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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK ELDON BENNETT,

Defendant and Appellant.

D065780

(Super. Ct. No. RIF1103751)

APPEAL from a judgment of the Superior Court of Riverside County,
Charles J. Koosed, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha
Cortina, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Mark Eldon Bennett guilty of the first degree murder of Victor
Arevalo. The jury also found true that Bennett personally discharged a firearm and

caused great bodily injury or death. Bennett appeals, contending the trial court erred in (1) excluding third party culpability evidence, and (2) admitting certain hearsay statements. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because Bennett does not challenge the sufficiency of the evidence to support his conviction, we summarize the pertinent facts to provide background for our discussion of his contentions on appeal.

In the afternoon of July 20, 2011, Arevalo and others, including Michael Rodriguez and Ricardo Diaz, worked on repairing cars, including a Toyota Camry. (Undesignated date references are to the year 2011.) They performed the repairs near Rodriguez's grandmother's house on Myers Street in Moreno Valley. At some point, Rodriguez went inside his grandmother's house while Arevalo continued to work on the Camry.

Bennett approached Arevalo and was upset about repairs Arevalo had performed on Bennett's car. Bennett's car had broken down after the repairs and Bennett wanted to know why Arevalo was working on someone else's car rather than his. Bennett went to his nearby house, returned with a gun and shot Arevalo twice. Arevalo managed to get inside the rear passenger seat of the Camry. Bennett then pointed the gun at Arevalo and stated, "Next time you mess with me, I'm going to dust you." Bennett went back to his house and left in a PT Cruiser within minutes.

When Rodriguez returned to the Camry, he saw Arevalo had been shot. Diaz told Rodriguez to take Arevalo to the hospital and remembered seeing the Camry pull away. A minute later, Diaz saw the Camry parked along the side of Myers Street. Diaz approached Rodriguez and asked what was going on. At that point, Rodriguez stated Arevalo was not responsive. Rodriguez called the police. Upon arriving, the police found Arevalo dead in the back seat of the Camry.

A neighbor, Antonio Quinones, who was fourteen years old at the time of the murder, saw Arevalo get shot. Quinones testified that Bennett and Arevalo engaged in a verbal altercation concerning Bennett's car. Bennett then went inside his house, returned and shot Arevalo twice.

Bennett presented evidence that on the night before the murder, he stayed with a friend in Hemet, California, which was approximately 30 to 45 minutes away from the crime scene. On the day of the crime, he went to Los Angeles to sell some merchandise and then returned to his friend's house.

A special agent with the Federal Bureau of Investigation analyzed Bennett's cell phone records for July 20 and 21. On July 20, Bennett's cell phone generated calls between 8:36 a.m. and 5:14 p.m. through a cell tower in the vicinity of the crime scene. Shortly after Arevalo's murder, Bennett's cell phone registered calls indicating he was driving to San Bernardino. Thereafter, Bennett's cell phone generated multiple calls in San Bernardino until 12:07 a.m. on July 21. In the afternoon on July 21, the cell phone registered calls through cell towers in

Compton, California. Between July 20 and 21, the cell phone did not register any calls in Hemet or downtown Los Angeles.

DISCUSSION

I. *Third Party Culpability Evidence*

Bennett argues the trial court abused its discretion and violated his rights to present a defense and due process by excluding third party culpability evidence that Rodriguez or Diaz murdered Arevalo. He also makes multiple references to the court's refusal to allow him to "argue" that Rodriguez or Diaz committed the crime. However, he does not develop that portion of his argument and only cites to trial court rulings excluding certain third party culpability evidence and refusing to instruct the jury with CALCRIM No. 373 regarding unjoined coparticipants. Bennett does not assert instructional error. Accordingly, we limit our review to whether the trial court erred in excluding third party culpability evidence and conclude it did not.

A. Background

Bennett sought to admit evidence suggesting Diaz or Rodriguez murdered Arevalo. Specifically, Bennett argued Diaz and Rodriguez were present and in close proximity when Arevalo was murdered, Diaz was a known gang member with the moniker "Muerte," which means death in Spanish, Diaz and Rodriguez both gave inconsistent statements to the police and initially denied being present prior to and at the time of the shooting, and Rodriguez looked nervous after the crime and

had moved the Camry. Bennett claimed this evidence combined with his alibi defense raised a reasonable doubt as to his guilt.

The trial court noted the standard for admission of third party culpability evidence is that it is capable of raising a reasonable doubt as to the defendant's guilt. The court further stated that in order to admit third party culpability evidence, the defendant must make an offer of proof that amounts to more than the third party's mere presence at the crime scene. Instead, there must be some direct or circumstantial evidence linking the third party to the actual perpetration of the crime. In this case, the court found Bennett failed to show more than Diaz's and Rodriguez's presence at the crime scene.

B. Analysis

In *People v. Hall* (1986) 41 Cal.3d 826, the California Supreme Court explained the criteria for admitting third party culpability evidence: "To be admissible, the third-party [culpability] evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. [¶] . . . [¶] . . . [C]ourts should simply treat third-party culpability evidence like any other evidence: if

relevant it is admissible [citation] unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion [under Evidence Code section 352]." (*Id.* at pp. 833-834.) (Undesignated statutory references are to the Evidence Code.) The trial court's discretionary ruling under section 352 may not be disturbed absent a showing that the court abused its discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 372-373.)

Contrary to his arguments, Bennett's so-called third party culpability evidence does not raise a reasonable doubt as to his guilt. Specifically, we conclude Bennett's proffered evidence demonstrates no direct or circumstantial link between Diaz or Rodriguez and the actual perpetration of Arevalo's murder. In regard to Rodriguez, Bennett claims Rodriguez's decision to move the Camry after Arevalo was shot, inconsistent statements about being present during the shooting and his failure to take Arevalo to the hospital supported an inference that Rodriguez shot Arevalo. "'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of . . . section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.'" (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.) Bennett's proffered evidence amounts to nothing more than speculative conjecture and does not in any way link Rodriguez to the actual perpetration of the crime.

Likewise, Bennett claims third party culpability evidence concerning Diaz shows a reasonable doubt as to Bennett's guilt. Specifically, Bennett points to

evidence that Diaz provided inconsistent statements to police, was present at the crime scene and was affiliated with a gang to suggest Diaz was involved in the crime. Again, none of this evidence linked Diaz to the actual perpetration of the crime and requires improper speculation to raise a doubt as to Bennett's guilt.

Moreover, although Bennett contends he had a strong alibi defense, that defense was seriously called into question through Bennett's cell phone records which revealed that he was at the crime scene on the day of the murder and was not in Hemet or Los Angeles where his alibi witness claimed Bennett was before and after the crime. Bennett's proffered third party culpability evidence does not change his questionable alibi.

Bennett also contends the trial court erred by "requiring too stringent a standard of proof." Specifically, he claims the trial court required the evidence provide substantial proof of a probability that the third person committed the crime rather than merely raise a reasonable doubt as to his guilt. We reject this argument. In excluding Bennett's proffered third party culpability evidence, the trial court correctly set forth the standard multiple times and there is no indication that it misapplied that standard.

Lastly, Bennett complains that the exclusion of his proffered third party culpability evidence violated his federal constitutional rights to due process and a fair trial by disallowing him the opportunity to present a defense. We disagree. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall, supra*, 41 Cal.3d at p. 834.)

Even assuming error, Bennett was not prejudiced in this case. "Because the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under [*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]." (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) In applying the *Watson* standard of prejudice, we follow the California Supreme Court's guidance in *People v. Breverman* (1998) 19 Cal.4th 142, 153-154: "Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Id.* at p. 177.)

First, the trial court did not exclude all evidence regarding Diaz's and Rodriguez's actions around the time of the murder. The jury was well aware that Rodriguez and Diaz were present at the crime scene before and after Arevalo's murder and that Rodriguez moved the Camry. Second, the overwhelming evidence supported Bennett's conviction. His alibi defense fell apart through his cell phone records, he had a motive to kill Arevalo, and at least one witness, other than Diaz or Rodriguez, identified Bennett as the perpetrator.

Based on the foregoing, we conclude the trial court acted well within its discretion in excluding Bennett's proffered third party culpability evidence and even assuming error, Bennett was not prejudiced.

II. *Admission of Hearsay Statements*

A. Background

During Diaz's direct examination, he responded to numerous questions regarding statements he made after the crime to Jessie Kirkendall, a fellow 18th Street gang member, by stating, "I don't recall." On cross-examination, defense counsel asked Diaz a series of questions regarding his earlier testimony and responses to the prosecutor's questions about what Diaz told Kirkendall. After Diaz responded that he did not recall, defense counsel asked if it would refresh Diaz's recollection to see a transcript of his prior testimony. The prosecutor objected on the basis that Diaz's testimony was not inconsistent with his prior testimony. The trial court informed defense counsel that he needed to ask Diaz questions rather than asking him about his prior testimony and if Diaz stated he did not recall, defense counsel could give him the transcript at that point. Diaz testified that he was inside his house when the murder occurred and did not witness the crime.

The prosecution later called Deputy Navarette to testify regarding his interview with Diaz after the crime. Deputy Navarette testified that Diaz told him he witnessed the crime. Specifically, Diaz told Deputy Navarette that he witnessed Bennett and Arevalo engage in an argument about car repairs and then Bennett went to his house, returned with a revolver and shot Arevalo twice.

Kirkendall testified that Diaz told him Bennett had "gunned [Arevalo] down." Specifically, Diaz told Kirkendall that Bennett was not satisfied with Arevalo's car repairs, Bennett and Arevalo engaged in an altercation and Bennett then shot Arevalo. Bennett objected on hearsay grounds and the prosecutor countered that the testimony was being offered to impeach Diaz. The trial court overruled defense counsel's hearsay objections.

B. Analysis

Bennett contends the trial court erred in admitting Diaz's statements to Kirkendall and Deputy Navarette because they constituted improper hearsay and did not fall under the hearsay exception for prior inconsistent statements. We reject this argument.

Except as otherwise provided in the Evidence Code, hearsay is inadmissible. (Evid. Code, § 1200, subd. (c).) Sections 1235 and 770 provide that evidence of a witness's prior statement is not inadmissible hearsay if the statement is inconsistent with the witness's testimony, and the witness has an opportunity to explain or deny the prior statement or has not been excused from giving further testimony.

"Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to

deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) We apply an abuse of discretion standard of review to the trial court's rulings on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Here, Bennett did not object to the admission of Deputy Navarette's testimony. "[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Accordingly, Bennett forfeited his argument as to Deputy Navarette's testimony about Diaz's statements after the crime.

In regard to Kirkendall's testimony about what Diaz told him after the crime, the statements were admissible as prior inconsistent statements. Diaz testified that he was inside his house when the murder occurred and did not witness the crime. This testimony was inconsistent with Diaz's prior statements to Kirkendall detailing that he witnessed Arevalo's murder. Furthermore, Diaz had an opportunity to explain his prior statements to Kirkendall and had not been excused from giving further testimony. Accordingly, Diaz's prior statements were admissible under sections 1235 and 770.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.