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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DENNIS MICHAEL CARTER,<br><br>Defendant and Appellant. | B275229<br><br>(Los Angeles County Super. Ct. No. MA065628) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Modified and affirmed with directions.

Katja Grosch, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Zee Rodriguez, Acting Supervising Deputy Attorney General, for Plaintiff and Respondent.

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Dennis M. Carter appeals the judgment entered following a jury trial in which he was convicted of second degree robbery (Pen. Code,[1] § 211; count 1) and misdemeanor battery on an elder or dependent adult (§ 243.25; count 2). The trial court found true the allegations that appellant had suffered two prior serious felony convictions under section 667, subdivision (a)(1), which qualified as serious or violent felony convictions under the Three Strikes law (§§ 667, subds. (b)–(j), 1170.12, subd. (b)). The court also found appellant had served six of seven alleged prior prison terms (§ 667.5, subd. (b)). The trial court sentenced appellant to an aggregate term of 40 years to life in state prison. The sentence included a one-year enhancement for a prison prior allegation as to which the trial court had made no finding.

Appellant contends the trial court prejudicially erred in admitting certain hearsay statements. We disagree and affirm the judgment of conviction. Appellant further asserts that he received a one-year enhancement for a prison prior allegation which he did not admit, and which the trial court did not find true beyond a reasonable doubt. We agree and therefore modify the judgment to strike one of the one-year enhancements.

## FACTUAL BACKGROUND

### A. Prosecution evidence

On March 19, 2015, Charles Gilson, then 73 years old, and his wife Kathleen were in Palmdale for their grandson's funeral, staying at the Marriott Courtyard Hotel. That afternoon, the Gilsons' granddaughter, Katie,[2] showed up unannounced at the

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[1] Undesignated statutory references are to the Penal Code.

[2] Katie passed away prior to appellant's trial.

home of her aunt and uncle, Reinnah and Michael Gilson, who were preparing for their son's funeral. Reinnah saw a man sitting in a small black car parked in the driveway. Katie asked Reinnah where her grandparents were. Reinnah told her, whereupon Katie left in the black car with the man.

Sometime later, Katie appeared at Charles and Kathleen's room at the Marriott with her infant daughter and appellant. Kathleen had known appellant four or five years. Charles had had little to do with appellant other than once giving him a ride, but he had issues with Katie—they had argued, and Katie had previously stolen Kathleen's car and bank cards. Having no desire to be around Katie and appellant, Charles left for the nearby Sears outlet immediately after they arrived at his hotel room.

After Charles had left, Katie asked Kathleen if she had any money. Kathleen replied that she did not. Katie said, "We need some money. I need to give [appellant] some money." Katie then asked if her grandfather had any money. Kathleen responded, "I don't know. Why don't you ask him when he comes back."

Kathleen went to the rest room, and Katie took Kathleen's wallet out of her purse. When Kathleen returned, Katie and appellant said something to each other, and appellant left. Appellant returned to the hotel room about 20 minutes later and said something to Katie which Kathleen could not hear. Katie and appellant then left together without the baby. They did not return to the hotel.

About 3:00 that afternoon, Charles was in the Sears parking lot putting his purchases in the trunk of his car when Katie and appellant pulled up behind him in a black car. Appellant jumped out of the car, grabbed Charles, and threw him

to the ground. Charles landed on his back and appellant got on top of him, pushing down on Charles's chest to prevent him from getting up. Appellant tried to roll Charles over and reached for Charles's wallet in his right rear pocket. As the two men continued to struggle, appellant punched and banged Charles's head on the ground. Finally, appellant grabbed hold of the pocket, ripped it open, and took Charles's wallet. Appellant returned to the vehicle, which sped away with Katie driving.

The wallet contained Charles's bank cards, identification, driver's license, medical cards, and $1,000 in cash Charles had withdrawn to help cover his grandson's funeral expenses. Charles never recovered his wallet or any of its contents.

Charles returned to the Marriott hotel. His clothes were dirty, his pants torn, and he was bleeding. On the way to his room he told the desk clerk he had been robbed, and the police were called. Charles spoke with police in the hotel parking lot. Charles's injuries included minor scrapes and bruising to his head, elbow, and right knee, which the police photographed.

Deputy sheriffs arrested appellant at a residence in Lakewood the next day. When police pulled up to the house, appellant was vacuuming the interior of the black car, which Charles identified as the car Katie and appellant were driving at the time of the robbery.

**B. Defense evidence**

Charles admittedly did not like appellant and wanted nothing to do with him or Katie when they showed up at his hotel room. At the preliminary hearing as Charles passed appellant on his way to the witness stand, he said to appellant, " 'You're toast.' "

The sheriff's deputy who interviewed Charles and photographed his injuries observed bruising to Charles's right elbow and knee. He did not, however, see any swelling or bruising from the single punch to the head which Charles had described.

Tanya Effinger and another friend were in the car with Katie and appellant when appellant had a conversation with "an older gentleman" in a mall parking lot. Appellant had exited the vehicle, but remained nearby, and was never closer to the man than about 16 feet. Effinger heard appellant say something about calling "children services." She never saw appellant strike, push, or take anything from the man. After the encounter, appellant got back in the car, and they drove straight back to Long Beach.

## DISCUSSION

### I. The trial court did not err in admitting the conversation between Katie and Kathleen.

Over a defense hearsay objection,[3] the trial court admitted Kathleen's account of her conversation with Katie in which Katie

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[3] We reject respondent's assertion that appellant forfeited his hearsay claims by failing to renew his objection during trial after the court had already ruled on the motion in limine that the evidence was admissible. As a general rule, after the court has made an in limine ruling that evidence will be admitted, the party seeking exclusion of the evidence must renew the objection during trial in order to preserve the issue for appeal. (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3.) However, a court's "sufficiently definite and express ruling" on the motion in limine may also preserve the claim. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) In light of the court's unequivocal ruling here, any

asked if either of her grandparents had any money. Appellant charges prejudicial error in the admission of two statements from that conversation: Katie's statement in appellant's presence that "We need some money. I need to give [appellant] some money"; and Kathleen's suggestion that Katie should ask Charles if he had any money when he returned to the hotel. The trial court ruled the first statement admissible as nonhearsay relevant to establishing appellant's motive to rob Charles. Later in the proceedings, the court explained that the first statement was admitted "not for the truth of the matter asserted but rather as circumstantial evidence of the defendant's desire to get money or *that he needed money*." (Italics added.) The court further declared that, even if deemed hearsay, the entire conversation was nevertheless admissible for its effect on the hearer, that is, appellant.

A trial court has broad discretion in determining the relevance of evidence, and we review the trial court's admissibility rulings under the abuse of discretion standard. (*People v. Kopatz* (2015) 61 Cal.4th 62, 85; *People v. Benavides* (2005) 35 Cal.4th 69, 90.) Under that standard, we will not disturb the trial court's exercise of discretion unless the court acted in an arbitrary, capricious or patently absurd manner (*People v. Jones* (2013) 57 Cal.4th 899, 947; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125), and its ruling " 'fall[s]

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further hearsay objection would have been futile. As there is no requirement that counsel proffer futile objections, appellant did not forfeit the issue for appeal. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

"outside the bounds of reason." ' " (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

An out-of-court statement is made inadmissible by the hearsay rule only if it is "offered to prove the truth of the matter stated." (Evid. Code, § 1200; *People v. Jurado* (2006) 38 Cal.4th 72, 117.) "[A] statement 'offered for some purpose other than to prove the fact stated therein is not hearsay.' " (*People v. Sanchez* (2016) 63 Cal.4th 665, 674; *People v. Jurado*, *supra*, at p. 117 [request for a gun not hearsay]; *People v. Bolden* (1996) 44 Cal.App.4th 707, 715 [statement offered to prove motive is not hearsay].) Evidence of an extrajudicial statement is therefore admissible if offered for a nonhearsay purpose and that nonhearsay purpose is relevant to an issue in dispute. (*People v. Davis* (2005) 36 Cal.4th 510, 535–536; *People v. Turner* (1994) 8 Cal.4th 137, 189.)

Here, the court's clarification of the basis for its ruling clearly demonstrates that one of the reasons the court admitted the evidence was for the improper purpose of proving the truth of the statement that appellant needed money. If the trial court had given no other permissible basis for admitting the evidence, we would be compelled to conclude that the trial court erred in ruling the statement admissible. However, the trial court also declared the first statement to be admissible for the nonhearsay purpose of showing appellant and Katie were trying to get money from Katie's grandparents and to explain their motive and subsequent conduct of approaching Charles in the parking lot. In this regard, what matters is not the truth or falsity of Katie's reason for asking her grandmother for money—whether appellant actually needed money or whether Katie actually intended to give appellant money—but the fact of the request

itself. Accordingly, we find no error in the trial court's admission of the statement for the nonhearsay purpose of showing appellant's desire to get money from Katie's grandparents.[4]

Appellant next characterizes Kathleen's suggestion that Katie should ask Charles if he had any money when he returned as inadmissible hearsay with no possible relevance to the issues of appellant's motive or knowledge. But this second statement—in the form of a request or suggestion—was plainly not admitted for its truth, and was thus not subject to exclusion as hearsay. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 117 [a request does not assert truth of any fact and is therefore not hearsay].) Like the first statement, the second was relevant for the nonhearsay purpose of establishing appellant's motive to find Charles and try to get money from him. The trial court did not abuse its discretion in admitting the second statement.

**II. The trial court erred in imposing a one-year enhancement for a prison prior allegation which was neither admitted nor found true.**

Appellant denied the allegation in the amended information under section 667.5, subdivision (b) that he had served prison terms on seven prior convictions. At the April 13, 2016 court trial on the prior conviction enhancement allegations, the trial court found beyond a reasonable doubt that appellant

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[4] In any event, any possible error in the admission of this statement was harmless in light of the overwhelming evidence supporting appellant's convictions on both charges in this case. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Covarrubias* (2016) 1 Cal.5th 838, 886–887 ["the *Watson* standard is applicable to state law error in admission of hearsay"].)

had suffered prior convictions and served prison terms in six cases: Kern County Superior Court case number FSB02414, and Los Angeles County Superior Court case numbers A482227, VA004131, VA082412, VA100784, and VA123744. The court did not make a finding as to a seventh case—Los Angeles County Superior Court case number VA132718—listed in the amended information as a section 667.5, subdivision (b) enhancement. However, contrary to the trial court's express findings, the minute order from the April 13, 2016 proceeding states that the trial court found true appellant's prior conviction in Los Angeles County Superior Court case number VA132718.

Appellant contends that the judgment must be modified and his sentence reduced by one year because the trial court imposed a one-year prior prison enhancement pursuant to section 667.5, subdivision (b) for a prior conviction that appellant did not admit and the trial court did not find to be true. We agree.

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; *People v. Mitchell* (2001) 26 Cal.4th 181, 185–186.)

Respondent argues there is no discrepancy in the record because "the reporter's transcript shows that the trial court found *at sentencing* that appellant suffered seven one-year priors under section 667.5, subdivision (b)," and "the clerk's transcript also reflects that appellant had seven one-year priors under section 667.5, subdivision (b). But respondent is comparing apples to oranges. The only relevant finding as to the one-year prior conviction enhancement allegation is the one the court made at the trial on appellant's prior convictions. That finding was beyond a reasonable doubt that appellant had suffered prior convictions and served prison terms in six, not seven, cases. The fact that the minute order incorrectly stated the court's findings does not change the oral pronouncement, and neither does the court's imposition of an enhancement at sentencing on the basis of a prior conviction it had not found to be true.

## DISPOSITION

The judgment is modified to strike the one-year enhancement imposed under Penal Code section 667.5, subdivision (b) with respect to Los Angeles County Superior Court case number VA132718. The trial court is ordered to correct the minute order and to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment to reflect the modification. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.