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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP CARDWELL GARCIA et al.,

Defendants and Appellants.

D059197

(Super. Ct. No. SWF011785)

APPEALS from judgments of the Superior Court of Riverside County, F. Paul Dickerson III, Judge. Affirmed.

Phillip Cardwell Garcia and Keiron Marquitt Elias appeal judgments sentencing them to prison after a jury found them guilty of the first degree murder of Anthonie Wendler. Garcia contends the trial court erroneously failed to instruct the jury to view with caution evidence of incriminating statements he made to Elias before trial. Elias contends the trial court erroneously denied his motion for new trial, which was based on

Garcia's confession at his sentencing hearing that he murdered Wendler and framed Elias. We reject these contentions and affirm both judgments.

I.

FACTUAL BACKGROUND

A. *Wendler's Murder*

After having been away for several days, Wendler's daughter Skyla and her fiancé returned one evening to the house they shared with Wendler. Skyla noticed Wendler's truck was missing and the front door was ajar. Upon entering the house, she was surprised to find it in filthy disarray, for Wendler was fastidious about keeping the house clean. Skyla came upon Wendler's corpse in a hallway and screamed. Her fiancé escorted her out of the house and telephoned the police.

Police investigators who responded to the call found Wendler had been hog-tied with a combination of duct tape, electrical cord and nylon rope. A sock was stuffed into his mouth, and a T-shirt was wrapped around his neck. Blood was found on Wendler's face and throughout the house. A forensic pathologist determined the cause of death was strangulation.

B. *Evidence Implicating Garcia in the Murder*

Evidence established Garcia and Wendler knew each other. Skyla testified that she met Garcia at Wendler's house one day after work and that the two men appeared to be friends. A piece of paper with the name "Phil" and Garcia's telephone number written on it was found in Wendler's bedroom.

Evidence also established Garcia and Wendler engaged in illegal activities together. Robinette Anderson, a prostitute, testified Garcia arranged for her to provide sexual services to Wendler. According to Anderson, Garcia also sold illicit drugs to Wendler.

Forensic evidence indicated Garcia was in Wendler's house at or near the time of the murder. Garcia's fingerprint was found on a table in the living room, near a couch stained with Wendler's blood. DNA matching Garcia's profile was recovered from the mouth of an open whisky bottle found in the kitchen.

Evidence also established Garcia had a financial motive for the murder. Three individuals testified that during the three weeks preceding the murder, Garcia had given them approximately \$15,000 worth of checks drawn on Wendler's account with instructions to deposit the checks, wait for them to clear, and then withdraw the money and give it to Garcia. About a week before the murder, Anderson overheard Garcia tell Elias how much money Wendler had. During the two weeks after Wendler's murder, purchases totaling several thousand dollars were charged to his credit and debit cards. When police finally arrested Garcia, he had Wendler's wallet; credit cards; Social Security card; and driver's license, on which Garcia's photograph had been substituted for Wendler's.

C. *Evidence Implicating Elias in the Murder*

Forensic evidence implicated Elias in Wendler's murder. A hair from which investigators extracted DNA matching Elias's profile was found on Wendler's corpse. DNA extracted from another such hair was a partial match to Elias.

Other evidence linked Elias to Wendler's truck. The same day Skyla found Wendler's corpse, a farmer found Wendler's truck abandoned in a field and reported it to the local sheriff. By the time investigating officers arrived, the truck had been burned. Inside or near the truck, officers found nylon rope matching the rope used to bind Wendler; a credit card belonging to Wendler; a photograph with a note on the back addressed to Elias; a document bearing Elias's name; and a police officer's business card bearing the number of a case involving Elias.

There was also evidence Elias participated in the fraudulent check-cashing scheme. Two of the individuals to whom Garcia had given checks drawn on Wendler's account testified that Elias was involved. One of them decided to keep the money and subsequently received telephone calls from Elias threatening to kill him if he did not hand over the money.

II.

PROCEDURAL BACKGROUND

The People charged Garcia and Elias with the murder of Wendler. (Pen. Code, § 187, subd. (a); undesignated statutory references are to this Code.) The People alleged the murder was first degree because Garcia and Elias committed the murder "willfully, unlawfully, and with deliberation, premeditation, and malice aforethought." (See § 189.) As a special circumstance, the People alleged the murder was carried out for financial gain. (§ 190.2, subd. (a)(1).)

The jury found Garcia and Elias guilty of first degree murder. The jury found the financial gain special circumstance allegation true as to Garcia; but it was unable to reach

a verdict on the allegation as to Elias, and the People subsequently dismissed the allegation as to him.

The court sentenced Garcia to life in prison without the possibility of parole. (§ 190.2, subd. (a)(1).) As discussed in detail below (see pt. III.B.1., *post*), at his sentencing hearing Garcia confessed to murdering Wendler and framing Elias.

Elias moved for a new trial based on Garcia's confession. (See § 1181, subd. 8.) The court denied the motion and sentenced Elias to prison for 25 years to life. (§ 190, subd. (a).)

III.

DISCUSSION

Garcia and Elias each raise a single claim of error on appeal. Garcia contends the trial court erred by failing to instruct the jury to view with caution Anderson's testimony relating Garcia's statements to Elias about how much money Wendler had. Elias contends the trial court erroneously denied his motion for new trial, which was based on Garcia's confession at the sentencing hearing that he framed Elias. We shall consider these contentions in turn.

A. *The Trial Court's Error in Failing to Instruct the Jury to View Garcia's Admissions with Caution Was Harmless*

Garcia complains the trial court failed to instruct the jury, pursuant to CALCRIM No. 358,¹ to view with caution Anderson's testimony that a week before the murder she

¹ CALCRIM No. 358 states: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in

heard Garcia talking to Elias about how much money Wendler had. According to Garcia, the "court's failure to comply with its sua sponte duty to instruct with CALCRIM No. 358 was prejudicial error that requires reversal of [his] conviction." We agree that there was error, but not that it requires reversal.

"It is well established that the trial court must instruct the jury on its own motion that evidence of a defendant's unrecorded, out-of-court oral admissions should be viewed with caution." (*People v. McKinnon* (2011) 52 Cal.4th 610, 679 (*McKinnon*)). In this context, "admission" means a statement tending to establish the defendant's guilt.

(*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) Here, Anderson's testimony that a week before the murder she heard Garcia tell Elias how much money Wendler had was evidence of an unrecorded, out-of-court statement by Garcia that tended to establish that he and Elias committed the crime together for financial gain. Thus, as Garcia argues and the People concede, the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 358. Its omission of the instruction was error. (*McKinnon*, at p. 679.)

"The omission, however, does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error." (*People v. Beagle* (1972) 6 Cal.3d 441, 455; accord, *McKinnon*, *supra*, 52 Cal.4th at p. 679.) "Since the

part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

"[Consider with caution any statement made by (the/a) defendant tending to show (his or her) guilt unless the statement was written or otherwise recorded.]" (Italics added.)

cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.) In assessing potential prejudice, reviewing courts disregard evidentiary conflicts regarding "details" of the defendant's admissions "that were immaterial"; they consider only conflicts concerning the "critical" content of the admissions. (*People v. Padilla* (1995) 11 Cal.4th 891, 922-923 (*Padilla*), overruled on unrelated grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The California Supreme Court has held "harmless the erroneous omission of the cautionary language when, in the absence of such conflict, a defendant simply denies that he made the statements. [Citation.] Further, when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, [the Supreme Court has] concluded the jury was adequately warned to view their testimony with caution." (*McKinnon*, at p. 680.)

Here, Anderson and a police investigator who took a pretrial statement from her were the only trial witnesses to testify regarding what Anderson heard Garcia tell Elias about Wendler's money before the murder. Although Garcia correctly points out that at trial Anderson denied or could not remember some of the details she previously had told the investigator (e.g., the amount of the money Wendler had or whether the money was buried in his basement), the evidence was not conflicting as to the essence of what Garcia

had told Elias before the murder: that Wendler had a substantial amount of money.² (See *Padilla, supra*, 11 Cal.4th at pp. 922-923.) Thus, there was no material dispute "concerning the precise words used, their meaning or context, or whether the oral admissions were remembered and repeated accurately." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 (*Bunyard*)). Rather, by pleading not guilty and arguing to the jury there was no evidence of an agreement with Elias to murder Wendler, Garcia simply "denied making the statements attributed to him, and the question for the jury was whether [Anderson was a] credible witness[] or had fabricated [her] testimony concerning his admissions to [her]." (*People v. Dickey* (2005) 35 Cal.4th 884, 906 (*Dickey*)).

On the matter of judging the credibility of witnesses, the trial court gave the jury thorough instructions, though it did neglect to give a cautionary instruction patterned after CALCRIM No. 358. The court gave a general instruction that advised the jury to consider, among other factors, a witness's prior consistent or inconsistent statements; conviction of a felony or involvement in other conduct that reflected on credibility; and partially false testimony. (CALCRIM No. 226.) Other, more specific instructions advised the jury to consider the fact a witness had committed a crime or other misconduct in evaluating the credibility of the witness's testimony (CALCRIM No. 316), and to

² To be sure, Anderson was not always consistent about whether she heard Garcia tell Elias about Wendler's money. At trial, she admitted that at Garcia's preliminary hearing she had denied hearing Garcia tell Elias about Wendler's money. Anderson explained, however, that Garcia had threatened her before the preliminary hearing; but between Garcia's preliminary hearing and the trial, she had moved to a different neighborhood and no longer feared being labeled a "snitch."

consider evidence of statements a witness made before trial to evaluate whether the witness's testimony in court was credible (CALCRIM No. 318). The court also instructed the jury that although the testimony of only one witness can prove any fact, "[b]efore [it] conclude[s] that the testimony of one witness proves a fact, [it] should carefully review all the evidence." (CALCRIM No. 301.)

Several aspects of Anderson's trial testimony triggered application of these instructions. For example, Anderson admitted she was a prostitute and had been convicted of three felonies. She also acknowledged she did not testify truthfully at Garcia's preliminary hearing when she denied knowing Elias and denied having heard Garcia tell Elias before the murder that Wendler had a substantial amount of money. Further, Anderson was the only witness to testify she actually heard the admissions attributed to Garcia. Given the trial court's comprehensive instructions on judging witness credibility "and given the extensive impeachment of [Anderson] raising credibility issues to which the instructions were pertinent, the jury was unquestionably aware [her] testimony should be viewed with caution." (*Dickey, supra*, 35 Cal.4th at pp. 906-907, fn. omitted.)

In sum, there was no evidentiary conflict about the material content of Garcia's admissions, and the jury was adequately instructed on how to judge Anderson's credibility. The error in failing to provide an additional cautionary instruction patterned after CALCRIM No. 358 was therefore harmless. (E.g., *McKinnon, supra*, 52 Cal.4th at pp. 680-681; *Dickey, supra*, 35 Cal.4th at pp. 906-907; *Padilla, supra*, 11 Cal.4th at pp. 922-923; *Bunyard, supra*, 45 Cal.3d at pp. 1224-1225.)

B. *The Trial Court Did Not Abuse Its Discretion by Denying Elias's Motion for New Trial*

Elias contends the trial court erroneously denied his motion for new trial, which was based on Garcia's confession at his sentencing hearing that he murdered Wendler and planted evidence to implicate Elias. According to Elias, Garcia's confession, "if overlaid on the case, made a different result reasonably probable," so that "it was an unmistakable abuse of discretion for the trial court" to deny the new trial motion. After setting forth additional background information, we shall explain why Elias's contention has no merit.

1. *Additional Background*

At his sentencing hearing, Garcia admitted he murdered Wendler and said he was willing to accept responsibility for the murder:

"But now remorse done set in, and now I feel guilty for what I did. And now that I'm expressing it to you, it's like it's being lifted up off my shoulders. . . . I'm wrong, and I'm admitting to you that I did the crime that I was convicted for. And I just want to come clean with that so that I can have a clean slate. And whatever the consequences is that I have to deal with, I'm ready to deal with them. You know, you have a job to do. So, you know, I'm ready to accept responsibility on that half."

Garcia also told the court "there's another twist":

"[W]hen I went back and I burnt that vehicle a second time, I put Mr. Elias's wallet, a picture of his three girls, his — whatever that was, a W-2, a check stub, I think it was, and you know, the card from the police department pointing at him. Because if something happened, I didn't want to be the one that got caught up.

"But I thought I was going to beat this case. But seeing that I didn't, and now that I know that I destroyed this young man and he wasn't nowhere involved in this case with me . . . ; Mr. Elias didn't have anything to do with this — I'm just here to let you know that I'm going to accept the responsibility for what I did."

Garcia further explained that because he and Elias lived together, he had access to Elias's personal effects and was able to plant some of them in and around Wendler's truck. Garcia, however, could not fully explain how Elias's hair got onto Wendler's corpse: "Now his hair — with that jersey on I had of his, I don't know. I don't know how that got there. That was unexpected. I didn't know about that until trial."

Based on Garcia's confession, Elias moved for a new trial on the ground of newly discovered evidence. (See § 1181, subd. 8.) In support of the motion, Elias submitted a declaration from Garcia in which Garcia stated that his confession at the sentencing hearing that he framed Elias was true and correct, and that if placed under oath he would make the same confession. The People opposed the motion on the ground Garcia's confession was not credible.

At the hearing on the new trial motion, the court found Garcia's confession that he framed Elias was "not credible" in light of both the testimony and physical evidence implicating Elias introduced at trial and Garcia's "track record, a lifetime of crimes of moral turpitude, and now including murder." It appeared to the court that by confessing Garcia "was trying to at least assist his confederate in getting a new trial." The trial court also found a different result on retrial was not reasonably probable were Garcia to testify at a new trial that he framed Elias, because such testimony "would be rejected out of hand." The court therefore denied the motion.

2. *Legal Analysis*

As noted, Elias moved for a new trial on the ground that "new evidence [was] discovered material to [him], and which he could not, with reasonable diligence, have

discovered and produced at the trial." (§ 1181, subd. 8.) To justify a new trial on this ground, the newly discovered evidence "'must make a different result probable on retrial.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308 (*Verdugo*)). To determine whether a different result is likely on retrial, the trial court must consider "all the evidence, old and new" (*People v. Clauson* (1969) 275 Cal.App.2d 699, 706 (*Clauson*)), and "may consider the credibility as well as materiality of the [new] evidence" (*People v. Beyea* (1974) 38 Cal.App.3d 176, 202 (*Beyea*), disapproved on other grounds by *People v. Blacksher* (2011) 52 Cal.4th 769, 808; accord, *People v. Delgado* (1993) 5 Cal.4th 312, 329). Here, as noted, the trial court denied Elias's new trial motion because it found Garcia's confession was not credible and therefore a different result was not likely on retrial were Garcia to testify that he framed Elias.

On appeal from an order denying a motion for new trial, we apply the deferential abuse of discretion standard. (E.g., *Verdugo, supra*, 50 Cal.4th at p. 308; *People v. Earp* (1999) 20 Cal.4th 826, 890 (*Earp*)). "'[W]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.'" (*Verdugo*, at p. 308.) In addition, "we justifiably accord considerable deference to the trial judge 'because of "his observation of the witnesses, [and] his superior opportunity to get 'the feel of the case.''" (*People v. Hayes* (1985) 172 Cal.App.3d 517, 524-525 (*Hayes*); accord, *People v. Cua* (2011) 191 Cal.App.4th 582, 608.)

Substantial evidence supports the trial court's finding that Garcia's confession was not credible. The court did not, as Elias complains, make a "perfunctory assignation of

incredulity to the evidence" presented at Garcia's sentencing, or subject that evidence to "ready dismissal." Rather, the court presided over a trial at which Garcia was found guilty of murdering Wendler for financial gain and at which evidence was introduced that Garcia had masterminded a fraudulent check-cashing scheme and had stolen Wendler's identity. The court read and considered the probation officer's report, which detailed Garcia's extensive criminal history dating back to 1989 and including convictions of, among other crimes, theft, burglary, false impersonation and possession of stolen mail. The court also heard Garcia admit at his sentencing hearing: "Everything I did was about fraud. From my previous record you can see, from the federal case, everything is checks fraud, credit cards. That's what I'm about." The trial court thus accurately described Garcia's "track record" as "a lifetime of crimes of moral turpitude, and now including murder." And, from that "track record" the court reasonably concluded Garcia's confession to framing Elias was not credible and would not produce a different result for Elias if admitted at a new trial. (See *Beyea, supra*, 38 Cal.App.3d at p. 202 [trial court may consider credibility in assessing probability of different result on retrial]; see also Evid. Code, § 788 [prior felony convictions may be used to attack credibility of witness]; *People v. Harris* (2005) 37 Cal.4th 310, 337 [prior conduct involving moral turpitude bears on veracity of witness].)

The trial court also reasonably concluded Garcia's confession was not credible because it was motivated by a desire to help Elias obtain a new trial. Courts have noted that it is not uncommon for a witness to come forward after trial to attempt to absolve a confederate who has been convicted. (See, e.g., *People v. Shoals* (1992) 8 Cal.App.4th

475, 488; *People v. Hernandez* (1971) 19 Cal.App.3d 411, 417; *People v. Gompertz* (1951) 103 Cal.App.2d 153, 163; *People v. Sullivan* (1906) 3 Cal.App. 502, 512-513.)

Under such circumstances, "[t]he trial court was not bound to accept the statement of [Garcia] as true. [Citation.] It was entitled to regard it with distrust and disfavor." (*Gompertz*, at p. 163.)

Furthermore, in determining whether Garcia's confession was credible and whether its introduction at a new trial would likely result in a different outcome for Elias, the trial court correctly considered "all the evidence, old and new." (*Clauson, supra*, 275 Cal.App.2d at p. 706.) The court mentioned the evidence implicating Elias in the murder, including "the physical evidence that was found where Mr. Elias was located" (by which the court apparently meant the documents found in or near Wendler's truck and the hairs found on Wendler's corpse), for much of which Garcia's confession did not account. The court concluded that when "you put all of that together, there is absolutely no way that the verdict would have been . . . anything other than what it was, which was guilty of first degree murder." Because the trial court was able to ""get 'the feel of the case'"" by observing the witnesses when they testified at trial and Garcia when he confessed at the sentencing hearing, whereas we have only a cold appellate record, we must "accord considerable deference" to the trial court's determination that introduction of Garcia's confession at a new trial likely would not produce a different result for Elias. (*Hayes, supra*, 172 Cal.App.3d at pp. 524-525.)

In sum, the trial court did not commit ""a manifest and unmistakable abuse of discretion"" by denying Elias's new trial motion. (*Earp, supra*, 20 Cal.4th at p. 890

[affirming denial of new trial motion based on new evidence that trial court found
"inherently untrustworthy . . . and not worthy of belief").)

DISPOSITION

The judgments are affirmed.

IRION, J.

WE CONCUR:

MCINTYRE, Acting P. J.

O'ROURKE, J.