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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. AMERICA REYES AGUILAR, Defendant and Appellant.	B262583 (Los Angeles County Super. Ct. No. TA133671)

APPEAL from judgment of the Superior Court of Los Angeles County, Patrick Connolly, Judge. Reversed and remanded with directions.

Alan S. Yockelson, 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, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

America Reyes Aguilar appeals from a judgment and sentence, following her conviction for assault with a deadly weapon against Marbella Delarosa. Appellant contends her conviction must be vacated and the judgment reversed, because the trial court violated Penal Code section 1138[1] and deprived her of her right to counsel when it answered a jury question on an issue of law outside defense counsel's presence. She further contends (1) that the court erred in admitting evidence regarding a prior conviction for making criminal threats against another person; (2) that the court abused its discretion in limiting her cross-examination of Delarosa; and (3) that the court abused its discretion in excluding her prior consistent statements. We conclude the trial court's ex parte communication constituted reversible error. Even were that error not fatally prejudicial, we would conclude that appellant's conviction must be reversed, as the cumulative effect of the trial court's errors denied appellant a fair trial. Accordingly, we vacate the conviction, and remand for retrial.

PROCEDURAL HISTORY

Appellant was charged in an information with assault with a deadly weapon, viz., an ice pick (§ 245, subd. (a)(1); count 1), and dissuading a witness (Delarosa) by force or threat (§ 136.1, subd. (c)(1); count 2). As to count 1, the information also alleged that appellant personally inflicted great bodily injury on Delarosa (§ 12022.7, subd. (a)). It further alleged that appellant had suffered one "strike" within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

The jury convicted appellant of count 1 (assault with a deadly weapon), and acquitted her of count 2 (dissuading a witness by force or threat). It also found true the great bodily injury allegation. In a bifurcated proceeding, the trial court found true the allegation that appellant had suffered a prior strike.

The court sentenced appellant to 12 years in state prison. Appellant timely appealed from the judgment.

FACTUAL BACKGROUND

A. *Prosecution Case*

Delarosa testified she first met appellant on Christmas Eve, 2013. Appellant and her five children were in the alley outside Delarosa's house. Appellant said her mother-in-law had evicted them. Delarosa provided appellant and her children with drinks. She also offered to allow the family to live in her two-bedroom house until January 4, when appellant said she would be receiving governmental assistance. However, appellant did not move out on January 4. When Delarosa repeatedly asked appellant when she would be receiving assistance, she replied, "pretty soon" or in "15 days." Delarosa testified that initially, appellant and her family lived in the extra bedroom, but later, appellant took over both bedrooms, forcing Delarosa out of her own bedroom. Appellant's husband also moved into the house without Delarosa's permission, consigning Delarosa to the living room.

Delarosa testified she was afraid of appellant, who repeatedly threatened to report her to immigration for deportation. According to Delarosa, appellant wore her hair in a bun and used an ice pick to hold it in place. The ice pick was about four to five inches long and made of wood and metal.

On April 7, 2014, Delarosa was driven home by her friend Elmer, after attending a church service. Appellant confronted her and began yelling expletives. Delarosa remained quiet and walked toward the house. Appellant trailed behind

her, yelling and spitting in her face. Appellant then pulled Delarosa's arm, turned her around to face appellant, removed the ice pick from her hair and stabbed Delarosa in the face.

Delarosa fell to the ground. Appellant's husband helped her get up, and then took appellant inside the house. Delarosa walked back to car and asked Elmer to call the police, but he responded that he did not know the number. Delarosa asked Elmer to give her her cell phone, and she used it to call her daughter. When her daughter arrived, she told Delarosa she had called the police. Delarosa was treated at a hospital, where she received stitches between her eyebrows. She testified she developed problems breathing as a result of the injury.

The next day, Delarosa received a telephone call from persons who said they were appellant's cousins. They told her that if she dropped the charges against appellant and did not assist the police, she would receive $500. They also told her if she did not take the money, she "would not live to tell the tale." Delarosa testified that appellant also called her that day, and threatened to "hurt" her if she continued "reporting" to the police. According to Delarosa, appellant "told me not to call the police anymore, otherwise if I did I would get into trouble."

Delarosa denied touching appellant during the incident, noting that appellant was pregnant at the time. She also denied that appellant paid her $600 to move into the house or ever paid rent to live there.

On cross-examination, defense counsel sought to question Delarosa about the nature of her relationship with appellant, including whether the two women had spoken about renting a trailer before meeting on December 24, the conditions of the house, whether appellant helped to get the gas turned on, and whether Delarosa had an eviction notice served on appellant. The trial court sustained objections to the questions as irrelevant.

Esmeralda Lopez, Delarosa's daughter, testified that on April 7, 2014, she received a call from her mother saying, "Come. The woman stabbed me and the bleeding won't stop." Lopez called the police while her husband drove her to Delarosa's home. When they arrived, Lopez saw her mother bleeding from the forehead. They drove Delarosa to the hospital where she was treated for her injury.

Over defense objection, the trial court permitted Gladys Ramirez to testify about a prior incident involving appellant. Ramirez testified that on December 18, 2011, she was preparing for her brother's wedding when she heard an argument outside her home. She went outside and observed appellant and her husband arguing with Ramirez's boyfriend. When Ramirez inquired about the argument, appellant approached her, using expletives, and said, "You should shut up and go inside, because I'm going to beat you up." When Ramirez asked appellant to stop arguing, appellant responded that "she was going to beat us up, and that her friends were gangsters and they were going to come shoot at us." Appellant also stated that "we should respect her because she was a thug."[2]

Los Angeles County Deputy Sheriff Jaime Juarez testified that on April 7, 2014, he responded to the 911 call about the incident involving Delarosa. When he arrived, he observed a one-inch laceration on Delarosa's forehead and some scratch marks on her left bicep. On cross-examination, Juarez testified he interviewed Delarosa in Spanish, and wrote a report about the incident three hours later. In the report, he stated that an "unknown object" caused Delarosa's injuries. Juarez also testified no ice pick was ever recovered.

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[2] In closing argument, the prosecutor summarized Ramirez's testimony, stating that appellant had told Ramirez, "I'm a thug. I'm a gangster."

B. *Defense Case*

Appellant testified she met Delarosa after calling her about renting a two-bedroom trailer. After Delarosa showed her the trailer, appellant paid $500, and started living there with her family. However, Delarosa's son, who had been living in part of the trailer, objected, so Delarosa proposed to appellant that she live in a two-bedroom house Delarosa owned. Appellant agreed to pay Delarosa an additional $900, and moved into the house. She also paid Delarosa $700 for the February 2014 rent, but stopped paying rent in March.

Although Delarosa promised appellant a kitchen, appellant did not have access to a kitchen. When she complained, Delarosa stated she was waiting for "the guy to construct it." Appellant also testified that four other people lived in the house: Delarosa, Elmer, and another couple. Defense counsel asked about the living conditions of the house when appellant first moved into the property, but the trial court sustained the prosecutor's relevancy objection to that line of questioning. The court also sustained relevancy objections to questions concerning an eviction notice appellant had received.

On April 7, 2014, appellant was seven-and-a-half-months pregnant. She was putting her youngest child to bed when she heard loud music coming from the other couple's room. She walked to their room and asked them to turn down the music. The man opened the door and said to someone inside, "Hey, they want you." Appellant observed Delarosa sitting in a couch, drinking a beer. Delarosa told the couple, "Don't turn it off." She then told appellant, "Get the F out of here. And if you want, go call the cops." Appellant returned to her room, and the music was turned down.

A few minutes later, after appellant's daughter fell asleep, she went to the bathroom. On the way, she phoned her husband to ask him when he would be

home. He responded that he was pulling up to the house. Appellant hung up and observed Delarosa walking toward her. Delarosa was upset and screaming, "Give me my money" and "You need to get the F- out of here." Delarosa was yelling and swinging her arms. She hit appellant in the forehead with a key ring. When Delarosa punched appellant in the stomach, appellant responded by hitting Delarosa with her cell phone. Delarosa began bleeding and backed off. Appellant's husband and Elmer then arrived. Delarosa told Elmer to call 911, but he threw a cell phone at her and told her to dial 911 herself. Delarosa picked up the phone and called her daughter.

Fearful of being arrested, appellant went to her cousin's home. She told her cousin about the incident, but could not recall if she showed her any of the bruises from the fight.

With respect to the December 2011 incident involving Ramirez, appellant denied threatening Ramirez. According to appellant, while she and her husband were walking home, a car almost hit her. Her husband and the driver began arguing. Ramirez came out from a nearby house and said, "You stupid bitch, you know. What the fuck is your boyfriend's problem . . . . Leave my boyfriend alone." Appellant told Ramirez to mind her own business. Shortly thereafter, the police arrived and knocked on appellant's door. The police did not want to hear appellant's version of the incident and arrested her. Appellant ultimately pled guilty because she wanted the shortest jail time possible so she could get back to her family.

On cross-examination, appellant admitted she pled guilty to a felony conviction of criminal threats or "terrorist threats" as a result of the incident with Ramirez. She also suffered a felony conviction for possession of marijuana for sale in 2001. Appellant agreed with the prosecutor that an ice pick is a dangerous

weapon, if it was used for purposes other than breaking ice. The prosecutor asked appellant if she went to the hospital after being punched in the stomach by Delarosa, and appellant stated, "no." On re-direct, appellant explained that she did not have money to go to the hospital, and she felt her unborn child was fine because she could feel her moving.

Appellant denied wearing an ice pick in her hair or owning an ice pick. She also denied threatening to call immigration to have Delarosa deported, or even joking about the matter. Appellant denied calling Delarosa and telling her not to report a crime. She also denied asking anyone to call Delarosa to threaten her.

Before Haydee Alfaro, appellant's cousin, testified, the prosecutor objected to her proposed testimony relaying appellant's statements that she had been defending herself against Delarosa. The trial court ruled that appellant's statements were not admissible as prior consistent statements.

Alfaro testified that appellant stayed with her for about two weeks in April 2014 Alfaro saw bruises and scratches on appellant's face and belly. She also observed lumps on appellant's head. On cross-examination, Alfaro acknowledged that she had not disclosed these observations until she was contacted by a defense investigator the day before.

DISCUSSION

A. *The Trial Court did not Err in Excluding Evidence of Appellant's Prior Consistent Statements.*

Alfaro, appellant's cousin, testified that she observed bruises and scratch marks on appellant's face and belly after the incident between appellant and Delarosa. The trial court, however, precluded Alfaro from recounting appellant's statements about the incident. Appellant contends the court abused its discretion in

excluding these prior consistent statements, as they would have countered the implied charge that appellant fabricated her trial testimony.

A prior consistent statement made by a witness is not admissible to bolster the witness's credibility, unless it is offered after "[a]n express or implied charge has been made that h[er] testimony at the hearing is recently fabricated . . . , and the statement was made before the . . . motive for fabrication . . . is alleged to have arisen." (Evid. Code, § 791, subd. (b).) "'[R]ecent fabrication may be inferred when it is shown that a witness did not speak about an important matter at a time when it would have been natural for him to do so,' and in such a circumstance, 'it is generally proper to permit rehabilitation by a prior consistent statement.' [Citations.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 803, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Appellant argues that the prosecutor impliedly charged appellant with fabricating her testimony that she acted in self-defense, as the prosecution asked the jury to infer from appellant's failure to consult a physician that she had not, in fact, been hit in the stomach by Delarosa. We agree that the prosecutor impliedly charged appellant with fabricating her testimony. Indeed, in closing, the prosecutor argued that appellant's version of events was "ridiculous," as there were "opportunities" for appellant to go to a hospital or free clinic to report her injuries. However, appellant has not shown that her statements to Alfaro were made before she had a motive to fabricate her story. By her own admission, appellant fled to her cousin's home out of fear she might be arrested and was thus aware of the potential charge. Moreover, any error was harmless, as Alfaro testified that she observed bruises and scratches on appellant's face and belly. Thus, any prior consistent statement about the incident would have been cumulative.

B. *The Trial Court Erred in Limiting Evidence Challenging Delarosa's Credibility.*

The court precluded appellant from questioning Delarosa regarding her contacts with appellant about renting a trailer before meeting her on December 24, having appellant call the gas company to get the gas turned on, the living conditions of the house, and having appellant served with an eviction notice. The court ruled these issues were not relevant. Appellant contends that the issues were relevant to Delarosa's credibility, and that the court's evidentiary rulings violated her constitutional right to confront Delarosa and constituted an abuse of discretion.

To prove a violation of the Confrontation Clause, a criminal defendant must show "'that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."'" (*People v. Pearson* (2013) 56 Cal.4th 393, 455, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) Evidence Code section 210 provides: "'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." Moreover, Evidence Code section 780 provides that "the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of [her] testimony at the hearing," including the "(i) [t]he existence or nonexistence of any fact testified to by [her]."

Here, Delarosa testified that she first met appellant on Christmas Eve, in the alley beside her house. She further testified that she intended to provide housing to appellant only for a few days and that appellant never paid her rent. In short,

Delarosa's testimony was that her motivation for housing appellant and her family was purely charitable, and that there was no landlord-tenant relationship between them. Counsel's questions sought to challenge that aspect of Delarosa's testimony, and were thus relevant under Evidence Code section 210 and permissible under Evidence Code section 780.

Respondent contends the trial court properly precluded counsel's questions under Evidence Code section 352.[3] Counsel's questions, respondent argues, would have resulted in only marginally relevant evidence, as the conditions of the property and whether appellant was a tenant, "had nothing to do with whether appellant assaulted Delarosa with a deadly weapon." Respondent further contends the additional evidence would had been time-consuming and potentially confusing to the jury. We disagree. Delarosa's direct testimony portrayed her as a good Samaritan, who took in appellant and her children out of charity, not as a paying tenant. In contrast, appellant claimed to have paid Delarosa to rent the lodgings, to have helped her by calling the gas company, to have complained of the conditions of the property, and to have been served with an eviction notice. Any of these facts, if acknowledged by Delarosa, would have cast doubt on the truth of her characterization of her relationship with appellant. As the case consisted largely of the conflicting testimony of Delarosa and appellant, evidence bearing on either's credibility was of more than marginal relevance. On this record, we find it unlikely the questions would have consumed undue time or confused the jury.

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[3] Evidence Code section 352 provides: "The court in its discretion may exclude evidence 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."

Nothing in the record suggests the trial court engaged in an analysis under Evidence Code section 352.

Respondent contends appellant has forfeited any claim that she was deprived of her federal constitutional rights, as she failed to raise specific objections at trial. Accordingly, respondent argues that any error should be reviewed under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). We need not decide whether the error in limiting Delarosa's cross-examination, standing alone, was harmless, as we conclude for the reasons set forth below that the cumulative effect of the trial court's errors requires a reversal of the judgment.

C. *The Trial Court Erred in Admitting Evidence Regarding Appellant's Prior Conviction for Making Criminal Threats Against Ramirez.*

Over defense objection, the trial court permitted Ramirez to testify about the December 2011 altercation that resulted in appellant's conviction for making criminal threats. The jury was instructed that it could consider Ramirez's testimony for the limited purposes of determining identity (whether appellant was the person who committed the charged offenses), knowledge (whether appellant knew her words would be received by Delarosa as a threat), or lack of mistake or accident (whether appellant's actions were not the result of mistake or accident). The jury was further instructed that the evidence was not sufficient by itself to prove appellant guilty of assault with a deadly weapon or of intimidating a witness by force or threat, or that she personally inflicted great bodily injury.

Appellant contends the trial court abused its discretion in admitting, under Evidence Code section 1101, Ramirez's testimony relating to appellant's prior conviction for making criminal threats. Evidence Code section 1101 provides in relevant part: "[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. [¶] (b) Nothing in this section prohibits the

admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act." "[T]o be admissible, evidence of other crimes must be relevant to some material fact in issue, must have a tendency to prove that fact, and must not contravene other policies limiting admission, such as Evidence Code section 352." (*People v. Malone* (1988) 47 Cal.3d 1, 18.) The trial court's rulings under Evidence Code sections 352 and 1101 are reviewed for abuse of discretion. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Kipp* (1998) 18 Cal.4th 349, 369.)

Appellant contends -- and respondent does not dispute -- that Ramirez's testimony was inadmissible as to count 1, assault with a deadly weapon. We agree. The other-crime evidence was relevant only for the inadmissible purpose of showing appellant's propensity to commit assault.

As to count 2, dissuading a witness by force or threat, respondent concedes on appeal that Ramirez's testimony was not probative of lack of mistake or accident. Respondent contends, however, that the evidence was relevant to show identity or knowledge. We disagree. The facts underlying appellant's prior conviction were not probative of appellant's knowledge that her alleged statements to Delarosa would be taken as a threat. Not only were the words used in the prior incident different from those used in the instant case, but it is common knowledge that telling someone she would get "hurt" if she continued assisting the police would be taken as a threat. (See *People v. Hendrix* (2013) 214 Cal.App.4th 216, 245 ["no need for the jury to hear inherently prejudicial other crimes evidence . . . to demonstrate defendant's familiarity with common sense, widely understood concepts"].)

Nor were the facts of the prior incident probative of identity. While the identity of the person who called Delarosa was disputed (as appellant denied making the calls), the facts underlying the prior conviction were dissimilar from the charged offense. (See *People v. Harris* (2013) 57 Cal.4th 804, 841 [“‘The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] “The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.” [Citation.]’”].) In the prior incident, appellant spontaneously threatened to assault Ramirez or send her friends to do so for intervening in an argument. In the instant case, the day after the event, Delarosa received a phone call from a person who threatened to hurt her if she continued assisting the police. Nothing about the prior incident was particularly “unusual” or “distinctive” -- much less sufficiently so to show that it was appellant who made the call. In short, Ramirez’s testimony relating to appellant’s prior conviction was inadmissible under Evidence Code section 1101.

Whether the erroneous admission of other-crimes evidence prejudiced appellant is reviewed under *Watson*. (See *People v. Malone*, *supra*, 47 Cal.3d at p. 22.) We need not decide whether the error in admitting the prior conviction, standing alone, was harmless, as we conclude for the reasons set forth below that the cumulative effect of the trial court’s errors requires reversal of the judgment.

D. *The Trial Court Erred in Answering the Jury’s Question on a Issue of Law Outside the Presence of Counsel.*

The information charged appellant with assaulting Delarosa with a deadly weapon, specifically, an ice pick. The prosecution’s theory was that appellant used

the ice pick she customarily wore in her hair to stab Delarosa. The verdict form required the jury to determine whether appellant assaulted Delarosa with an ice pick. In closing, the prosecutor argued that the deadly weapon used was an ice pick. Defense counsel countered that it was not believable that appellant wore an ice pick in her hair, and that it was "ridiculous" to infer that Delarosa's injury was caused by an ice pick. Rather, counsel argued, the physical evidence was much more consistent with the injury being caused by the "edge of a cell phone," as related by appellant. Neither party argued that any other instrument -- such as the "unknown object" mentioned in Deputy Sheriff Juarez's report -- caused Delarosa's injury.

During deliberations, the jury submitted a question to court: "Is it required that the prosecution prove that the weapon used was an ice pick? Or is it sufficient to prove that an unknown instrument was used?" Without informing the prosecutor or defense counsel of the jury's inquiry, the court responded, "No - The prosecution is not required to prove that the weapon was an actual ice pick." After being advised of the question and answer, defense counsel objected. The court overruled the objection and let the answer stand. Approximately one hour later, the jury returned its verdict.

"It is well settled that the trial court should not entertain, let alone initiate, communications with individual jurors except in open court, with prior notification to counsel." (*People v. Wright* (1990) 52 Cal.3d 367, 402 (*Wright*), overruled on another ground by *People v. Williams* (2010) 49 Cal.4th 405, 459.) "[T]he rule against ex parte communications with jurors is based on a defendant's constitutional right to personal presence at all critical stages of his trial and on his right to counsel." (*Wright*, *supra*, 52 Cal.3d at p. 402.) The rule against ex parte communication with the jury is also codified in section 1138, which provides:

"After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." (See *People v. Garcia* (2005) 36 Cal.4th 777, 801 [section 1138 applicable "whenever a jury poses any question to the court that may affect the jury's consideration or resolution of the case (for example, questions relating to factual or evidentiary matters, as well as to questions of law)"].) Accordingly, "a trial court's instructions to a jury in a criminal case are given at a 'critical' stage of the proceedings and therefore, without the presence of counsel and absent a stipulation, comprise both constitutional and statutory error." (*People v. Dagnino* (1978) 80 Cal.App.3d 981, 988 (*Dagnino*).)

Here, the record indicates the jury asked a question of law: whether the prosecution was required to prove that appellant used an ice pick in order to show that she committed assault with a deadly weapon. The trial court provided the jury with an answer concerning the question of law outside the presence of counsel and absent any stipulation. This was error.

We review the trial court's error under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, and must reverse the judgment unless we find the error harmless beyond a reasonable doubt. "[W]hile denial of counsel at the 'critical stage' of a criminal proceeding is not necessarily prejudicial as a matter of law, prejudice will be presumed where the denial '*may have affected*' the substantial rights of the accused. Only the 'most compelling showing' to the contrary will suffice to overcome the presumption, and courts will not engage in 'nice calculations' in making such a determination." (*Dagnino, supra*,

80 Cal.App.3d at p. 989; accord, *People v. Lozano* (1987) 192 Cal.App.3d 618, 624 (*Lozano*).) In making this determination, we find *Dagnino* and *Lozano* instructive. In *Dagnino*, the jury requested instructions on reasonable doubt, the difference between first and second degree burglary, the definition of an accessory, and the definition of circumstantial evidence. Without notifying counsel, the trial court provided the jury with copies of the previously read instructions on these issues. (*Dagnino, supra*, 80 Cal.App.4th at p. 984.) The appellate court reversed, holding that it could not determine whether the trial court's ex parte communication with the jury was harmless beyond a reasonable doubt, as (1) "counsel should have had an opportunity to move the court to exercise its discretion in favor of rereading the instructions"; (2) counsel could have asked the judge to provide a supplemental jury instruction, explaining to the jury how to evaluate any modifications or interlineations made to the written instructions; and (3) there were "undoubtedly" other measures and precautions that able and conscientious counsel reasonably could have taken which might have affected their clients' substantial rights. (*Id.* at pp. 989-990.)

In *Lozano, supra*, 182 Cal.App.3d at page 623, the jury sent a note to the trial court, stating that it was confused "'as to the definition of force and violence, as it applies to resistance: what does wrongful application of force mean?'" Without notifying defense counsel, the court sent the jury an instruction on self-defense. The appellate court found the trial court had erred in providing the self-defense instruction. The court further held the error was prejudicial, as the appellant was deprived of the same opportunities identified in *Dagnino* to request that the instructions be reread, that the court give a cautionary instruction about written instructions, or that other precautionary measures be taken. "Moreover, it is impossible to gauge the effect that the court's sua sponte introduction of a self-

defense theory may have had on the jury[,] especially when it appears to have been confused concerning the meaning and application of the phrase 'force or violence.' The jury might have taken the instruction as a cue from the court concerning the proper way to analyze the facts . . . ." (*Lozano, supra*, 192 Cal.App.3d at p. 625, fn. omitted.)

Here, the issue of the deadly weapon was hotly disputed. The prosecutor argued that appellant used an ice pick to injure Delarosa. Defense counsel argued the physical evidence was consistent with appellant's testimony that she defended herself with her cell phone. The prosecutor never suggested appellant used any other item to injure Delarosa. Nor did she argue that a cell phone was a deadly weapon. Defense counsel thus had no occasion to address this alternative factual scenario or its legal implications. Based on its question, the jury apparently was not convinced that appellant used an ice pick. The court's new instruction, however, allowed the jury to convict appellant of assault with a deadly weapon based on a theory of the case never charged or argued at trial -- that appellant assaulted Delarosa with an unknown instrument. Moreover, no substantial evidence was presented that appellant used an unknown instrument to injure Delarosa. On this record, we cannot conclude the trial court's error was harmless beyond a reasonable doubt.

E. *Cumulative Error*.

Even had we not determined that the trial court's ex parte communication was fatally prejudicial, we would find that the cumulative effect of the court's errors compels reversal of the judgment. "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973)

410 U.S. 284, 298, 302-303.) For example, "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53.) Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 , overruled on other ground by *People v. Whitmer* (2014) 59 Cal.4th 733, 741.)

Here, the erroneously admitted other-crime evidence allowed the prosecutor to portray appellant as a "thug" and a gangster. The effect of the impermissible evidence was compounded by the improper limitation on impeaching the key witness, Delarosa, and by the trial court's serious error in providing a sua sponte instruction, outside the presence of counsel, on the deadly weapon used in count 1. On this record, it is reasonably probable that in the absence of the cumulative effect of these errors, the jury would have reached a more favorable result. (See *People v. Holt* (1984) 37 Cal.3d 436, 459 [cumulative effect of improperly admitted character evidence, improper impeachment of defendant's witness, and prosecutorial misconduct during closing argument required reversal of judgment]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 978-979 ["the trial court, in limiting cross-examination of a key witness in a material area, coupled with commenting on the credibility of that witness, without informing the jury that its statements were merely its personal opinion, committed serious error" requiring that the judgment be reversed].)

DISPOSITION

The judgment is reversed, and the matter remanded for a new trial on count 1.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.