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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. GRESIA GUERRA, Defendant and Appellant.	B275889 (Los Angeles County Super. Ct. No. BA435161)

APPEAL from a judgment of the Superior Court of Los Angeles County, Douglas Sortino, Judge. Affirmed.

Kelly C. Martin, 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, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Gresia Guerra (defendant) is the mother of a daughter, C.; Pablo Zamora (Zamora) is C.'s father. Not long after C. was born in April 2012, Zamora initiated custody proceedings and obtained an order for visitation with C. In the ensuing months, the court-ordered visitation became a source of conflict between defendant and Zamora, and ultimately, Zamora received no visitation with C. for roughly a seven-month period beginning in September 2014. The Los Angeles County District Attorney charged defendant with violating Penal Code section 278.5,[1] which makes it a crime to "take[ ], entice[ ] away, keep[ ], withhold[ ], or conceal[ ] a child and maliciously deprive[ ] a lawful custodian of a right to custody[ ] or . . . visitation." (§ 278.5, subd. (a).) A jury found defendant guilty, and the trial court sentenced her to probation. Defendant now asks us to reverse her conviction for a host of reasons. Chief among them are her contentions that substantial evidence does not establish she withheld C., or if she did, that she did so maliciously; that the trial court prejudicially erred by admitting too much evidence of uncharged conduct to prove intent; and that several of the trial court's rulings admitting or excluding certain evidence were an abuse of discretion. Defendant also asks, absent reversal, that we modify her conditions of probation.

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[1] Undesignated statutory references that follow are to the Penal Code.

I. BACKGROUND

A. Evidence Concerning Conduct Prior to the Charged Seven-Month Period of Withholding

Defendant and Zamora's romantic relationship was rocky, and they split not long after C.'s birth. Roughly eight months later, in early December 2012, defendant told Zamora she was going on a trip to Hawaii with C. Zamora asked for her departure and return dates. Defendant replied it was none of his business, and she would text Zamora "when to pick [C.] up." Zamora said it was his business if it related to C., to which defendant responded "[w]rong." A couple weeks later, defendant sent a text to Zamora in which she referred to him as someone who "only donated the sperm [t]o complete [her] family."

Zamora initiated custody proceedings in family court, where he represented himself without an attorney. In January 2013, Zamora and defendant attended a custody hearing, the rulings at which the family court memorialized in a minute order. The court awarded defendant and Zamora "joint legal custody with sole physical custody awarded to [defendant]." The court granted Zamora the following visitation with C.: "[f]rom January 27, 2013 at 10:00 a.m. to January 28, 2013 at 11:00 a.m."; the first, third, and fifth weekends in February "from Sunday at 10:00 a.m. to Tuesday at 11:00 a.m."; and, from March onward, the first, third, and fifth "weekends of the month from Sunday at 10:00 a.m. to Wednesday at 11:00 a.m." The "receiving parent" was to transport C. for custody exchanges. The family court directed Zamora to prepare an order consistent with its ruling.

The day after the hearing, Zamora texted defendant to confirm he would pick up C. at 10 a.m. on January 27. Defendant replied it was her recollection that Zamora's visitation began the

following week and defendant said she had plans to take C. and her other children to a "monster truck event" on the 27th. Defendant asked Zamora if he could pick C. up at a later time, but she did not tell him when. Zamora went to pick up C. the following morning, but she was not home. He did not see her that day.

In mid-March, Zamora filed the custody and visitation order the family court directed him to prepare. Consistent with the hearing, the order stated that as of March, Zamora would have visitation with C. on the first, third, and fifth weekends of the month. The order defined "[t]he first weekend of the month" as "the first weekend with a Saturday." The order did not specify where Zamora was to pick C. up, but he made it his practice to go to "the Puritan address," which was defendant's parents' home in the city of Downey, "because that address ha[d] the longest history" and defendant's family had "been there forever." The order provided the visitation schedule could be modified by the parents' "mutual agreement . . . ."

Over the next eight months (March 2013–November 2013), Zamora faulted defendant for failing to comply with the visitation order on multiple occasions. On the fifth weekend in March 2013 (Easter Sunday), for example, defendant told Zamora that "[h]olidays never were put in writing"[2] and did not permit him to pick C. up until after an Easter egg hunt, which was a few hours after the scheduled pick-up time. Zamora called the Downey Police Department when he failed to receive C. on time.

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[2] The visitation and custody order submitted by Zamora included a "[h]oliday schedule" section that was not filled out.

According to Zamora, he received C. late again on May 5. Then, on June 2, Zamora texted defendant about an hour before the pick-up time to ask where he could retrieve C. Defendant replied Zamora should meet them at the "church parking lot," indicating they had agreed in the past to exchange C. there. Their exchange of text messages grew combative as Zamora repeatedly asked for the "cross streets" of the church and defendant repeatedly responded it was the "same church" they had always conducted the exchange at before. Zamora called the police department and received C. later that day.

Two days before one of Zamora's scheduled visitation weekends in August 2013, defendant texted him that C.'s half-brother's birthday was that Sunday and could not be rescheduled—so Zamora could pick C. up after the birthday party. Zamora objected, showed up at 10 a.m. on Sunday, and went to the Downey police station when he did not see C. He received her later that day.

At the end of August, defendant told Zamora there would be a change in plans to C.'s next visit because it coincided with defendant's birthday (Monday, September 2). Zamora did not agree to the change and did not see C. that weekend.

On three additional occasions over the next month, Zamora contacted the police after not receiving C. at the Puritan address when he went to pick her up. Zamora ultimately received C. on two of those dates. Zamora also complained about having to transport C. to defendant after one of his weekend visits despite post-visit transportation being defendant's responsibility under the visitation order.

During the same eight-month period in 2013, defendant and Zamora were scheduled to attend two family court mediation

sessions. Defendant did not appear at the first and arrived late to the second, at which point Zamora had already left.

In November 2013, the family court modified the custody and visitation order to provide Zamora additional visitation and to specify who would receive C. on holidays.[3] Zamora was awarded visitation on the first, third, and fourth weekends of each month, "on the same days and times as previously ordered," with one additional weekly visit on Thursdays from 9:00 a.m. to 11:00 a.m.[4] The order again was silent on the place where visitation exchanges should take place, except as to the added Thursday morning visits for which it provided the exchange location would be "the home of [defendant]." The modified custody order also provided that defendant and Zamora must notify each other within five days if either had a change in contact information and neither parent could change C.'s "residence" without 10 days prior written notice to the other parent. In a clarifying order issued a few days later, the family court added that if Zamora or defendant was "more than 30 minutes late for any visitation without making other arrangements with the [other parent,] the visit [would] be cancelled."

At the time the court issued its modified visitation orders, Zamora believed defendant was living with her cousin, Jorge Morales (Jorge), and Jorge's wife, Maria del Carmen Cortez

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[3] According to the written minute order, both defendant and Zamora were personally present at the hearing and the terms of the order were "recited in open court this date . . . ."

[4] The order also set special, superseding visitation terms for holidays and birthdays.

(Carmen), at a Downey residence on Benedict Avenue that was about half a mile from the Puritan address.[5] Zamora generally followed the same pattern on the days he was to pick up C. Because there was only a 30-minute window to retrieve her (lest the visit be cancelled), and because Zamora found locating his daughter among the potential places where she could be "like a cat and mouse chase," he would typically drive first to the Benedict address around 9:20 or 9:25 a.m. If he did not see familiar cars outside the Benedict address, he would then drive to a Compton address approximately 20 minutes away where defendant's family owned a store. If that failed, Zamora would then go to the Puritan address as a "last resort."[6] If he did not see a vehicle there, he would contact the police "and try to get an incident report."[7] Zamora sought out police incident reports when he perceived defendant was in violation of the court order "[t]o keep track," "to cover [his] end," "to prevent any miscommunication of this happened or that happened," and because he knew "[t]he way things were going [the reports were] going to be necessary in the near future."

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[5] Like the witnesses and counsel for the parties at trial, we refer to Jorge and Carmen by their first names.

[6] Zamora testified he sometimes "switch[ed] it up" by going first to the Compton address and then to the Benedict address in the "hope [he] would get lucky." He always went to the Puritan address last.

[7] A Downey police officer testified that an incident report consisted of "basic documentation" of "whatever the reporting person" told police dispatch personnel. Incident reports were used to refresh Zamora's memory at defendant's trial but were not admitted in evidence.

When Zamora drove to each address, he never got out of his vehicle to knock on the door because he "just didn't feel comfortable" and wanted to "prevent any he said/she said." Zamora also believed he had "already gotten bad energy" from Jorge.[8] When Zamora went to pick up C., Carmen (Jorge's wife and C.'s frequent babysitter) was usually the person who brought her out to him.

According to Zamora, over the next 10 months (from late November 2013 to late September 2014), defendant failed to comply with the visitation order on approximately 18 occasions. Zamora was supposed to spend Thanksgiving and New Year's Eve with C. but did not receive her on either date. On December 1, 2013, and January 26, 2014, Zamora received C. only after he contacted the police. Zamora also contacted the police to document perceived non-compliance with the visitation order on May 25, June 1, June 22, and August 17 of 2014, on which dates the visitation between Zamora and C. never took place. On the June 1 occasion, Zamora maintained that Carmen told him she had not seen defendant "in a few days."

Notably, on another date during this time period, August 24, 2014, Zamora went to pick up C. for a scheduled visit. He first drove to the Benedict address, but defendant was not there. He then drove to the Compton address, and seeing defendant's car there, he contacted the sheriff's department. Sheriff's deputy Jose Magana and his partner arrived at the location and knocked

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[8] Zamora thought Jorge was upset primarily because of the frequency with which the police responded to Jorge's home in response to Zamora's complaints about problems with the custody exchange.

on the door. They identified themselves as being from the "L.A. County Sheriff's" Department and explained they were there because "Zamora had custody of . . . the child th[at] weekend." Defendant informed the deputies that C. was inside but defendant "refused to open the door." The sheriff's deputies did not press the matter. Instead, they left the location and defendant never provided C. to Zamora for visitation that day. (The trial court excluded evidence concerning defendant's asserted reason for refusing to open the door, which we discuss *post* in addressing whether the exclusion was a prejudicial abuse of discretion.)

Throughout 2014, Zamora not only sought to obtain police incident reports when he failed to receive C. at the scheduled visitation time, he also obtained incident reports when defendant did not pick C. up at the conclusion of one of his visits, and, on two occasions, when defendant was not home when Zamora attempted to drop C. off.

B. Evidence Concerning the Charged Period of Child Withholding

Zamora obtained a police incident report when defendant did not pick up C. at the conclusion of a visit on September 25, 2014. The next day, Downey Police Department personnel contacted Zamora and instructed him to drop C. off at the police station. Defendant was present for the custody exchange, and nothing out of the ordinary was said. But Zamora did not see C. again until May of the following year. In the interim, which represented the seven-month period that formed the basis of the charged child withholding offense, defendant did not look for

Zamora, attempt to contact him, or ask anyone else to contact him during the period of the charged offense.

Zamora, however, followed the same routine of driving by the Benedict, Compton, and Puritan addresses to try to locate C. on several occasions in October, November, and December of 2014. When no one brought his daughter out to his car for visitation, he obtained police incident reports. Zamora also had difficulty reaching defendant during this time because she had changed her phone number and, contrary to the terms of the visitation order, failed to provide Zamora with her new contact information. Zamora sent letters by certified mail to defendant at the Puritan and Benedict addresses in which he notified her of his own contact information. The Puritan letter was returned, and Zamora received no response to the Benedict letter.

In December 2014, a social worker with the Department of Children and Family Services spoke by phone with defendant concerning an investigation involving C.[9] Defendant told the social worker she was hiding from Zamora because he had abused her and she believed he was making false allegations about her. Defendant also told the social worker she would not reveal her contact information because she did not want Zamora to obtain it.

When Zamora did not receive C. on his scheduled visitation date in the first week of January 2015, he contacted the police. Downey police officer Daniel Olivares, who had responded to previous reports by Zamora on eight to 12 occasions, went to both

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[9] Initially, the social worker was unable to make contact with defendant. The social worker sent a registered letter to the Benedict address that went unclaimed, but sometime after sending the letter, defendant called him.

the Puritan and Benedict addresses and did not find defendant or C. at either location.[10] The officer completed a missing persons report as to both defendant and C.

Later that week, Zamora made an ex parte appearance in family court. The court entered an order pursuant to Family Code section 3130 directing the district attorney to "take all actions necessary to locate [defendant] and the child . . . ." (Fam. Code, § 3130.) Zamora gave an investigator in the district attorney's office copies of the various police incident reports he had obtained and information regarding defendant and C., including photos and vehicle identification information. At some point, Zamora provided similar information to a Los Angeles County Sheriff's detective in Compton.

After the ex parte hearing, Zamora obtained additional police incident reports on January 22 and March 1 when his lack of visits with C. continued. In the meantime, defendant also missed a scheduled mediation session with Zamora concerning their family court case. The family court continued the Family Code section 3130 order in force because defendant and C. had not yet been found. Zamora asked the family court judge whether he should persist in his attempts to follow the visitation order. According to Zamora, the judge told him the order was "out the window" at that point.

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[10] The Benedict address consisted of three units, one in front and two in back. Defendant lived in one of the back units. Officer Olivares testified that when he went to the Benedict address, nobody answered the door of the front unit. He then spoke with someone in one of the back units but did not take down that person's name or any other identifying information.

On May 5, 2015, the district attorney's office informed Zamora that investigators had located C. and he could come pick her up. Zamora was granted sole physical custody of C., and defendant was given visitation rights.

C. The Defense at Trial

The defense presented evidence in an effort to establish defendant moved to the Benedict address in late 2012 or early 2013 and lived there with C., Jorge, and Carmen continuously from that time forward, including during the entire seven-month period of the charged offense. Carmen babysat C. when defendant was at work. Carmen testified she went to church every Sunday but was always back at 9:00 or 9:30 a.m. and was ready to hand C. to Zamora at 10:00 or 10:30. She said whenever the police came after being called by Zamora, either she or defendant would bring C. out. On a number of occasions after Zamora called the police from the Puritan address, he ended up receiving C. at the Benedict address.[11] Jorge testified he had no issues with Zamora and would have had no problem with him coming to the front door to retrieve C.

Defendant testified in her own defense and asserted she did not find it odd when Zamora failed to pick up C. beginning in October 2014 (essentially the start of the charged period of child

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[11] Defendant said that because she did not live at the Puritan address, she was never there on Zamora's visitation days. The prosecution undermined her testimony in this regard, however, with testimony concerning an incident report indicating defendant and C. were awaiting Zamora at the Puritan address on one occasion when Zamora and the police were at the Benedict address.

withholding) because he had failed to show up on scheduled visitation days in the past (e.g., Thanksgiving 2013), and had even gone months without seeing her. Defendant said she did not know C. had been reported missing until she was arrested in May 2015.

In addition, through cross-examination of Zamora, defense counsel sought to establish Zamora was more interested in obtaining incident reports to document perceived violations by defendant than in actually seeing his daughter. Zamora conceded he would drive by the locations where he thought C. might be without parking or getting out of his car unless he saw "the cars" outside a location, in which case he would stop. Defendant acknowledged that on at least two occasions before the charged period of withholding, he called the police from the Puritan address to report visitation order non-compliance and the police were able to pick up C. at the Benedict address for visitation.

Defense counsel also elicited testimony from Zamora that he obtained incident reports even when defendant had not actually violated the terms of the custody order. The family court order defined the first weekend of the month as a weekend having a Saturday, and thus, Zamora lacked visitation rights on several of the Sundays he claimed to have been deprived of visitation (and for which he obtained incident reports)—e.g., September 1, 2013, September 15, 2013, December 1, 2013, and June 1, 2014.[12] Zamora also complained about not seeing C. on

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[12] Defendant conceded she never raised this issue in family court but said she brought it to the attention of Zamora, her attorney, and police officers on numerous occasions. She had no police documentation to support her assertion.

her birthday in 2013 despite having no right to visitation on that day. In addition, Zamora contacted the police to obtain incident reports when defendant did not pick up C. after Thursday visits, even though Zamora was responsible for both picking up and dropping C. off on those days.

The defense also questioned Zamora's motives in testifying against defendant, suggesting he continued to be romantically interested in defendant and was upset because she kept rejecting him. The defense pointed to text messages in which Zamora asked defendant on multiple occasions whether she was with another man and told defendant he missed her. In another exchange, Zamora texted he was "not happy," and when defendant responded "[w]hy[?], kiss my baby" (Zamora had sole physical custody of C. at this point), Zamora texted back, "[t]he baby, the baby, never [the] dad." Zamora also sent defendant texts, less than three weeks before the start of trial, in which he asked defendant if she ever thought of him; said he was "fantasizing about [her]"; and remarked they had shared "a very strong sexual chemistry," defendant "always pleased [Zamora]," he "always enjoyed pleasing [her]," and Zamora wished they could "turn back the clock" to when C. was born. (The trial court excluded more sexually explicit text messages, which we address later in resolving defendant's challenge to the trial court's ruling.) Even after voir dire began during defendant's trial, Zamora texted her to "wait for [him]" and asked her if he could see her that evening. Defendant testified she had changed her phone number in August 2014 because Zamora was "constantly texting [her] sometimes inappropriate things" and she "didn't want him to emotionally abuse [her] anymore . . . ."

D. The Jury Verdict and Sentencing

During deliberations, the jury asked for and obtained a read-back of the "testimony of Pablo Zamora for all [of] September 25, 2014 to January 4, 2015." The jury also asked for all incident reports, police reports, and the missing persons report for the period of the charged offense, but the court informed the jury the reports were used to refresh the recollection of testifying witnesses and were not evidence in the case.

On the single charged count of child custody deprivation, the jury found defendant guilty. The trial court suspended the imposition of a prison sentence and placed defendant on probation for five years with various conditions, including two of particular relevance in this appeal. First, the court ordered defendant not to "own, use or possess any dangerous or deadly weapons including firearms, knives or other concealable weapons." Second, defendant was ordered "to submit her person and property to search or seizure with or without a warrant, with or without probable cause[,] at any time of the day or night by any peace or probation officer." Defense counsel objected to the search condition on the ground it was "not rationed to [defendant's] conduct." The prosecutor argued the condition was appropriate "based on the numerous text messages that were entered into evidence." Without adopting the prosecutor's argument, the court stated it would leave the condition in place because "[i]t's a felony conviction. It's a standard condition on felony convictions. It's appropriate."

II. DISCUSSION

We affirm defendant's conviction and, as clarified in one respect, defendant's conditions of probation. The prosecution presented substantial evidence that defendant kept, concealed, or withheld C. and did so with malicious intent. The various challenges defendant advances to the trial court's rulings admitting or excluding evidence fail—most because the trial court did not abuse its discretion and, for the one or two instances in which the trial court may have exceeded the bounds of its discretion, because the admitted or excluded evidence did not prejudice defendant. The trial court had no sua sponte obligation to instruct the jury that the evidence of uncharged conduct admitted to prove intent was received for that limited purpose, and we cannot say on direct appeal that defendant's trial attorney was constitutionally ineffective by not asking for such an instruction. The prosecution did not prejudicially err in delivering its closing argument. And the challenged conditions of probation are legally justified, although we reach that conclusion construing the search condition to exclude searches of personal electronic devices, including defendant's cell phone.

A. Substantial Evidence Supports Defendant's Conviction

The standard by which we evaluate defendant's insufficient evidence claim is well established. "'[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the

judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890; see also *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

Section 278.5, the statute of conviction, requires proof that a defendant took, kept, withheld, or concealed a child, with malicious intent, from someone having a lawful right to visitation. (§ 278.5, subd. (a).) A defendant acts "maliciously" if her statements or conduct reveal "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act . . . ." (§ 7.)

There was substantial evidence introduced at defendant's trial that she kept or withheld C. from Zamora from September 26, 2014, to May 5, 2015. Prior to that time period, Zamora had numerous visits with C., and the successful custody exchanges for those visits typically occurred with Carmen, on defendant's behalf, bringing C. out to defendant on his scheduled visitation days. There was accordingly ample evidence to permit the jury to infer a custom or settled practice had developed between the parties that the custody exchanges would occur in this manner—particularly with Zamora having to contend with the limited 30 minute window for visitation. Beginning in late September 2014, however, it was undisputed at trial that Zamora received no visits with C., and the key difference was the change in practice—neither defendant nor Carmen would bring C. outside to defendant for visits and Zamora no longer saw (or so the jury

could find, at least in most instances) familiar cars outside the Benedict address.

Defendant makes much of the fact that Zamora did not stop his car or approach the front door of the Benedict address as he made his rounds on visitation days during this period where there were no visits, but this does not undermine the evidence on which the jury could conclude defendant kept or withheld C. Zamora testified he continued to follow the same custom of driving around that he followed previously. In light of evidence Zamora frequently received visitation with C. during that earlier time period, despite his unusual method of picking her up, jurors could infer defendant intentionally withheld C. from him after September 26, 2014. And the evidence that defendant refused to provide Zamora the new phone number she obtained around this time, and to respond to the certified letters he sent her in November 2014, strongly reinforces that inference.

This same evidence, plus the other acts evidence before the charged period of withholding,[13] was also sufficient to establish defendant withheld C. to vex or annoy Zamora—or at least with the intention of violating her known obligations under the court-issued visitation order. Defendant and Zamora's interaction was undeniably antagonistic, and the text message exchanges and instances in which defendant knew Zamora had gone so far as to involve the police to secure his visitation rights gave the jury a solid basis to infer defendant intended to annoy Zamora by

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[13] For reasons we discuss below, we conclude all or nearly all of the evidence of defendant's prior conduct was probative of her intent.

withholding visits with C.[14] Moreover, even if the jury were inclined to instead give some credence to defendant's explanation for going incommunicado during the period of withholding—that she was hiding from Zamora either because he had abused her and was making false allegations about her (as she told the social worker) or because she was tired of defendant's efforts to, as she put it, "lead [her] on"—it is indisputable that defendant did so knowing that she was thereby violating her obligations under the court visitation order. That is sufficient to show malicious intent.

B. The Trial Court's Admission of Uncharged Other Acts Evidence Does Not Warrant Reversal

1. All or nearly all of the evidence was relevant, most highly so

Evidence of a defendant's uncharged wrongful conduct is inadmissible to show the defendant had the character or propensity to commit the charged crime. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159 (*Villatoro*); Evid. Code, § 1101, subd. (a) ["[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion"].) But such evidence may be admitted if it is relevant "to establish a material fact like intent, common design

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[14] The June 2, 2013, text message exchange—in which defendant repeatedly refused to give Zamora the cross streets of the church where she and C. were at the time—was particularly revelatory in this respect.

or plan, or identity ([Evid. Code,]§ 1101, subd. (b)) . . . ." (*Villatoro*, *supra*, at p. 1159.)

The admissibility of a defendant's uncharged conduct under Evidence Code section 1101, subdivision (b) turns on three considerations: the materiality of the fact sought to be established by the evidence, the tendency of the evidence to prove that fact, and whether any rule or policy requires exclusion of the evidence regardless of its probative value. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114 (*Thompson*); *People v. Jones* (2012) 54 Cal.4th 1, 49.) We review a decision to admit evidence of prior uncharged acts under Evidence Code section 1101, subdivision (b) for abuse of discretion. (*People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*).)

Defendant's intent was the pivotal issue at trial, and the bulk of the prosecution's efforts to establish C. was maliciously withheld relied on Zamora's testimony (refreshed by police incident reports and corroborated by exhibits) about events preceding the charged conduct. Prior to trial, the court considered the admissibility of the uncharged conduct evidence. Counsel for the prosecution argued evidence of defendant's actions beginning in 2012 showed a "pattern" of "violations and withholdings" that were probative of intent. Defense counsel countered that evidence of defendant's conduct in 2012 and 2013 had limited relevance to establishing her intent from September 2014 onward. The trial court concluded the evidence was admissible.

With one potential caveat addressed below, the trial court did not abuse its discretion in admitting evidence of defendant's uncharged conduct under Evidence Code section 1101, subdivision (b). There was almost no evidence of defendant's

conduct during the period of the charged offense—because defendant was "hiding" from Zamora and the two had no interaction—and her prior dealings with Zamora were accordingly highly probative and important evidence of intent. The evidence tending to show defendant knowingly violated the visitation order by providing C. late to defendant (e.g., on March 31, May 5, August 18, and October 6 of 2013, plus January 26, 2014) or by not providing C. to him at all (e.g., January 27, November 28, and December 31 of 2013, and June 22, August 17, and August 24 of 2014) was sufficiently similar to the charged withholding conduct to allow the jury to make inferences regarding intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [uncharged conduct must be similar enough to offense conduct to support inference defendant probably acted with the same intent on each occasion]; see also *Leon*, *supra*, 61 Cal.4th at p. 598 [""The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent""].)

Other evidence of defendant's interaction with Zamora before the time period charged in the information was somewhat less probative of her intent to withhold C.: defendant's texts before the family court ordered a visitation schedule; the "weekends" beginning September 1, 2013, September 15, 2013, September 29, 2013, December 1, 2013, and June 1, 2014, where Zamora mistakenly believed he was denied visitation with C.; the times defendant failed to attend mediation sessions; and the days defendant failed to pick up C. at the conclusion of Zamora's visitation. But with the possible exception of defendant's failure to pick up C. on Thursdays, we conclude the trial court was within the proper bounds of its discretion to admit this evidence.

Even though defendant testified she told Zamora and police officers that Zamora had no right to visitation on certain weekends, the jury was entitled to disbelieve her testimony. Defendant never reported Zamora's mistakes to the family court, and in text messages preceding the September 1, 2013, incident, she spoke of keeping C. that weekend because it was defendant's birthday, not because Zamora was not entitled to visitation under the court order. If the jury believed defendant was unaware Zamora had no right to visitation on September 1, 2013, September 15, 2013, September 29, 2013, December 1, 2013, and June 1, 2014, evidence she prevented or delayed his visitation with C. on those dates was probative of her intent. (Furthermore, as discussed *post*, to the extent the jury did believe defendant, the evidence would have inured to her benefit by establishing Zamora on some occasions made demands inconsistent with the family court's visitation order.)

The evidence regarding defendant's pre-visitation-order texts and her failure to attend mediation did not necessarily show defendant intended to keep C. from Zamora, but those incidents did tend to show defendant's refusal to cooperate with Zamora or her general desire to "vex, annoy, or injure" him. (§ 7.) Thus, we conclude the evidence was properly admitted as relevant, even if not quite as relevant as other evidence.

Zamora also testified defendant failed to pick up C., or was not at home when he attempted to drop her off, after approximately nine visits. Five of those incidents involved weekend visits, and two involved Thursday visits where no one was home when Zamora attempted to return C. We conclude evidence of defendant's conduct as to those incidents was not erroneously admitted under Evidence Code section 1101,

subdivision (b) because jurors could infer she intended to vex or annoy Zamora by not retrieving C. as directed in the court order, or by not being available at the time C. was to be returned. Again, such evidence had probative value, albeit limited value, on the issue of defendant's intent.

On the other hand, the two incidents where Zamora complained defendant failed to pick C. up on a Thursday (July 17 and September 25, 2014) were far less relevant to proving intent (or any other issue permitted by Evidence Code section 1101) because the court order made *Zamora* responsible for dropping C. off. But for reasons we explain momentarily, admission of that evidence could not warrant reversal because it is not "reasonably probable that a result more favorable to [defendant] would have been reached" if the evidence had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)[15] Considering the trial as a whole (*ibid.*), in which Zamora testified to more than two dozen instances in which defendant failed to fully comply with the visitation order, the two times defendant failed to pick up C. after a Thursday visit could not have carried much, if any, weight in the jurors' assessment of the evidence.

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[15] "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*); see also *People v. Malone* (1988) 47 Cal.3d 1, 22 [applying *Watson* standard to admission of prior conduct evidence].)

2. Admission of the evidence did not offend Evidence Code section 352, or did not constitute prejudicial error under state law

Even if evidence is admissible under Evidence Code section 1101, subdivision (b), a trial court has discretion to exclude it "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." (Evid. Code, § 352.) Here, defense counsel argued evidence of defendant's prior uncharged conduct could consume an undue amount of time, and the trial court agreed the evidence would "at some point . . . become [subject to exclusion under section] 352 . . . ." As the trial progressed, the court expressed concern that the prosecution's presentation of the prior conduct evidence was "starting to bog down." The court did not curtail the prosecution's evidence, but made suggestions for abbreviating it.

The trial court's Evidence Code section 352 balancing, which permitted the prosecution to introduce the evidence of intent it did, was not an abuse of discretion. (*Thompson*, *supra*, 1 Cal.5th at p. 1114 [abuse of discretion standard of review applies].) Evidence showing defendant provided C. to Zamora late or not at all on his scheduled visitation dates was quite probative of her intent to later deprive him of visitation. Evidence of defendant's 2012 text messages and her failure to attend mediation were only marginally relevant but such evidence was not particularly prejudicial, it was covered in a short amount of time at trial, and it did not form a significant basis of the prosecution's case.

The analysis, of course, differs for the evidence regarding the dates on which Zamora erroneously claimed he was denied visitation and the two Thursdays defendant failed to pick up C. The prosecution did devote substantial attention to this evidence, both in terms of the weight accorded to it and the time spent developing it. Reversal is not warranted, however, because defense counsel used the evidence in a manner that not only neutralized any possibility of prejudice but also affirmatively assisted the defense case. The defense argued Zamora's claim to visitation rights on numerous occasions when he actually lacked such rights, and his repeated requests for police incident reports revealed he was intent merely on manufacturing a case against defendant rather than being genuinely interested in spending time with his daughter.

3. Admission of the prior uncharged conduct evidence did not violate the federal Constitution

We additionally reject defendant's suggestion that admission of the other acts evidence was so prejudicial as to violate her right to due process and made her trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Instead, we adhere to the well-established view that "application of ordinary rules of evidence . . . does not implicate the federal Constitution . . . ." (*People v. Marks* (2003) 31 Cal.4th 197, 227; accord, *People v. Catlin* (2001) 26 Cal.4th 81, 122-123; *People v. Cudjo* (1993) 6 Cal.4th 585, 611 ["'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense'"]; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402-

1403 ["Federal due process rights are not implicated where the disputed evidence is relevant and admissible to show intent, motive, identity, knowledge, common plan . . ."].)

Moreover, even taking defendant's argument on its own terms, all or nearly all of the Evidence Code section 1101, subdivision (b) evidence admitted had probative value. Those aspects of the evidence that were not as probative on the issue of intent either received relatively little attention at trial or were effectively used by defense counsel to attack Zamora's testimony. (Cf. *People v. Bivert* (2011) 52 Cal.4th 96, 118 (*Bivert*) [irrelevant evidence results in fundamental unfairness where it """"diverts the jury's attention from its proper role or invites an irrational, purely subjective response""""].) We further find it significant that the jury, during deliberations, requested testimony and evidence relating solely to the time period of the charged offense, which strongly suggests the jurors understood they could convict defendant only by reason of her conduct during that time period, and not in reliance on the prior conduct evidence.

C. The Remainder of the Challenged Evidentiary Rulings Were Not an Abuse of the Trial Court's Discretion

1. Exclusion of evidence defendant had been sexually assaulted by a sheriff's deputy

Prior to trial, the court considered whether to admit evidence of the reason defendant gave for refusing to open the door when deputies from the Los Angeles County Sheriff's Department appeared at the Compton address on August 24, 2014: the fact that defendant had previously been sexually assaulted by a sheriff's sergeant stationed in Compton. The

offending sergeant was in custody when the sheriff's deputies knocked on defendant's door, but she believed his law enforcement colleagues blamed her for his incarceration.

In a discussion outside the presence of the jury, defense counsel asked the court for permission to inquire about the assault "to explain [defendant's] mindset and conduct on the August 2014 date." The trial court barred counsel from making any mention of the assault, concluding it was "not very probative" because (based on the prosecution's offer of proof) Zamora initially went to the Compton address by himself and defendant did not make C. available for visitation, which "show[ed] that [defendant's] intent not to turn the child over really had nothing to do with the Compton sheriff's department . . . ." The court additionally reasoned "the fact that the sheriffs came out" was a situation defendant "created with her conduct." The court found the sexual assault evidence to be "highly potentially prejudicial" to the prosecution because it "might create a situation where the jury exercises sympathy rather than basing a decision on the evidence . . . ."

After Deputy Magana testified about going to the Compton address on August 24, 2014, defense counsel renewed his request to admit evidence of the sexual assault, asserting it was alternately admissible under Evidence Code section 356, which provides, in pertinent part, that "when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Defense counsel made an offer of proof that Detective Magana would testify, if asked, that when defendant refused to open the door, she told the deputies she "was raped for two-and-

a-half hours by Sergeant Fitzpatrick from Compton" and did not trust the police. Defense counsel argued defendant's reason for not opening the door was highly relevant because "this [was] the only testimony . . . offered [by the prosecution]" where "police are showing up and [defendant is] refusing to turn over the kid" and the jury would misinterpret defendant's refusal if not told the ostensible reason for it.

The court declined to change its original ruling excluding inquiry into the sexual assault. Reasoning that the August 24 incident was not an "isolated" occurrence of some form of interference by defendant, the court reiterated its conclusion that the probative value of the sexual assault was substantially outweighed by the potential for prejudice because the value of the evidence was "remote" compared to the "high" risk of a prejudicial effect on the jury.

On appeal, defendant contends that by excluding evidence to show she refused to open the door because of the prior sexual assault, the trial court not only erred as a matter of California evidentiary law but also deprived her of "a meaningful opportunity to present a complete defense" in violation of her federal constitutional right to due process. (*California v. Trombetta* (1984) 467 U.S. 479, 485 (*Trombetta*).) "A defendant is denied that opportunity when the state is permitted '"to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence,"' absent a valid justification for excluding the evidence. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [ ].)" (*People v. London* (2014) 228 Cal.App.4th 544, 558-559.)

If the facts had shown defendant made C. available for visitation after sheriff's deputies left her home—or perhaps even

if she offered to make C. available once they were no longer present—we would agree the trial court abused its discretion in preventing the defense from introducing evidence of her professed reason for refusing to open the door for the deputies. But in actuality, the evidence was that defendant refused to make C. available earlier that day (which prompted Zamora's call to the authorities) and defendant never made C. available to Zamora later that day even after the sheriff's deputies left. Thus, the primary reason why the evidence was relevant was not because defendant refused to open the door notwithstanding the identity of those asking, but because defendant refused to allow C. to visit with Zamora even though she was acutely aware he was attempting to enforce his right to visitation and even though there were ample alternative avenues by which she could comply with the visitation order without exacerbating her stated fear of the police. Seen in that light, defendant's reason for keeping the door shut to the deputies was not especially relevant to the factual issues the jury was being asked to resolve.

Having said that, we do acknowledge there could be some risk defendant might be prejudiced by a ruling excluding the evidence for the reason she identifies—because the jury might misuse her mere refusal to comply with a law enforcement command to conclude she was a scofflaw deserving of punishment. But even assuming that risk existed, the trial court was right there was also a countervailing risk of prejudice if the evidence instead were admitted: the gross misconduct by the offending sergeant might inflame the jurors' passions and give them reason to find in defendant's favor for reasons that were not germane to the issues to be decided at trial. (See *People v. Cowan* (2010) 50 Cal.4th 401, 479 ["'Evidence is prejudicial within the

meaning of Evidence Code section 352 if it encourages the jury to prejudge defendant's case based upon extraneous or irrelevant considerations'"].) Balancing the conceivable prejudice on both sides was bound to be a close call, and one we think the trial court was better equipped to make by being closer to the action—observing the jurors throughout the trial and hearing the witnesses testify. The deferential abuse of discretion standard of review exists for this reason, and we are not convinced under this standard that the trial court erred in concluding the balance tipped in favor of excluding inquiry into the sexual assault, whether under Evidence Code section 352 or section 356. (*Thompson*, *supra*, 1 Cal.5th at p. 1114 [abuse of discretion review applies to Evidence Code section 352 determinations]; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 73 [abuse of discretion review applies to Evidence Code section 356 determinations].)

Of course, having concluded the trial court did not abuse its discretion in precluding inquiry into the sexual assault, we likewise conclude defendant has no viable claim the court's ruling deprived her of her federal constitutional rights to a fair trial and to present a complete defense. Indeed, viewing the entire record, we believe the defense at trial was quite robust and defendant's trial was in no way fundamentally unfair. As the trial court observed, the August 24, 2014, incident involving the deputies' knock on defendant's door was one of many instances in which there was evidence defendant did not comply with the visitation order and police officers were called to enforce the exchange. The earlier, unrelated sexual assault was not central to her defense against the charge.

2. The court's exclusion of sexually explicit text messages from Zamora

After Zamora testified he had not been romantically interested in defendant during the recent past, the defense sought to impeach his credibility—and reveal he had an ulterior motive for testifying against defendant—by introducing in evidence certain text messages of a romantic or sexual nature that Zamora had sent defendant shortly before trial (described *ante*). In addition to the text messages the court admitted in evidence, defense counsel sought to introduce two additional, more prurient text exchanges Zamora sent defendant shortly before trial.[16] The court excluded the additional texts after finding their sexually graphic nature made them "unduly prejudicial and not sufficiently probative under [Evidence Code section] 352 in light of the other three texts" the court admitted in evidence. On appeal, defendant argues exclusion of the texts was error under California law and violated her federal constitutional rights to a fair trial and to present a complete defense.

In light of the other texts the court admitted and the content of the texts the court excluded, we find no abuse of discretion and no violation of defendant's constitutional right to a fair trial. The excluded texts were of like kind to the admitted texts insofar as they demonstrated Zamora's continued romantic, sexual interest in defendant. Thus, to the extent defendant's

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[16] In one series of texts, Zamora spoke of wanting to perform oral sex and have intercourse with defendant in graphic terms. In another text, Zamora told defendant he woke up with an erection (using a somewhat cruder phrase) after dreaming of her.

claim of innocence depended on revealing Zamora's feelings toward her, she received a meaningful opportunity to present that evidence through the texts the court admitted. The trial court acted within its discretion in finding the potential prejudicial effect of the excluded texts substantially outweighed their probative value.

3. The court's exclusion of evidence regarding Zamora's absence from C.'s life and defendant's lack of attorney representation

During trial, the court allowed Zamora to testify he lacked an attorney when he initiated proceedings in family court, but the court sustained a prosecution objection on the same ground when defense counsel asked defendant whether she initially had an attorney in those same proceedings (her answer being no). The court also admitted prosecution evidence of defendant's text messages predating the visitation order but excluded defense evidence that Zamora absented himself from C.'s life for "a few months" soon after her birth, sustaining the prosecution's relevance objection and directing defense counsel to "focus on [acts] after the visitation order" because "that's the relevant time."

We reject defendant's contention that the court's rulings constituted prejudicial error. Even if the evidence was relevant to show defendant lacked malicious intent or to impeach Zamora, its admission would not have made a more favorable result to defendant reasonably probable. (*Partida*, *supra*, 37 Cal.4th at p. 439.) Nor did the exclusion of the evidence deprive her of a meaningful opportunity to present a complete defense. (*Trombetta*, *supra*, 467 U.S. at p. 485.) Defendant testified she

herself was not a lawyer and found court proceedings "very confusing." She also testified there were times after the visitation order was issued, including periods longer than a month, when Zamora did not visit with C. despite defendant making her available. Thus, defendant was given an adequate opportunity to emphasize the points she wished to establish with the excluded evidence.

4. The court did not err in admitting evidence of C.'s age when defendant took her to a monster truck show

When the prosecutor cross-examined defendant about taking C. to a monster truck show two days after the family court's initial custody and visitation decision, the prosecutor elicited testimony over a defense objection that C. was just nine months old on that date. Defendant asserts the admission of this testimony constituted prejudicial error because its sole purpose was to portray her as a bad mother. We are not persuaded.

C.'s age at the time of the monster truck show was probative of defendant's intent to deprive Zamora of visitation because jurors could infer she had no pressing reason to take an infant of that age to such an event. The probative value of the evidence was not substantially outweighed by a risk of prejudice considering jurors heard testimony about C.'s date of birth and could therefore determine themselves how old she was on the date at issue.

5. Allowing Zamora to briefly testify about the effect the charged child withholding had on him was not prejudicial error

Over a defense objection under Evidence Code section 352, the trial court allowed Zamora to testify in a "general[,] brief" manner about what he missed out on during the seven-month period in 2014 and 2015 when he did not see C. Zamora called the time he missed "priceless." He said he lost that time "to create more memories with [his] daughter[:] . . . potty training, the parks, . . . sightseeing, [and] little simple things like that" which he could never "get . . . back."

Defendant contends this evidence was irrelevant, prejudicial, and deprived her of a fair trial. Because the testimony was indeed general and brief, the trial court may have been within its discretion to permit it—there is no basis to conclude the effect was much different than if Zamora had teared up while testifying about the period of custody deprivation. But regardless, Zamora's testimony did nothing to alter or enhance properly admitted evidence showing defendant intentionally withheld or kept C. from him. Thus, the exclusion of Zamora's testimony would not have made a more favorable result to defendant reasonably probable. (*Partida*, *supra*, 37 Cal.4th at p. 439.) Nor was the evidence "so inflammatory as to divert the jury's attention or invite an irrational response." (*Bivert*, *supra*, 52 Cal.4th at p. 118.)

D. The Absence of a Limiting Instruction Did Not Amount to Error

Defense counsel did not request a jury instruction describing the limited admissibility of the Evidence Code section

1101, subdivision (b) evidence. Defendant contends the trial court should have given—sua sponte—CALCRIM No. 375. That instruction provides, as would be applicable to this case, that if the prosecution "proved by a preponderance of the evidence that the defendant in fact committed" the prior uncharged acts, jurors could consider that evidence solely for the limited purpose of determining her intent to commit the charged offense. The instruction further provides that a jury finding that defendant committed the prior acts is not sufficient in itself to prove defendant committed the charged crime, proof that instead must be made beyond a reasonable doubt.

Trial courts generally have no obligation to instruct sua sponte on the limited admissibility of other uncharged acts. (Evid. Code, § 355 ["When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly"], emphasis added; *People v. Collie* (1981) 30 Cal.3d 43, 63 (*Collie*) ["Although the trial court may in an appropriate case instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct, we have consistently held that it is under no duty to do so"].) Exceptions to this rule, such that a trial court would have a sua sponte duty to instruct, lie only in the "'occasional extraordinary case in which unprotested evidence . . . is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052, quoting *Collie*, *supra*, at p. 64.) This is no extraordinary case. The evidence of defendant's prior conduct was relevant to her intent—and much of it highly so. For the

reasons we have already given, to the extent some of the prior conduct evidence had limited relevance, the parties' handling of it prevented any significant prejudice that would necessitate a sua sponte limiting instruction.

Nor are we convinced defense counsel was constitutionally deficient for failing to request a limiting instruction. "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [ ]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [ ].)'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) We presume that "'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.' [Citations.]" (*Ibid*.) If the appellate record "'sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.' [Citation.]" (*Ibid*.)

Defendant has not presented "affirmative evidence that counsel had 'no rational tactical purpose'" for failing to request a limiting instruction. (*People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*).) We can envision tactical reasons why counsel would not request a limiting instruction, including a belief the instruction's benefits would be limited under the circumstances

and would risk focusing the jury's attention on defendant's uncharged conduct. But regardless, defendant has not established "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) As explained earlier in our discussion, the jurors' evidentiary requests during their deliberations show they were focused on the period of the charged conduct in this case. There is no indication they believed they could convict defendant by reason of the evidence of her actions prior to the period of the charged offense.

E. Defendant's Prosecutorial Misconduct Claims Do Not Warrant Reversal

Defendant contends the prosecutor made several comments during closing argument that amount to reversible error when viewed either singly or cumulatively. "A prosecutor's conduct violates the federal Constitution when it infects the trial with unfairness, and violates state law if it involves the use of deceptive or reprehensible methods of persuasion. [Citation.] When the claim focuses on the prosecutor's comments to the jury, we determine whether there was a reasonable likelihood the jury construed or applied the remarks in an objectionable fashion. [Citation.]" (*People v. Brady* (2010) 50 Cal.4th 547, 583-584; see also *People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

During trial, the prosecution sought to establish during Detective Magana's testimony that defendant never obtained a restraining order against Zamora, which was intended to counter evidence that defendant limited her contact with Zamora because he had abused her. The trial court excluded the restraining order

testimony on hearsay grounds. In her rebuttal argument, however, the prosecutor asserted defendant "never got a restraining order." The trial court sustained a defense objection on the ground the statement assumed facts not in evidence, told jurors there was "no testimony about restraining orders," and instructed them to "disregard that comment." Although it sustained the objection, the court later clarified (when ruling on a defense motion for a mistrial) it ruled the way it did "in an abundance of caution" and did not believe the prosecutor had engaged in misconduct.

It may have been error for the prosecutor to state defendant did not get a restraining order (rather than arguing defendant *could have* gotten a restraining order and yet still complied with the terms of the visitation order), but we do not believe the isolated misstatement on the tangential point was misconduct. (*Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Parson* (2008) 44 Cal.4th 332, 363 [comment not misconduct because it was "isolated in nature and did not render the trial fundamentally unfair" and because it "did not amount to the use of deceptive or reprehensible methods for purposes of persuasion"]; compare *People v. Trinh* (2014) 59 Cal.4th 216, 248 [misconduct established where prosecutor repeatedly asked questions in a form the trial court had prophylactically barred].) In any event, reversal is not warranted because there is no possibility the misstatement affected the jury's verdict, especially in light of the trial court's decision to sustain the defense objection and to instruct the jury that the comment was stricken. (*People v. Peoples* (2016) 62 Cal.4th 718, 803 (*Peoples*) [no "reasonable possibility" closing statement referring to facts not in evidence affected verdict where "remarks were brief and

tangential to the issues in the case, and the trial court correctly sustained defense objections to the[ ] statements"]; *People v. Edwards* (2013) 57 Cal.4th 658, 742 ["even assuming the prosecutor's comment rose to the level of misconduct, there was no possible prejudice given the trial court immediately sustained defendant's objection and struck the comment"].)

Defendant also contends the prosecutor relied on facts not in evidence when she made the following statement during her rebuttal argument: "How do you hide a child at home? You don't answer the door when the police arrive. That's what Carmen said. The police kept coming even during [the] time period [of the charged offense]. Officer Olivares [testified], I knocked. Three houses, nobody answered the door." Defense counsel objected that the statement assumed facts not in evidence, and the trial court admonished the jurors that it was their "recollection of the facts and what the facts show[ed]" that controlled, "[n]ot what the lawyers argue[d] the facts to be."

Defendant contends the prosecution's statement was improper because Carmen never testified about not answering the door for the police and Officer Olivares did not testify that he knocked on all three units at the Benedict address. Even though the court did not strike the comment, there is no reasonable probability it affected the jury's verdict in light of the court's immediate admonition, the brevity of the statement, and the evidence and argument presented at trial as a whole. (See *Peoples*, *supra*, 62 Cal.4th at p. 803.) What Carmen may have said has little, if any, relevance to what defendant intended. And suggesting that Officer Olivares found no one home after knocking on all three doors at the Benedict address was not more harmful to defendant than his actual testimony—that no one was

home when he knocked on the front unit and that he concluded defendant was not at the property after speaking with someone in one of the back units.

Defendant also contends the prosecutor misstated the law and improperly appealed to the jurors' sympathy when she made the following statement as she opened her closing argument: "The judge is going to tell you about Penal Code section 278.5 which [the defendant is] charged with and it's important to realize that it's not from the child's perspective that the law is, and it's not from the defendant's perspective. It's from the left behind parent's perspective. It's the left behind parent denied the rightful—" At this point, defense counsel objected that the prosecutor had misstated the law, and the court admonished the jury as follows: "Ladies and gentlemen, the lawyers will argue what they believe the law—what the instruction states. . . . To the extent their comments on the law conflicts with my instructions, you follow the instructions. . . . I have the final say on the law." The prosecutor then continued her statement: "[l]egal court ordered visitation. [¶] The law doesn't get to say and neither does [the] defense[,] well, the child [C.] was with her mother so there's no crime."

The prosecution's statement was not an inaccurate characterization of section 278.5, which looks to the rights of the deprived parent and not to whether the child consented or desired to remain with the withholding parent. (See *People v. Grever* (1989) 211 Cal.App.3d Supp. 1, 7 [withholding parent's later change of mind does not negate earlier intent to withhold nor is child's desire to remain with withholding parent relevant]; see also *People v. Moore* (1945) 67 Cal.App.2d 789, 792; CALCRIM No. 1251.) Nor did the prosecution's statement

improperly appeal to the jury's sympathy. "As a general rule, a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406.) The rule does not apply where the comment has a legitimate purpose, however. (*Ibid.*) Here, the context for the prosecutor's challenged statement was not aimed at garnering sympathy for Zamora but explaining the statute focused on effect on the deprived parent—the withholding—and it was immaterial whether defendant believed C. would be better off if she did not visit her father or whether C. was safe during the period of withholding because she was with her mother. The remark was within the bounds of proper argument.

F. Defendant's Cumulative Error Claim Fails

Defendant contends cumulative prejudice resulting from the combination of individual trial errors and instances of prosecutorial misconduct deprived her of a fair trial. (See *Hill*, *supra*, 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) The cumulative effect of any errors in defendant's trial we have found or assumed did not render that trial unfair.

We have rejected nearly all of defendant's claims of error. Of those evidentiary errors we did not reject, we concluded their significance was slight or the defense neutralized the risk of prejudice by employing the challenged evidence to defendant's advantage. Thus, we conclude that any errors, found or assumed, did not render defendant's trial fundamentally unfair and, if such errors had not been made, it is not reasonably probable the jury

would have reached a more favorable result to defendant. (See, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1075; *People v. Roberts* (1992) 2 Cal.4th 271, 326 [no cumulative prejudice where individual errors were harmless in themselves and, considering the entire record, "the whole of [the individual errors] did not outweigh the sum of their parts"].)

G. The Probation Search Conditions Are Valid, As Construed

Defendant contends two probation conditions imposed by the trial court—the search condition and the weapons condition—violate state law and trespass upon her federal constitutional rights. She asks us to strike the search condition and to modify the weapons condition by limiting it to a firearm ban.

Sentencing courts have "broad discretion to determine whether to grant an eligible defendant probation, and if so, what terms of probation will promote rehabilitation and protect public safety." (*People v. Hall* (2017) 2 Cal.5th 494, 498 (*Hall*).) In granting probation, the court may impose "reasonable conditions[ ] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (§ 1203.1, subd. (j); see also *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121 (*Carbajal*).)

To accord with state law, probation conditions "must serve a purpose specified in the statute." (*Carbajal*, *supra*, 10 Cal.4th at p. 1121.) "A probation condition is valid under the statutory scheme if it relates to the crime for which the defendant was

convicted, relates to other criminal conduct, or requires or forbids conduct that is reasonably related to future criminality. (*Hall*, *supra*, 2 Cal.5th at p. 498, citing *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) Because this analysis—which is sometimes referred to as the *Lent* test—is disjunctive, "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*).)

If a probation condition "imposes limitations on a person's constitutional rights," the sentencing court "must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' [Citation.]" (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*).)

Absent the impairment of a constitutional right, probation conditions are reviewed for abuse of discretion. (*Olguin*, *supra*, 45 Cal.4th at p. 384.) We review overbreadth challenges de novo. (*Appleton*, *supra*, 245 Cal.App.4th at p. 723.)

1. The weapons condition

Defendant argues the condition of probation that she not own, use, or possess any dangerous or deadly weapons is unreasonable and overbroad—apart from the firearm prohibition,

which she acknowledges is permissible. Defendant asserts the weapons condition is unreasonable under section 1203.1 because her offense did not involve any weapons or violence. She also claims the condition is overbroad because it "unduly restricts [her] Second Amendment right to bear arms," which she understands to encompass a right to possess weapons generally, not just firearms. We conclude defendant has forfeited both arguments because she did not object to the weapons condition at the time of sentencing. (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

Furthermore, we reject defendant's assertion that her counsel was constitutionally ineffective by failing to object to the condition because we conclude the trial court did not abuse its discretion in imposing the condition. Defendant accepts the firearm prohibition is proper because it "relates to other criminal conduct" (*Hall*, *supra*, 2 Cal.5th at p. 498), that is, the restriction against firearm possession by felons. Defendant complains the rest of the condition is unreasonable, however, because it would prohibit her from possessing "kitchen cutlery" or "mace or pepper spray to guard against an attacker, even in her own home."

Defendant's contention is meritless because one's ownership, use, or possession of kitchen cutlery for that purpose does not fall within the well-established definition of dangerous or deadly weapons. (See *People v. Graham* (1969) 71 Cal.2d 303, 327 ["dangerous or deadly weapons" encompass instrumentalities that "are weapons in the strict sense of the word and are 'dangerous or deadly' to others in the ordinary use for which they are designed" and instrumentalities that "are not weapons in the strict sense of the word and are not 'dangerous or deadly' to others in the ordinary use for which they are designed" but are

"capable of being used in a 'deadly or dangerous' manner" and may be shown by the evidence that the "possessor intended on a particular occasion to use it as a weapon"]; see also *People v. Burton* (2006) 143 Cal.App.4th 447, 457.) Defendant's pepper spray example to show unreasonableness fares no better: like the firearm prohibition, felons are prohibited from purchasing, possessing, or using pepper spray. (§§ 17240, 22810; *People v. Autterson* (1968) 261 Cal.App.2d 627, 630-631.)

Defendant's contention that the prohibition on possessing, owning, or using weapons other than firearms is overbroad by infringing on her Second Amendment rights is easily dispatched. There is no authority of which we are aware—and defendant cites none—that holds the Second Amendment's right to "bear arms" extends to weapons other than firearms.

2. The search condition

Defendant asserts the probation condition subjecting her to suspicionless searches of her person and property at any time cannot stand. She argues the condition is unreasonable under section 1203.1 because her texts to Zamora were not used to perpetrate the offense, her conviction was unrelated to the possession or use of any contraband, and she has no meaningful criminal history. She further argues the condition is unconstitutionally overbroad because allowing unfettered searches of her cell phone and person is not sufficiently tailored to a compelling state interest.[17]

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[17] The Attorney General argues defendant forfeited her overbreadth claim because defense counsel only objected that the search condition was not reasonably related to defendant's crime and evaluation of her claim requires a fact-intensive analysis

We hold the search condition is reasonable under section 1203.1 because it "aid[s] in deterring further offenses by [defendant] and in monitoring compliance with the terms of [her] probation." (*People v. Robles* (2000) 23 Cal.4th 789, 795; see also *People v. Bravo* (1987) 43 Cal.3d 600, 610.) Those terms include a weapons prohibition that the search condition will help facilitate. (See *Olguin*, *supra*, 45 Cal.4th at p. 381 [proper supervision to ensure probationer complies with probation conditions and does not reoffend "includes the ability to make unscheduled visits and to conduct unannounced searches of the probationer's residence"].)

Defendant's overbreadth challenge, however, raises thornier issues involving the extent to which searches of electronic devices intrude upon constitutionally protected privacy interests. (See *Riley v. California* (2014) 573 U.S. ___ [134 S.Ct. 2473, 2491] ["[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is"].)

In *Appleton*, *supra*, 245 Cal.App.4th 717, the defendant met his victim through a social media application. (*Id.* at p. 719.) The defendant pled no contest to false imprisonment by means of deceit, and the trial court imposed three years' probation, which

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that cannot be resolved as a pure question of law. We conclude that defense counsel's objection that the condition was "not rationed to [defendant's] conduct" adequately encompasses an overbreadth challenge.

included a condition allowing a "forensic analysis search" of the defendant's "computers and all other electronic devices . . . for material prohibited by law." (*Id.* at pp. 719, 721). On appeal, the *Appleton* court held the condition satisfied the *Lent* test because the trial court properly found the defendant's crime involved social media or computer software. (*Id.* at p. 724.) The *Appleton* court concluded, however, that the condition was unconstitutionally overbroad. It observed the condition "arguably swe[pt] more broadly than the standard three-way search condition allowing for searches of probationers' persons, vehicles, and homes" because it allowed for searches outside the defendant's home or vehicle and "the scope of a digital search is extremely wide." (*Id.* at p. 725.) The court noted "a search of defendant's mobile electronic devices could potentially expose a large volume of documents or data, much of which may have nothing to do with illegal activity. These could include, for example, medical records, financial records, personal diaries, and intimate correspondence with family and friends." (*Ibid.*)

In a number of other recent decisions, many involving juveniles,[18] the Courts of Appeal have considered whether

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[18] Because the power of the state to supervise juveniles is greater than its permissible authority over adults, courts may subject minors to more intrusive probation conditions than adults. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 889; *In re P.O.* (2016) 246 Cal.App.4th 288, 297 (*P.O.*); but see *In re Erica R.* (2015) 240 Cal.App.4th 907, 914 (*Erica R.*) [because minor, unlike adult probationer, cannot avoid a probation condition by accepting incarceration in lieu of probation, search conditions imposed upon minor cannot be automatic and must be properly tailored].)

electronic search probation conditions are unreasonable or overbroad. (See, e.g., *People v. Smith* (2017) 8 Cal.App.5th 977 [condition reasonable under *Lent* test]; *P.O.*, *supra*, 246 Cal.App.4th 288 [condition valid under *Lent* but modified to avoid being unconstitutionally overbroad]; *Erica R.*, *supra*, 240 Cal.App.4th 907 [condition invalid under *Lent*]; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 [condition reasonable and not overbroad].) Currently pending before our Supreme Court are at least 10 published decisions involving the imposition of electronic search probation conditions. (See, e.g., *In re R.S.* (2017) 11 Cal.App.5th 239, review granted July 26, 2017, S242387 (*R.S.*); *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210.)

In all of the review-granted cases (as of July 2017) save *R.S.*, *supra*, 11 Cal.App.5th 239, the challenged probation condition specifically referred to electronics, computers, or cell phones. The condition at issue here is, of course, different because it is generally worded and makes no specific reference to permitting searches of electronic devices. Considering the constitutional issues raised by suspicionless searches of data accessed through electronics and the general terms of the condition here, we construe defendant's search condition to exclude searches of electronic data. (See *In re I.V.* (2017) 11 Cal.App.5th 249, 259-260, 262 ["[W]e conclude that it would not be reasonable to construe the standard property search condition, the origin of which precedes the digital era, to encompass searches of electronic data. If a court intends to authorize warrantless searches of a probationer's electronic data, the procedure is straightforward—the court must impose an explicit

search condition pertaining to electronic data"]; see also *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 610-612 [probation condition requiring submission to search of probationer's "'person and property, including any residence, premises, container or vehicle under [the probationer's] control'" did not include cell phone data]; *Hall*, *supra*, 2 Cal.5th at p. 501 [giving reasonable, practical construction to probation condition to avoid constitutional issue]; *In re Luis F.* (2009) 177 Cal.App.4th 176, 192 [construing probation condition "in a manner that allows it to pass constitutional muster"].) So construed, the condition is not overbroad.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.*

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