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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD LEROY SNOW, JR.,

Defendant and Appellant.

D058200

(Super. Ct. No. SCS205658)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed.

INTRODUCTION

A jury convicted Edward Leroy Snow, Jr., of first degree murder (Pen. Code, § 187, subd. (a)) and he admitted having a prior strike conviction (Pen. Code, §§ 667, subd. (b)-(i), 1170.12). The trial court sentenced him to an indeterminate term of 50 years to life in prison.

Snow appeals, contending the trial court erred in denying his new trial motion, brought on the ground the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to disclose that, at the time of Snow's trial, the district attorney's office was investigating a prosecution witness for various fraudulent acts. He additionally contends the trial court abused its discretion by allowing evidence of a gun and ammunition cache found in Snow's home to corroborate and bolster a prosecution witness's testimony. Finally, he contends the cumulative, synergistic effect of these errors deprived him of his constitutional right to a fair trial. We conclude these contentions lack merit and affirm the judgment.

## BACKGROUND

### *Prosecution Evidence*

Larry Lemler owned Paxton's Towing (Paxton's), a towing service and impound yard in Chula Vista. The yard had a small office building with two connecting rooms. One room was a dispatcher's office. The other room was Lemler's office. Access to the impound lot was through remote controlled pedestrian and vehicle security gates, which were typically closed. There were 16 security cameras around the impound yard and two inside the office building. The camera system was housed in a locked security box wired to the wall.

Lemler also operated concession stands at local home improvement stores. The concession stands' sales were all in cash, mostly in small denominations. Each day, the concession stand employees packaged the day's cash receipts in yellow sandwich wrap and placed them into a safe. A manager collected the money every third day and brought

it to Lemler. Lemler stored the money in large plastic bags under his desk at Paxton's. He counted the money at the end of the month.

Lemler counted and wrapped most of the money other than \$1 bills with paper money bands he obtained from his bank. He wrapped the \$1 bills with rubber bands. On stacks of money with odd amounts, he wrote the amount on the bills in pencil. He estimated he collected between \$65,000 and \$80,000 each month from the concession stands.

Snow worked for Paxton's from May through August 2006,<sup>1</sup> primarily as a tow truck driver. In late July or early August, Snow discussed robbing Paxton's with his coworker, James Myers.<sup>2</sup> Snow told Myers they could get David Sanders, the night dispatcher, out of the way by knocking him out and putting him in a portable toilet or the trunk of a car.

Sometime in mid-August, Snow took some money from Lemler's office and paid Myers \$1,000 to keep quiet about it. Around the same time, Snow and Myers again discussed robbing Paxton's. A few days after their discussion, in exchange for 20 to 25 percent of the robbery proceeds, Myers agreed to keep himself and another coworker, Terry Taylor,<sup>3</sup> out of the impound lot during the robbery.

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1 Further calendar references are also to the year 2006 unless otherwise indicated.

2 Myers admitted having a prior misdemeanor conviction for conduct involving moral turpitude.

3 Taylor admitted having a prior felony theft-related conviction.

Also around the same time, Snow told Lemler he had to go to Kansas because his grandfather was sick. About 10 days later, Snow told Lemler his grandfather had died and he would be back to work soon. He picked up his pay at the end of August and told Lemler he was ready to return to work, but Lemler never saw him again. Snow told Myers he moved to Kansas and was growing marijuana. Snow similarly told Taylor he was opening a business in Kansas and showed him pictures of his marijuana field.

On September 18 Snow returned to the San Diego area. He checked into a National City hotel and paid for three nights with a credit card. The vehicle listed on Snow's registration card was a 2005 Dodge van. The van's rear window brake light did not work.

That same day, Snow told Taylor he was planning to rob Paxton's on September 20. Snow said two other people were going to help him. They were going to put Sanders in a portable toilet and then Snow was going to take money from Lemler's office. He asked Taylor where the main power switch to the building was and Taylor pointed it out on the office wall. Snow said he would give Taylor \$10,000 or 10 percent of the robbery proceeds if Taylor stayed away from the impound lot between 7:30 p.m. and 9:30 p.m. Snow also said Myers would be watching Taylor to make sure Taylor stayed away. He told Taylor that Myers had helped him steal money from Paxton's on four or five prior occasions.

In the evening of September 19 and again in the afternoon of September 20, Snow met with Taylor to acquire methamphetamine for resale in Kansas. On the first occasion, Snow and Taylor discussed the robbery further. Taylor told Snow he did not want to

participate in the robbery, but agreed to stay away from Paxton's during the robbery. Snow told Taylor to "keep [his] mouth shut" and everything would be okay. On the second occasion, Snow showed Taylor a chrome and black gun. On both occasions, Snow drove a blue Dodge van.

Meanwhile, Myers had told his wife about the robbery plan and she talked him out of participating. On September 20, Myers phoned Snow, told Snow he did not want anything to do with the robbery, and tried to talk Snow out of going through with it. They subsequently met for lunch and Myers again told Snow he did not want anything to do with the robbery; however, Snow confirmed he was going through with it. He told Myers he did not need him anyway because he had already told Taylor about the robbery plan and Taylor agreed to stay away from Paxton's during the robbery. Snow also told Myers to keep his mouth shut and that he hoped Myers had not said anything to his wife because he did not want to see anything happen to her. This remark frightened Myers.

That day, Lemler worked in his office until about 7:00 p.m. When he left, he locked his office, which had about \$89,000 in cash stored in it. At that point, Sanders was alone.

Taylor went to work that day around 5:30 p.m. After towing one vehicle, he returned to Paxton's around 7:15 p.m., where Myers was waiting for him. They left in separate trucks around 7:45 p.m. and planned to stay away until 9:00 p.m. or 10:00 p.m. They went to a park and sat in their trucks. While they waited, Taylor used some drugs. Sanders called Taylor around 8:30 p.m. to unlock a car. Taylor declined to take the job. He and Myers then went to Taylor's house for awhile.

At around 9:30 p.m., Taylor tried to contact Sanders by phone and by radio. When Sanders did not respond, Taylor and Myers drove back to Paxton's. They found the vehicle security gate open and Sanders's body on the ground by the dispatcher's office. His head was bleeding, and there was blood on the ground and the wall. Myers called 911.

Several police officers responded to the scene. The officers searched the grounds and noticed Taylor and Myers standing near a tow truck. Taylor and Myers directed the officers to Sanders's body. Sanders had two gunshot wounds that were consistent with being caused by a handgun. One of the wounds was to his head and the other was to his neck just behind his ear. He also had minor blunt trauma to his head. There were no signs of a struggle. He died from the gunshot wounds.

Paxton's security camera system was missing. The wires for the system were cut and all of the recording devices and videotapes were gone. Wire cutters lying next to the cut wires contained a mixture of DNA from at least three contributors. Snow could not be excluded as a contributor to the mixture.

Lemler's office door had been forced open and the deadbolt had been ripped out of the wood. A stack of currency on Lemler's desk totaling more than \$3,000 and Paxton's cash box and drop safe had not been disturbed. However, a majority of the bags of cash Lemler kept under his desk were gone.

Lemler originally told police about \$12,000 was stolen. He later told police about \$50,000 to \$60,000 was stolen. At the preliminary hearing, he testified that about \$90,000 was stolen and, at trial, he testified that about \$80,000 was stolen. Lemler did

not file an insurance claim for the loss and denied his failure to do so was because he thought the insurance company might investigate the loss.

A security video from the business next door to Paxton's showed a tow truck with a vehicle entered Paxton's at 7:29 p.m. At 7:42 p.m., two tow trucks left Paxton's. At 9:13 p.m., a dark-colored vehicle entered Paxton's. It stopped and waited for approximately 15 seconds for the vehicle security gate to open and then proceeded into the impound lot. The vehicle did not have an illuminated third brake light. At 9:20 p.m., Paxton's yard lights shut off. At 9:21 p.m., the vehicle left Paxton's. At 9:25 p.m., the vehicle returned. This time, the gate was open and the vehicle did not stop. The vehicle left again at 9:26 p.m. At 9:48 p.m., the two tow trucks returned to Paxton's.

On September 21, Taylor called Snow several times. Snow told Taylor he had to shoot Sanders. He also told Taylor not to worry and to keep his mouth shut. Taylor asked Snow how much money he had taken and Snow said he had not counted it. He wanted Taylor to come to Kansas to get his share. Instead, Taylor gave Snow a bank account number and asked Snow to deposit the money into it. Snow never did.

Taylor called Snow about three or four days later and asked him how much money he had taken, guessing it was \$15,000 to \$20,000. Snow said he had gotten five or six times that amount. He told Taylor he had bought welding equipment and a flat screen television and was living like a king.

Myers also called Snow three or four days after the robbery. Snow bragged that "Wal-Mart loves him" and that he was watching his 52-inch television. Snow also mentioned Myers would be getting "four zeros," meaning \$10,000 or more. Snow asked

whether Myers and Taylor had talked to the police and told Myers they had better not do so. He also told Myers that Sanders had "never seen it coming."

Although Taylor and Myers were at the scene when police officers arrived, investigators did not consider them suspects. Investigators later learned of their involvement in the crime through a Crime Stoppers tip. Investigators interviewed both men, who initially lied and then downplayed their involvement. Both men eventually told investigators Snow had killed Sanders during a planned robbery.<sup>4</sup>

On October 10, police officers searched Snow's home in Kansas. They found a duffel bag in Snow's bedroom containing \$24,953 in cash, banded in denominations of \$1, \$5, \$10, and \$20. A fingerprint expert examined the money and the bands. Snow's fingerprints were on four of the bands. Lemler's fingerprints were not on any of the bands or any of the money. They also found cash in the amount of \$8,400 in Snow's pants, consisting of 64 \$100 bills and 100 \$20 bills. There appeared to be new kitchen appliances and a new flat-screen television in the home. There were also three welding machines, two of which looked new, and one air compressor in the garage.

The officers found a small pipe and \$20 or less worth of marijuana along with other drug-related paraphernalia. They did not find "pay and owe" sheets or other items indicating Snow was growing or selling marijuana.

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<sup>4</sup> Both men pleaded guilty to voluntary manslaughter for their roles in this crime. Neither had been sentenced at the time of Snow's trial.

Lemler identified the money found in Snow's residence based on the type and color of the paper bands used, the type of rubber bands used, the numbers written on the bills, and the type of marking system used. The money bands on the bills found in Snow's home matched the money bands supplied by Lemler's bank.

#### *Defense Evidence*

Snow's mother testified he visited her in Wyoming for three days between August 16 and 28 on his way to Kansas. He was alone and he had a large amount of money in a coffee can. Snow and his mother went to a bank, got some money bands, and counted and banded the money. It totaled between \$30,000 and \$38,000, consisting mostly of \$1 and \$5 bills. Neither Snow nor his mother wrote on any of the money in pencil. Snow used some of the money to buy a house in Kansas.

Snow's father-in-law was a truck driver and a mechanic. He had a compressor, toolboxes and lots of tools, but no welding equipment. He gave Snow a compressor and a toolbox full of tools because Snow wanted to start a welding business.

Snow told his father-in-law he sold marijuana. His father-in-law thought Snow sold marijuana in Kansas and that his money was from marijuana sales. Snow told his father-in-law he paid cash for the house in Kansas. His father-in-law thought the house cost less than \$20,000. Neither Snow nor his wife had a job in Kansas. While in San Diego, they lived with Snow's mother-in-law rent free to save money for Snow to start a business. Snow's father-in-law also gave them money for living expenses so Snow could start a business, but he did not buy them a house, a flat screen television, a refrigerator, or a stove.

## DISCUSSION

### I

#### *Prosecutor's Failure To Disclose Evidence*

##### A

More than a year after the jury returned its verdict, defense counsel<sup>5</sup> moved for new trial on the ground, among others, that the prosecution violated its discovery obligations under *Brady, supra*, 373 U.S. 83. At the evidentiary hearing on the motion, the evidence showed that, at the time of Snow's trial, the district attorney's office was investigating Lemler for workers' compensation insurance fraud, employment tax fraud and consumer fraud (predatory towing). The district attorney's office learned of the worker's compensation insurance and employment tax fraud claims approximately a year and a half before trial. The prosecutor learned of them approximately five months before trial. The district attorney's office learned about the consumer fraud claim approximately a month before trial. It is unclear from the record when the prosecutor learned of the consumer fraud claim. However, the prosecutor did not disclose the fraud investigations to defense counsel until approximately nine months after Snow's trial, when, following an in camera review, the trial court ordered disclosure of the information.

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<sup>5</sup> By then, the trial court had relieved Snow's retained trial counsel at Snow's request and appointed a public defender to represent him in posttrial matters.

After the hearing on the motion for new trial, the trial court found the prosecution willfully failed to properly discharge its discovery obligations,<sup>6</sup> but the undisclosed evidence was not material because it was not reasonably probable use of the undisclosed evidence would have resulted in a different trial outcome. The trial court reasoned it would have limited the use of the evidence under Evidence Code section 352; Snow's defense counsel rigorously cross-examined Lemler about his loss estimates, his operation of cash businesses, and his failure/unwillingness to make an insurance claim; Lemler's testimony about his money marking method was coherent and credible; and Lemler's testimony was not critical given Taylor's and Myer's testimony, which was corroborated by cell phone records.

## B

Snow contends the trial court erred in denying his motion for new trial because the trial court mistakenly determined the prosecution had not violated *Brady, supra*, 373 U.S. 83. "In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [Citation.] The high court has since held that the duty to disclose such evidence exists even though there has been no request by the accused [citation], that the duty encompasses impeachment evidence as well as exculpatory evidence [citation], and that the duty extends even to evidence known only to police

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<sup>6</sup> Because the People are not disputing this finding, we omit a summary of the facts underlying it. We note, however, the record amply supports the finding.

investigators and not to the prosecutor [citation]. Such evidence is material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " [Citation.] In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." ' ' "

(*People v. Letner* (2010) 50 Cal.4th 99, 175 (*Letner*).)

A *Brady* violation has three components: " ' "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." [Citation.] Prejudice, in this context, focuses on "the materiality of the evidence to the issue of guilt and innocence." [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction "more likely" [citation], or that using the suppressed evidence to discredit a witness's testimony "might have changed the outcome of the trial" [citation]. A defendant instead "must show a 'reasonable probability of a different result.' " [Citation.]' [Citation.] We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence."

(*Letner, supra*, 50 Cal.4th at p. 176.)

The first two components of a *Brady* violation are satisfied in this case. The prosecution had an obligation to disclose the fraud investigation evidence because "the circumstance that a prosecution witness faced pending criminal matters, some of which

were being prosecuted by the same district attorney's office prosecuting the defendant, constitutes evidence 'favorable' to the defense, in that a jury could view this circumstance as negatively impacting the credibility of testimony by the witness that was helpful to the prosecution." (*Letner, supra*, 50 Cal.4th at p. 176.)

We, nonetheless, agree with the trial court the fraud investigation evidence was not material. " ' "In general, impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime,' [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, [citation]." ' ' " (*Letner, supra*, 50 Cal.4th at p. 177.) Neither circumstance applies here. Lemler's testimony did not supply the only evidence linking Snow to the crime. Myers's and Taylor's testimony also linked Snow to the crime and arguably did so as strongly or more strongly than Lemler's testimony since they were Snow's coconspirators and their testimony was corroborated by cell phone records.

Although Lemler's testimony supplied key evidence linking the cash found in Snow's home to the crime, the fraud investigation evidence would not have undermined this aspect of Lemler's testimony. As the trial court noted, Lemler's testimony describing how he counted and banded his money, the materials he used to band his money, and his method of marking stacks of money with odd amounts was internally consistent and not inherently incredible. In addition, after the discovery of the banded cash in Snow's home, a detective obtained sample cash bands from Lemler and from Lemler's bank. The

sample bands were consistent with the bands used on the cash found in Snow's home, corroborating Lemler's testimony.

Moreover, the jury already knew from Lemler's testimony that he paid most of his employees in cash. They also knew from Myer's testimony that Lemler required his employees to tow cars illegally. Given this testimony and Lemler's unconventional cash management practices, it is doubtful the fraud investigation evidence would have surprised the jury or appreciably affected the jury's assessment of Lemler's credibility. To the contrary, the fraud investigation evidence might have bolstered Lemler's credibility in some respects because the evidence would have helped explain why Lemler had bags of cash stashed under his desk, why he could not give a precise accounting of the stolen money, and why he did not report the theft to his insurance company. Accordingly, we conclude the fraud investigation was not material within the meaning of *Brady, supra*, 373 U.S. 83 and the trial court did not err in denying Snow's new trial motion on this ground.

## II

### *Admission of Gun and Ammunition Cache Evidence*

#### A

Among the items found during the search of Snow's home were firearms and ammunition. Defense counsel moved in limine to exclude this evidence. The trial court granted the motion, subject to the possibility the evidence would be admissible to bolster Taylor's credibility if he testified he saw Snow with a gun around the time of the crime.

After the defense counsel's cross-examination and impeachment of Taylor, the trial court permitted the prosecutor to admit the evidence.

The evidence showed a police officer found a Ruger .38 or .357-caliber revolver with six spent shells, two Glock automatic .45-caliber handguns with unloaded magazines, and a single shot, 12-gauge shotgun in a bedroom closet. The officer also found unused .22-caliber shells in another area of the house.

In conjunction with the admission of the evidence, the trial court instructed the jury, "The evidence you are hearing regarding guns found in [Snow's] residence . . . is being admitted for a limited purpose. To support or undermine the credibility of any witness. [¶] There is no evidence that any of these weapons was used in a crime committed on September 20, 2006. You cannot use the fact that guns were found in [Snow's] residence in your deliberations . . . except to determine the credibility of a witness."

## B

Snow contends the trial court should have excluded the gun and ammunition cache evidence as unduly prejudicial. A court has the discretion to 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." (Evid. Code, § 352.) A trial court has broad discretion to determine both the relevance of evidence and whether its prejudicial effect outweighs its probative value. (*People v. Jones* (2011) 51 Cal.4th 346, 373.) "The "prejudice" referred to in Evidence Code section 352 applies to

evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' ' ' (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) We review a trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

Generally, evidence a defendant possessed a weapon not used in the crime charged is inadmissible as such evidence "leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360; see also *People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on another ground in *People v. Chapman* (1959) 52 Cal.2d 95, 98; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393; *People v. Witt* (1958) 159 Cal.App.2d 492, 497.) Nonetheless, evidence of the defendant's possession of a weapon is admissible when it is probative on issues other than the defendant's propensity to possess weapons. (See, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 821–822; *People v. Cox* (2003) 30 Cal.4th 916, 956, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Smith* (2003) 30 Cal.4th 581, 614; *People v. Gunder* (2007) 151 Cal.App.4th 412, 416, called into doubt on another point in *People v. Moore* (2011) 51 Cal.4th 386, 410-412.)

In this case, Taylor was a key prosecution witness and defense counsel impeached his testimony with evidence of his past drug use, his poor memory, his past felony criminal conduct, his numerous lies to police, and his favorable plea bargain. As Taylor

testified he saw Snow with a handgun the day of the crime, the gun and ammunition cache evidence was relevant to and probative of Taylor's credibility. (*People v. Abel* (2012) 53 Cal.4th 891, 924-925 [evidence bearing on a witness's credibility is relevant and admissible].) In addition, the trial court limited the prejudicial effect of this evidence by specifically instructing the jury the evidence was only admissible for the purpose of determining a witness's credibility. We presume the jury followed these instructions as Snow has not provided evidence to the contrary. (*People v. Houston* (2012) 54 Cal.4th 1186,1214.)

Snow's reliance on *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 is misplaced because it involved the impermissible use of weapons evidence to show the defendant's bad character and propensity to engage in murderous behavior. (*Id.* at pp. 1382-1384.) It did not involve or discuss the permissible use of weapons evidence to assess a witness's credibility. Accordingly, we conclude Snow has not established the trial court abused its discretion by admitting the gun and ammunition cache evidence.

### III

#### *Cumulative Effect of Evidentiary Errors*

Snow contends we must reverse his conviction because the accumulation of the above claims of error was not harmless beyond a reasonable doubt. Because we have rejected both of the above claims of errors, we reject Snow's cumulative error claim as well. (*People v. Vieira* (2005) 35 Cal.4th 264, 294; *People v. Bolin, supra*, 18 Cal.4th at p. 335.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

AARON, J.

IRION, J.