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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIAS ORTEGA DELGADO,

Defendant and Appellant.

G048668

(Super. Ct. No. 09NF2376)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Appellant Elias Ortega Delgado stands convicted of special circumstances murder for his role in the shooting death of Ranato “Rascal” Gaitan. He contends the trial court erred in finding the declaration against interest exception applicable to hearsay statements made by his codefendants that implicated him in the shooting. He also faults the trial court for failing to declare a mistrial after a gang expert testified he was the shooter. Finding appellant’s arguments unavailing, we affirm the judgment.

FACTS

At the time of the shooting in 2009, Gaitan belonged to a criminal street gang called the Rascals, and appellant and his codefendants Juan Fuentes and Jimmy Patrick belonged to a gang known as 18th Street. The two gangs did not get along. In fact, prior to the shooting, Gaitan got into a fight with some 18th Street members and suspected they were going to target him for revenge. Fuentes told a friend of Gaitan, “[T]hey’re gonna kill Rascal[.]” And just two days before the shooting, appellant showed Fuentes and Patrick a .25-caliber pistol he had purchased. Appellant did not say what the gun was for, but he did have several bullets with him at the time.

On the night of the shooting, Gaitan was hanging out near his apartment with Robert Anduaga, Jesus Priego and others. They were drinking beer and smoking marijuana when a black SUV drove by and one of its occupants yelled, “18.” Anduaga and Priego then left the area. As Priego was leaving, he saw appellant, Fuentes and Patrick walk up to Gaitan. They asked Gaitan what gang he was in, but Priego didn’t hear any response because he was walking in the other direction. A few minutes later, while at a nearby coffee shop, Priego heard a barrage of gunfire that left Gaitan mortally wounded. Gaitan was shot multiple times in the chest and torso. The police found six .25-caliber bullet casings in the area where he was slain.

After the shooting, appellant, Fuentes and Patrick ran to appellant’s black SUV, which was parked nearby. Appellant’s girlfriend Ivon Parra and Patrick’s girlfriend Zena Castillo were sitting inside the vehicle. They had seen appellant, Fuentes

and Patrick go off together, but they did not know where they went or what they had done. As the men were entering the SUV, appellant yelled, “We got to get the fuck out of here.” Then he drove everyone to Castillo’s house and dropped off Castillo, Fuentes and Patrick there.

By that time, Castillo knew something bad had happened because there were police helicopters searching her neighborhood. Fearful she might get in trouble herself, Castillo insisted that Fuentes tell her what happened. Fuentes said appellant had spotted Gaitan in the area and asked him (Fuentes) to call him over, which he did. Gaitan asked Fuentes if everything was okay, and Fuentes told him it was. Then the “three of them” – meaning Fuentes, appellant and Patrick – began asking Gaitan who he was and where he was from. When Gaitan said he was “Rascal, from Rascals,” appellant shot him about seven times. Fuentes told Castillo he did not know that was going to happen. He claimed that before the shooting occurred, he kept asking appellant if he was going to “blast” Gaitan, but appellant did not say one way or the other.

Castillo also spoke to her boyfriend Patrick about the shooting. He said that after Gaitan identified himself as Rascal, appellant got “a look in his eyes” and reached into his pocket. Then Patrick heard a shot and took off running. Although he did not see the shooting, he suspected Gaitan got “cap[ped].”

At trial, Castillo testified she could not remember much about what happened on the night of the shooting. She said she was a heavy drug user and was currently in custody for driving under the influence. However, she did remember speaking with the police on two occasions following the shooting. During the first interview, which occurred three days after the shooting, Castillo refused to divulge any information. However, following that interview, she spoke with Patrick, and he implored her to be honest with the police. So, the next day she contacted investigators and told them everything she knew, including the above statements from Fuentes and Patrick. At trial, a tape recording of that entire conversation was played for the jury.

A gang expert testified appellant, Fuentes and Patrick were all members of the 18th Street gang at the time of the shooting. He also said that several gangs were then vying for the territory where the shooting occurred, including 18th Street and the Rascals. Explaining gang culture, the expert said that when a gang member asks someone what gang they are in, that's called a "hit-up." The question is basically a challenge and often leads to violence in one form or another. Having investigated the shooting in this case, and knowing who was involved, the expert believed it was "gang-related."

Appellant, Fuentes and Patrick were all charged with special circumstances murder for killing Gaitan to further the activities of their gang. Patrick pled guilty to voluntary manslaughter, and Fuentes was acquitted in a separate trial. Appellant was found guilty on the murder charge, as well as one count of street terrorism. (Pen. Code, §§ 190.2, subd. (a)(22), 186.22, subd. (a).) The jury also found true separate gang and firearm allegations. (*Id.*, §§ 186.22, subd. (b), 12022.53, subds. (d), (e)(1).) The trial court sentenced appellant to life in prison without parole, plus 25 years to life.

Admissibility of Codefendants' Statements

Appellant contends the trial court abused its discretion and violated his fair trial rights by allowing the jury to hear what Fuentes and Patrick told Castillo about the shooting. Although the trial court found their statements were admissible under the declaration against interest exception to the hearsay rule, appellant contends the exception was inapt because the statements were primarily exculpatory as to Fuentes and Patrick. We find the statements were properly admitted into evidence.

Pursuant to Evidence Code section 1230, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

There is no dispute Fuentes and Patrick were unavailable. Thus, our focus is on “the basic trustworthiness” of their declarations as evidenced by the extent to which they were against their own self interests. (*People v. Geier* (2007) 41 Cal.4th 555, 584, overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.) We will not disturb the trial court’s determination that the declarations were worthy of belief unless an abuse of discretion is shown. (*Id.* at p. 585.)

“‘In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.’ [Citation.]” (*People v. Geier, supra*, 41 Cal.4th at p. 584.) “Clearly the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. ‘Once partners in crime recognize that the “jig is up,” they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.’ [Citation.] However, the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures. [Citations.]” (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.)

At the time of the shooting, Castillo was Patrick’s live-in girlfriend and a good friend of Fuentes, who was then 15 years old. So when they got back to her place after the shooting, she naturally wanted to know what had happened. Castillo was actually quite insistent about this, but she never indicated she intended to go to the police. In fact, as it turned out, she refused to tell the police anything until after Patrick told her it was okay to do so. Thus, the setting in which Fuentes and Patrick spoke to Castillo following the shooting was largely friendly and conducive to free disclosure.

As set forth above, Fuentes told Castillo he did not know appellant was going to shoot Gaitan. But he did admit asking appellant about this beforehand,

indicating he knew appellant was armed. Fuentes also admitted he called Gaitan over and questioned him with the others before appellant started shooting. Patrick added that appellant got a certain look in his eyes and reached into his pocket after Gaitan identified himself to the group as Rascal. He told Castillo he took off running after he heard the first shot.

Looking at Fuentes' statements, it appears they were more inculpatory than exculpatory. While Fuentes tried to downplay his role in the shooting, he admitted calling over Gaitan, a rival gang member who was on 18th Street's hit list, at appellant's request. Fuentes must have known this was an extremely dangerous thing to do because he kept asking appellant if he was going to "blast" Gaitan. Indeed, it appears appellant wasted little time in shooting Gaitan after appellant's group – including Fuentes – hit him up and Gaitan said he was Rascal. The circumstances Fuentes described clearly implicated him as an important player in the shooting. Although he pinned the actual shooting on appellant, Fuentes' statements painted himself as someone who, by facilitating the shooting, was potentially liable as an aider and abettor, either for knowingly assisting the murder or setting up a situation that would naturally and probably lead to Gaitan's death.

On whole, we do not believe the damning things Fuentes admitted had a "net exculpatory effect," as appellant claims. Appellant's "argument shows only that a court might perhaps have been able to arrive at the conclusion that [Fuentes'] statement[s] did not so far subject him to the risk of criminal liability that a reasonable person in his position would not have made it unless he believed it to be true. It simply does *not* show that a court was unable to arrive at the opposite conclusion. Therefore, it does not establish an abuse of discretion." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1253, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

Appellant argues that even if some of Fuentes' statements were self-inculpatory, the trial court should have redacted his allegation that appellant shot Gaitan

because it shifted the blame away from Fuentes toward appellant. It is no doubt true that “[a] court may redact portions of [a] statement [that are] not ‘disserving to the interests of the declarant.’” (*People v. Leach* (1975) 15 Cal.3d 419, 441; see also *People v. Duarte* (2000) 24 Cal.4th 603, 612 [court must redact portions of statement not falling within hearsay exception].)” (*People v. Dixon* (2007) 153 Cal.App.4th 985, 997.) However, for the reasons explained in *People v. Tran* (2013) 215 Cal.App.4th 1207 (*Tran*), we do not believe a redaction was required in this case.

In *Tran*, the defendant was charged with murdering a prostitute who had refused to pay him protection money. At trial, the jury heard a hearsay statement the defendant’s brother Tommy made to a friend on the heels of the murder. Specifically, Tommy told the friend: 1) He (Tommy) had helped the defendant burn his car (which contained incriminating evidence) after the shooting; 2) the defendant had done something really bad; and 3) the defendant had shot someone. (*Tran, supra*, 215 Cal.App.4th at pp. 1212-1213.) While only the first assertion was inculpatory as to Tommy, the *Tran* court held that, viewed in context and taken as a whole, the entire statement was inculpatory and thus admissible as a statement against Tommy’s penal interest. More specifically, the court determined “the entire statement was compelling evidence that Tommy knowingly and purposefully assisted defendant in destroying evidence to help defendant escape arrest, prosecution, and punishment for a shooting. Indeed, Tommy’s two assertions about what defendant had done were an inextricable part of what made his entire statement to [the friend] contrary to his penal interests. [Citation.]” (*Id.* at p. 1219.)

Likewise here, Fuentes’ statement about what appellant had done (in terms of shooting Gaitan) was an inextricable part of what made his entire statement to Castillo contrary to his penal interests. While there was nothing illegal per se with Fuentes calling Gaitan over and asking him who he was and where he was from, those actions take on an entirely different light knowing that soon after this, Gaitan was gunned down

by appellant, who was not only Fuentes' companion at the time, but his fellow gang member, as well. Unlike *Tran*, the particular information about the underlying crime in this case did not subject the declarant (Fuentes) to potential liability as an accessory after the fact to murder, but it did show why he might be subject to potential liability as an aider and abettor to the murder.

We therefore find no error in the trial court's decision to admit all of Fuentes' statements to Castillo into evidence. Having carefully considered the content, the context and the circumstances under which the statements were made, we believe they could reasonably be considered sufficiently reliable and contrary to Fuentes' interests to warrant admission under Evidence Code section 1230. We cannot say the trial court abused its discretion or violated appellant's rights in so finding.

Patrick's statements are a different matter. All they reveal is that he was present during the shooting and fled after the first shot. In contrast to Fuentes' self-inculpatory statements, they do not indicate Patrick knew the shooting was going to take place or that he assisted appellant in setting it up. Therefore, they did not qualify for admission under the declaration against interest exception to the hearsay rule. However, any error in admitting Patrick's statements was harmless beyond a reasonable doubt because they were cumulative to what Fuentes told Castillo, which, as explained above, was admissible under that exception. Therefore, there is no basis for reversal.

Expert Testimony

Appellant also contends the trial court should have granted a mistrial after the gang expert alluded to him as the shooter. Again, however, this is a discretionary call, and we find no abuse of discretion in the court's failure to do so.

The issue arose while the prosecutor was attempting to establish appellant's gang status. After asking the gang expert about appellant's background, tattoos, moniker and police contacts, the prosecutor asked if the circumstances surrounding the underlying crime in this case were also important in terms of assessing appellant's gang status. The

expert replied, “Yes. Taking all the evidence and the totality of the circumstances involving this specific incident, the crime in which Mr. Delgado shot Mr. Gaitan, his association -- ” Before the expert could finish his answer, defense counsel objected and moved to strike his response. The court sustained the objection, struck the response and then promptly discussed the issue with counsel outside the presence of the jury.

Defense counsel argued a mistrial was warranted because the expert’s testimony encompassed the ultimate issue in the case. The prosecutor conceded the expert should have referred to appellant as the “alleged shooter.” However, she argued the error was curable because the expert was not asked whether he believed appellant was the shooter. Rather, he was just explaining the basis for his opinion about appellant’s gang status. Agreeing with the prosecutor, the court denied appellant’s request for a mistrial and gave the following curative instructions to the jurors:

“You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] One, the defendant acted with the intent, purpose and knowledge that are required to prove the gang-related crimes and enhancements and special circumstance allegations charged. [¶] Or, two, the defendant had a motive to commit the crimes charged. [¶] You may also consider this evidence when you evaluate the . . . believability of a witness and when you consider the evidence relied on by an expert witness in reaching his or her opinion.

“Now, I told you to disregard the last response by the [witness] because it contained his own personal opinion as to who did the crime. Never admissible. Never. An expert cannot give an opinion as to whether or not a defendant committed the crimes alleged. [¶] Does everyone understand that? That’s why we have the jury, to make that decision. Is everyone crystal clear on this? I’m going to read it again. [¶] An expert cannot give an opinion as to whether or not a defendant committed the crimes alleged. You may not consider this evidence for any other purpose. You may not conclude from

this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.

“So in the last hour, you have been hearing a lot of things about gang activity, gang topics. The law is specific. You can only accept that information for very limited purposes. And basically it’s [the] two prongs that I just read you. And . . . , of course, I cleared up this issue with the expert.”

Later, in its final instructions to the jury, the judge, as he did at the outset of trial, told the jury, “If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.” The court also reiterated that “an expert cannot give an opinion as to whether or not a defendant committed the crimes alleged” and that it was up the jurors to decide the truth or falsity of the evidence on which an expert relied in forming his opinions.

Despite these instructions, appellant claims the expert’s statement about him being the shooter violated his right to a fair trial. Because the expert was familiar with his background and the facts of the case, appellant argues it would be unrealistic to believe the statement did not influence the jury’s verdict. He simply does not believe the curative instructions could rectify the harm caused by the improper testimony, since it came from an expert on gang activity and went to one of the key issues in the case.

A motion for a mistrial should only be granted when the defendant’s chances of receiving a fair trial have been irretrievably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 282; *Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1523.) “Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) Unless the trial court’s ruling is “arbitrary, capricious or patently absurd,” we are powerless to disturb it. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

The trial court's decision in this case was none of those things. Following the subject testimony, the court struck it from the record and instructed the jurors to disregard it. The court also told the jurors they could not consider any testimony which had been stricken. There is nothing in the record to suggest the jurors ignored these pointed instructions. (See *People v. Stitely* (2005) 35 Cal.4th 514, 559 [absent contrary indications, jurors are presumed to have followed their instructions].)

Moreover, it is clear that in stating appellant was the shooter, the expert was stating the basis for his opinion about appellant's gang status, not his opinion about appellant's culpability in the case. In fact, the court emphatically instructed the jurors that an expert may *never* offer his opinion about whether a defendant committed the charged crimes. Therefore, it is unlikely the jury considered the challenged statement at face value. Given the context in which the statement was made and the court's curative instructions, we do not believe the court erred in failing to declare a mistrial. No abuse of discretion or violation of appellant's fair trial rights has been shown.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.