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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY DEMON TOPPS, Defendant and Appellant.	B267272 (Los Angeles County Super. Ct. No. TA135890)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen Joseph Webster, Jr., Judge. Affirmed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Web, Supervising Deputy Attorney General, Ilana Herscovitz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Gregory Demon Topps was convicted of spousal battery (Pen. Code, § 273.5, subd. (a); count 1)[1] and disobeying a criminal protective order (§ 166, subd. (a)(4); count 2). Defendant contends the trial court violated his rights to a fair trial and due process when it permitted the prosecutor to amend the information to add count 2 (an offense not supported by the evidence introduced at the preliminary hearing) during the prosecutor's case in chief. He also argues the trial court committed evidentiary errors by excluding three hearsay statements as well as testimony that would have corroborated his alibi. Defendant also claims he was deprived of his right to the effective assistance of counsel because his trial attorney did not identify evidentiary issues and raise proper corresponding objections. Finally, he asserts the cumulative effect of prejudice from the trial court's evidentiary errors and his trial attorney's ineffective performance requires reversal of the judgment. We affirm the judgment of conviction.

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[1] All statutory citations are to the Penal Code unless otherwise noted.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

Jennifer Thompson and defendant were married for 13 years. Thompson's son from a different relationship, Joseph Madden,[2] lived with her and defendant in Paramount.

There were numerous incidents of domestic violence between Thompson and defendant. They argued constantly, and sometimes the arguments became physical. Witnesses testified that on several occasions defendant had punched Thompson in the face and head, pushed her, shoved her, called her names, threatened to kill her and others, hit her with a metal wire causing her to bleed, kicked her, and grabbed her arm.

In April 2010, Thompson wrote in her journal, "I am so tired of going through the mess, abusive mental, sometimes physical. My son, I should have—I shouldn't have to take this abuse in our home."

Thompson and Jessie Burns were friends and neighbors. Three or four times during the thirteen years Burns and Thompson had been friends, Thompson showed Burns bruises Thompson had on her body. On one occasion, Burns noticed Thompson had a bruise on her eye; Thompson was crying. Thompson said defendant hit her. On another occasion, several months later, Thompson showed Burns a "big" bruise she had on

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[2] Thompson has another son, Michael Madden Junior. Because both sons share the same surname, we refer to them by their first name.

her hip and again stated her injury was caused by defendant striking her. On each of the occasions, Burns told Thompson to report the matter to the police, but Thompson said she did not want to do so because she was afraid defendant would lose his job.

The incident that is the subject of this appeal occurred on about November 12, 2014, at around 10:30 p.m. when defendant woke Thompson from her sleep and yelled at her. Thompson got out of bed and walked out of her bedroom, which was on the second story of her home. As she approached the staircase, defendant grabbed her and pushed her down the stairs. She fell onto a landing in the middle of the staircase. When Thompson stood up, defendant pushed her again, causing her to fall down the rest of the stairs to the first floor. While Thompson was on the ground, defendant punched her in the face until she lost consciousness. Thompson sustained severe bruising on her face.

In the evening of the next day, Joseph arrived at the home and saw his mother's bruised face. She told him she was attacked by several Hispanic men while she was walking to an El Pollo Loco restaurant near her home. Thompson initially told Joseph she walked home after the attack, but later said the police drove her home. She did not file a police report and could not tell Joseph the name of the deputy who assisted her.

Around 30 minutes after Joseph spoke with his mother about her bruised face, defendant arrived at the home and asked Thompson what happened. She told him what she had told Joseph. Defendant acted surprised, then went to bed. Thompson also told her sisters, Sarah and Vanessa Parker,[3] what she had

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[3] Because Thompson's sisters share the same surname, we refer to them by their first name.

told Joseph. They both thought Thompson was not telling the truth.[4]

Shortly after the incident, Burns and Enrika Taylor (Burns's daughter) separately saw Thompson crying and her bruised face. Thompson initially told Taylor she was physically assaulted by several Hispanic men when she went to El Pollo Loco restaurant. Then she told Taylor and Burns defendant had punched her in the face. Thompson remained adverse to Burns's advice to call the police because she was still concerned that defendant would lose his job. In response to Taylor's advise to go to the police, Thompson said "[t]he police is not going to do nothing." Thompson also told Taylor she did not want to contact the police because defendant had a good job and Thompson needed his benefits. Taylor photographed Thompson's bruised face and took the pictures to the police station. Taylor also sent the pictures to Thompson's son, Michael.

On November 15, 2011, Los Angeles Sheriff's Deputy Ginger Matson arrived at Thompson's home and observed "severe bruising" on the left side of Thompson's face. Thompson's left eye was swollen shut; it had an open wound with "a lot" of puss coming out of it. Thompson also had bruises around her right eye. In response to Matson's inquiry of what happened, Thompson said defendant "was upset" at her, "grabbed" her, "caused" her to fall down the stairs, and hit her in the face.

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[4] Within approximately two days of this conversation, Thompson told Vanessa that, when defendant was planning to leave town, she asked him for $600 to assist her with the mortgage. Defendant responded by telling Thompson to "get your ass out of my face," and punching her.

Thompson never mentioned being physically assaulted by Hispanic men.

Thompson was not willing to provide Matson with additional details of the incident. Matson said Thompson did not want to get defendant in trouble at his job, and she was on defendant's insurance through his employment.

Thompson called her sister Sarah while Matson was at her home, and Sarah heard Thompson over the speaker phone say, "My husband beat me." Thompson said she had not told Sarah about defendant beating her because she feared defendant would kill her. Thompson insisted she was "okay."

After the police left Thompson's house, Thompson became angry with Taylor for taking the photographs and providing them to the police. Later that day, Thompson received medical care for her injuries.

Matson went to defendant's place of work to arrest him, but he was not there. When defendant learned about this, he was upset with Thompson and yelled at her.

On November 17, 2014, Los Angeles Sheriff's Detective David Fernandez and his partner interviewed Thompson at her home. Thompson initially told them her injuries were a result of her slipping and falling down the stairs. When Fernandez said that is not what she previously told the other deputies, she started to cry and said defendant hit her. She explained, defendant pushed her down the stairs and then, prior to her getting up from the fall, punched her in the face numerous times causing her to lose consciousness. Thompson told Fernandez there had been "numerous" prior incidents of domestic violence, but she never reported them because defendant threatened to

hurt her or her son if she ever said anything. The following day, Matson took photographs of Thompson's injuries.

On December 1, 2014, after a warrant for defendant's arrest was issued, defendant turned himself in at the sheriff's station. Defendant was accompanied by Thompson, and defendant's friends, Deidra Jones and Walter Smith.

Thompson told Los Angeles Sheriff's Detective Pascual Delgadillo defendant did not hit her; she was injured because she was robbed and assaulted by two Hispanic men.[5] She also claimed she fell down the stairs in her house, and she fell frequently because she had been ill with cancer, multiple sclerosis, depression, and alcohol addiction.[6] Delgadillo did not believe Thompson. In his experience, victims of domestic violence change their stories.

Defendant called Thompson from jail and Thompson said she told the police she had been "mugged" and defendant did not hit her. Thompson posted bail for defendant, using her home as collateral for the bail bond.

At defendant's December 2, 2014, arraignment, the trial court issued a criminal protective order requiring defendant to stay away from, and have no contact with, Thompson. Defendant was personally served with the protective order. Defendant did not comply with the protective order; he continued to live with Thompson.

Vanessa accompanied Thompson to court when the trial was first scheduled to commence, but Thompson did not want to

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[5] Thompson's trial testimony also pinned the cause of her injuries on a robbery/assault by unknown Hispanic males.

[6] Vanessa testified Thompson did not have any illnesses.

go. Thompson said she believed, if she "confess[ed] the truth," and defendant were to be convicted, defendant could still have somebody kill her and her son.

2. Defendant's Evidence

Defendant testified on his own behalf. On November 12, 2014, at around 8:00 p.m., he watched television, and went to bed at around 10:00 p.m. Defendant did not push Thompson down the stairs or punch her in the face to the point of unconsciousness.

On November 13, 2014, at around 5:30 p.m., defendant was home watching a football game.[7] When the game reached half-time, defendant ran errands. He went to his place of work to pick up his airplane ticket to Mississippi, and to El Pollo Loco to buy chicken for Thompson's dinner.

When defendant arrived home with the chicken he noticed Thompson had a cut on her face, and the left side of her face was starting to swell.[8] Thompson was sitting on the couch, watching television with Joseph. She said she had gone to El Pollo Loco because defendant took too long to do so, and was robbed by "two Mexicans." Defendant offered to take her to the hospital, but Thompson declined, saying she would go by herself. Defendant also suggested she report the robbery to the police, but she refused to do so.

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[7] Smith, defendant's friend, testified he was with defendant at Smith's home watching the football game, until defendant left during half-time of the game.

[8] Defendant however denied ever seeing her face look as it did in a photograph taken of her injuries.

Defendant testified he never hit Thompson or Joseph and denied making threats or being verbally abusive to Thompson or Joseph. Defendant had a prior conviction for possession of cocaine.

Debra Gettes (Smith's girlfriend) also testified for the defense. On November 13, 2014, at around 6:00 p.m. or 7:00 p.m., she went to Thompson's house. Gettes noticed minor scrapes on Thompson's shoulder, and "a little bruise" and scrape under her left eye. Gettes did not see defendant in the house.

The following morning, on November 14, 2014, Gettes noticed Thompson's face looked different. Thompson's face was swollen and matched a photograph taken of her injuries that resulted in the filing of a spousal abuse charge.

Several additional defense witnesses testified defendant was humble and nonviolent whereas Thompson was aggressive and argumentative. Defendant's sister, Linda Jennings, testified she had seen Thompson fall, and noticed bruises on her legs and arms.

B. Procedural Background

The Los Angeles County District Attorney filed an information charging defendant with spousal battery, in violation of section 273.5, subdivision (a). It was also alleged defendant personally inflicted great bodily injury against his spouse under circumstances involving domestic violence in violation of section 12022.7, subdivision (e).

During trial, the prosecution moved to amend the information to add a misdemeanor charge for disobeying a criminal protective order (issued in this case on December 2,

2014), in violation of section 166, subdivision (a)(4) (count 2). The trial court granted the motion.

Following a jury trial, defendant was found guilty as charged and the special allegation was determined to be true. The trial court sentenced defendant to state prison for a term of seven years, consisting of three years on count 1 and four years on the great bodily injury enhancement; and one year on count 2, to run concurrently.

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DISCUSSION

A. Amended Information

Defendant contends the trial court violated his constitutional rights to a fair trial and due process when it permitted the prosecutor to amend the information to add the charge of disobeying a protective order (count 2). Defendant has forfeited his contention.

1. Standard of Review

We review a trial court's decision to permit amendment of an information for an abuse of discretion. (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1581.)

2. Background

On December 2, 2014, at his arraignment, defendant was served with a protective order requiring him to stay away from, and have no contact with, Thompson. At his December 16, 2014, preliminary hearing defendant was held to answer on a showing of sufficient cause to believe he had injured his wife on November

12, 2014. The original information was filed on January 13, 2015, charging defendant with one count of spousal battery.

On August 12, 2015, the third day of trial, the trial court over defense counsel's objection granted the prosecutor's motion to amend the information to add count 2—disobeying the protective order on or between December 3, 2014, and January 31, 2015, in violation of section 166, subdivision (a)(4), a misdemeanor. On August 24, 2015, the seventh and last day of trial, the prosecutor filed an amended information including count 2 and rearraigned defendant.

3. Applicable Law

"The 'preeminent' due process principle is that one accused of a crime must be 'informed of the nature and cause of the accusation.' [Citation.] Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 317.)

The "essential purpose of an information is to inform the accused of the charge he is required to meet at the trial so that he may prepare his defense." (*People v. Spencer* (1972) 22 Cal.App.3d 786, 800.) "'[A] defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based.' [Citations.]" (*People v. Graff* (2009) 170 Cal.App.4th 345, 360; accord §§ 739, 1009; *People v. Winters* (1990) 221 Cal.App.3d 997, 1007-1008.)

"[O]ur Supreme Court has interpreted sections 739 and 1009 to '"permit amendment of the information to add

charges . . . which are supported by the actual evidence at the preliminary hearing, provided the facts show due notice by proof to the accused." [Citations.]' [Citations.] 'Under section 739, "[t]he law is settled that unless the magistrate makes factual findings to the contrary, the prosecution may amend the information after the preliminary hearing to charge any offense shown by the evidence adduced at the preliminary hearing provided the new crime is transactionally related to the crimes for which the defendant has previously been held to answer." [Citations.] "Under the case law interpreting section 1009, the test applied is whether or not the amendment changes the offense charged to one not shown by the evidence taken at the preliminary examination. [Citation.]" [Citation.]'" (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1531.) "It is as a matter of law irrelevant whether a defendant is prejudiced by being prosecuted for an offense not shown by the evidence at the preliminary hearing." (*People v. Burnett* (1999)71 Cal.App.4th 151, 177.)

4. Analysis

Defendant contends the evidence introduced at the preliminary hearing did not support the charge in count 2 and, for that reason, the trial court erroneously allowed the amendment to the information. The Attorney General argues defendant forfeited his contention. We agree with the Attorney General.

"'"'"'"The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."'" [Citation.] "'No procedural

principle is more familiar to this Court than that a *constitutional right*," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." . . .' [Citation.] [¶] 'The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 . . . : "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'" [Citation.]" (Fn. omitted; [citations].)' [Citation.]" (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265.)

Defendant did not move to set aside count 2 in the amended information pursuant to section 995. Section 995, allows a motion to set aside an information where "the defendant had been committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B).) Unless the preliminary hearing has been waived, misdemeanors included in an information are subject to dismissal under section 995 if not supported by a showing of probable cause at the preliminary hearing. (*Griffith v. Superior Court* (2011) 196 Cal.App.4th 943, 947-948; *People v. Thiecke* (1985) 167 Cal.App.3d 1015, 1018.)

Because defendant did not move to set aside count 2 pursuant to section 995, he "is precluded from afterwards taking the objections mentioned [in that section]." (§ 996.) Failure to make motion under § 995 or raise the questioned impropriety at

trial constitutes a forfeiture of that argument on appeal. (*People v. Bartlett* (1967) 256 Cal.App.2d 787, 792; *People v. Ortiz* (1962) 208 Cal.App.2d 313, 316.)

B. Excluded Evidence/Assistance of Counsel

Defendant contends the trial court erred by excluding two hearsay statements made by Thompson, a hearsay statement made by defendant, and evidence that would have corroborated defendant's testimony. Defendant also contends his trial attorney's assistance fell below professional norms when the evidentiary issues were addressed by the trial court. He claims the cumulative effect of the trial court's errors and his counsel's deficient performance prejudiced his trial such reversal of the judgment is required. We disagree.

1. Standard of Review for Evidentiary Rulings

A "trial court is 'vested with broad discretion in ruling on the admissibility of evidence.' [Citation.] '[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.] '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]' [Citation.] Moreover, even where evidence is improperly excluded, the error is not reversible unless '"it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]" [Citation.]' [Citations.]" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.) We do not review the trial court's reasoning in making the

evidentiary ruling; "'if the ruling was correct on any ground, we affirm.' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12.)

2. Hearsay Statements Thompson Made to Gettes and Jennings

a. Applicable Law

The hearsay rule precludes evidence of "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) "Evidence Code sections 770[9] and 1235[10] except from the general rule against hearsay evidence a witness's prior statement that is inconsistent with the witness's testimony in the present hearing, provided the witness is given the opportunity to explain or deny the statement. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.)

In turn, Evidence Code section 1236 provides that evidence of a witness's prior out-of-court statement "is not made inadmissible by the hearsay rule if the statement is consistent

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9 Evidence Code section 1235 states, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

10 Evidence Code section 770 states: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

with his testimony at the hearing and is offered in compliance with Section 791." (Evid. Code, § 1236.) Evidence Code section 791 states: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

b. Statements Thompson Made to Gettes

i. Background

At a hearing held on August 14, 2015, the following exchange occurred: "The [Trial] Court: So where are we [on] the . . . Gettes statement? [¶] [The Prosecutor]: Counsel can correct me if I'm wrong. This is where we are. [Gettes] is going to be a witness who specifically says that she came over to [Thompson]'s house and saw her face swollen. And basically the majority of her statement is a bunch of statements. It's pretty much all [Thompson]'s statements. [¶] And my position is, all of these statements that [Thompson] made to [Gettes] are hearsay. So there needs to be an exception. And the problem is that [defendant's counsel] didn't confront [Thompson] on any of these

statements. [¶] . . . [¶] In terms of them coming in as prior inconsistent statements, which I think would be [defense counsel]'s theory of how they come in, [Thompson] was never confronted about any of these statements."

Defense counsel did not contend the statements Thompson made to Gettes were admissible as prior consistent statements. Instead, he argued the statements were admissible as evidence of Thompson's state of mind at the time. The trial court pointed out Gettes could not testify about another person's state of mind. Defense counsel responded, "Okay. That's fine." The trial court also advised defense counsel that for the statements to be admissible as prior inconsistent statements, he would have to recall Thompson to confront her with her statements and then call Gettes to potentially elicit evidence of Thompson's prior statements.

ii. Analysis

Defendant contends the trial court erred when it mischaracterized Thompson's statements made to Gettes as inconsistent with Thompson's testimony. He maintains the prior statements were actually consistent with her testimony. However, the appealing party has the burden of supporting an appellate contention with citation to supporting facts in record. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Equilon Enterprises LLC v. Board of Equalization* (2010) 189 Cal.App.4th 865, 881; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Here, defendant does not cite, and we do not see, anything in the record that indicates what Thompson said to Gettes. The record therefore does not support defendant's assertion that the statements were consistent with Thompson's testimony,

including, as defendant contends on appeal, Thompson's statements she suffered the injuries because she was assaulted by several Hispanic men at or near the El Pollo Loco restaurant. Defendant has not established the trial court erred by excluding the evidence.

c. Statements Thompson Made to Jennings

i. Background

The prosecutor objected to Jennings testimony regarding statements Thompson made to her on the ground that, when Thompson testified, defense counsel did not confront Thompson with those statements. The prosecutor understood the statements at issue to include: (1) Thompson saying she "needed help;" (2) Thompson asking Jennings to contact defendant because he was not returning her calls; (3) Thompson being "pissed;" and (4) Thompson saying she "made a big mistake by calling the police."

Defense counsel argued the proposed evidence was relevant because it showed Thompson tried "to clear this thing up" and that she was "crying wolf" when she said defendant caused her injuries. The trial court ruled that it would "play it by ear," and noted that defense counsel could call Thompson to allow her to explain or deny any inconsistent statements she made to Jennings.

Defense counsel questioned Jennings about what Thompson said during various telephone conversations they had but the content of those statements is not in the record—there was no offer of proof made by defense counsel—and the trial court

sustained the prosecutor's hearsay objections when defense counsel asked questions concerning the content of those conversations.

ii. Analysis

Defendant's claim suffers from the same infirmity as the previous one. He does not identify the statements that were excluded, other than to say "the prosecutor contended that Jennings could not testify that Thompson told her over the telephone that going to the police was a big mistake and that she wanted to clear it all up." The record however does not indicate Thompson told Jennings that Thompson "wanted to clear it up." Moreover, although there is some reference by the prosecutor to Thompson telling Jennings it was a "big mistake" to go to the police, the connotation of that remark was ambiguous. The comment, standing alone, provided no indication of the reason why Thompson regretted going to the police. Perhaps the issue was not adequately developed in the trial court. In any event, defendant has not established the trial court erred by excluding the evidence.

3. Hearsay Statement Defendant Made to Smith

a. Applicable Law

Evidence Code section 1240 provides, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

"A 'spontaneous utterance[]' is considered trustworthy, and admissible at trial despite its hearsay character, because 'in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 925 (*Clark*).) "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on other grounds as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

"For admission of a spontaneous statement, '"(1) there must be some occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.] Whether the statement was made before there was 'time to contrive and misrepresent' is informed by a number of factors, including the passage of time between the startling occurrence and the statement, whether the statement was a response to questioning, and the declarant's emotional state and physical condition. [Citations.]" (*Clark, supra,* 52 Cal.4th at p. 925.) "Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact" for the trial court. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

b. Background

At a hearing held on August 17, 2015, the prosecutor moved to exclude a hearsay statement defendant purportedly made over the telephone to Smith, on the night of the alleged robbery that Thompson's "face is swollen like a beach ball." Defendant's counsel argued the statement was admissible as an "excited utterance" because it was in response to defendant seeing Thompson for the first time with the injuries. The prosecutor took the position that the evidence should be excluded because Smith was not been present when defendant walked into his house and observed Thompson's face.

The trial court ruled the statement was inadmissible hearsay because Smith did not see "the" face. Defendant's counsel responded, "Okay," and "Right."

Defense counsel asked the trial court if he could inquire into whether Smith received a telephone call from defendant. The trial court permitted that line of questioning provided Smith did not testify about the substance of the call.

c. Analysis

Defendant has not demonstrated the record establishes he was under the stress of a startling event when the statement was made. When the trial court considered the issue, there was no indication that defendant was alarmed by the injuries to his wife and blurted the statement out without reflection, or, for that matter, that he expressed any emotion whatsoever when he made it. Also, there was no indication of how much time elapsed between defendant's observation of Thompson and the telephone call to Smith.

Indeed, when defendant testified, he never mentioned he was shocked, or under any stress upon seeing his wife. Rather, he simply testified she was sitting on the couch watching television when he arrived home and that he observed one side of her face "starting to swell." He never said he called Smith while under the stress of what he observed. Additionally, although the court permitted defense counsel to inquire into the fact that Smith received a call from defendant, Smith merely testified that defendant sounded "upset," but there is no indication as to why defendant was purportedly upset, or whether defendant was upset when he told Smith one side of Thompson's face "start[ed] to swell."

It is true that the trial court's rationale may have been flawed, i.e., there is no hard and fast requirement that the recipient of the statement witness the same startling event as the declarant. But, we are obligated to uphold a trial court's evidentiary ruling if it is correct on any theory. (*People v. Fruits* (2016) 247 Cal.App.4th 188, 205.) The record is simply insufficient to support a determination that the trial court erred by ruling defendant's comment to Smith fell within the meaning of the spontaneous statement exception to the hearsay rule.

Even if the trial court erred in excluding Smith's testimony, the error was harmless. "In regard to whether the evidentiary ruling was harmless, an erroneous evidentiary ruling requires reversal only if 'there is a reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.]' [Citations.]" (*Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1449; Accord *People v. Partida* (2005) 37 Cal.4th 428, 439.)

This was the classic case of an abused wife who is reluctant to implicate her husband and ultimately recants at trial. Thompson provided two scenarios for her injuries: defendant pushed her down the stairs and punched her; or robbers attacked her while she was walking to a restaurant. The evidence that Thompson's injuries were caused by defendant (as opposed to a random robbery) was so strong that any possible evidentiary error was harmless.

The evidence demonstrated quite convincingly that that defendant and Thompson had a history of domestic violence, including defendant having punched, kicked, grabbed, pushed, shoved, kicked, and threatened to kill Thompson. Thompson wrote about the physical abuse in her journal. When Thompson's friends routinely noticed her bruises, Thompson acknowledged they were caused by defendant striking her.

Thompson was historically reluctant to report her abuse to law enforcement. Friends testified they told her to report the incidents to the police, but Thompson said she did not want to do so because she needed defendant's employment benefits and was afraid defendant would lose his job. Similarly, Thompson told Fernandez that she did not report "numerous" prior incidents of domestic violence because defendant threatened to hurt her or her son if she ever said anything.

Although Thompson initially told her son, sisters, and friends that the injuries she sustained in November 2014 were caused when she was robbed and attacked by several Hispanic men while she was walking to a local restaurant, she later admitted to several friends that she had actually been punched in the face by defendant. Ultimately, lending to the credibility of this version of the events, she even told one of her sisters the

motivation for defendant's hostility, i.e., that she asked him to contribute money to the mortgage, and the language he used before punching her ("get your ass out of my face").

Thompson was interviewed on separate occasions by Matson and Fernandez. She told both of those officers that defendant pushed her down the stairs and punched her in the face. No mention of the Hispanic robbers was ever made.[11]

Finally, defendant's alibi defense was of no real consequence as it pertained to the day after the date of the charged abuse. The fact that defendant presented some alibi evidence for the date that the purported robbery took place had little if any bearing on the case.

It is not reasonably probable the result of the trial would have been more favorable to defendant if the language defendant used to describe Thompson's face to Smith had been introduced into evidence. The error was harmless.

4. Jones's Proposed Testimony That She Had Seen Paperwork Regarding Defendant's Flight to Mississippi in his Work Locker.

Defense counsel indicated he would question Jones regarding a locker she shared with defendant, in which she had previously seen, at some unknown date, paperwork regarding his trip to Mississippi.[12] Defendant's counsel argued this was

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[11] The legitimacy of the robbery was additionally undermined by the fact that Thompson told Joseph that she did not file a police report and could not recall the name of the officer who assisted her.

[12] Defendant's counsel stated: "I don't know if she saw [it] on the 13th, that I didn't ask."

relevant to corroborate defendant's defense that on November 13, 2014, he went to work to pick up that paperwork. The trial court found the evidence irrelevant because whether Jones saw such paperwork at some unknown point in time did not "prove[] anything or disprove[] anything." Defendant's counsel responded, "Okay," and "[t]hat's fin[e]." Defendant's argument that the trial court erred is meritless.

"Only relevant evidence is admissible . . . ." (*People v. Harris* (2005) 37 Cal.4th 310, 337.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) We review a trial court's ruling that evidence is inadmissible as irrelevant for abuse of discretion. (*People v. Scott* (2011) 52 Cal.4th 452, 490-491.)

Defendant's need for a November 13, 2014, alibi was curious as the prosecution theory was that the beating occurred one day earlier—November 12. It appears defendant's position was Thompson's injuries occurred on November 13 at the hands of the Hispanic robbers and, because he was busy retrieving his airline ticket when she was robbed, he could not have injured his wife *on November 13*. The disconnect between the alibi and the charged offense is obvious. Nonetheless, without knowing when Jones saw defendant's travel documents in his work locker, the excluded evidence did not have any tendency to prove or disprove defendant's alibi that he was retrieving his travel documents on the night Thompson was supposedly robbed. The trial court did not abuse its discretion in ruling the evidence irrelevant.

5. Ineffective Assistance of Counsel

Defendant contends his counsel's "failure to identify evidentiary errors and to object to them clearly, correctly, and consistently was ineffective assistance." Defendant cites the evidentiary issues addressed above and faults his trial attorney for failing to adequately litigate them in his favor. The appellate record does not warrant reversing the judgment on this basis.

We have previously explained why the record does not warrant reversal based on defendant's claimed evidentiary errors. We pointed out, for the most part, the record is devoid of the particulars necessary to conclude the trial court abused its discretion. For example we do not know what exactly Thompson said to Gettes, or the specifics of what Thompson told Jennings, or when Jones saw defendant's travel papers. Moreover, as we stated, defendant has not demonstrated the record reflects his statement to Smith satisfied the spontaneous statement exception to the hearsay rule and, in any event, it is quite clear the evidence would not have impacted the outcome of the trial. This dovetails into the analysis of ineffective assistance of counsel.

"To prevail on a claim of ineffective assistance of counsel, defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.'" (*People v. Hart* (1988) 20 Cal.4th 546, 623.) Prejudice occurs only if the record demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

"'When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court

should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.) Claims of ineffective assistance of counsel should not be raised on direct appeal "except in those rare instances where there is no conceivable tactical purpose for counsel's actions." (*People v. Lopez* (2008) 42 Cal.4th 960, 972.) "'[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' [Citation.]" (*Ibid.*)

Here, the record sheds no light on the reason for counsel's tactical approach. While it may be true that he did not vigorously litigate some issues, it is possible he knew something about the evidence that, due to the holes in the record, we do not know. We are not privy to trial counsel's knowledge of the specific statements Thompson made to Gettes or Jennings and we do not know whether he had a strategic reason for opting not to make further efforts to provide an offer of proof that the statement regarding his client's perception of Thompson's injured face was admissible as a spontaneous statement.

Next, defendant has failed to establish prejudice. We previously assessed any prejudice that may have flowed from the exclusion of defendant's description of Thompson's face and, in so doing, we determined any possible error was harmless. The same holds true here. For the reasons we have identified above, it is not reasonably probable defendant would have prevailed on count 1 had it not been for any of his counsel's purported errors.

6. Cumulative Impact

Defendant contends his conviction on count 1 (injuring his spouse) must be reversed because of the cumulative effect of his counsel's alleged ineffectiveness and the asserted evidentiary errors. We find no prejudicial legal error. We therefore reject defendant's argument that the cumulative effect of the errors requires reversal. (*People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. Edwards* (2013) 57 Cal.4th 658, 746.)

DISPOSITION

We affirm the judgment of conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P. J.

BAKER, J.

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