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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARTURO LOPEZ, Defendant and Appellant.	B277127 (Los Angeles County Super. Ct. No. MA062878)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed in part, reversed in part and remanded with directions.

David L. Polsky, 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, Noah P. Hill, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Arturo Lopez of second degree murder, conspiracy to destroy evidence, offering false evidence and three counts of possession of a firearm by a felon. On appeal Lopez principally argues his murder conviction must be reversed because the trial court improperly instructed the jury he could be convicted on a theory of felony murder and the evidence is insufficient to support his conviction for offering false evidence. We agree with Lopez, reverse his convictions for murder and offering false evidence, affirm the convictions for the other four offenses, which Lopez does not challenge on appeal, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Lopez was charged in a six-count information with the second degree murder of Stephen Finson (Pen. Code, § 187, subd. (a); count 1),[1] three counts of possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 2-4), conspiracy to destroy evidence (§ 182, subd. (a)(1); count 5) and offering false evidence (§ 132; count 6). As to the murder charge it was specially alleged Lopez had intentionally discharged a firearm proximately causing Finson's death (§ 12022.53, subd. (d)). Lopez pleaded not guilty and denied the special allegation.

2. *The Evidence at Trial*

The prosecution's theory of the case was that Lopez tracked Finson as he rode in the desert on his all-terrain cycle (ATC), took a position where he could shoot Finson and intentionally shot him, most likely using a high-powered rifle with a scope. No

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

motive was offered. Defense counsel argued that Lopez had gone to the desert to test-fire a handgun several hours before Finson left his home to ride in the desert and that Finson had been killed by someone else.

a. *The People's case*

Finson, who lived with his wife on the outskirts of Lancaster near the intersection of East Avenue H and 70th Street East, left home between 3:30 and 4:00 p.m. on Sunday, February 23, 2014, to ride his ATC into the desert. When Finson failed to return after several hours, his wife became concerned. About midnight she called the police emergency number.

Los Angeles County Sheriff's Detective Sean Maloney met with Finson's wife at her home in the early morning of February 24, 2014. Around 9:00 a.m. Maloney was notified that a search and rescue team had found Finson's body and his ATC near East Avenue H and 135th Street East.

The deputies who found Finson initially believed he had died in an accident and did not preserve the crime scene. When deputies found a bullet hole in the back of his helmet, the homicide division was notified. Removal of the helmet revealed a bullet hole in the back of Finson's head in line with the hole in his helmet.

i. The evidence from the crime scene

Sergeant Robert Martindale was assigned to investigate Finson's death. On February 25, 2014 the area was searched with metal detectors, but no bullets, bullet fragments or shell casings were recovered.

The tire tracks left by the ATC showed that Finson had traveled in a straight line before making an abrupt right turn off the designated trail and into the desert. The tracks led back to

an area near the property of Gerardo Amaya, a friend of Lopez's, where they disappeared.

Finson's autopsy showed he died from a single gunshot wound to the head. The bullet entered the back of the head and left at the right temple. There were no bullet fragments found in the wound. The toxicology report showed Finson had methamphetamine, hydrocodone and morphine in his system, but those drugs did not cause his death.

Marco Iezza, a senior criminalist in the firearms identification section of the sheriff's department crime laboratory, examined Finson's helmet. According to Iezza, the bullet that killed Finson was at least .30-caliber and as large as .40-caliber. It could not have been fired from a .22-caliber rifle or a .223 Remington 556 rifle because bullets from those guns were too small to have caused the damage. Iezza also testified, if the fatal bullet had been fired from 100 or more yards away, it had to have been from a high powered rifle to have caused the damage to the helmet and fatal injury. A bullet from a handgun had inadequate velocity to cause that amount of damage from that distance.

ii. Amaya's testimony regarding Lopez test-firing a gun on the afternoon of February 23, 2014

In testimony at Lopez's preliminary hearing, which was read at trial due to Amaya's unavailability, Amaya said Lopez had asked him to help with a project at a family member's residence on February 23, 2014. Lopez picked up Amaya from Amaya's house at East Avenue G-8 and 140th Street East in a green 1998 Mercury Sable, which belonged to Lopez's girlfriend, Christine Banghart. They drove a few blocks north on 140th Street East to East Avenue G, but turned around when Lopez

received a call that their help was not needed. They then drove south on 140th Street East and turned right (west) on East Avenue H, heading toward 135th Street East. A short while later, Lopez stopped the car and told Amaya he wanted to test-fire a new handgun he had. Lopez got out of the car and went to the rear of the car. Amaya, who remained in the car, did not see Lopez open the car's truck. Shortly thereafter, Amaya heard two gunshots a few seconds apart. When Lopez returned to the car, he was carrying a semiautomatic handgun. The two men drove to Lopez's house at East Avenue H and 120th Street East. Lopez took the gun into the house, returned to the car and drove Amaya home.

After Lopez's arrest Amaya told Sergeant Martindale he saw Lopez two days after the test-firing incident when they ran into one another at a gas station. Although Amaya testified he could not recall this, according to Martindale Amaya said Lopez told him he had killed someone and apologized for getting Amaya involved. Lopez insisted he had only fired the gun randomly into the desert.

iii. Lopez's incriminating statements

Vanessa Burkes had known Lopez for 20 years, and they lived together for 14 years. Both Burkes and Lopez were methamphetamine users. Burkes had seen Lopez with a .30-.30-caliber Marlin rifle with a scope, which he used to shoot at rabbits and squirrels on his property

Burkes testified that after Finson's death she went to the home of Kris Kirby, where Lopez and Kirby were watching a recorded news broadcast about the death. Kirby asked Burkes if she recognized Finson; she said she did not. Kirby left the house, and Lopez told Burkes he thought he had shot and killed

someone. Burkes told him to "knock it off," because she was "not in any mood for his foolishness." Lopez said he was serious and told Burkes he was scared and wanted to know what to do. He asked Burkes to hide him, but she refused, explaining that she was already in hiding due to an outstanding arrest warrant for possession of methamphetamine.

Lopez then told Burkes he and "Green Eyes"—Amaya—"went to go scare this guy and that they had a confrontation. And he walked off, and he went like this and shot his gun off." Burkes told him to be quiet because she did not want to know about the shooting. Lopez then told her, if the police tried to arrest him, he would "do suicide by cop."

Lopez told Burkes the gun he used had been ground down and thrown away. Kirby told her he had taken pieces of the gun to the recycling center. Kirby also told Burkes that Lopez had told him that he sold the green car (the 1998 Mercury Sable) in Mexico.

Burkes told her daughter, Trisha Van Rossum, that Lopez killed Finson. Lopez subsequently told Van Rossum he had shot his new gun into the desert and "saw the body drop" from the ATC. Lopez added that he had a confrontation with Finson, shot him in the head, and watched him fall to the ground. He said he destroyed the gun he used and took the green car to Mexico. He begged Van Rossum not to tell anyone.

Van Rossum knew some of Finson's relatives, including Phyllis Sandberg, and told her Lopez had said he killed Finson. Sandberg reported this information to Sergeant Martindale and provided contact information for Lopez and Amaya. Prior to receiving this information the investigation had considered Melvin Byers a person of interest based on information from

Finson's wife that Byers and Finson had argued earlier in the day of February 23, 2014 over Byers's dogs attacking chickens on Finson's property. From this point on, the investigation focused on Lopez.

Sergeant Martindale interviewed Van Rossum, who told him that Burkes told her Lopez said he and Amaya had gone back to the scene the day after the shooting to verify that Finson had died. They cleaned up any evidence they might have left, and the gun Lopez used had been ground up and thrown away. Lopez also said he took the green car to Mexico.

iv. The search of Lopez's property and his arrest

Sergeant Martindale and a team of deputies executed a search warrant at Lopez's property in Lancaster on April 30, 2014. They found a 3-9X32 Bushnell rifle scope resting in the dirt by a trailer behind the house. They recovered a large number of .30-.30-caliber Winchester cartridge casings in a 55-gallon, bullet-riddled burn barrel. There were also unspent bullets on the ground. The deputies recovered a .22-caliber revolver, a .22-caliber rifle, a holster and narcotics paraphernalia buried in a fairly deep hole on the neighboring property near the property line. The deputies observed a tile saw and a grinder with industrial-sized grinding wheels on the property.

Inside the house the deputies found a digital camera containing photographs of Lopez holding assault-type rifles. They also found rounds for that type of weapon, as well as other ammunition. After the search of Lopez's property, he was located at a neighbor's house and arrested.

v. The bill of sale for the green car

During the search of Lopez's home, Sergeant Martindale and Sergeant Steven Owen spoke to Banghart, Lopez's girlfriend,

who lived with him at his property. Banghart learned about Finson's death from a news broadcast; Lopez did not tell her anything about it. However, Lopez had said that, without Banghart's advance knowledge, Lopez sold her 1998 green Mercury Sable, which he often drove, to an individual named David Wright.

Banghart indicated she had a bill of sale for the car in her file box. Martindale went with her to retrieve the document, but it was not there. Deputies subsequently discovered the bill of sale, title and registration for the automobile in the bedroom. The bill of sale stated that the vehicle was sold to David Wright. According to the California Department of Motor Vehicles, the car was still registered to Banghart. Banghart told Martindale she did not believe "David Wright" was a real person.

At trial, Banghart testified that she wrote the bill of sale, which was dated February 15, 2014, at Lopez's direction two or three days after Finson's death. She had lied to the deputies on the day of the search because she was high on methamphetamine and concerned her children would be taken from her if she were arrested.

vi. Lopez's in-custody interview

On April 30, 2014, following Lopez's arrest, Sergeant Martindale interviewed him at the Lancaster sheriff's station. Lopez said on the day of the shooting he went to Amaya's house in Banghart's green Mercury Sable, as he did every day. He had known Amaya since they were in junior high school.

Lopez said the scope found on his property was for his .22-caliber rifle, although he acknowledged it was too powerful for that rifle. When asked about the .30-.30-caliber cartridge casings, he responded, "I have a .30-.30." He then corrected

himself and said, "I had a .30-.30." He explained that he had destroyed the rifle six months earlier because the pin was misfiring. He used the grinder to cut it into pieces, then took the metal pieces to a recycling center that no longer existed. He burned the wood pieces in his burn barrel. He acknowledged the rifle was worth $600 to $800 in working order.[2] Sergeant Martindale observed that cutting the rifle up as Lopez did suggested it was a dirty gun. Lopez concurred, "It probably was a dirty gun. You know what I mean? I don't know." "I don't think it was used in a murder or something like that."

Lopez told Sergeant Martindale that he had hidden his .22-caliber rifle and his handgun on a neighbor's property because he had a felony conviction[3] and Burkes had warned him his property was going to be searched. Martindale asked him if he shot Finson accidentally. Lopez answered, "Even if it was an accident, I wouldn't tell you or anyone else."

Lopez also told Sergeant Martindale he thought Banghart had sold the green car in "February, before the actual killing" because its transmission was slipping. He denied he had sold the car himself.

vii. Lopez's jail telephone calls

On May 28, 2014 while in custody, Lopez spoke to Banghart on the phone and asked her to destroy his cell phone, which he had hidden at his friend Angel's house. Banghart and Lopez's

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[2] According to Sergeant Martindale, the rifle could have been repaired for under $100.

[3] The parties stipulated that Lopez had been convicted in 1997 of felony driving or taking a vehicle in violation of Vehicle Code section 10851, subdivision (a).

brother, Antonio, went to Angel's property and, at Lopez's direction, smashed the phone, put the pieces in a cup of water and then threw the pieces out of their car as they drove away.[4]

b. *The Defense case*

Lopez did not testify in his own defense.

Kris Kirby, who had known Lopez and Burkes for many years, denied that any of the events Burkes had described as happening at his house had taken place.

William Moore, an independent forensic scientist, conducted various tests to determine what kind of weapon could have made the hole in Finson's helmet. He concluded a .30-caliber rifle could not have been used because it left a hole in a test helmet larger than the one in Finson's helmet. Based on land and groove markings Moore opined a .38-caliber bullet had been used, but explained a .357 magnum bullet, which is of similar size but generates greater kinetic energy, might also have been used. That type of bullet is fired from a handgun, not a rifle. None of the rifle rounds he tested left land and groove markings in the entry hole.

3. *The Verdict and Sentence*

The jury convicted Lopez on all six counts and found the special firearm-use enhancement allegation true. The court sentenced him to an aggregate indeterminate term of 45 years eight months to life: 15 years to life for second degree murder, plus 25 years to life for discharging a firearm causing death; a consecutive term of three years (the upper term) for one count of

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[4] Banghart subsequently pleaded guilty to destruction of evidence and, with respect to the bill of sale for the green Mercury Sable, offering false evidence.

possession of a firearm by a felon; plus consecutive terms of eight months (one-third the middle term) for each of the remaining four counts.

DISCUSSION

1. *The Trial Court Committed Prejudicial Error by Instructing the Jury on Felony Murder*

a. *Standard of review*

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu* (2014) 59 Cal.4th 155, 167.) "An instruction on an invalid theory may be found harmless when 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' under a legally valid theory." (*In re Martinez* (2017) 3 Cal.5th 1216, 1226; see *People v. Chun* (2009) 45 Cal.4th 1172, 1205 (*Chun*) ["[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless"].)

b. *The court erred in instructing that Lopez could be found guilty of murder under the felony-murder rule*

The trial court instructed the jury that Lopez was being prosecuted for Finson's murder under alternate theories, murder with malice aforethought, that is, Lopez killed Finson while acting with either express or implied malice; and felony murder, that is, Lopez was grossly negligent in discharging a firearm in a manner that could result in injury to a person, an act that caused Finson's death, even if the killing was unintentional, accidental or negligent. (See CALCRIM Nos. 520, 541A & 548.) The People

concede it was error to instruct the jury that discharging a firearm in a grossly negligent manner, an assaultive felony, could serve as a basis for second degree felony murder. (See *People v. Chun*, *supra*, 45 Cal.4th at p. 1200 ["When the underlying felony is assaultive in nature, such as a violation of section 246 [discharge of a firearm at an inhabited dwelling house or occupied building] or 246.3 [willfully discharging a firearm in a grossly negligent manner that could result in injury or death to a person], . . . the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An 'assaultive' felony is one that involves a threat of immediate violent injury"].)

c. *The error was prejudicial*

The jury was instructed pursuant to CALCRIM No. 520 with respect to murder with malice aforethought that Lopez acted with express malice if he unlawfully intended to kill and implied malice if he intentionally committed an act the natural and probable consequences of which were dangerous to human life and "[a]t the time he acted, he knew his act was dangerous to human life [and] [h]e deliberately acted with conscious disregard for human life."

The jury was instructed pursuant to CALCRIM No. 541A that Lopez was guilty of second degree murder under the felony-murder theory if he intentionally shot a firearm; he did the shooting with gross negligence; and the shooting could have resulted in the injury of a person. The instruction continued, "a person acts with gross negligence when: 1. He acts in a reckless way that creates a high risk of death or great bodily injury; and 2. A reasonable person would have known that acting in that way would create such a risk. In other words, a person acts with gross negligence when the way he acts is so different from the

way an ordinary careful person would act in the same situation that his act amounts to disregard for human life or indifference to the consequences of that act."

The jury was also instructed it could not find Lopez guilty of murder unless all jurors agreed the People had proved Lopez committed murder under at least one of the theories presented, but, "You do not all need to agree on the same theory." (CALCRIM No. 548.) Accordingly, under these instructions Lopez could have been convicted of murder if the jurors in some combination believed the People proved he had shot at Finson actually intending to kill him (express malice) or shot in a manner he subjectively knew was dangerous to human life and deliberately acted with conscious disregard for human life (implied malice)[5] or simply shot recklessly in a manner that, objectively, a reasonable person would have known created a high risk of death or great bodily injury (felony murder).

Although acknowledging the instructions improperly permitted a conviction for murder based on gross negligence, the People argue the error in giving this instruction was harmless because the prosecutor tried the case on the theory Lopez had deliberately targeted and intentionally shot and killed Finson using a high-powered rifle with a scope. Lopez, in contrast, defended himself by arguing he had test-fired his gun around 2:00 p.m., well before Finson left his home, and suggesting it was Byers, who had argued with Finson earlier in the day, or someone else who was responsible for the murder. Thus, the

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[5] "[A] finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.)

People argue, the jury had to choose between finding Lopez guilty of malice murder or finding him not guilty.

Lopez contends at least one juror could have accepted Amaya's testimony that Lopez had test-fired his new gun in the desert, believed Amaya was mistaken (or lying) about the time that occurred and concluded Lopez was grossly negligent for doing so without realizing that Finson was riding his ATC in the vicinity—that is, that Lopez did not subjectively appreciate that his actions carried a high probability of death but was nonetheless guilty of felony murder under the court's instructions. (See, e.g., *In re Hansen* (2014) 227 Cal.App.4th 906, 924 [jury could have found a lack of implied malice where the defendant shot into apartment after checking first and believing no one was home].)

Amaya's testimony on the issue of timing certainly allowed for such a hybrid result, combining aspects of the testimony of various witnesses. (Cf. *People v. Riel* (2000) 22 Cal.4th 1153, 1182 [the jury is not required to choose between different witnesses' version of the events; "[t]he jury may well have believed the truth lay somewhere in between"]; *People v. Wickersham* (1982) 32 Cal.3d 307, 324 ["[t]he jury should not be constrained by the fact that the prosecution and defense have chosen to focus on certain theories"].) Asked if he could give a more precise time when Lopez's test-firing had occurred, "[w]as it after 3:00 p.m., for example," Amaya responded, "I don't remember." The following exchange then occurred:

"Q. You just know that it was after noon, sometime after noon?

"A. It was after lunch.

"Q. After lunch? Would that be after 12:00 p.m.?

"A. Afternoon time. But I don't know what time it was.

"Q. Do you know if it was before 7:00 p.m.?

"A. Yes.

"Q. Was it before 5:00 p.m.?

"A. I think it was about 2:00. I'm not sure."

Moreover, although the prosecutor emphasized the evidence tended to prove Lopez intentionally shot Finson,[6] he also directed the jury to the court's erroneous instruction—the "additional theory of felony murder"—and explained, "[T]o prove the defendant is guilty of the second-degree murder under this theory, I must prove—the People must prove that the defendant committed a grossly negligent discharge of a firearm." The prosecutor than asked rhetorically, "How do you aim a rifle with a hunting round at somebody and pull the trigger and that not be grossly negligent? . . . The defendant intended to commit grossly negligent discharge of a firearm."

On the evidence presented and in light of the prosecutor's argument to the jury, we cannot "conclude beyond a reasonable

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[6] The prosecutor argued, "What the testimony here shows is that on that afternoon, something happened here [near Amaya's house] that caused [Lopez] to get into the Sable with his buddy and leave the house . . . ." While Finson traveled through the desert on his ATC, Lopez "is tracking [Finson] in his car." Lopez drove until he got "to a point of rest where he could get out of his car go to the rear, arm himself, and shoot two rounds due north at [Finson] . . . ." He argued Lopez had to know Finson was there because he was riding a loud ATC, which had to be kicking up dust as he rode in the desert. The prosecutor told the jury, "This wasn't some accidental shot in the desert. This was an intentional shooting of a rifle at a human being that [Lopez] was tracking down 140th Street East and west along Avenue H."

doubt that the jury based its verdict on the legally valid theory." (*People v. Chiu*, *supra*, 59 Cal.4th at p. 167.) Lopez's conviction for second degree murder must be reversed.

2. *The Evidence Is Insufficient To Support Lopez's Conviction for Offering False Evidence*

a. *Standard of review*

To determine whether the evidence is sufficient to support a conviction, "'we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; accord, *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

b. *Lopez did not "offer" the false bill of sale for the 1998 Mercury Sable*

Penal Code section 134 provides, "Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony." Section 132, the basis for Lopez's conviction for offering false evidence, provides, "Every person who upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or antedated, is guilty of felony."
"Section 132 and 134 are complementary. The latter section applies to the *preparation* of a false or antedated document with the intent to produce it or allow it to be produced for any fraudulent purpose. The former section applies to the actual *offer in evidence* of a false or fraudulently altered or antedated document. Each section deals with a discrete act . . . ." (*People v. Pereira* (1989) 207 Cal.App.3d 1057, 1068.)

In light of Banghart's testimony she prepared the false bill of sale for the 1998 Mercury Sable at Lopez's direction shortly after Finson's death, there certainly would be substantial evidence Lopez violated section 134. (See *People v. Bhasin* (2009) 176 Cal.App.4th 461, 470 ["Defendant manipulated the DMV into creating a document based on false information given by him. We believe the fact that defendant did not physically make the document is not fatal to a conviction under section 134"].) But even if making the false document available to police officers executing a search warrant constitutes offering the document in

evidence within the meaning of section 132, as the People argue (cf. *People v. Gallardo* (2015) 239 Cal.App.4th 1333, 1348 [voluntary delivery of false documents to Department of Child Support Services to support father's claim that he had been paying child support constitutes an offer in evidence within the meaning of section 132]; *People v. Pereira*, *supra*, 207 Cal.App.3d at pp. 1064, 1067 ["tender of documents pursuant to a subpoena duces tecum" was sufficient to meet the elements of "offer in evidence" of section 132; "the scope of section 132 extends beyond those situations involving the formal introduction in evidence of documents in a court of law"]), there was simply no evidence, substantial or otherwise, that Lopez instructed or directed Banghart to make the false bill of sale available to the deputies when they searched his home.[7] Although one might speculate along with the Attorney General that Lopez intended for the document to ultimately make its way to the investigating officers, such speculation is inadequate to support Lopez's conviction. (See *People v. Waidla* (2000) 22 Cal.4th 690, 735 ["'speculation is not evidence, less still substantial evidence'"].) Lopez's conviction for offering false evidence is reversed.

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[7] As discussed, Lopez was at a neighbor's house during the search.

DISPOSITION

The judgment is reversed as to counts 1 and 6. In all other respects the judgment is affirmed. The matter is remanded for retrial of count 1 and further proceedings not inconsistent with this opinion.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.