopez attempted to tear up a letter he had written. It read: "Cindi You['re] done. You put my mom in the hospital. Bomb planted in car. House. Red car. White Camaro. Sis

house. You and I rest the same day. I tried giving you clues with the song [“]Asi Es Mi Persona[,”] you didn’t get it you denied what we had you fucked up there’s no turning back I can’t trust that so we are done I tried I told you I was going to test you I did on Sat[urday]. You failed and the guy friends Ha Ha you fucked up stupid jokes on you as soon as I went in you were done. . . .” The People introduced evidence Santana’s older sister drove a red Mustang and her brother-in-law a white Camaro, as well as an English translation of the Spanish song “*Asi Es Mi Persona*.”[2]

The People also introduced into evidence a 19-page transcript of threatening text messages Lopez had sent to Santana prior to Santana’s death. Among them, on August 14, 2011 Lopez wrote “You fucked up. Flirt. Dance. Talk to any motherfucking guy in that way, you find your fucking self six feet under. Okay, being fucking smart and stupid.” Another, sent the same day, said in part, “Keep being stupid. Watch, Okay, I’m going to fucking track wherever you are and go get your fucking ass right now. Okay. You fucked up. Okay.” Another warned her to call him as soon as she woke up, otherwise he would

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[2] The song lyrics were translated for the jury: “I am a real good friend [¶] but bad too [¶] Here is my hand for whatever you need [¶] I like enjoying life to the fullest [¶] Helping the people that need it most [¶] Getting along with everybody and no worries [¶] A real stand-up guy, that’s who I am [¶] But if I’m betrayed [¶] My tone changes [¶] and I’m done with being humble [¶] I will chase them [¶] And those dogs [¶] With a semi-automatic pistol and AK-47 [¶] Until I finish them off, dig them up [¶] To kill them again [¶] That’s who I am [¶] When I’m betrayed [¶] And even if I’m bad [¶] And even if I’m good [¶] My temper gets to me [¶] When someone goes too far [¶] I know what I’m talking about [¶] And I turn evil.”

"knock some . . . sense" into her. In several text messages Lopez warned Santana, if she kept ignoring his demands to respond to his messages promptly, he would hurt her or someone else.

In the week leading up to Santana's death, Lopez's text messages became more menacing. On September 24, 2011 he sent Santana a text message that she was going to know what "real pain is ok I fukking tired of the bs ok u allowed u mom to push me back to this level u failed." On September 25, 2011 Santana and her mother went to the police to report Lopez's threatening behavior. The same day Lopez threatened to hurt Santana's brother-in-law for talking to the police about him, telling her he would put "that mutha fucker to sleep" if he ever interfered. Later, Lopez wrote to Santana, "Stupid stupid move on ur part u fucked it up already[;] the plan is made[.] I ga[v]e ur fukking chance u fucked it up now the fun[] an[d] games begin ok."

In addition, the People introduced several out-of-court statements Santana had made relating to Lopez's threats and her fear of him. Over Lopez's objections on relevance, hearsay and Evidence Code section 352 grounds, the court permitted Santana's out-of-court statements to be considered for the limited purpose of explaining Santana's state of mind or her conduct and not for the truth of the matters asserted. The court also permitted the prosecutor to introduce Santana's September 25, 2011 application for a restraining order against Lopez for the same limited purpose.

b. *The defense case*

Lopez testified in his defense. He and Santana began dating in 2008. In 2010 the relationship changed; Santana's family, particularly her mother, did not want Santana to see him

anymore. Lopez acknowledged sending Santana multiple threatening text messages but said he was just "being stupid" and did not intend to hurt her or her family. He loved Santana. He also felt betrayed that Santana had reported him to the police. His arrest had upset his mother and caused her to go to the hospital.

On the day of Santana's death Lopez arrived at school intending to talk with Santana and clarify whether she really wanted to end their relationship. He routinely carried his knife with him in his shorts. He also brought an airsoft gun with him to scare Santana. While he and Santana were arguing, she called to Ordonez for help. Ordonez intervened in their conversation, and he and Ordonez shouted at each other. He put his arm on Santana's shoulder, and Ordonez attempted to push him away from Santana. During this altercation with Ordonez, he was suddenly tackled from behind by Jorge, who placed him in a chokehold. Lopez could not breathe and felt as though he would pass out. He pulled out his pocket knife for his own safety, opened it and reached behind him to get Jorge's attention. Other individuals piled on top of him. He did not know what was happening, who these people were or what to do. He did not realize any of them were police officers. He denied intending to stab Santana at all. If anything, he insisted, he must have fallen on top of her in the melee and stabbed her accidentally.

Lopez acknowledged he had authored the handwritten note addressed to Santana, but said he never intended to give it to her. He wrote it to help him process his feelings. He tried to destroy it after he was arrested because he knew the police would misinterpret it.

c. *The prosecution and defense theories*

The People's theory of the case was that Lopez was a controlling boyfriend who could not accept Santana's decision to end their relationship. He also felt betrayed by Santana's decision to report him to the police. He went to school intending to threaten and ultimately kill Santana if she did not agree to date him again and assaulted several other individuals during the struggle that ensued.

The defense theory was that Lopez was an 18-year-old young man who had behaved impulsively and foolishly but not deliberatively. He wanted to scare Santana into dating him again but did not intend to carry out his threats. He did not stab Santana on purpose; it was an accident. He stabbed Jorge in self-defense. To reinforce this theory, the defense introduced several of Santana's text messages from August and September 2011, arguing the messages revealed the two had a caring relationship.

3. *Jury Instructions, Verdict and Sentence*

The court instructed the jury on first and second degree murder, assault with a deadly weapon or with force likely to produce great bodily injury, assault on a peace officer with a deadly weapon or with force likely to produce great bodily injury, false imprisonment, possession of a weapon on school grounds, self-defense or defense of another (with respect to count 3—aggravated assault on Jorge), mutual combat self-defense, contrived self-defense and accident. The court also instructed that "[o]ral statements by [Santana] are admitted for the limited purpose of her state of mind or to explain her conduct but not for the truth of the matter asserted. You may consider that evidence only for that purpose and for no other."

The jury found Lopez not guilty of aggravated assault on Alejandra and making a criminal threat to Alejandra (counts 4 and 11).[3] It convicted him on all other charges and found true each of the special allegations. Lopez was sentenced to an aggregate indeterminate state prison term of 40 years four months to life.[4]

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[3] Alejandra testified that, after Lopez stabbed Santana, he told Alejandra "the same thing" would happen to her if she tried to help Santana.

[4] The court imposed an indeterminate term of 25 years to life for first degree murder, plus one year for the weapon enhancement (count 1), and a principal determinate term of four years for the assault with a deadly weapon on Ordonez (count 2), plus three years for the related great bodily injury enhancement. The court imposed consecutive subordinate terms of one year (one-third the middle term) plus one year for the great bodily injury enhancement for the aggravated assault on Jorge (count 3); three 16-month terms for aggravated assault on a peace officer (counts 5, 6 and 7); eight months for unlawfully bringing or possessing a weapon on a school campus (count 9) and eight months for false imprisonment by violence (count 10). The court also imposed a two-year term for bringing a knife on school grounds (count 8) to run concurrently and stayed pursuant to section 654 sentence on the two counts of resisting an executive officer (counts 12 and 13).

DISCUSSION

1. *The Trial Court Did Not Err in Admitting Santana's Extrajudicial Statements for Limited Nonhearsay Purposes*

a. *Santana's out-of-court statements*

Five days before her death, Santana reported Lopez to authorities, telling Los Angeles Police Officer Edward Bolar that Lopez had threatened to kill her family and that she was afraid of him. The same day, after Bolar spoke to Lopez, Santana acknowledged having sent Lopez playful and loving text messages after he had threatened her, but explained he had demanded it. When she refused his other demands, stopped talking to him or attempted to end their relationship, he threatened to hurt her or kill her family. Santana also told Bolar that Lopez had on numerous occasions threatened to disseminate intimate photographs of her dressed in a bra and underwear if she did not comply with his demands.

In a September 29, 2011 application for a restraining order, Santana detailed three occasions between August and September 2011 in which Lopez had threatened her. She also stated in the application that she was afraid of him.

On September 30, 2011, while in the hospital following the stabbing, Santana told School District Police Officer Ray Jordan that Lopez had ordered her to go with him to the locker area and told her he would kill her if she refused. [5]

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[5] Santana's mother and sister also testified Santana was afraid of Lopez because he had threatened her. Although Lopez challenges this testimony, neither woman was asked the basis for her knowledge; and the record does not reveal whether either had witnessed direct interactions between Lopez and Santana or had

Over defense counsel's hearsay, relevance and Evidence Code section 352 objections, the trial court admitted each of these out-of-court statements for the limited purpose of showing Santana's state of mind and conduct and not for the truth of the matters asserted.

b. *Governing law and standard of review*

Hearsay—"evidence of a statement that was made other than by a witness while testifying at the hearing" and "offered to prove the truth of the matter stated" (Evid. Code, § 1200, subd. (a))—is generally inadmissible unless it satisfies a statutory exception to the hearsay rule. (Evid. Code, § 1200, subd. (b).) When multiple hearsay is offered, an exception for each level of hearsay must be found for the evidence to be admissible. (*People v. Sanchez* (2016) 63 Cal.4th 665, 675 (*Sanchez*); accord, *People v. Riccardi* (2012) 54 Cal.4th 758, 831 (*Riccardi*), disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; see Evid. Code, § 1201 ["[a] statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule"].)[6]

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learned of the threats from Santana. Nevertheless, Lopez's hearsay objection was sustained, and the jury instructed to consider that evidence only for Santana's state of mind and not for the truth that Lopez had threatened Santana.

[6] Santana's extrajudicial statements contained at times only a single level of hearsay—direct statements made to witnesses who testified at trial; two levels of hearsay—Santana's statement and out-of-court statements of Lopez; and on at least one

An out-of-court statement may be hearsay or nonhearsay depending on the purpose for which it is offered. As the Supreme Court has explained, a decedent's "direct declarations of her state of mind—e.g. 'I am afraid of [defendant]'" are hearsay, but admissible under the state-of-mind exception to the hearsay rule contained in Evidence Code section 1250[7] to prove her fear, provided her state of mind is in dispute. (*Riccardi, supra,* 54 Cal.4th p. 823.) On the other hand, the decedent's "indirect declarations of her state of mind . . . e.g.—'[Defendant] kidnapped me at gunpoint' [] . . . [are] not hearsay to the extent they [a]re admitted to prove circumstantially [the victim's] state of mind or conduct, and not to prove the truth of matters asserted regarding defendant's conduct." (*Riccardi*, at p. 823; accord, *People v. Green* (1980) 27 Cal.3d 1, 23, & fn. 9 [defendant's threat to decedent

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occasion, a third level of hearsay—Santana's written application for a restraining order. Lopez's appeal focuses solely on the relevancy and admissibility of Santana's statements and not other levels of hearsay. Accordingly, we limit our discussion to Santana's statements only.

[7] Evidence Code section 1250 provides, "Subject to [Evidence Code] section 1252 [trustworthiness], 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. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

that he would kill her if she left him was not hearsay; it was not offered for the truth of the matter asserted, to prove that he actually uttered the threat, but as "circumstantial evidence of the fact that [she] was in fear of him on the morning of the crime"].)

Whether out-of-court statements are offered as hearsay or for a more limited nonhearsay purpose, they, like all evidence, must be relevant. (Evid. Code, § 210 [only relevant evidence is admissible]; see *People v. Jablonski* (2006) 37 Cal.4th 774, 820 ["'[A] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.'"].) We review the trial court's rulings on the admissibility of evidence for abuse of discretion. (*People v. Lee* (2011) 51 Cal.4th 620, 643; *Jablonski,* at p. 821.)

c. *Santana's extrajudicial statements concerning Lopez's threats were relevant and admissible for the nonhearsay purpose of providing circumstantial evidence of Santana's state of mind*

Lopez argues generally that Santana's state of mind was not relevant to whether he intended to kill Santana or whether her death was an accident. Consequently, he argues, whether admitted as direct evidence of her state of mind under Evidence Code section 1250 (hearsay subject to the state-of-mind exception to the hearsay rule) or as circumstantial evidence of her state of mind (nonhearsay), all of Santana's statements concerning Lopez's threats were irrelevant or, at the very least, should have been excluded under Evidence Code section 352 because any marginal relevance was substantially outweighed by their prejudicial effect.

In *Riccardi, supra,* 54 Cal.4th 758, a case with markedly similar facts, the Supreme Court explained circumstances in which evidence of a victim's state of mind may be relevant and admissible. The defendant in *Riccardi* killed his girlfriend, Connie, after she had ended their relationship. Witnesses testified Connie had told them she was "living in fear" of the defendant. After Connie made it clear to the defendant she was afraid and begged him to stop, the defendant's stalking behavior and threats escalated. Connie told people she had her locks changed and engaged in other conduct to protect herself. Over defense objections citing hearsay, relevance and Evidence Code section 352, the trial court admitted Connie's out-of-court statements that she was afraid as direct evidence of Connie's state of mind under Evidence Code section 1250, the state-of-mind exception to the hearsay rule; it also admitted Connie's statements that she had had the locks changed as circumstantial evidence of her state of mind and not for the truth that she had, in fact, changed the locks.

Appealing his conviction, the defendant argued all of Connie's statements should have been excluded because her state of mind was not at issue. Citing the same cases Lopez cites in his appellate brief, the Supreme Court began its analysis by recognizing that a victim's fear of a defendant, standing alone, has little, if any, tendency to show anything about the defendant's state of mind (did he or she premeditate the murder) or motive to kill. (*Riccardi*, *supra,* 54 Cal.4th at p. 816, citing *People v. Jablonski, supra,* 37 Cal.4th at pp. 819-820; *People v. Armendariz* (1984) 37 Cal.3d 573, 585-586.) However, it continued, there are times when a defendant is aware of, and reacts to, the victim/decedent's fearful state of mind. In those

limited circumstances, the Court explained, evidence of the decedent's fearful state of mind can be relevant to the defendant's own motive or mental state. (*Riccardi*, at p. 820.) Because of the potentially inflammatory nature of such evidence, the Court held there must be independent foundational evidence that the defendant "was aware of the decedent's state of mind before the crime and may have been motivated by it" for evidence of the victim's fear to be admissible for this purpose. (*Riccardi, supra,* 54 Cal.4th at p. 820.) Finding "ample foundational evidence" in the case before it that defendant "was well aware that Connie was fearful of him, no longer desired a relationship with him, and took actions in conformity with her fear" (*id.* at p. 819), and also that defendant had manipulated that fear as a means to stalk and premeditate her murder, the Court held "Connie's statements describing her fear of defendant and her actions in conformity with that fear" were relevant to defendant's motive and "explained how a once peaceful relationship deteriorated into a case of stalking leading to murder." (*Id.* at p. 820.) Accordingly, the Court held, "the trial court did not abuse its discretion by concluding that Connie's statements concerning her fear of defendant and her actions in conformity therewith, satisfied the threshold for relevance." (*Id.* at p. 821.)

Here, as in *Riccardi,* there was ample independent, foundational evidence that Lopez was aware of Santana's state of mind and reacted to it: Lopez knew Santana was afraid of him and used it to his advantage whenever she attempted to end their relationship. Lopez also knew Santana had reported him to the police, which led to his arrest. After that arrest Lopez's threatening behavior escalated. By his own admission, Lopez felt Santana had betrayed him. That feeling of lack of control over

Santana and betrayal, the prosecutor argued, motivated him to craft a plan to kill her. As in *Riccardi,* the trial court did not abuse its discretion in ruling that evidence concerning Santana's fearful state of mind was relevant to establish Lopez's motive for stabbing Santana.

Lopez attempts to distinguish *Riccardi* on the ground the trial court in that case had instructed the jury it could consider Connie's out-of-court statements for the purpose of proving the defendant's motive for the crimes. (*Riccardi, supra,* 54 Cal.4th at p. 815.) Here, in contrast, the trial court limited the jury's consideration of Santana's statements to Santana's state of mind and "not for another purpose." The difference in the limiting instructions in the two cases, if significant at all, worked to Lopez's advantage. In *Riccardi* the trial court explained why evidence of the victim's state of mind was relevant. Here, the trial court properly limited the jury's consideration of the evidence but left it to the jury to decide whether Santana's state of mind was relevant to the case. No additional instructions were required on that point.

Santana's statement to Officer Jordan that Lopez had threatened to kill her was also relevant to the false imprisonment charge because it showed Santana had not gone willingly with Lopez to the locker area. (Cf. *People v. Lancaster* (2007) 41 Cal.4th 50, 83 [defendant's threats to victim admissible to show murder victim's state of mind and conduct in conformity with threat—that victim did not go willingly with the defendant]; see generally *People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1360 ["any exercise of express or implied force which compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment"].)

d. *The court did not abuse its discretion in admitting Santana's extrajudicial statements over Lopez's Evidence Code section 352 objection*

Lopez alternatively contends that Santana's out-of-court statements were highly prejudicial and should have been excluded under Evidence Code section 352.[8] The trial court has broad discretion to admit or exclude evidence under Evidence Code section 352, and its ruling will not be disturbed absent evidence that it is arbitrary or capricious. (*Riccardi, supra,* 54 Cal.4th at p. 758; *People v. Scheid* (1997) 16 Cal.4th 1, 13.) We find no abuse of discretion here. Most of the evidence Lopez cites, including Santana's statements to Officer Bolar and Santana's statements in her application for a restraining order, were less inflammatory than the direct evidence presented of Lopez's own threatening text messages.

In any event, the evidence of premeditation was overwhelming even without Santana's statements. In several messages sent to Santana, Lopez threatened Santana and the lives of her family members. He arrived at school with a knife, an airsoft gun and a note telling Santana they would die "the same day." After Jorge released him, Lopez deliberately crawled toward Santana, straddled her body and stabbed her multiple times. In short, even if it were error to have admitted Santana's out-of-court statements, on this record it is it is not reasonably probable that Lopez would have received a more favorable verdict had any or all of those statements been excluded. (*People v.*

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[8] Evidence Code section 352 vests the trial court with discretion to exclude relevance evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice.

Seumanu (2015) 61 Cal.4th 1293, 1308 [erroneous admission of evidence evaluated under state standard of harmless error articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

e. *The confrontation clause*

Lopez contends the introduction of Santana's statements violated his Sixth and Fourteenth Amendment right to confrontation as articulated in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1534, 158 L.Ed.2d 177] (*Crawford*). In *Crawford* the Supreme Court held testimonial hearsay statements are admissible without violating the confrontation clause only if (1) the declarant testifies at trial or (2) the defendant had a prior opportunity to cross-examine the declarant and the declarant is unavailable. (*Crawford*, at pp. 53-54; accord, *People v. Sanchez, supra,* 63 Cal.4th at p. 680.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, at p. 689.)[9]

Santana's statements, other than her direct statements she was afraid, were admitted for a nonhearsay purpose—as indirect evidence of her state of mind. Accordingly, none of that evidence was subject to the constitutional limitations established in *Crawford*. (See *Sanchez, supra,* 63 Cal.4th at p. 674 [confrontation clause "'does not bar the use of testimonial

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[9] We review Lopez's constitutional challenge—whether the admission of extrajudicial statements violated the confrontation clause—de novo. (See *People v. Seijas* (2005) 36 Cal.4th 291 304.)

statements for purposes other than establishing the truth of the matter asserted"']; *Crawford*, *supra*, 541 U.S. at p. 59, fn. 9 [same].)

Santana's direct statements of her state of mind, in contrast, were hearsay, admissible under state law by virtue of the state-of-mind exception in Evidence Code section 1250. (*Riccardi, supra,* 54 Cal.4th at p. 823.)[10] Most of those direct statements were not testimonial. Santana's statement to Officer Bolar that she feared Lopez was made as she sought police intervention to protect her from an ongoing emergency. (*Sanchez, supra,* 63 Cal.4th at pp. 689, 694.) Similarly, statements Santana may have made to her mother and her sister in enlisting their assistance and protection were similarly nontestimonial.

Santana's direct statements of her fear made under penalty of perjury on her application for a restraining order, however, bore the formality and solemnity of statements made for a testimonial purpose. (See *People v. Dungo* (2012) 55 Cal.4th 608, 619 [to be "testimonial" statement "must be made with some degree of formality or solemnity"]; *People v. Lopez* (2012) 55 Cal.4th 569, 581 [same].) Nevertheless, Santana's direct statements of fear set forth in that application were limited and entirely cumulative of other, properly received evidence, including Lopez's own threatening text messages. Any error in

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[10] Although the trial court erroneously concluded all of Santana's extrajudicial statements were admitted for nonhearsay purposes, any error in that regard benefitted Lopez, not the prosecution, and was harmless in any event in light of the court's instruction that all of those statements could be considered only to show Santana's state of mind.

admitting this limited evidence was harmless beyond a reasonable doubt. (*People v. Capistrano* (2014) 59 Cal.4th 830, 873 [confrontation clause violations subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Pearson* (2013) 56 Cal.4th 393, 463 [same].)

2. *The Trial Court's Exclusion of Expert Testimony on Adolescent Brain Development Does Not Compel Reversal*

During an Evidence Code section 402 hearing Dr. Elizabeth Cauffman, an expert on adolescent brain development, testified that individuals between the ages of 10 and 25 typically have underdeveloped sections of their brains—the frontal lobe and prefrontal cortex—that cause them to act impulsively, especially in groups, even when they know intellectually their actions are wrong. The People stipulated to Dr. Cauffman's qualifications as an expert but argued her testimony was irrelevant. To the extent Dr. Cauffman's proposed opinion was directed to Lopez's capacity to form the requisite mental state or to his actual mental state at the time Santana was stabbed, it was also prohibited by sections 28 and 29.[11] The court agreed and excluded the evidence.[12]

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[11] Section 28, subdivision (a), provides, "Evidence of a mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific

Lopez, who had turned 18 years old two months before he killed Santana, contends Dr. Cauffman's testimony was directly relevant to whether he had committed the stabbing rashly and impulsively rather than with premeditation and deliberation. He likens Dr. Cauffman's proffered testimony to permissible expert testimony on the effects of post-traumatic stress syndrome on a defendant's mental state (see *People v. Cortes* (2011) 192 Cal.App.4th 873, 909 [expert testimony on post-traumatic stress disorder (PTSD) was permissible and relevant to whether defendant, who suffered from PTSD, had lapsed into a dissociated state and thus lacked requisite mental state to commit premeditated murder]; *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1365 [same]), insisting that incomplete neuroanatomical development may affect an adolescent's mental state just as much as a mental disease, mental defect or mental disorder.

There is little question that new and evolving research on adolescent brain development has significantly altered our jurisprudence on adolescent culpability in a variety of ways, most

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intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."

Section 29 provides, "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states . . . ."

[12] The court stated, Dr. Cauffman's testimony "is that . . . adolescents ages 10 to 25 . . . engage in riskier behavior than older people and I think that's pretty obvious. She did not opine regarding this defendant's capacity, and indeed is prohibited by statute [§ 29] from opining on that. So I don't think her testimony is relevant on any material issue in this case."

prominently on issues involving criminal sentencing. (See *Montgomery v. Louisiana* (2016) __ U.S. __ [136 S.Ct. 718, 732, 193 L.Ed.2d 599] [states must ensure prisoners serving sentences of life without parole for offenses committed before the age of 18 have benefit of individualized sentencing procedure that considers their youth and immaturity at the time of the offense]; *Miller v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455, 2467-2468, 183 L.Ed.2d 407] [same]; *People v. Franklin* (2016) 63 Cal.4th 261, 276; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1376 [discussing studies cited in *Miller v. Alabama*]; see also § 3051, subd. (a)(1) [imposing mandatory youth offender parole hearing after prescribed period for any prisoner "who was under 23 years of age at the time of his or her controlling offense"]; see generally *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272-273 [131 S.Ct. 2394, 180 L.Ed.2d 310] [age of child subjected to police questioning is relevant to determine whether he or she had been taken into custody for purposes of *Miranda v. Arizona* (1966) 384 U.S. 436 so long as the age was known to the officer at the time of questioning].)

There are, as the trial court suggested, critical differences between the guilt phase of a trial and the sentencing proceeding. (Compare § 29 [prohibiting expert from opining on defendant's particular mental state, which is a fact for the jury to resolve] with *People v. Franklin, supra,* 63 Cal.4th at p. 276 [requiring individualized assessment of adolescent, including his or her likelihood of rehabilitation].) On the other hand, we can conceive of circumstances when expert evidence on adolescent brain development not directed to capacity or the defendant's actual mental state may well assist the jury in the guilt phase of a trial in understanding the reasons for an adolescent's impulsivity

under circumstances unlikely to provoke an adult. (See, e.g., *Commonwealth v. Okoro* (Mass. 2015) 26 N.E.3d 1092, 1104-1105 ["[T]he trial judge was correct in allowing [the expert] to testify regarding the development of adolescent brains and how this could inform an understanding of this particular juvenile's capacity for impulse control and reasoned decision-making on the night of the victim's death. This information was beyond the jury's common knowledge, it offered assistance to the jury in determining whether the defendant was able to form the intent required for deliberate premeditation or malice generally at the time of the incident, and it did not amount to an opinion that the defendant (or any other fifteen year old) was incapable of forming the intent required for murder in the first or second degree simply by virtue of being fifteen"]; see also Carroll, *Brain Science and the Theory of Juvenile Mens Rea* (2016) 94 N.C. L.Rev. 539, 598-599 [limiting expert testimony on adolescent brain development to criminal sentencing and excluding it in guilt phase "undermines the value of the science and is logically inconsistent with criminal law's reliance on the defendant's mental state as a measure of guilt and blameworthiness"].)

Nevertheless, we need not resolve whether Dr. Cauffman's proffered testimony was properly excluded in this case, where there was no issue whether the killing occurred because of a sudden quarrel or in the heat of passion, because any error in excluding the evidence was harmless. Dr. Cauffman explained the biological reasons for adolescent impulsivity. She did not opine on the effect on teenagers of circumstances of the type introduced at trial to show premeditation. In fact, she emphasized impulsivity increased with group behavior, a factor not present in this case. Moreover, as discussed, evidence of

Lopez's premeditation was overwhelming. The jury was properly instructed on premeditation and deliberation and told that it could not find Lopez guilty of first degree murder absent a finding that he had acted with premeditation and deliberation, that is, not impulsively or rashly. Accordingly, in light of the marginal relevance of Dr. Cauffman's testimony on that question, it is not reasonably probable Lopez would have received a more favorable verdict had Dr. Cauffman's proffered testimony been admitted. (*People v. Sanders* (1995) 11 Cal.4th 475, 510 [error in excluding expert testimony reviewed under *Watson* standard of prejudice].)

3. *Jury Instructions*

A trial court must instruct the jury on all general principles of law that are ""closely and openly connected to the facts and that are necessary for the jury's understanding of the case,"" provided the instruction is supported by substantial evidence. (*People v. Burney* (2009) 47 Cal.4th 203, 246; *People v. Moon* (2005) 37 Cal.4th 1, 30.) This obligation includes the duty to instruct on any lesser included offenses supported by substantial evidence. (*People v. Eid* (2014) 59 Cal.4th 650, 656.) Conversely, "[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 39-40 [instructions not supported by substantial evidence should not be given].)

We review the record de novo to determine whether substantial evidence supported a given jury instruction. (*People v. Avila* (2009) 46 Cal.4th 680, 705, *People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

a. *The self-defense instructions were proper*; *any error in giving inapplicable instructions was harmless*

Lopez contends the court erred in instructing the jury with CALCRIM Nos. 3471 (mutual combat/initial aggressor self-defense) and 3472 (contrived self-defense)[13] in connection with count 3 (aggravated assault of Jorge) because there was no evidence of mutual combat or contrived self-defense to support either instruction. (See *People v. Ross* (2007) 155 Cal.App.4th 1033, 1049 ["mutual combat" in CALCRIM No. 3471 means an altercation that begins by agreement or with mutual consent]; *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334 [CALCRIM No. 3472 is correct statement of law that one who provokes fight

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[13] CALCRIM No. 3471, as given to the jury, provided, "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; and [¶] 3. He gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose."

CALCRIM No. 3472 provides, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

or quarrel with intent to create excuse to use force may not rely on self-defense, though the instructions should be modified, when applicable, to make clear that defendant may resort to deadly force if victim escalates combat by resorting to deadly force].)

Both instructions, neither of which Lopez objected to, were supported by substantial evidence. Although Lopez is correct that there was no evidence of combat by consent or agreement, CALCRIM No. 3471 is more than a mutual combat instruction. By its terms, CALCRIM No. 3471 also applies to circumstances when the defendant is the initial aggressor; and this record includes substantial evidence that Lopez was the initial aggressor. He grabbed Santana forcefully, prompting her to call for help and Jorge to intervene. It was up to the jury to determine if Jorge had used deadly force, thereby entitling Lopez to defend himself with deadly force. There was also substantial evidence Lopez came to the school intending to attack Santana, thus supplying sufficient basis for the contrived self-defense instruction in CALCRIM No. 3472.

Moreover, even if error occurred, it is not reasonably probable that Lopez would have received a more favorable verdict had either or both instructions been omitted. (See *People v. Guiton, supra,* 4 Cal.4th at p. 1129 [inapplicable jury instruction is error, but subject to harmless error analysis in *Watson*].) In addition to CALCRIM Nos. 3471 and 3472, the jury was instructed as to count 3 with CALCRIM No. 3470 on lawful self-defense, which Lopez argued applied to his altercation with Jorge. It was also told that "[s]ome of these instructions may not apply." (See *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278 [jury is presumed to disregard instruction if it finds evidence does not support its application].) The prosecutor did not discuss

either CALCRIM Nos. 3471 or 3472 in closing argument. (See *People v. Crandell* (1988) 46 Cal.3d 833, 872-873 ["the [initial aggressor self-defense] instruction should not have been given but we are confident that the jury was not sidetracked by the correct, but irrelevant instruction, which did not figure in the closing arguments"], disapproved on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *People v. Olguin* (1994) 31 Cal.App.4th 1355 [typically, giving correct but inapplicable jury instruction will be harmless error].)

Lopez's reliance on *People v. Ross* (2007) 155 Cal.App.4th 1033, 1056 to argue reversible error occurred is misplaced. The *Ross* court found the mutual combat instruction inapplicable on the record before it and reversed the judgment, finding the error prejudicial. Significantly, the court agreed the error would have been harmless had the jury been given a correct definition of the term "mutual combat." But mutual combat had not been defined in the instructions; and the jury could have erroneously believed the term included any exchange of blows, rather than a fight by mutual consent. Absent a proper definition, the appellate court explained, the jury had no reason to know of the instruction's inapplicability and thus no reason to disregard it if factually unsupported. (*Id.* at pp. 1055-1056.) Here, in contrast, the jury was provided a proper definition of mutual combat and was directed to disregard instructions not supported by the evidence. *Ross* is inapposite.

b. *Assault with a deadly weapon—count 2*

The court instructed with CALCRIM No. 875 on the elements of assault with a deadly weapon or by means of force likely to produce great bodily injury. The court deliberately omitted language from the approved form of the jury instruction

that is "to be given when instructing on self-defense." (CALCRIM No. 875.) The omitted part of the instruction would have required the jury to find as an element of the offense, "The defendant did not act in self-defense or in defense of someone else." (*Ibid.*)

Lopez contends omission of this portion of CALCRIM No. 875 was error because there was evidence he had acted in self-defense in connection with his assault on Ordonez, charged in count 2. In particular, Lopez asserts there was evidence he slashed Ordonez's wrist accidentally while defending himself against Jorge. Even if some evidence supported this explanation of the injury to Ordonez, it raised an issue of accident (intent), not self-defense. The jury was properly instructed on accident as a defense and told it must find Lopez not guilty of assault with a deadly weapon if it found he had acted accidentally.[14] There was no error in modifying CALCRIM No. 875 to omit the self-defense aspects of the instruction.

c. *The court had no sua sponte duty to instruct on the lesser included offense of simple assault on counts 5, 6, 7, 12 and 13*

Lopez asserts the court had a sua sponte duty to instruct the jury on simple assault as a lesser included offense of assault with a deadly weapon on a peace officer charged in counts 5, 6 and 7. (See *People v. Hood* (1969) 1 Cal.3d 444, 449 ["assault with a deadly weapon upon a peace officer includes the lesser

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[14] The jury was instructed, "The defendant is not guilty of the charged crimes if he acted without the intent required for that crime, but acted accidentally. You may not find the defendant guilty of the charged crimes unless you are convinced beyond a reasonable doubt that he acted with the requisite intent."

offenses of assault with a deadly weapon as well as simple assault"]; cf. *People v. Milward* (2011) 52 Cal.4th 580, 586 [aggravated assault is a lesser included offense of aggravated assault by a life prisoner].) However, there was no evidence to support such an instruction: The uncontroverted evidence was that Lopez slashed at each of the officers with a knife.

To be sure, Lopez testified he did not know the officers he assaulted were peace officers. But Lopez's purported ignorance that the uniformed men he assaulted with his knife were peace officers did not provide a factual basis for a jury to find simple, rather than aggravated, assault.

Similarly, although Lopez is correct that simple assault can be a lesser included offense of resisting an executive officer under certain circumstances (see *People v. Brown* (2016) 245 Cal.App.4th 140, 153), it is undisputed Lopez wielded his knife when attempting to prevent Officers Barraza and Reyes from detaining him as charged in counts 12 and 13. Whether or not he knew they were police officers when doing so, those actions do not constitute simple assault.

4. *The Court Erred in Denying Lopez's Motion for Acquittal on Possessing the Airsoft Gun on a School Campus*

At the close of the defense case Lopez moved pursuant to section 1118.1 for an acquittal on count 9 (bringing or possessing a weapon on school grounds) because the People presented no evidence that the airsoft gun Lopez brought to school was capable of expelling a metallic projectile. (See § 626.10, subd. (a)(1) [gun must be capable of expelling "a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO[2] pressure or spring action"].) Before ruling on the motion, the court asked the prosecutor whether the People had any additional evidence to

present. The prosecutor stated he had some evidence to present in rebuttal. Among other matters, the prosecutor introduced over defense objection the testimony of Los Angeles County Police Sergeant John O'Brien, who opined, based on his experience with similar weapons, that airsoft guns like the one Lopez possessed were capable of shooting a metallic BB or pellet. Lopez contends the court erred in denying his section 1118.1 motion and in admitting this improper rebuttal evidence.

Section 1118.1 provides in part, "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

"An appellate court reviews the denial of a section 1118.1 motion under the standard employed in reviewing the sufficiency of the evidence to support a conviction. [Citation.] In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] . . . We do not reweigh evidence or reevaluate a witness's credibility. [Citation.] Review of the denial of a section 1118.1 motion . . . focuses on the state of the evidence as it stood" at the time the motion was made. (*People v. Houston*

(2012) 54 Cal.4th 1186, 1215 [internal quotation marks omitted]; *People v. Cole, supra,* 33 Cal.4th at p. 1213.)

The Attorney General concedes there was no evidence Lopez's airsoft gun was capable of expelling a metallic projectile under the parameters set by statute when Lopez moved for acquittal on that charge. However, the Attorney General argues, Sergeant O'Brien's testimony cured that omission. Even if that testimony was not responsive to any evidence of the defense and thus exceeded the scope of permissible rebuttal (see *People v. Harris* (2005) 37 Cal.4th 310, 336-337 [rebuttal evidence is "'restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt'"]), the Attorney General contends, the court had discretion pursuant to sections 1093 and 1094[15] to permit the prosecutor to reopen the People's case-in-chief to introduce the evidence. In effect, the Attorney General concludes, any error in this regard should be considered harmless. Neither argument is persuasive.

Section 1118.1 is mandatory. It requires the court to order entry of a judgment of acquittal upon the defendant's motion at the close of evidence by either side if the evidence is insufficient at that time to sustain a conviction. As the Attorney General concedes, that evidence was indisputably deficient to support a conviction under count 9.

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[15] Section 1093 prescribes the order of proceedings at trial. Section 1094 permits the court, when "the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court" to depart from that prescribed order of proceedings.

The People's reliance on section 1094 to render this patent error harmless is misplaced. The court did not exercise its authority under sections 1094; it permitted the evidence to be introduced in rebuttal along with other rebuttal evidence even though it was not responsive to anything in the defense case. Moreover, the discretion afforded the trial court by section 1094 to reopen the case for the entry of additional evidence "for good reasons" does not extend to violating section 1118.1's command to enter a judgment of acquittal when the state of the evidence at the time the motion is made requires it, particularly when, as here, there is no indication of inadvertence or mistake other than the absence of evidence on count 9 that Lopez's motion identified.

We recognize *People v. Riley* (2010) 185 Cal.App.4th 754, 764 (*Riley*), on the particular facts presented, reached a different result. In *Riley* the defendant moved for acquittal under section 1118.1 after the close of the People's case-in-chief on the ground there was no evidence the .47 grams of marijuana found in the defendant's possession constituted a "usable amount" to support a conviction under section 4573.6, possession of a controlled substance in a place where prisoners are in custody. (*Riley*, at p. 759.) After the prosecutor explained he believed he had introduced that evidence and directed the court to a schematic prepared to show the evidence he had introduced, the trial court found the prosecutor's omission inadvertent and permitted the People to reopen their case-in-chief to present that evidence. The defendant argued that was error.

The appellate court in *Riley* acknowledged the issue before it was one of first impression: "We have not found a published case in which a trial court exercised its discretion to allow the prosecution to reopen its case—after the defendant has moved for

judgment of acquittal under section 1118.1—to present evidence that was inadvertently omitted and that goes to an element of the offense." (*Riley, supra,* 185 Cal.App.4th at p. 766.) Nevertheless, analogizing to cases holding the trial court has discretion after a bench trial to permit the prosecutor to reopen his or her case following a similar section 1118 motion[16] (see *People v. Goss* (1992) 7 Cal.App.4th 702, 708), the court upheld the denial of the section 1118.1 motion, finding no conflict between the discretion afforded under section 1094 and the mandatory nature of section 1118.1: "[W]e conclude that section 1118.1 does not place a limitation on the trial court's discretion under sections 1093 and 1094 to permit either party to reopen its case for good cause and when justice so requires. The purpose of section 1118.1 is to provide a procedure by which a defendant may promptly terminate a fatally deficient prosecution, not to provide the defendant with a tactical trap when the prosecution inadvertently fails to present evidence in its possession." (*Riley,* at p. 766.)

Although we do not question the basic rationale of *Riley*—that section 1118.1 does not absolutely bar a trial court from allowing the People to reopen their case-in-chief and present additional, necessary evidence upon an adequate showing of good

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[16] Section 1118, like section 1118.1, contains mandatory language. It provides in part, "In a case tried by the court without a jury . . . the court on motion of the defendant or on its own motion shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading after the evidence of the prosecution has been closed if the court, upon weighing the evidence then before it, finds the defendant not guilty of such offense or offenses."

cause—that limited authority must be exercised with great care. Indeed, the cases upon which *Riley* relied involving bench trials expressly observed the greater potential for prejudice inherent in the presentation of late evidence in a jury trial. (See *People v. Goss, supra*, 7 Cal.App.4th at p. 708; *People v. Rodriguez* (1984) 152 Cal.App.3d 289, 295.)

In this case, accepting that the trial court had limited discretion under section 1094 to permit the prosecutor to reopen its case-in-chief and assuming that is what the court intended to do—a highly questionable assumption at best—we have little difficulty finding the ruling to be an abuse of that discretion. Unlike in *Riley* where there was no question the prosecutor intended to introduce, and thought he actually had introduced, evidence that the amount of controlled substance possessed by the defendant was usable, here nothing suggests the prosecutor planned to present evidence of the airsoft gun's capabilities or was even aware of the requirement that he do so. But for the defense motion and the trial court's invitation to the People to present additional evidence through their rebuttal case, the jury would have acquitted Lopez on this charge or we would have reversed a conviction on appeal for insufficient evidence. In sum, whatever possible justification there may be for a trial court to exercise its discretion under section 1094 to allow the People to correct a deficiency in their case-in-chief following a defendant's section 1118.1 motion for acquittal, one did not exist here.[17]

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[17] Lopez also contends the errors he has identified, when considered cumulatively, denied him due process. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-845 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"];

DISPOSITION

The conviction on count 9 for bringing or possessing a weapon on a school campus is reversed and the judgment modified to strike the consecutive eight-month subordinate term imposed on count 9. In all other respects the judgment is affirmed. The trial court is ordered to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SMALL, J.*

People v. Rivas (2013) 214 Cal.App.4th 1410, 1436 ["[a] claim of cumulative error is in essence a due process claim"].) For the reasons we have explained, none of the errors Lopez has alleged (except his conviction on count 9), even when considered cumulatively, deprived him of a fair trial. Accordingly, we reject Lopez's claim of cumulative error.

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.