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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISRAEL GUTIERREZ,

Defendant and Appellant.

B286384

(Los Angeles County  
Super. Ct. No. KA114291)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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## I. INTRODUCTION

A jury convicted defendant Israel Gutierrez of forcible rape (Pen. Code, § 261, subd. (a)(2))<sup>1</sup> and making a criminal threat (§ 422, subd. (a)). The trial court sentenced defendant to eight years eight months in state prison. On appeal, defendant argues it was an abuse of discretion to admit his jail telephone conversations into evidence. We find no abuse of discretion. Accordingly, we affirm the judgment.

## II. THE EVIDENCE

### A. *The Rape and the Threats*

Defendant's brother Martin Gutierrez Aguilar ("Aguilar") was in a relationship with the victim, M. Doe. All three—defendant, Aguilar, and Doe—lived together. Aguilar and Doe had a six-year-old son, who also lived with them.

Aguilar and Doe had seen defendant be physically abusive toward women, including defendant's partner, Monica.<sup>2</sup> In March 2007, defendant pled guilty or no contest to misdemeanor cohabitant battery (§ 243, subd. (e)(1)) after he hit Monica. On

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<sup>1</sup> Further statutory references are to the Penal Code except where otherwise noted.

<sup>2</sup> Monica did not testify at trial. The witnesses referred to her throughout the trial by her first name. The witnesses and exhibits further referred to numerous other people by their respective first names only. We therefore use those first names in this opinion.

another occasion, Aguilar saw a woman run from defendant's bedroom and heard her call defendant "the devil." There were red marks on the woman's neck.

In September or October 2016, Doe was washing dishes when defendant "c[a]me on" to her for the first time. He put his arms around her and kissed her hair. She told him to move away. Defendant said "he [did not] like to feel rejected by any women." Defendant forced Doe into his bedroom, threw her on the bed, got on top of her, and tried to kiss her. After Doe started to scream, Doe's son came into the room and began hitting defendant. Doe broke free, ran with her son to her bedroom, and locked the door. Defendant tried to open the locked door with a knife but did not succeed. (Detective Janet O'Bryan later observed pry marks on the outside of Doe's bedroom door.) Defendant threatened to kill Doe and her son if Doe ever told Aguilar about the incident. Defendant said he had a gun. Defendant continually threatened Doe from that point forward.

On January 3, 2017, Doe was helping her son get ready for school when defendant assaulted her for the second time. Defendant grabbed Doe by the hair, forced her into his room, and locked the door. Doe's son, locked out of the room, began screaming and kicking the door. Defendant raped Doe.

Doe was distraught and in shock. She called her mother in Mexico and told her defendant had raped her. On her mother's advice, Doe called her cousin who also lived in Mexico. The cousin told Doe to tell Aguilar and to call the police. Doe called

Aguilar and told him his brother had raped her. Then she called the police. The jury heard Doe's recorded 911 call.<sup>3</sup>

Doe's son testified that defendant came into Doe's bedroom, grabbed Doe by the hair, and took her into his room. Doe's son followed and tried to kick open the door. He heard his mother screaming. Doe was crying when she left defendant's room. Sometime later, the police came to Doe's son's school and spoke with him.

Aguilar told the jury that on the day in question Doe called him at work and said defendant had "abused" her and she had called the police. When Aguilar arrived at their home, Doe was shaking and "couldn't speak because she was shaken up." Aguilar noticed Doe's neck was red. After Aguilar picked the son

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<sup>3</sup> Doe and the 911 operator spoke in Spanish. The transcript of the recording includes an English translation: "911 What is your emergency? [¶] Hello, good morning. [¶] 911. What i[s] your emergency? [Background noise] [¶] Yes? Hello? [¶] . . . [¶] Sorry, the thing is, um, I have just been raped. [¶] Okay. How lo[n]g ago did that occur? [¶] Ah, like at 7:30. [Background noise, overlapping voices.] 8:00. [¶] [Unintelligible] . . . [¶] At 7:30 or 8:00? [¶] Yes. [Audio glitches.] [¶] Okay. And where did that happen? [¶] [Background noise.] In my house. [¶] Okay. And where do you live? [¶] . . . [¶] And who did it? [¶] My brother-in-law. [¶] And is he still there or [unintelligible] did he leave? [¶] . . . [¶] No, he already left. [¶] . . . [¶] Okay. [Background noise.] And what's your name? [¶] [Doe] [background noise] [Sobbing]. [¶] . . . [¶] And you said this person isn't there anymore? [¶] No, he's not here. [¶] Okay. But does he live there or not? [¶] He lives here. [Background noise.] [¶] And it was your brother in law who did it? [¶] Yes. [¶] And what's his name? [¶] Israel Gutierrez. [¶] . . . [¶] Okay. We're going to send someone over to speak to you."

up from school, the son told him defendant was “mean” and “a bad man” who had grabbed Doe by the neck and hair.

At first, Aguilar hesitated to cooperate with the prosecution. Defendant had spoken with their brother Lionel, who lived in Mexico, and told Lionel to threaten Aguilar. Lionel threatened to harm Aguilar’s family if Aguilar pursued charges against defendant. Lionel told Aguilar to drop the case or else defendant would “finish with [Doe].”<sup>4</sup> Aguilar received a second threatening telephone call from relatives in Mexico. Aguilar told the prosecutor and Detective O’Bryan about the calls and showed the detective his call logs.<sup>5</sup> On cross-examination, Aguilar denied his relatives were simply urging him to tell the truth or to tell Doe to tell the truth.

Doe’s cousin confirmed that on January 3, 2017, Doe called her and was crying. Doe told the cousin defendant had just sexually abused her. The cousin told Doe to tell Aguilar. Doe said she was afraid to tell Aguilar because defendant had

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<sup>4</sup> Aguilar testified: “Q Now, were there things that happened to you outside the court that made you undecided about participating? [¶] . . . [¶] [A] Because I received threats to not to continue forward with the case or otherwise my family would be harmed. [¶] . . . Q Who were you receiving threats from sir? [¶] . . . [¶] A Israel would speak to my other brother in Mexico, and he would tell me. [¶] . . . [¶] Q And so what exactly was it that you felt or understood based on what your brother in Mexico was telling you [defendant] was having him say to you— [¶] . . . [¶] Q —that made you concerned? [¶] A Because he said to leave the case or he was going to finish with [Doe].”

<sup>5</sup> During deliberations, the jury requested “transcript of [Aguilar’s] . . . testimony related to threats received from Mexico.”

threatened to kill Aguilar and their son and to continue abusing her. Doe was also hesitant to call the police; she feared she would be deported.

Doe was examined at a hospital by a Sexual Assault Response Team nurse. Doe complained of vaginal pain. The nurse took vaginal swabs. The nurse also took DNA samples from defendant. Subsequent testing showed defendant was the major contributor of the DNA from the semen on the vaginal swabs.

Defendant testified in his own defense. He said he had been having an affair with Doe since 2013 and all sexual contact was consensual. In 2016, Doe became jealous that defendant was dating other women. On January 3, 2017, Doe initiated the sexual contact.

Defendant's testimony about his relationship with Doe was consistent with what he had told Detective O'Bryan on January 4, 2017, the day after Doe reported the rape. The jury heard portions of Detective O'Bryan's recorded interview with defendant. Defendant said he had been in a consensual sexual relationship with Doe for two years.

Doe denied having an affair with defendant. She denied that she had agreed to have sex with him on January 3, 2017.

#### *B. Defendant's Telephone Calls from Jail*

The jury heard recordings of three telephone conversations defendant had with his partner Monica while he was in jail. In argument to the court, the prosecutor characterized the calls as evidence of consciousness of guilt in that defendant wanted Monica to talk to his family members in Mexico and ask them to

pressure Doe and Aguilar about the case. Defense counsel asserted the conversations were irrelevant. The court concluded the jury should decide whether the conversations reflected consciousness of guilt. Although the transcript identifies the woman with whom defendant spoke as “Liliana,” defendant testified he was speaking with Monica.

During their first conversation, defendant told Monica not to talk to Doe or Aguilar because a restraining order had been issued. Defendant said he could not even send someone to talk to Doe including Monica because “they’re going to say that you’re telling her on my behalf.” He described the restraining order as requiring “that I can’t even tell them anything through other people.” In reference to Doe, defendant said: “I’ll fix that later. Don’t worry. I’ll take care of it later.”

In their second conversation, defendant asked whether Monica had called Mexico. He told her, “Talk with Carlos. But call. Tell him to comment to him that he can do something.” Further, “Tell him to talk with him and he can do something because he can say things in my favor.” Defendant repeatedly prompted Monica to “[t]ell him that he can do something.” Monica told defendant she had talked to defendant’s older brother Pablo, who lived in Mexico; Pablo said “that the last time he talked with him, that [Aguilar] started to get mad at him.”

In their third conversation, defendant discussed communications with Pablo and Pablo’s wife, Licha:  
“[Defendant]: I would like for you to call— [¶] . . . [¶] to Mexico too but to call Pablo at night. [¶] [Monica]: Uh huh. [¶]  
[Defendant]: And explain to him to see if he tells that guy because court, to pressure him. Talk well with Pablo. Why haven’t you told him? [¶] [Monica]: I have talked with them

and, uh, Elisa told me that the— [¶] [Defendant]: Tell him how things are. Tell him everything that has been spent. Tell him, talk with that guy—her or him can do something. Tell him, they can do something. [¶] [Monica]: Yeah. Yeah, but that slut doesn't want to do anything. [¶] [Defendant]: But [Aguilar] does. He does. [¶] . . . [¶] [C]all Pablo and explain it to him. Tell him that I said. [¶] [Monica]: Yeah. No, I talked with, uh, Licha and Licha told me to call—I mean, last week she called over there like nothing. She just asked about your mom and that's it. That [unintelligible]d and didn't say anything. [¶] [Defendant]: Have Pablo call and tell her. [¶] . . . [¶] Have him tell her that she can do something. [¶] . . . [¶] Because if not, after they tell her, she better accept the consequences. [¶] . . . [¶] Please. Call Pablo— [¶] . . . [¶]—and tell him. [¶] [Monica]: Yeah. Yeah. [¶] [Defendant]: Agreed? [¶] [Monica]: Yeah. Agreed. [¶] . . . [¶] [Defendant]: Tell him. All right then. [¶] . . . [¶] I'm saying [unintelligible] if something, well we don't complicate ourselves too. [¶] . . . [¶] If he can, well he can and if not, well we won't complicate ourselves with Jose.”

At trial, defendant told the jury that when he told Monica that Doe “better accept the consequences” he meant that he had not done anything to Doe and if she lied in court she would face consequences. Defendant further explained that when he said Aguilar got mad at him, it was because he had tried to tell Aguilar about defendant's relationship with Doe.<sup>6</sup> On cross-

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<sup>6</sup> This testimony appears to be a response to a misreading of the transcript. The transcript reads, “I already told [Pablo] and he told me that the last time *he* talked with him, that [Aguilar] started to get mad at him.” (*Italics added.*) At trial, the question defense counsel posed to defendant was: “[The transcript] said;



examination, defendant admitted he had asked Monica to call his relatives in Mexico. He testified, “I was simply telling them to tell [Aguilar] the truth of the relationship that she and I had.” Defendant knew he could not communicate directly with Doe, so he had to convey messages to Doe or Aguilar through others. Defendant explained he wanted Monica to tell Pablo about defendant’s relationship with Doe.

### III. DISCUSSION

Defendant argues the telephone conversations were inadmissible as irrelevant because: Doe did not testify to any threats; the conversations were at best vague and equivocal as to any efforts to influence Doe or Aguilar; and the discussions did not corroborate Aguilar’s testimony he was threatened. Defendant further asserts even if the telephone conversations were relevant, the trial court should have excluded them under Evidence Code section 352 as unduly prejudicial because they informed the jury defendant was in jail and undermined his credibility as to his innocence.

Relevant evidence is evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210; *People v. Clark* (2011) 52 Cal.4th 856, 922.) “‘The test of relevance is whether the evidence tends “logically, naturally, and by reasonable inference” to establish material facts such as identity, intent, or motive.’ [Citation.]” (*People v. Harris* (2005)

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‘I already told him, and he told me that the last time *you* talked with him that [Aguilar] started to get mad at him.’ [¶] What was that referenced conversation about?” (Italics added.)

37 Cal.4th 310, 337.) Evidence a defendant has made a threat against a prosecution witness in an attempt to suppress evidence of guilt is admissible as indicating consciousness of guilt. (*People v. Vines* (2011) 51 Cal.4th 830, 867, overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

Whether evidence is relevant and admissible rests in the trial court's discretion. "A trial court has "considerable discretion" in determining the relevance of evidence. [Citation.] Similarly, the court has broad discretion under Evidence Code section 352 to exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects. [Citation.] An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" [Citation.] (*People v. Jones* (2017) 3 Cal.5th 583, 609.)

The trial court did not abuse its discretion in determining the telephone conversations between defendant and Monica were relevant. In those conversations, defendant repeatedly asked Monica to call relatives in Mexico and implore them to "do something." He talked about "pressur[ing]" someone. He told Monica to talk to Carlos and tell Carlos he could "do something." Defendant wanted his brother Pablo to tell Doe she could "do something" and if not, "she better accept the consequences." Monica acknowledged she had spoken with several relatives—Pablo, Elisa, and Licha. Pablo had spoken with Aguilar but Aguilar got angry with him. Aguilar testified he had twice

received threats from family in Mexico, including his brother Lionel. According to Aguilar, defendant had spoken with Lionel and told him to threaten Aguilar. Defendant had also, through Lionel, threatened to “finish with [Doe].” Considered in light of Aguilar’s testimony his relatives in Mexico had threatened him, the jury reasonably could infer defendant’s consciousness of guilt from the telephone conversations between defendant and Monica. (Evid. Code, § 350; *People v. Jones*, *supra*, 3 Cal.5th at pp. 609-610.)<sup>7</sup> Defendant characterizes the conversations as innocent, but that was for the jury to decide.

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<sup>7</sup> The trial court instructed the jury: “If you find that the defendant attempted to or did persuade a witness to testify falsely or attempted to or did fabricate evidence to be produced at trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.

“If you find an effort to procure false or fabricated evidence was made by another person for the defendant’s benefit, you may not consider that effort as tending to show the defendant’s consciousness of guilt unless you also find that the defendant authorized that effort. If you find the defendant authorized that effort, that conduct is not sufficient by itself to prove [guilt], and its weight and significance, if any, are for you to decide.

“If you find that the defendant attempted to suppress evidence against himself in any manner, including intimidation of a witness, by destroying evidence or concealing evidence, this attempt may be considered by you as a circumstance, tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

The trial court also did not abuse its discretion in declining to exclude the evidence under Evidence Code section 352. Defendant argues his credibility was damaged because “the prosecutor cited the calls to attack [defendant’s] claims of innocence.” But this is not the type of prejudice Evidence Code section 352 is intended to avoid. “If the jury subscribed to the prosecution’s understanding of the taped conversation, then it was damaging to defendant. But ‘[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” [Citation.]” (*People v. Jones, supra*, 3 Cal.5th at p. 610.) Here, as in *Jones*, “Although the parties debated the meaning of the taped conversation—which contained both statements that could be interpreted as inculpatory and statements that could be interpreted as exculpatory—the recording was neither misleading nor inflammatory, and was therefore properly admitted.” (*Ibid.*) It was for the jury to decide whether defendant’s intent was to threaten Aguilar and Doe to drop the rape claim or to urge them to tell the truth about his consensual sexual relationship with Doe.

Defendant also asserts prejudice in that the calls “informed the jury that [defendant] was in jail.” The jury was aware that,

at least for some period of time, defendant was in custody. The evidence was that defendant made three telephone calls from the county jail to Monica. Defendant argues revealing that he was in jail undermined the presumption of innocence. He analogizes the evidence of the calls to requiring a defendant to appear at trial in jail clothing: “[A] court may not require a defendant to attend trial wearing jail clothing, because such a requirement would impair the presumption that a defendant is innocent unless and until proven guilty beyond a reasonable doubt. [Citations.] ‘The Supreme Court has observed that the defendant’s jail clothing is a constant reminder to the jury that the defendant is in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor. [Citation.]’ [Citation.] It may be inferred that other information, having the same tendency to remind the jury that a defendant is in custody, might have a similar effect.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1335-1336.)

The custody information revealed to the jury in this case did not undercut the presumption of innocence. The fact defendant was in jail when he spoke with Monica was not emphasized. There was no constancy as in the case of a defendant wearing jail clothing throughout trial. There was no repeated or constant reminder of defendant’s custody status. The focus was at all times on the substance of defendant’s conversations with Monica. Under these circumstances, we conclude the jurors’ knowledge that defendant’s telephone conversations with Monica occurred while he was in jail did not have any significant potential to undermine the presumption of innocence. (*People v. Bradford, supra*, 15 Cal.4th at p. 1336.)

#### **IV. DISPOSITION**

The judgment is affirmed.

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KIM, J.

We concur:

BAKER, Acting P.J.

MOOR, J.