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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RAUL GARCIA, Defendant and Appellant.	B247796 (Los Angeles County Super. Ct. No. PA 062208)

APPEAL from a judgment of the Superior Court of Los Angeles County, Beverly Reid O'Connell, Judge. Affirmed with modifications.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Kimberley J. Baker-Guillemet, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Raul Garcia challenges his conviction for first degree murder. He argues that the admission of evidence that two dogs alerted to a cadaver smell at the trunk of the victim's car should have been excluded because it lacked foundation. He also argues that the court should have instructed the jury with a form instruction requiring corroboration of evidence of a canine identification. Defendant's arguments lack merit, and we affirm. We modify the judgment to reflect one additional day of presentence conduct credit.

FACTS

1. Defendant Kills Francis Flores

Francis Flores told her niece that defendant was "creepy" and that he was "perverted." Flores knew defendant because he dated her roommate Tina Pen.

On April 15, 2008, defendant killed Flores by strangulation. Defendant stuffed a sock in Flores's mouth, taped her mouth, and covered her head with a plastic bag, which he taped around her neck. Defendant also taped Flores's wrists and ankles. Defendant loaded Flores into a large plastic container and stored the container in his bedroom closet in his parents' house.

Flores's family worried when they did not hear from her. On April 17, 2008, Flores's sister, Patricia Nevarez, filed a missing person's report. On April 24, 2008, Flores's sister received text messages from Flores's phone asking for Flores's bank card number. Nevarez was suspicious that someone other than her sister sent the texts both because they were written in Spanish and because Flores was upset with her sister and would not have texted her. Nevarez tried to call Flores, but no one answered Flores's phone. Flores's cousin Frances Schmidt hired a private investigator to try to locate Flores. Defendant spoke to the investigator but refused to meet with him.

Beginning on April 15, 2008, Flores's husband, Walter Campilongo received numerous text messages purportedly written by Flores asking about the pin number for

Flores's bank card and requesting that he activate the bank card.[1] Campilongo did not believe the texts were from Flores because they were in Spanish and because Flores did not use the bankcard to withdraw money. Defendant later admitted to sending the text messages to Nevarez and Campilongo.

Around the time of Flores's killing, defendant owed numerous people money. He owed his father approximately $7,000. He owed his friend Daniel Tadeo approximately $4,200. Defendant's friend Michael Camarillo wired him money. Defendant told Camarillo he was broke and moved back to his parents' home because he did not have enough money to afford an apartment. In the middle of April 2008, defendant borrowed money from his former high school coach, Mitchell Villa. Villa noticed that defendant had a bite on his left hand and that he appeared very stressed. Defendant also borrowed money from his cousin.

On April 16, 2008, using Flores's Automated Teller Machine (ATM) card, defendant withdrew $300 from her bank account.

2. Flores's Body and Car Are Found

Approximately two months after her death, on June 13, 2008, Flores's decomposing and partially liquefied body was found in a plastic container in defendant's closet. Flores's knees were pointing upward and her legs were spread. Her purse was around her neck and papers were placed between her legs. Her sweater was torn. An autopsy revealed that defendant fractured two bones in Flores's neck. The fractured bones were surrounded by muscle and difficult to break.

Flores's car was retrieved at Camarillo's home. Forensic tests showed that several areas, including the trunk and spoiler on Flores's vehicle tested presumptively positive for blood. Two dogs trained to alert to cadaver scent alerted at the rear of Flores's vehicle. The dog handlers admitted that there was a possibility the scent could be

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[1] Flores and her husband had separated but were on good terms.

transferred. Analysts were unable to identify DNA profiles from any of the blood samples retrieved from Flores's car.

3. Defendant Admits to Killing Flores

In a tape-recorded conversation with his father, defendant's father said "how cruel [or how barbaric] what you did" and asked defendant if he did "it here at the house." Defendant answered affirmatively.

Defendant testified in his defense and claimed that the killing was accidental – the result of erotic asphyxiation. Defendant testified that he had sex with Flores twice before April 15, 2008, and according to defendant, she enjoyed erotic asphyxiation. On April 15, 2008, Flores drove to defendant's home, where he was going to change the oil in her car. According to defendant, Flores asked to do "a favor for a favor" instead of paying him in cash. Defendant further claimed that Flores asked him to place both of his hands around her neck and choke her. He followed Flores's purported request, holding her neck for about one minute with both of his hands. She told him that she would hold her breath. Defendant "freaked out" when blood started flowing from her nose. Defendant did not feel any pulse and listened for but did not hear any breathing. He thought about calling the police but did not.

Defendant testified that because Flores's body was limp he used duct tape to better manage it. He wrapped the tape around her ankles and hands. He put her pants on and then took them off again. He put her in a bin and put her personal belongings on top of her. According to defendant he placed a sock in Flores's mouth to keep blood from leaking out of her mouth. He placed tape on her mouth because he was "worried" that blood "might leak somehow." Defendant testified that he sent text messages from Flores's phone to make it appear she was alive and he used her Automatic Teller Machine (ATM) card also to make it appear she was alive.

During cross-examination, defendant admitted that he had lied to police, lied to Villa, lied to his friends, and lied to Flores's family. He lied to Villa about how he obtained the bite mark on his hand, stating that it was during a struggle with his father.

He lied to his girlfriend Pen when he was arrested, telling her that he had no idea why he was in a police car and promising her "I didn't do anything." He lied to police during a three-hour interview. He "was just making stuff up. [He] was lying and throwing things out there. . . ." He lied about the amount of blood on the floor. He told police a "mystery woman" had picked up Flores. Defendant lied to his father about the smell in the house. Through his text messages defendant lied to Campilongo and Nevarez. Defendant acknowledged that prior to trial, he never described the killing as an accident. He also acknowledged asking his friend Juan Cano to lie to the police on his behalf.

PROCEDURE

Defendant was charged with one count of murder with malice aforethought.

At the end of the jury trial, during closing argument, defense counsel focused on defendant's credibility, identifying it as the principal issue at trial. He argued: "Either you believe Mr. Garcia, or you don't. And that's the bottom line. Either you believe him or you don't. [¶] He says it was an accident." Defense counsel argued the "bottom line" was whether jurors believed defendant and the trial "boils down" to defendant's credibility.

The prosecutor argued that he was not required to prove "exactly how the murder happened." The prosecutor argued defendant was a "world class manipulator" and lied about everything, to his family, friends, girlfriend, the victim's family, the investigator, police, and jurors. Defendant's countless lies made him less believable and more apt to attempt to manipulate jurors. He questioned defendant's story that he previously had sex with the victim, pointing out that Flores was not interested in defendant and described him as perverted and creepy.

Defendant was desperate because he borrowed money from numerous people. The prosecutor argued that defendant might have hurt Flores in order to obtain her pin number to her bank card. The prosecutor suggested the blood splatter on the car and dogs who alerted to the car suggested that defendant hurt Flores. The alerts by the cadaver dogs made it more likely that it was blood on the car. The bite on the hand and torn

sweater also suggested a struggle. The cadaver dogs' scent detection on the car "tend to indicate" a struggle. A reasonable interpretation of the evidence was that defendant beat Flores in order to get her pin number.

Given how the body was found, it suggested defendant wanted Flores dead. There was a bag over her head. Defendant not only strangled Flores but he broke two of her bones, which requires substantial pressure. The absence of blood in the house suggests defendant contrived the reason for putting a sock in the victim's mouth. It was more likely he put the sock over her mouth to stop her from biting him, and the bite indicated that she did not consent. There was no need for him to put tape over a dead person's mouth. The prosecutor questioned defendant's story that he bound Flores in order to lift her.

Jurors found defendant guilty of willful, deliberate, and premeditated first degree murder. The court sentenced defendant to 25 years to life in prison and awarded him 1,743 days of presentence conduct credits.

DISCUSSION

Defendant's primary arguments concern the cadaver dog alerts. Additional legal and factual background is necessary.

1. Legal Principles

In *People v. Malgren* (1983) 139 Cal.App.3d 234, the defendant challenged the admission of dog tracking evidence. (*Id*. at p. 237, disapproved on another ground in *People v. Jones* (1991) 53 Cal.3d 1115, 1144-1145.) In that case, a dog was able to track a burglar from the burglarized house to bushes where the defendant was hiding. (*Ibid.*) The court held that with the following proper foundation dog tracking evidence was admissible: "(1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or

contaminated." (*Id*. at p. 238; see also *People v. Craig* (1978) 86 Cal.App.3d 905, 916 [discussing foundation for dog trailing cases].)

The *Malgren* court rejected the defendant's argument that the trial court should have instructed jurors that dog tracking evidence should be treated with caution. (*Malgren, supra*, 139 Cal.App.3d at p. 241.) It found "no reason to categorize that evidence thereafter as inferior or untrustworthy, and instruct that it be given *less* weight than other evidence." (*Ibid*.) The court, however, held that when dog tacking evidence is "used to prove the identity of a defendant" it must be corroborated. (*Id*. at p. 242.)

Twenty years after *Malgren*, *People v. Mitchell* considered the use of dogs to identify a person based on a "canine scent identification lineup." (*People v. Mitchell* (2003) 110 Cal.App.4th 772, 775.) Canine scent discrimination involves a dog sniffing scent "from an object a person is known to have touched and determining whether a second object has been touched by the same individual." (*Id*. at p. 779.) The *Mitchell* court distinguished between a scent lineup and a dog tracking case. (*Id*. at p. 790.) In contrast to a dog tracking case, a scent lineup case required a hearing pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 to determine whether the lineup technique was scientific. (*Mitchell,*at p. 793; see also *People v. Willis* (2004) 115 Cal.App.4th 379, 385.)

2. Factual Background Relevant to the Cadaver Alerts

The prosecutor hypothesized that there was a struggle near Flores's vehicle. The prosecutor believed that the presumptive positive blood tests and the alerts by cadaver dogs supported that theory. Defense counsel argued that the scent evidence from Flores's car might be stale or contaminated.

The court concluded that the cadaver dog alert was more like a dog tracking case than a lineup case in which a dog identified a specific suspect based on a scent pad. The court held a hearing outside of the presence of the jurors to determine whether the *Malgren* foundational requirements were satisfied.

At that hearing, Agneta Cohen testified that she had been employed as a volunteer at the Los Angeles County Sheriff's Department since 2001. California Emergency

Services is a statewide organization that provides guidelines for training dogs and guidelines for the dog handler. In 2008, Cohen's German shepherd Kazaam had been certified annually four times. Cohen trained with him three times a week. Kazaam had to be 100 percent accurate in finding cadaver scent in order to be certified.

In June 2008, Cohen and Kazaam went to a tow yard where Flores's vehicle was located. Kazaam alerted at the driver's door and at the trunk. Cohen testified that the intense scent of blood remains for a month and the more diffuse scent of blood would remain for a couple of years. She testified that dogs can smell a grave over a century in age. Defense counsel did not cross-examine Cohen.

Shirley Smith, another volunteer for the Los Angeles County Sheriff's Department, also testified at the hearing. Smith trained four days a week. In June 2008, her dog was named Flash Gordon. Smith and her dog were recertified annually. Flash Gordon found six cadavers including two full bodies. Smith testified that a cadaver scent can exist for years; it has different stages of putrefaction and she was not an expert in that area. She testified that cadaver dogs have found bones that were 200 years old.

On June 6, 2008, Smith brought Flash Gordon to a tow yard where Flores's vehicle was located. Flash Gordon alerted at the trunk of Flores's car. Defense counsel did not cross-examine Smith.

The trial court asked defense counsel if he wished to be heard and defense counsel responded negatively.

The court found the dog alert evidence was admissible. It found that both Cohen and Smith had significant experience and were qualified annually. The court found the dogs were reliable because they were recertified every year and the handlers testified they were reliable. The procedure was conducted properly and fairly because the handlers were not told what to expect and worked separately. The scent was not stale because scents of cadavers can last hundreds of years.

At trial, Cohen and Smith testified consistently with their testimony out of the jurors' presence. Smith testified that dogs detected scents that were 200 years old,

though she acknowledged that once a scent was "skeletonized" it was more difficult to detect." She further acknowledged that scents could be transferred and that the rate of decomposition depends on environmental conditions. Cohen also acknowledged that scents can be transferred and that clothing items could carry cadaver scents.

3. No Error in Admitting Evidence Concerning Dog Alerts

Defendant argues that there was no basis to conclude the scent was not stale or contaminated. Defendant argues that there was no evidence that "cadaver scent in cases like this where there is no cadaver does not go stale for at least a couple of months[.]" Defendant also argues that either Flores's car or the tow yard could have been contaminated. Finally defendant argues that the admission of the cadaver dog alerts violated his right to due process.

The trial court did not err in finding the scent was not stale or contaminated. The *only* evidence in the record supported that conclusion. Both Cohen and Smith testified that cadaver dogs were able to locate bones that were hundreds of years old. Here the scent was only two months old. Smith further testified that a cadaver scent could last for several years. Nor was there evidence that the scent was contaminated in the two months between Flores's death and locating the vehicle. Defendant left the car at Camarillo's house and covered the car. He covered the car because he "didn't want . . . a cop to come by and see the license plates and call it in." There was nothing at Camarillo's house that would have caused blood to get onto the exterior of the vehicle and there was a cover on the car. Camarillo drove the car only to move it from one side of the street to the other and then replaced the cover. Even crediting defendant's testimony that he left the car uncovered for two days prior to moving it to Camarillo's house there was no suggestion that a cadaver scent was or even could have been placed on the car during that brief period. Nor was there any evidence that the tow yard was or could have been contaminated. Defendant therefore demonstrates no state evidentiary error in admitting the evidence and no violation of his federal right to due process in the admission of the evidence.

In any event, even if the court erred (in admitting the evidence that the dogs alerted to cadaver scents) it was harmless beyond a reasonable doubt. First, defense counsel was able to cross-examine Smith and Cohen and elicit testimony that scent could be transferred. Defense counsel argued that the cadaver dogs could have alerted to a secondary transference. That argument may have lessened the weight of the evidence but did not undermine the foundation.

More importantly, following defendant's admission to killing Flores the cadaver evidence was of limited probative value. The cadaver scent evidence was important to the prosecution case prior to defendant's testimony because, when combined with the evidence that defendant was in possession of Flores's body, it supported the inference that defendant was responsible for the killing. But once defendant testified, he admitted killing Francis. The probative value of the cadaver dog alerts was significantly diminished following defendant's admission. At that point, the only real question as defense counsel repeatedly acknowledged during closing argument, was whether defendant's testimony that the killing was accidental was credible. The cadaver dog alerts were not probative of defendant's intent. The alerts may have suggested defendant fabricated the story of killing Flores in his house, but defendant admitted to lying so many times that one additional lie would not have affected the outcome of trial.

Moreover, the evidence that the killing was not accidental was overwhelming. Defendant broke two bones in Flores's neck, suggesting he used substantial pressure on her neck. Defendant stuffed a sock in Flores's mouth, taped her mouth, placed a plastic bag over her head and taped the bag around her neck. He also taped her wrists and ankles. Defendant's only explanation for the duct tape around Flores's mouth and head was that her nose was bleeding. And his explanation for the duct tape around her wrists and ankles to assist in lifting Flores's body from the floor to the plastic container defies logic. Although defendant emphasizes the prosecutor's argument that the cadaver dog alerts indicated a struggle, the prosecutor was not required to prove a struggle to show the elements of first degree murder and the argument concerning a struggle was a small point

in the prosecutor's overall argument. The manner of killing does not support the inference that it was accidental and defendant's explanations are patently unreasonable.

Not only does the manner of killing refute defendant's defense, but his conduct after her death supported the inference that his actions were intentional and contradicted his claim that they were accidental. Although he had been trained in Cardiopulmonary resuscitation (CPR), defendant did not administer it to Flores. He did not call 911. He considered calling police but did not. He placed Flores's body in a plastic container. The same day he killed Flores, defendant began contacting her family members because he wanted to take money from her bank account. Defendant was successful in removing $300 from Flores's bank account. Defendant asked Cano to lie to detectives and tell them that defendant had tried to set his friend Cano up on a date with Flores. Defendant searched for the prices for the parts in Flores's car. Defendant admitted to his father that he committed the cruel (or barbaric) act and did not describe it as accidental. In light of this overwhelming evidence and the limited probative nature of the cadaver evidence, the admission of the dog cadaver alerts was harmless beyond a reasonable doubt.

4. No Instructional Error Related Cadaver Dog Evidence

Defendant argues the court had a sua sponte duty to instruct the jury with CALCRIM No. 374, which is required under *Malgren* and *People v. Gonzales* (1990) 218 Cal.App.3d 403, 408-409. That instruction provides:

"You have received evidence about the use of a tracking dog. You may not conclude that the defendant is the person who committed the crime based only on the fact that a dog indicated the defendant [or a location]. Before you may rely on dog tracking evidence, there must be:

"1. Evidence of the dog's general reliability as a tracker;

"AND

"2. Other evidence that the dog accurately followed a trail that led to the person who committed the crime. This other evidence does not need to independently link the defendant to the crime.

"In deciding the meaning and importance of the dog tracking evidence, consider the training, skill, and experience, if any, of the dog, its trainer, and its handler, together with everything else that you learned about the dog's work in this case."

As written CALCRIM No. 374 is not applicable to this case because the cadaver alert evidence was not used to prove identity. It was not offered to show defendant was the person who killed Flores. To the extent defendant is arguing that the instruction should have been modified to fit the parameters of this case, he should have requested such modification in the trial court. (*People v. Kelly* (1992) 1 Cal.4th 495, 535 ["'The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel.'"].) Here, defense counsel agreed that CALCRIM No. 374 was not applicable and did not request a modified instruction. Defendant therefore fails to show either that the trial court was required to instruct the jury with CALCRIM No. 374, with an unrequested modification, or that his right to due process was violated.

Assuming error and further assuming the error rose to a due process violation, the error was harmless beyond a reasonable doubt. For the same reasons described above, the dog alert evidence was marginally probative in light of defendant's admission and the overwhelming evidence against him. Moreover, the corroborating evidence was substantial: defendant admitted to killing Flores, Flores was found in a plastic bin in his bedroom, defendant admitted to driving around in Flores's car after killing her; defendant admitted to lying to everyone about the incident, and other tests were presumptively positive for blood on Flores's car. Instructing jurors with CALCRIM No. 374 would not have changed the outcome.

5. Presentence Custody Credit

Defendant argues that he was entitled to 1,744 days of presentence custody credit and the trial court mistakenly awarded him 1,743 days. Respondent agrees with this contention. Defendant was incarcerated from June 13, 2008, to March 22, 2013, prior to imposition of his sentence on March 22, 2013. The sentencing court is required to award

presentence credit for the partial day of custody on the day defendant is sentenced. (*People v. Smith* (1989) 211 Cal.App.3d 523, 526.) The total number of days including the date of sentencing is 1,744.

DISPOSITION

The judgment is modified to reflect 1,744 days of presentence conduct credit. In all other respects the judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.