In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARTURO JESUS HERNANDEZ,** **Defendant and Appellant.**	Case No. S175615

First Appellate District, Division Two, Case No. A119501
Contra Costa County Superior Court, Case No. 050707604
The Honorable Nancy Davis Stark, Judge

REPLY BRIEF ON THE MERITS

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THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PLACING A DEPUTY NEAR THE WITNESS STAND DURING APPELLANT'S TESTIMONY, NOR WAS APPELLANT PREJUDICED BY THE PLACEMENT OF THE DEPUTY

A. The Court Did Not Abuse Its Discretion In Posting the Deputy at the Stand During Appellant's Testimony

Appellant acknowledges several comments by the trial court indicate that it exercised judicial discretion by allowing a deputy sheriff near the witness stand while appellant testified. (See OBM 27-28.) Nevertheless, appellant claims the trial court's statements about a deputy routinely being posted near the witness stand demonstrates that the court failed to exercise proper discretion. (OBM 28-29, 33.)

The claim ignores a cardinal rule of appellate review—that error must be affirmatively shown. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To conclude the trial court decided the issue of the deputy's location while appellant sat in the witness chair as a matter of the court's standard procedure and nothing more, this Court would have to ignore the trial court's express statement that the decision to post a deputy was discretionary, as well as three bases supporting the discretionary decision actually articulated by the trial court.[1] This is not the law. A reviewing court presumes "that official duty has been regularly performed." (Evid. Code, § 664.)

Appellant claims that the trial court did not consider the security issue in light of appellant's interest in a fair trial. (OBM 32.) The court's

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[1] The trial court listed the fact that appellant had committed a violent offense resulting in "a very bad injury[,]" appellant's 30-year criminal history, and appellant's "inability to follow the orders of the [c]ourt[,]" as demonstrated by his violations of multiple restraining orders. (3 RT 406-409.)

comments belie appellant's claim. The court expressly noted that it was posting a deputy to protect appellant's security. (See 3 RT 408 [trial court noting that bailiff was posted for defendant's security "and for all the rest of us"].) It is clear that a defendant's right to a fair trial directly implicates the trial court's obligation to consider the defendant's own safety and security in the courtroom during the actual trial. Implicit in the trial court's comments was concern for defendant's personal right to a fair trial.

Our opening brief makes clear, like Justice Haerle's dissent below, that where the question is whether the trial court exercised its discretion, a reviewing court interprets the trial court's comments "in favor of the conclusion that the trial court did indeed exercise its discretion." (Exh. A at p. 2; see also Evid. Code, § 664; *Denham v. Superior Court, supra*, 2 Cal.3d at p. 566 [unless clear case of abuse shown, and unless there has been miscarriage of justice, reviewing court may not substitute its opinion for that of the trial court].) Appellant claims that the trial court was "adamant," rather than ambiguous or "ambivalent," in making its decision to post the deputy at the stand. (ABM 32-33.) That is merely one interpretation of the record, not the only one. At all events, abuse of discretion is not proven by the fact that a trial court is adamant in its ruling.

B. Appellant Was Not Prejudiced By the Placement of the Deputy Regardless of the Absence of an Admonition to the Jury Regarding Appellant's Custodial Status

Appellant asserts that he was prejudiced by the posting of the deputy. He urges that this was a "close case," involving a credibility contest that the jury resolved by acquitting him on at least one count. (OBM 35.) The record does not support this argument. First, the jury deliberated a total of an hour before returning its three findings on the two assault charges and the great bodily injury enhancement. (CT 220.) Whether or not the evidence could have been viewed as presenting a set of potentially difficult

decisions in the abstract, the length of the deliberations reflect that this jury did not share appellant's conception of the case as an intractable credibility contest.

Second, had the placement of the deputy during appellant's testimony caused the jury to change its view of the case as one that was difficult to one that was simple, or caused it to conclude that appellant was dangerous or unreliable as a witness, its acquittal of him on the charge of assault with a deadly weapon would be exceedingly hard to explain. Appellant makes no effort to actually provide such an explanation.

Third, appellant's conviction of assault likely to produce great bodily injury came with solid evidentiary support: appellant's trial testimony and his pretrial statement to the police. Appellant admitted to "slamming" or "flinging" Deva to the ground, and when asked if Deva hurt him, appellant testified that "[s]he was hitting on me trying to take my wallet." (2 RT 368.) He never claimed to the police or to the jury that he was physically afraid of Deva, or that he struck her out of fear. To the contrary, appellant testified that he had lost his temper—that he "was pretty pissed"—just before he "slammed" Deva onto the ground. (2 RT 362; 3 RT 414.) That is, he struck her because he was angry, not because he felt afraid of her physically. This is consistent with his statement to police that "'she's a little girl, . . . and I don't think she could do damage. She punched me, but she didn't hurt me.'" (See 2 RT 370.)

We do not dispute appellant's apparent point that a defendant's anger does not absolutely preclude a claim of self-defense. However, the evidence here showed that appellant acted *because* of his anger, and not because he believed he perceived imminent danger to himself. No support appears in the evidence for a verdict consistent with self-defense. (See *People v. Flannel* (1979) 25 Cal.3d 668, 674-675, superseded by statute on another ground, as stated in *In re Christian* (1994) 7 Cal.4th 768, 773 ["[t]o

be exculpated on a theory of self-defense one must have an honest *and* reasonable belief in the need to defend" and must have acted under influence of those fears alone]; see also CALCRIM 3470 [defendant's use of force must have been reasonable and he *must have acted because of that belief*].) As to appellant's further claim that he did not intend Deva to suffer the grave injuries she sustained, assault "does not require a specific intent to injure the victim." (*People v. Wyatt* (2010) 48 Cal.4th 776, 780; *People v. Williams* (2001) 26 Cal.4th 779, 786 ["assault does not require a specific intent to injure the victim"].)

Appellant also points to the trial court's failure to instruct the jury that it should not consider appellant's custodial status as supportive of a finding of prejudice. (ABM 37.) As the trial court noted, appellant was dressed in plainclothes and did not come through a different door indicating he had been in a holding cell, so the jury had not seen him in custody. (See 3 RT 461.) Appellant argues that the trial court's "ruling makes no sense as the presence of the deputy directly behind appellant on the stand had to tell the jury he was 'in custody.'" (AOB 33.) That would be true only if a deputy's nearness to the stand "tells" a jury every adjacent testifying witness is "'in custody," but the claimed "tell" is fallacious. The trial court's conclusion that the instruction would have confused the jury (and apparently was requested by defense counsel to encourage the jury to sympathize with appellant by inserting his custodial status into the case (3 RT 460-461)) was proper. (See *State v. Gonzalez* (2005) 129 Wash.App. 895, 120 P.3d 645, 649 [preemptive instruction drawing jury's attention to defendant's custodial status "creates the problem it purports to solve"].)

Appellant also claims the prejudice is more apparent here than it was in *People v. Stevens* (2009) 47 Cal.4th 625 where it was unclear exactly where the guard was stationed and and whether the guard was armed. (ABM 38.) His attempted distinction of *Stevens* fails. First, the deputy was

in uniform and stationed at the witness stand in *Stevens* as in this case. (See *People v. Stevens*, *supra*, 47 Cal.4th at p. 631.) Second, while it was unclear whether the deputy there was armed (see *ibid.*, fn. 1), this Court made clear that the presence of a weapon on the bailiff or deputy is not determinative. (See *id.* at p. 634 [concluding that "[s]ecurity measures that are not inherently prejudicial need not be justified by a demonstration of extraordinary need[,]" and relying on *People v. Ainsworth* (1988) 45 Cal.3d 984, 1003, which involved "four to six uniformed armed deputies, including two posted behind" the defendant.].) This Court noted that the presence of armed guards does not necessarily convey the message that a defendant is "particularly dangerous or culpable . . . so long as their numbers or weaponry do not suggest particular official concern or alarm. [Citation.]'" (*Stevens*, *supra*, at p. 635, quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) No numbers or weaponry delivered any "message" here any more than in *Stevens*.

As detailed in our opening brief, it is not reasonably probable the jury's guilty verdict would have been different had the deputy been posted elsewhere in the courtroom while appellant testified. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Any reliance upon the Court of Appeal's finding to the contrary is misplaced. First, the appellate court relied, in part, on an irrelevant theory that appellant had not intended to injure Deva. (See OBM, Exh. A at p. 28.) As noted *ante*, appellant's intent in that regard is not relevant to his liability for the assault. (*People v. Williams*, *supra*, 26 Cal.4th at p. 786.) Second, the appellate court did not consider the requirements that a viable self-defense claim would have required the jury to find appellant's belief in the need for defense was reasonable, and that he must have acted because of a belief that he was in imminent danger. Neither finding has the support of substantial evidence in the trial record.

Appellant also relies on three declarations from his habeas corpus petition to support a finding of prejudice. (ABM 36-37.) For the reasons stated in our opposition to appellant's motion for judicial notice, and based on the authority cited therein, the declarations are not properly considered here.

CONCLUSION

Respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: August 26, 2010

Respectfully submitted,

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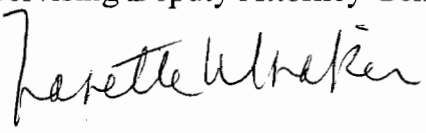

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 1,728 words.

Dated: August 26, 2010

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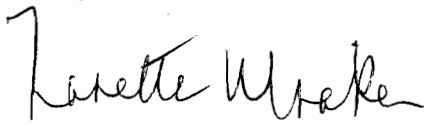

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 26, 2010, at San Francisco, California.

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