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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EDGAR MARTINEZ, Defendant and Appellant.	D060559 (Super. Ct. No. SCD228494)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed.

I.

INTRODUCTION

A jury found Edgar Martinez guilty of robbery (Pen. Code, § 211)[1] (count 1); assault with a firearm (§ 245, subd. (a)(2)) (count 2); making a criminal threat (§ 422) (count 3); burglary (§ 459) (count 4); and grand theft of a firearm (§ 487, subd. (d)(2))

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

(count 5). As to count 1, the jury found that Martinez personally used a firearm within the meaning of section 12022.53, subdivision (b). As to all counts, the jury found that Martinez personally used a firearm within the meaning of section 12022.5, subdivision (a). The trial court sentenced Martinez to an aggregate term of 15 years.

On appeal, Martinez contends that the trial court erred in admitting statements that a witness made to law enforcement officers, as prior consistent statements, pursuant to Evidence Code sections 1236 and 791. We conclude that the trial court did not abuse its discretion in admitting the statements and affirm the judgment.[2]

II.

FACTUAL BACKGROUND

A. *The People's evidence*

1. *The robbery and the related offenses*

In July 2010, Matthew Atencio worked at Super Canna, a medical marijuana dispensary located in San Diego. On July 6, at around 11:00 a.m., a man who Atencio later identified as Martinez entered the dispensary. Martinez looked at some marijuana, said he did not want anything because he was in a hurry, and left.

After Martinez left, Atencio noticed that his cell phone was missing. A short time later, Martinez called the dispensary using Atencio's cell phone. Martinez apologized to Atencio and explained that he had taken Atencio's cell phone by mistake, thinking that it

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[2] Martinez also filed a petition for habeas corpus, which we summarily deny by way of a separate order filed simultaneously with this opinion.

was his. About five minutes later, Martinez returned to the dispensary with Atencio's cell phone. Martinez said that he wanted to look at the marijuana one more time.

As Atencio was weighing some marijuana that Martinez had selected, he felt a gun against his neck. He looked in Martinez's direction. Martinez said, "Don't look at me. Look at the ground." Martinez forced Atencio to lie face down in a corner of a small nearby "grow room." Martinez then opened the door and let some other people into the dispensary. After a while, Martinez escorted Atencio into the dispensary's office. Martinez was still pointing a gun at Atencio. Martinez asked Atencio if he had any weapons. Atencio replied that there was a shotgun in the office, and handed the gun to Martinez.

Martinez also told Atencio that if he contacted the police or tried to get Martinez in trouble, Martinez would find Atencio's family, kill them, and kill Atencio. Atencio begged Martinez not to kill him. Martinez said, "You're not going to call the police, right, if I don't shoot you?" Atencio promised Martinez that he would not call the police. Martinez said, "Well, you don't call the police, and I won't come find you. And I'm going to take this ID to make sure." Martinez took Atencio's wallet and left.

After the incident, Atencio looked through the dispensary to see what had been taken. Atencio discovered that a television set, a few laptop computers, a video game console and some games, approximately six pounds of marijuana, a shotgun, and a taser were among the missing items.

2. *The investigation*

Video cameras located outside the dispensary captured portions of the robbery. The video recording revealed that the vehicle used in the robbery appeared to be a forest green Ford F-150 truck with an airbrush design on the tailgate. Three days after the robbery, on July 9, 2010, a police officer saw a similar truck travelling on a highway. The officer stopped the truck and detained the driver, Brissa Floriano.

An officer transported Floriano to police headquarters. San Diego Police Department Detective Maria Estrella interviewed Floriano. As discussed in greater detail in part III., *post*, Floriano told Detective Estrella that she had driven Martinez, who was her cousin, and his friend Emilio Marquez, to the dispensary on the day of the robbery. Floriano said that Martinez and Marquez entered the dispensary and stole some items from the establishment while Floriano remained in the truck.

Police arrested Marquez at a friend's house approximately a week later, and recovered a laptop that had been stolen from Super Canna inside the friend's house. Police arrested Martinez a few months later.

B. *The defense*

Martinez's mother testified that Martinez lived with her at the time of the robbery. Martinez's mother maintained that although Martinez had left the house at various points during the day in question, he was never gone for more than a half hour. Martinez's mother had not seen any suspicious items in her house after the robbery.

III.

DISCUSSION

The trial court did not abuse its discretion in admitting statements that Floriano made to law enforcement officers as prior consistent statements

Martinez contends that the trial court erred in admitting Floriano's statements to law enforcement officers as prior consistent statements pursuant to Evidence Code sections 1236 and 791.[3] We apply the abuse of discretion standard of review to Martinez's claim. (See *People v. Alexander* (2010) 49 Cal.4th 846, 908.)

A. *Governing law*

Evidence Code section 1236 provides, "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 791."

Evidence Code section 791 provides in relevant part:

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> "[¶] . . . [¶]
>
> "(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias,

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[3] We assume for purposes of our decision that Martinez adequately preserved his contention that the trial court erred in admitting Floriano's statements under Evidence Code sections 1236 and 791, since the People do not contend in their respondent's brief on appeal that Martinez forfeited this issue.

> motive for fabrication, or other improper motive is alleged to have arisen."

It is well established that if the defense suggests through cross-examination that a witness is motivated to testify in a certain manner in order to obtain the benefits of the witness's agreement with the prosecution, the prosecution may offer statements that the witness made to law enforcement that are consistent with the witness's trial testimony, and that were made prior to the witness entering into the agreement with the prosecution, under Evidence Code section 791, subdivision (b). (See, e.g, *People v. Andrews* (1989) 49 Cal.3d 200, 210 (*Andrews*); *People v. Jones* (2003) 30 Cal.4th 1084, 1107 [concluding trial court properly admitted witness's extrajudicial statement that was consistent with trial testimony where defendant presented "evidence of [witness's] favorable plea bargain" and witness's consistent statement was made prior to plea bargain].)

In *Andrews*, *supra*, 49 Cal.3d at page 210, the Supreme Court concluded that a trial court had not erred in admitting, as a prior consistent statement, a statement that a witness had made to police prior to the witness obtaining a "deal" with the prosecution. The *Andrews* court reasoned:

> "Defense counsel cross-examined [witness] extensively about the alleged 'deal' he had made with the prosecution in 1983, four years after his initial statement to the police. Specifically, counsel questioned [witness] regarding the nature of the charges to which he had pleaded guilty, the sentence he was to receive, and the fact that sentencing had been continued until after defendant's trial. 'The mere asking of questions may raise an implied charge of an improper motive . . . .' [Citation.] Here, defense counsel's questioning of [witness] raised an implicit charge that the 'deal' provided [witness] with an additional motive to testify untruthfully. This, in turn, entitled the prosecution to show that [witness's] testimony was consistent with the recorded statement he gave shortly after his arrest

> but before the 'deal' was consummated, that is, before the subsequent, specific motive to fabricate arose." (*Ibid*.)

B. *Factual and procedural background*

1. *The trial court's pretrial ruling regarding the admissibility of Floriano's statements to law enforcement officers*

Prior to trial, the People filed a trial brief in which they stated that the defense would likely attempt to cross-examine Floriano in a manner that would suggest that her testimony was fabricated. The People stated that if the defense engaged in this type of cross-examination at trial, the People should be permitted to introduce statements that Floriano made to law enforcement officers in a taped interview, in order to rehabilitate Floriano's trial testimony, pursuant to Evidence Code section 791, subdvision (b).

At a hearing on the People's request, the trial court noted that it was likely that the defense would attempt to attack Floriano's credibility given the fact that Floriano had entered into a cooperation agreement with the prosecutor. The trial court ruled that if the defense were to attempt to attack Floriano's credibility, the court would allow the prosecutor to introduce statements that Floriano made to law enforcement officers.

2. *Floriano's trial testimony*

On direct examination, Floriano testified that she drove Martinez and Marquez to the dispensary in her truck on the day of the robbery. According to Floriano, she did not know that the two intended to rob the dispensary when she stopped her truck behind the dispensary. Floriano said that Martinez went into the dispensary and that approximately 20 minutes later, Marquez went into the dispensary. Marquez returned to the truck several times with various "items" from the dispensary. Floriano explained that she

began to "figure[] out," that Martinez and Marquez were "taking stuff." Floriano saw a flat screen television, a duffel bag, and "a lot of stuff" in the truck. Martinez and Marquez eventually got back into the truck and the three left the scene.

Floriano testified that she had pled guilty to robbery in connection with the incident, and that she was facing a sentence of up to three years in prison. Floriano admitted that she had entered into an agreement with the prosecutor pursuant to which she promised to tell the truth and in exchange, a judge would consider her cooperation in this case in sentencing her.

Floriano also testified that on the day she was arrested, she made a statement to a detective. Floriano explained that she initially lied to the detective but ultimately told the detective the truth about her involvement in the crimes.[4]

During defense counsel's cross-examination of Floriano, the following exchange occurred:

> "[Defense counsel]: Ms. Floriano, you have a contract with the district attorney's office; isn't that true?
>
> "[Floriano]: It wasn't quite a contract. It was more like—I'm going to say no.
>
> "[Defense counsel]: Did you—
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> "[Floriano]: I agreed to come in, but it wasn't—
>
> "[Defense counsel]: It wasn't in writing?

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[4] The prosecutor asked, "And when you told the truth the second time, did you explain how you were involved and you were driving the truck." Floriano responded, "Yes."

"[Floriano]: Yeah.

"[Defense counsel]: It was in writing?

"[Floriano]: Uh-huh.

"[Defense counsel]: You signed a contract?

"[Floriano]: Okay.

"[Defense counsel]: Did you?

"[Floriano]: Yes.

"[Defense counsel]: And it's true that you have a fear of going to prison, is it not?

"[Floriano]: Yes.

"[Defense counsel]: And it's true you have a fear of losing your kid, is it not?

"[Floriano]: Yes."

Shortly after this exchange, defense counsel stated that he wanted to "talk to [Floriano] about some of the stories that you've told."

Defense counsel also asked the following questions concerning Floriano's cooperation agreement with the prosecutor during re-cross-examination:

"[Defense counsel]: Now, you said that the benefits—that you could lose the benefits according to that contract[,] correct?

"[Floriano]: Yes.

"[Defense counsel]: If you don't tell the truth, according to the district attorney[,] correct?

"[Floriano]: Yes.

> "[Defense counsel]: This man can decide whether or not you get the benefits of this agreement or not[,] correct?
>
> "[Floriano]: Correct.
>
> "[Defense counsel]: And the benefits you hope to get are the benefits that allow you to walk in and out of the front door of this courtroom[,] correct?
>
> "[Floriano]: Correct.
>
> "[Defense counsel]: You don't want to walk out the back door[,] correct?
>
> "[Floriano]: Of course."

During re-cross-examination, defense counsel asked Floriano, "And between whether it's you or [Martinez], obviously the choice you've made today is for you[,] correct? Your benefit?"

3. *The videotape of Floriano's interview with law enforcement officers*

Detective Estrella testified that she interviewed Floriano at police headquarters on July 9, 2010. The People played a videotape of the interview at trial, after Floriano had finished testifying and had been cross-examined. During the first portion of the interview, Floriano told police that she had loaned her truck to Martinez on the day of the robbery and that she had not driven to the dispensary. During the latter portion of the interview, Floriano testified in a manner consistent with her trial testimony, stating that she had driven Martinez and Marquez to the dispensary and that Martinez and Marquez had robbed the establishment while she remained in her truck.

C. *Application*

Martinez contends that the trial court erred in admitting the statements that Floriano made to Detective Estrella because "defense counsel neither alleged that [Floriano's] trial testimony was recently fabricated or that unfounded claims of bias or reasons for providing false testimony had been established."[5] We disagree.

On cross-examination, defense counsel asked Floriano questions about her "contract" with the prosecutor and then proceeded to ask her whether she had a "fear of going to prison." Defense counsel stated that he wanted to talk about some of the "stories" that Floriano had told. On re-cross-examination, defense counsel asked Floriano a series of questions concerning her cooperation agreement with the prosecutor in which defense counsel implied that Floriano would be willing to testify in a manner favorable to the prosecution in order to obtain the benefits of her agreement with the prosecutor, and to avoid going to prison.[6] Defense counsel thus clearly implied that Floriano's trial testimony was motivated by a desire to obtain the benefits of her cooperation agreement with the prosecutor. We conclude that in view of the cross-examination of Floriano, the trial court did not abuse its discretion in admitting Floriano's statements to law enforcement officers as prior consistent statements pursuant to Evidence Code sections 1236 and 791, subdivision (b). (See, e.g., *People v. Andrews*,

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5 It is undisputed that Floriano made the statements at issue during a recorded interview on July 9, 2010, which was prior to Floriano's execution of the December 28, 2010 "Cooperating Agreement" with the prosecutor.

6 Martinez does not discuss this cross-examination in his brief.

supra, 49 Cal.3d at p. 210 [trial court properly admitted witness's statement to police as prior consistent statement after defense raised implicit charge that witness was motivated to testify untruthfully in order to obtain "deal" with the prosecution].)[7]

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.

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[7] Martinez also contends, "The fact that defense counsel through his cross-examination suggested [*sic*] Ms. Floriano's prior statement implicating appellant . . . does not and should not allow for unfettered admission as prior consistent statements. The videotape of Floriano's interview was more prejudicial than probative under Evidence Code section 352."

To the extent that Martinez intends to argue that the trial court should have precluded the People from playing the video of Floriano's interview at trial pursuant to Evidence Code section 352, we agree with the People that Martinez has forfeited this contention because he did not raise it in the trial court. (See *People v. Ervine* (2009) 47 Cal.4th 745, 777 [defendant forfeited claim that trial court erred in admitting out-of-court statements under Evidence Code section 352].)