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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY J. TILLER,

Defendant and Appellant.

A138045

(San Mateo County
Super. Ct. No. SC74044)

Larry J. Tiller appeals his conviction for possession of cocaine for sale. He argues the trial court erred by permitting immunized testimony of a witness who had admittedly perjured herself in a previous trial of the same case. He also argues the court erroneously excluded evidence proffered by the defense to impeach this witness. We affirm Tiller's conviction.

I. BACKGROUND

In 2011, Tiller was charged by felony information with unlawful possession of cocaine with intent to sell (Health & Saf. Code, § 11351). After two mistrials, he was convicted of the charge in January 2013.¹

¹ The first jury was empanelled in June 2012. The court granted a mistrial after two in limine orders were unintentionally violated by the prosecution. A second jury was empanelled on January 8, 2013, and the court granted a mistrial the following day for juror misconduct before any witnesses were sworn. The court denied a defense request to dismiss the case due to the two mistrials. The third jury was empanelled on January 10, 2013.

Tiller challenges admission of the trial testimony of witness Bilen Tadesse, who was with Tiller at the time of his arrest. Called as a prosecution witness at Tiller's first trial, Tadesse testified in a manner generally favorable to the defense. Called again by the prosecution when the matter was assigned for retrial, Tadesse informed the court out of the jury's presence that she was concerned that her testimony might subject her to prosecution, and she requested that counsel be appointed to represent her. Tadesse's counsel then advised the court and the parties that Tadesse would testify differently in the new trial and feared a perjury prosecution based on her prior testimony. The prosecution offered Tadesse use immunity for current truthful testimony. The court approved the immunity order over Tiller's objections and denied Tiller's motions to exclude Tadesse's testimony or dismiss the case. Tadesse was again called as a prosecution witness on January 11, 2013. As discussed *post*, Tadesse this time testified in a manner unfavorable to Tiller. Following her testimony, Tiller again moved to dismiss the case or strike the testimony as inherently unreliable, and the motion was again denied.

Evidence at Trial

At 8:35 a.m. on March 15, 2011, South San Francisco Police Sergeant Scott Campbell knocked on the door of a motel room and announced himself as a police officer. Tiller opened the door and Campbell saw Tadesse lying on one of the beds. On the other bed, Campbell saw a man's jacket (with a cell phone inside), wallet, keys, and two small Ziploc bags of what appeared to be marijuana. Campbell searched the room for contraband.² Campbell found a clear Ziploc bag on top of the air conditioning unit. The bag contained six smaller Ziploc bags, all of which contained about a quarter gram of white powder that Campbell suspected was cocaine. Five of the smaller bags were clear plastic with a green money symbol and one was transparent purple plastic. Later testing established that the smaller bags contained a total of 2.09 grams of cocaine. No usable

² Although the jury was not so informed, Campbell apparently conducted the search of Tiller's motel room pursuant to a probation search condition.

fingerprints were found on the bags. The wallet contained Tiller's identification and \$95 in cash. No drug paraphernalia was found in the room or Tiller's vehicle.

Campbell took a statement from Taddesse just outside the motel room door. Taddesse initially said she knew nothing about the cocaine. Campbell "explained to her how evidence is processed, and [he] asked her if her fingerprints would be found on any of the suspected baggies of cocaine." Taddesse then said she had seen "the baggy of suspected cocaine near [the] center console of [Tiller's] vehicle. She asked [Tiller] if he had any drugs. He replied that he had some powder, and handed her the baggy. She looked at the baggy, out of curiosity, and then handed it back to [Tiller]." Taddesse was upset and crying when she made this statement. She told Campbell "she had nothing to do with the drugs, and . . . didn't want to take the rap for something that she didn't do." He searched Taddesse's cell phone and did not find any text messages related to controlled substances. He also searched her purse and found no drug paraphernalia or other items related to controlled substances.

Campbell placed Tiller and Taddesse together in the back seat of a patrol car, which was equipped with a hidden recording device. A video recording of a conversation between Tiller and Taddesse was played for the jury. A transcript provided to assist the jury (but not admitted in evidence) included the following statements:

"[Taddesse]: Oh my God, (unintelligible) I need some help. [¶] . . . [¶]

"[Tiller]: . . . [L]isten, they don't have nothing, (unintelligible) all they tryin to scare you. [¶] . . . [¶]

"[Taddesse]: You need to tell them.

"[Tiller]: So I can what? Go down the river [¶] . . . [¶]

"[Taddesse]: Lord I'm going down for this shit. [¶] . . . [¶]

"[Tiller]: All you gotta do is tell 'em you don't know nothing about nothing. [¶] . . . [¶] . . . You don't have to fuck with me. [¶] . . . [¶] . . . They're not going to do nothing to you. . . . What do they have on you?

"[Taddesse]: I touched that bag. . . .

“[Tiller]: You touched the bag. That was a plastic bag. [¶] . . . [¶] Stop letting them scare you. . . .”

Campbell transported Taddesse to the police station and interviewed her again. She was no longer crying and said she could not remember anything due to intoxication. Tiller told Campbell the cocaine found in the motel room did not belong to him and must have been left behind by a previous guest.

San Mateo County Deputy Sheriff Scott Mueller, a member of the county narcotics task force, reviewed text messages that were downloaded from the cell phone found in the motel room. A February 8, 2011 incoming message from “Aaron Labowski” stated, “ ‘Hey, you ready for another quarter or half?’ ”³ A February 14 incoming message from “Kimra” stated, “ ‘Hey, Larry, my friends want to buy like an eighth, so I suggested you. Are you available for drop-off tonight?’ ” An outgoing message shortly thereafter stated, “ ‘Hey, I’m going to have Brooks bring it down to you because I’m in Seattle right now. What time you want him to bring it?’ ” A March 6 incoming text from “Layla” stated, “ ‘Well, there’s this . . . dude in here looking for Llello. . . . He said two grams . . . [.]’ ” and an outgoing text stated, “ ‘Well, tell him it’s 100, and if he wants I’ll be there in 20 minutes.’ ” Incoming messages from Brooks Banks on March 7 and 8 stated, “ ‘Can you bring that half with you[?]’ ” and “ ‘[C]an you bring some eighths?’ ” On March 14, the day before Tiller’s arrest, an incoming message from Banks stated, “ ‘Is it good for the 340, and what time you want me to pick you up,’ ” and an outgoing message stated, “ ‘I don’t know yet. I ain’t got it right now and I still haven’t paid my bills, so I don’t know if I can wait that long. That’s three weeks away.’ ” Banks responded, “ ‘What about a half,’ ” and an outgoing message stated, “ ‘For 170.’ ” Banks then texted, “ ‘Fa sho’ ” and “ ‘Is it good to slide through?’ ” Later, he texted, “ ‘What’s up Bro? You got some more?’ ” Many additional texts were on the phone that did not appear to be related to drug sales.

³ Text message quotes are derived from the reporter’s transcript.

Mueller opined that the February 8, 2011 text from Labowski referred to cocaine, but acknowledged it could also refer to marijuana. The February 14 messages referred to cocaine because cocaine, but not marijuana, is typically sold by the eighth of an ounce, and the March 6 text from Layla referred to cocaine because “Llello” is street slang for cocaine and \$100 is a typical street price for two grams of cocaine but not marijuana. Messages from Banks on March 7 and 8 referred to cocaine because of the reference to “eighths,” and his March 14 messages referred to a sale of half an ounce of cocaine for \$340. Mueller opined that the cocaine found in the motel room was possessed with intent to sell based on the texts, the cocaine’s packaging, the presence of four \$20 bills in the wallet, and the absence of drug paraphernalia.

Taddesse testified that in the early morning of March 15, 2011, Tiller picked her up from a club where she worked as an entertainer. She had several alcoholic drinks during her shift and smoked marijuana just before Tiller picked her up. Taddesse then drank alcohol and smoked marijuana in Tiller’s car. She testified, “I was really drunk.” While in the car, Taddesse asked Tiller if he had drugs, and Tiller said he did not. She did not see any cocaine in the car. While they were in the motel room, a man came by, stepped outside the room with Tiller, and both then reentered the room. “[W]hen they walked back inside the room, they was sitting on the bed [by the door], and . . . I touched the bag. I was like, what is this? I didn’t know what it was.” The bag was on the bed near the men, but she did not know how it got there. She did not see the cocaine again until the police showed it to her. She told the police she did not know whose cocaine it was. The police later told her, “[W]e can arrest you for this.” They did not tell her they might find fingerprints on the bag. Taddesse told the police she had not seen cocaine in the room, which was a lie. She did not recall telling the police that she had seen cocaine in Tiller’s car.

Taddesse acknowledged she testified at the earlier trial that she did not see cocaine in the motel room before the police showed it to her. That was a lie. “I said that because . . . the officer told me that I could get arrested ‘cause I’m in the room.” She later asked for legal representation because she had lied under oath. The court appointed her counsel

and the prosecutor granted her immunity for her current testimony. The prosecutor told her to tell the truth and she was doing so. She denied having testified at the first trial that two men entered the room, but was impeached on this point with her prior testimony.

Testifying for the defense, Banks said he was the person who brought the bag of cocaine to the motel room. He had been using cocaine with his friend “Mooky” earlier that night, and Banks still had the cocaine in his pocket when they went to visit Tiller at the motel. He pulled the cocaine out at one point when Mooky asked for some, but then decided not to use it out of respect for Tiller, who did not use cocaine. He must have dropped the bag or left it out in the room. Banks never handed it or showed it to Tiller or Taddesse, and he did not know how the cocaine ended up on top of the air conditioner. He remembered leaning on the air conditioner, but not putting anything on it. After Banks and Mooky left the motel, Banks realized the cocaine was missing and called Tiller, but Tiller did not respond. Banks decided he’d probably left the cocaine in the motel room and would likely get it back from Tiller the next day. Banks’s lawyer had told him he could go to prison for four years for admitting the cocaine was his,⁴ but he was testifying because Tiller was a close friend and should not go to jail for something Banks had done.

Banks also testified that he used Tiller’s phone to send the text message about cocaine to “Layla.” He explained that he spent time in Tiller’s music studio; Tiller often left his cell phone in the studio for communications, and the phone frequently was answered by people other than Tiller. One day, Banks answered a call from Layla, a woman he liked. Layla then sent Banks text about “Llello” on Tiller’s phone and Banks responded with a text that offered to sell cocaine for \$100. Banks acknowledged sending Tiller messages about a purchase for \$340 on about March 14, but he said it was an offer to buy marijuana. Banks bought all of his marijuana from Tiller, even though Banks did

⁴ Before trial, the court appointed counsel for Banks and conducted an Evidence Code section 402 hearing. At the hearing, Banks acknowledged that he was exposing himself to criminal liability by testifying the cocaine belonged to him, and he waived his Fifth Amendment right not to incriminate himself.

not have a medical marijuana card, and he sometimes delivered marijuana sold by Tiller. He testified that a request for an “eighth” would be for marijuana and a request for an “eight-ball” would be for cocaine.

Tiller testified in his own defense. On the night of March 14–15, 2011, Tiller went to several nightclubs, starting off with about \$100 or \$120 in his wallet. He picked up Taddesse at about 2:30 a.m. When they got to the motel room, Taddesse acted withdrawn and they did not have sex. Banks contacted Tiller about stopping by. Banks arrived with Mooky and they left after an uneventful visit. The next thing Tiller remembered was the police knocking on the door. Tiller did not see the bag of cocaine at any time before the police showed it to him. He told the police it was not his.

Regarding the video of Tiller and Taddesse in the police car, Tiller testified, “I was trying to console her because the police found cocaine in the room, but I knew that I hadn’t done anything wrong. . . . [¶] . . . [¶] [Y]ou might not have been able to hear it through the mechanism that you were playing. I definitely told her over and over again, we don’t have anything to do with this. Just chill out.” Tiller did not know what Taddesse was talking about when she said she had touched the bag, which is why he said, “What do you mean, you touched the bag?” He mentioned the plastic bag because he knew the cocaine found by police was packaged in plastic. He never saw Taddesse touch the bag of cocaine.

Tiller had a medical marijuana card and smoked an eighth to a quarter ounce of marijuana a day. He admitted using his medical marijuana card to purchase marijuana for people who did not have a card. The text from Labowski was an offer from a marijuana cooperative (Tiller’s regular supplier) to sell Tiller marijuana. The February 14, 2011 text was an offer to buy an eighth of marijuana. He responded by offering to have Banks deliver the marijuana. The texts about a “half,” “eighths,” “340” and “170” all referred to sales of ounces of marijuana to Banks. Tiller did not receive the text from Layla or send the response. He regularly left his cell phone in the studio, a soundproofed downstairs area of his house, to communicate with people when he was upstairs. It was not uncommon for people in the studio to make their own calls on the

phone. However, Tiller also used the phone as his primary personal phone. Tiller attempted to introduce evidence that Tadesse had a motive to falsely implicate him, but the court sustained an objection to the evidence as hearsay.

On rebuttal, Campbell testified that the bag of cocaine was lying atop a small box of condoms when he found it. Campbell also testified that the cell phone contained 4,774 text messages dated between late December 2010 and March 15, 2011. Sixty of the texts referenced the name “Larry,” six referenced an email address beginning “L_T_,” and none identified the author of the text as someone other than Larry. Fewer than 50 messages related to music; most related to romantic relationships with women. On March 6, 2011, Banks called the phone 50 minutes before Layla sent her text. In between, two other women called or texted the phone. There were also text messages to and from Layla on March 11. On March 15, there were incoming texts from “Chase Tha Homie” at a time consistent with when Tiller was at the motel. Chase asked to meet in the parking lot. Mueller testified that the texts to and from Chase were consistent with arranging a drug transaction.

The jury convicted Tiller of the charged offense.

II. DISCUSSION

Tiller raises three arguments related to the credibility of Tadesse’s testimony. We conclude that all are meritless and at least one argument has been forfeited.

A. Grant of Immunity to Tadesse

Tiller first argues the court’s approval of a grant of immunity to Tadesse coerced her into testifying in a particular manner and implied to the jury that the court or prosecutor were vouching for the credibility of Tadesse’s testimony.

1. Background

Before trial commenced, Tadesse expressed concern that her current testimony might subject her to prosecution. The court appointed counsel, who later informed the court that Tadesse was “afraid that her former testimony that she didn’t see [the cocaine] at all[,] which was in contradiction with the statement she made [on the video recording] as to touching something,” would expose her to prosecution for perjury. The prosecutor

offered Tadesse immunity, and Tadesse’s counsel advised the court and parties that Tadesse planned to testify that she had seen the cocaine in the room at some point before the police arrived. Tiller objected to the proposed grant of immunity. “[T]his court is sort of the gatekeeper of the integrity of our judicial system, and to allow the prosecution [to try] Mr. Tiller with testimony that consists of at least three stages of lies seems to be something that . . . just is wrong [¶] . . . [S]hort of dismissal, the Court also has the option of excluding . . . Tadesse’s testimony in its entirety” The prosecutor responded that the grant of immunity would allow the defense to cross-examine Tadesse on the fact that she lied, thus allowing the jury to assess her credibility. “A[s] for the integrity of our judicial system,” he argued, the court must “ensur[e] that the People get a chance to put on a case” Because Tadesse was a civilian witness rather than a state agent like a police officer, dismissing the case would not serve the purpose of deterring future unlawful government conduct. The court ruled that the decision to grant Tadesse immunity was up to the prosecutor, and “I don’t see that the granting of immunity to a witness under these circumstances gives this Court a reasonable basis upon which to dismiss the charge.” The court denied the motion without prejudice to its renewal after Tadesse testified.

The next day, the prosecutor submitted a “Petition and Agreement for Use Immunity Pursuant to Penal Code Section 1324” (immunity agreement), asking the court to order Tadesse to testify, subject to the district attorney’s agreement that “no testimony or other information compelled under the Order of this Court, nor any information directly or indirectly derived from said testimony or other information, may be used against [Tadesse] in any criminal case.” The immunity agreement specifically provided that any testimony during the third trial relating to Tadesse’s prior testimony would not be used against her in any prosecution. It further provided that “[t]his agreement extends to all **truthful testimony** offered in the case at bar and does not entitle the witness to commit perjury. Thus the witness may be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed during her testimony.” The prosecutor advised Tadesse of the immunity agreement’s terms and

reminded her that “this agreement extends to all truthful testimony and does not entitle you to commit perjury today or tomorrow, and . . . the most important thing still is to tell the truth about what happened on March 11th, 2011.” Tiller again objected. The court signed the immunity order and directed Taddesse to testify truthfully.

In his opening statement, the prosecutor informed the jury about the immunity agreement and Taddesse’s earlier false testimony; Taddesse acknowledged the agreement in her testimony. The court instructed the jury that in evaluating a witness’s credibility it should consider, “Was the witness promised immunity or leniency in exchange for his or her testimony?” The jury was informed of the immunity agreement, Taddesse was cross-examined about her prior inconsistent testimony, and in closing argument defense counsel urged the jury to disregard Taddesse’s testimony based in part on the grant of immunity.

2. *Analysis*

“ [A] defendant is denied a fair trial if the prosecution’s case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.’ (*People v. Medina* (1974) 41 Cal.App.3d 438, 455.) Thus, when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police (*id.* at p. 450), or that his testimony result in the defendant’s conviction (*People v. Green* (1951) 102 Cal.App.2d 831, 837–839), the accomplice’s testimony is ‘tainted beyond redemption’ [citation] and its admission denies the defendant a fair trial. On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid. (*People v. Fields* [(1983)] 35 Cal.3d 329, 361; [citation].)” (*People v. Allen* (1986) 42 Cal.3d 1222, 1251–1252, fn. & parallel citations omitted (*Allen*); see also *id.* at p. 1252, fn. 5 [same rule applies to plea deals conditioned on testifying truthfully].)

The People first argue that Tiller forfeited this argument by not objecting to the grant of immunity as “coercive” in the trial court. (See *People v. Boyer* (2006)

38 Cal.4th 412, 454.) We disagree. Tiller argued, “[T]he immunity agreement is essentially based upon the proposition that this witness has previously testified in an earlier trial . . . , and that the testimony now being proffered is going to change in some significant aspect [¶] I object to this Court becoming a party to an immunity agreement that, in essence, says, okay, never mind. Whatever you said before we’re not going to prosecute you for because we want you to tell your new story” We believe this argument was sufficient to preserve the claim.

Here, the immunity order did not expressly require Taddesse to testify in conformity with a prior statement or to help achieve a conviction at the trial. It required only that she testify truthfully at the third trial. However, Tiller reasonably argues that Taddesse nevertheless understood that the prosecutor expected her to testify that she had seen the cocaine before the police discovered it, the prosecutor believed the anticipated testimony to be the truth, and the prosecutor might prosecute her for perjury if she testified that she did not see the cocaine in the room before the police found it. We disagree that such circumstances render the grant of immunity unlawfully coercive.

The Supreme Court has explained, “We recognize that a witness . . . is under some compulsion to testify in accord with statements given to the police or the prosecution. The district attorney in the present case obviously believed that [the witness’s] last statement was a truthful account, and if she deviated materially from it he might take the position that she had breached the bargain, and could be prosecuted But despite this element of compulsion, it is clear, and the cases so hold [citation] that an agreement which requires only that the witness testify fully and truthfully is valid, and indeed such a requirement would seem necessary to prevent the witness from sabotaging the bargain.” (*People v. Fields, supra*, 35 Cal.3d at p. 361.) “Surely, law enforcement officials cannot be expected to offer plea agreements only to those individuals who have made no prior statements and expressed no views concerning the events in question.” (*Allen, supra*, 42 Cal.3d at p. 1253.)

The Supreme Court has acknowledged that other circumstances might render a plea deal or grant of immunity coercive even if the literal terms of the plea deal or

immunity order do not require testimony consistent with a prior statement. (*Allen, supra*, 42 Cal.3d at p. 1255.) The witness in *Allen* testified at two preliminary hearings, one before and one after receiving a plea deal that was conditioned on his testifying truthfully. Before trial, however, he stated in an intercepted letter that his preliminary hearing testimony had been false in a number of respects and he planned to testify differently at trial. Upon discovering the letter, the prosecutor repudiated the plea agreement. The witness nevertheless testified at the trial consistently with his preliminary hearing testimony and admitted that he hoped to regain the benefit of the plea deal. (*Id.* at pp. 1249–1251.) The court held that those circumstances did not coerce the witness to testify in a certain way at trial, but “the situation might be different if, after intercepting the letter, the district attorney had threatened to repudiate the agreement *if* [the witness] changed his testimony at defendant’s trial, or if the district attorney had repudiated the agreement immediately but offered to reinstate it if [the witness] would stand by his original version of the facts.” (*Id.* at p. 1255.)

No circumstances presented here render the prosecution’s grant of immunity coercive. The record indicates Taddesse informed the court that she was concerned the apparent conflict between her testimony at the first trial that she never saw the cocaine before police found it and her recorded statement that she “touched it” exposed her to prosecution for perjury. Before she was formally granted immunity, Taddesse indicated she intended to testify that she had seen the cocaine before the police found it in the motel room. Nothing in this record suggests that the prosecutor in any way pressured Taddesse to change her testimony, by threatening her with a perjury charge or otherwise. Her surreptitiously recorded statement on the night of Tiller’s arrest gave the prosecution an objective reason to believe that the anticipated testimony in the third trial would be truthful and testimony given at the first trial was not. (See *People v. Boyer, supra*, 38 Cal.4th at p. 455 [“we have upheld the admission of testimony subject to grants of immunity which simply suggested that the prosecution *believed* the prior statement to *be* the truth, and where the witness understood that his or her sole obligation was to testify fully and fairly”].) Taddesse may have felt under some compulsion to testify as she had

indicated she would once immunity was granted, but she was only subject to potential prosecution for perjury if her current testimony was untruthful.

Tiller argues the prosecutor's grant of immunity, and the court's approval of that grant, amounted to improper vouching for the credibility of Taddesse's testimony at the third trial as compared to that at the first trial. The Supreme Court, however, has rejected that argument, holding that no reasonable juror would interpret the mere fact that a witness was granted immunity for her testimony "as implying that the judge, or anyone else, had vouched for her credibility." (*People v. Freeman* (1994) 8 Cal.4th 450, 489.)

B. *Unreliability of Taddesse Testimony*

Tiller argues the court abused its discretion in failing to exclude Taddesse's testimony as unreliable evidence under Evidence Code section 352. We review a trial court's ruling to admit or exclude evidence under Evidence Code section 352 for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.)

Tiller points to evidence that Taddesse was heavily intoxicated on the night of the pertinent events, had changed her story several times, and admitted lying under oath. Moreover, even her supposedly truthful testimony at the third trial was inconsistent with her prior testimony that more than one person visited Tiller at the motel and with Campbell's statement that Taddesse told him she had seen the cocaine in Tiller's car. We find no abuse of the trial court's discretion. All of these facts were shared with the jury through evidence and argument, and the jury was instructed that each of these factors was relevant to its assessment of Taddesse's credibility. The jury also had the benefit of Taddesse's recorded statement at the time of her arrest, which was made close to the time of the events. The jury was well equipped to make its own credibility determination in comparing Taddesse's recorded statement with her various statements to police and prior inconsistent testimony, as well as taking into account her intoxication and motive to lie.

C. *Exclusion of Police Statement to Taddesse*

Tiller argues the court erred by excluding his testimony that he overheard a police officer tell Taddesse she needed to blame the crime on Tiller if she wanted to avoid

arrest. We agree with the People that the claim is forfeited and, in any event, any error was not prejudicial.

1. *Background*

On cross-examination, Taddesse denied that the police told her the only way she could avoid being arrested was to say the cocaine belonged to Tiller. When Tiller was on the witness stand, he began to testify: “[A]fter the police held the bag up, . . . we both denied having seen or even known, had any knowledge about the bag, the police tell her, well, . . . if you don’t tell us, if you don’t in essence, blame Mr. Tiller . . . [.]” The prosecution objected on the ground of double hearsay and the court sustained the objection. Defense counsel asked Tiller, “That particular conversation you were just alluding to, did that take place in front of you, or something she told you later?” He answered, “No. This happened directly in front of me.” Counsel asked, “What did the police [say]?” Tiller started to testify, “The police told her in front of me, if she did not . . . [.]” He was again interrupted by a hearsay objection that was sustained. Defense counsel said, “Okay” and moved on to another line of questioning.⁵

2. *Forfeiture*

The People argue that Tiller forfeited his claim by failing to state the precise ground of his objection in the trial court. Evidence Code section 354, subdivision (a) provides, “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless . . . it appears on the record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.” In *People v. Livaditis*, the Supreme Court held that the statute requires

⁵ On recross-examination, the prosecutor asked Tiller if he saw the police talk to Taddesse outside the hotel room. Tiller testified, “Yes, I remember them taking her after . . . police made the statement saying that, ‘If you don’t blame it on Mr. Tiller, we’re going to take you both to jail.’ ” The prosecutor objected that the statement was hearsay and nonresponsive to his question, and the court sustained the objection and admonished the jury to disregard the response.

a proponent of hearsay evidence to show the testimony came within an exception to the hearsay rule. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.)

Tiller argues the proffered evidence was not hearsay at all because it was not offered for the truth of the matter stated. He claims the testimony was elicited not to prove the police actually intended to arrest Taddesse unless she blamed the crime on Tiller, but to prove the police made a threat that gave Taddesse a motive to falsely implicate Tiller. We agree the statement would not be hearsay and would be admissible for this purpose. Because this distinction goes to whether the proffered testimony was hearsay in the first instance, rather than whether it falls within an exception to the hearsay rule, Tiller suggests he should not have borne the burden of contesting an erroneous hearsay ruling by the court.

Tiller's argument is not persuasive. On its face, he attempted to elicit a hearsay statement, and the fact it may have been made in Tiller's presence does not render it less so. Tiller never advised the court he intended to offer the statement to show its effect on Taddesse rather than for its truth. It was incumbent on him to do so. Because he failed to do so, the claim is forfeited.

3. *Merits of the Claim and Prejudice*

Even if the claim were not forfeited, any error was not prejudicial. We find no reasonable probability that admission of the statement to show bias would have changed the trial's outcome. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [erroneous exclusion of evidence under Evid. Code, § 352 reviewed for harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

The jury heard undisputed evidence that Taddesse made the statement about seeing the cocaine before its discovery by police at a time when she was fearful of arrest and prosecution for possessing it. Campbell testified he had told Taddesse the police would check the bag of cocaine for fingerprints and asked her if her prints were on the bag. Taddesse testified the police told her she could be arrested for being in the room with the cocaine. The video recording clearly demonstrated Taddesse's distress at facing arrest and prosecution and her insistence that Tiller relieve her of blame. Tiller's

additional testimony that the police made a more direct effort to put pressure on Taddesse by telling her that she would be arrested unless she shifted the blame to Tiller (a statement the jury heard but was told to disregard) would not have significantly changed the state of the evidence.

Moreover, Tiller's contention that Taddesse's testimony was crucial to the prosecution's case does not withstand scrutiny. For all of the reasons pointed out by Tiller—the grant of immunity, the prior inconsistent testimony, Taddesse's intoxication, and her motive to avoid arrest—Taddesse's testimony would necessarily have been viewed by the jury with caution. Moreover, her demeanor on the witness stand drew comment from both the prosecution and the defense. The prosecutor described her as “interesting” and “not the most sophisticated individual,” while defense counsel described her as an “odd character.” Significantly, the prosecutor urged the jury to *reject* part of Taddesse's testimony—her denial that she had seen the cocaine in Tiller's car. The prosecutor also expressly disclaimed reliance on Taddesse's trial testimony to establish the state's case against Tiller. Instead, he urged the jury to consider the video recorded statement in the patrol car (particularly urging the jury to consider Tiller's demeanor on that recording), a crucial omission in Banks's testimony (he never explained how the cocaine ended up on the top of the air conditioning unit), and the text and call records on Tiller's phone. The undisputed authenticity of the video recording and cell phone records, in combination with the full record of texts and calls on Tiller's cell phone, undermined the defense theory that Tiller had never sold cocaine and amply supported the jury's implicit finding that Banks and Tiller were not credible.

III. DISPOSITION

The judgment is affirmed.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.