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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAMES STACY BUSH, Defendant and Appellant.	B227828 (Los Angeles County Super. Ct. No. SA070972)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka and Lance E. Winters, Senior Assistant Attorneys General, Paul M. Roadarmel and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a jury trial, appellant was convicted of first degree murder (Pen. Code,[1] § 187, subd. (a)) and the jury found he used a deadly weapon in the commission of the crime (§ 12022, subd. (b)(1)). Five prior prison terms, within the meaning of section 667.5, were found true by the trial court. Appellant was sentenced to a 5-year determinate term plus a consecutive indeterminate term of 25 years to life.

Appellant contends reversal of the judgment is necessary because the trial court erred by: admitting the testimony of a former codefendant (Crystal Harmon); admitting Harmon's plea agreement; denying his motion to dismiss the information; and denying his motion for a new trial. The contentions lack merit and the judgment is affirmed.

II. FACTS

The victim, Sean Parmley, was from Santa Rosa. He moved to the Los Angeles area in 2007 and eventually began dating Lesley Conway. Subsequently, his son (Michael Miller) moved in with Parmley and began dating Crystal Harmon. Although Miller had an intimate relationship with Harmon, he did not consider her to be his girlfriend. Miller believed Harmon understood he did not want a serious relationship.

During Christmas week in 2007, Parmley and Miller took a trip to Santa Rosa. Sometime after Christmas, but before their return on December 29, Miller sent Harmon a text message indicating he was ending their relationship and going to return to the Los Angeles area with his former girlfriend—Christine Campbell. This made Harmon very angry. Parmley also returned with another woman (Mistry Lujan) but he and Conway had an "open" relationship.

On December 30, Harmon waited in the parking garage of Parmley's apartment complex for Parmley and Miller to arrive. Because she was very small, Harmon was able

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[1] All further statutory references are to the Penal Code.

to slip through bent rails in the parking gate and gain entry to the parking lot. After the men arrived and entered Parmley's apartment, Harmon slashed the tires of Parmley's car, "keyed" the side of the car, and proceeded to the basement where she shut off the electricity to his apartment.

Harmon went to Gabe's Bar and told Conway what she had done to the vehicle. At around 2 or 2:30 p.m., while still at the bar, Harmon sent Miller a text message indicating she wanted to see marijuana they brought back from Santa Rosa because Harmon had a possible buyer. However, Harmon's true reason for wanting to go to the apartment was to see what Miller's girlfriend looked like. Harmon was told she could examine the marijuana. She went to the apartment and was provided with marijuana. While in the apartment, she told Parmley that he should remain indoors because there were people either "looking for him" or "angry at him."

Harmon returned to the bar. She recalled some of her clothes were at Parmley's apartment and became increasingly angry about them not being returned to her. She spoke to Cherri Costill and Deadra Wolicky about the issue. Attempting to assist Harmon, Costill and Wolicky left the bar and went to Parmley's apartment in order to ask if Harmon could retrieve her clothes. The women returned to Gabe's Bar after being told that Harmon did not have any clothes at the apartment but that she was free to return to the apartment and look for missing items.

Harmon sent Miller text messages indicating she had a New Year's Eve present for him and that she had "met some people [who] don't like gentlemen from up north." She told Conway, "They ruined my New Year's Eve. I'm going to ruin theirs."

Sometime after 5:00 p.m., Harmon was seen at a table with Costill, Alicia Ibarra, Madrigal, Wolicky and appellant. Harmon was angry and ranting about Miller returning to Los Angeles with another woman. Harmon pointed out that Parmley's group had a large quantity of marijuana and that someone should "jack them for their weed." She said, "if you go up there and you just kill them, you can get the computers and everything else." Harmon revealed the location of the marijuana—in a cooler under a table.

Appellant asked where Miller and Parmley "were from." Harmon replied, "Up north." Appellant and Madrigal agreed to retrieve Harman's clothes from Parmley's apartment.

Sometime after 8:00 p.m., Conway went outside the bar and observed Harmon, Madrigal, Costill, Ibarra and appellant leaving. Conway asked where the group was going. Harmon pointed and said "over there."

Harmon, appellant and Madrigal walked to Parmley's apartment. Costill and Ibarra stayed behind. The plan was to steal the marijuana and retrieve Harmon's clothes. During the walk, appellant obtained a knife from Harmon. The three reached the apartment and Harmon knocked on the door. Parmley asked who was "there" and Harmon replied "Crystal."

Parmley answered the door and said, "Wait, wait, wait." Appellant engaged in an altercation with Parmley, grabbed him by the throat and said, "Shut the fuck up or I'll fucking shoot you." Appellant took out a knife, held Parmley by the neck, and used a swinging motion to repeatedly stab Parmley.

Miller woke up to the sound of Campbell and Lujan screaming. He ran toward the door and was knocked down to the ground by an unknown person. Miller fought with Madrigal in the hallway. Madrigal eventually left whereupon Miller observed Parmley on the ground in the hallway. Miller and Lujan called 911.

Just before 9:00 p.m., Costill, Ibarra, and Harmon returned to the bar—assisting Madrigal as he walked. There was blood on Madrigal's forehead. When they reached the inside of the bar, Conway grabbed a rag for the cut. As Harmon walked by, she was smiling and made reference to the fact that Parmley had been stabbed.

While en route to Parmley's apartment, Conway received a call from someone at the bar telling her to return to the bar because "something . . . happened." When she returned, several police officers were present but the women who were previously with Madrigal had taken him to the hospital. There was a substantial amount of blood in the bathroom.

The police arrived at the apartment and followed a trail of blood to Gabe's Bar. The bar was a "three to five minute walk" from the apartment. When the police reached the bar, they discovered blood and a bloody rag in the bathroom.

After the stabbing, Crystal White received a telephone call from appellant asking her to pick him up at the intersection of Venice and Washington because he was injured. When she arrived, appellant's fingers were cut. He explained he had been in a bar fight and attempted to take a knife away from another person. Appellant indicated he needed to go to a hospital but the hospital was required to be out of the immediate area. When he reached the hospital he used a false name and social security number. Appellant told hospital personnel that he cut himself with a kitchen knife.

After leaving Madrigal at the hospital, Ibarra and Harmon proceeded to the home of Ibarra's mother. Harmon was covered in blood and changed out of her clothes. Ibarra spoke to appellant on her cellular telephone. Appellant told Ibarra, "Keep that f-ing bitch with you." At about 6:00 a.m., after speaking with her mother, Ibarra decided to go to the police and told Harmon they should both speak to officers. Ibarra used the restroom and, when she returned, Harmon was gone.

The following day, after receiving an anonymous tip, police officers checked a dumpster in an alley near Gabe's Bar. In it they discovered Harmon's bloody pocket knife wrapped in tissue paper. Parmley's blood was on the knife. The anonymous tip was from White who had been told of the whereabouts of the knife from Costill.

Parmley did not survive the attack. The causes of death were blood loss and a collapsed lung.

III. DISCUSSION

A. Crystal Harmon's Testimony was Properly Admitted

Crystal Harmon was a codefendant in this case. She was charged with murder of Parmley, burglary and robbery. During the prosecution case, pursuant to a plea

agreement, Harmon pled guilty to being an accessory after the fact (§ 32). The plea agreement provided: (1) in exchange for the plea, Harmon would be granted probation and be given credit for time already served as long as she testified truthfully at appellant's trial; and (2) the determination of whether the testimony was truthful would be made by the trial court.

Harmon testified at trial regarding the events leading up to Parmley's murder, her eyewitness account of appellant stabbing Parmley, and events following the murder. Harmon was sentenced after the evidence was presented. During Harmon's sentencing hearing, the trial court indicated it had a strong suspicion Harmon was untruthful on a number of issues but it did not believe, beyond a reasonable doubt, that Harmon testified falsely. Thus, Harmon was granted probation pursuant to the plea agreement.

Appellant's contention that the trial court erred by permitting the prosecution to call Harmon as a witness is without merit. Section 1099 allows a prosecutor to make an application to the trial court to discharge a defendant from criminal charges in order to allow the defendant to be a witness for the prosecution. "'"[N]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence . . . ."'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1010.) This practice is a "matter wholly within the discretion of the trial court . . . ." (*People v. Frahm* (1930) 107 Cal.App. 253, 263.) Thus, we conduct a review of the record to determine whether the trial court acted arbitrarily or capriciously such that an abuse of discretion is established. (See *People v. Jordan* (1986) 42 Cal.3d 308, 316.) As explained below, we find no abuse of discretion.

It appears appellant's concern regarding the admission of Harmon's testimony centers around his belief that her testimony was unreliable due to: (1) the favorable plea bargain she received; and (2) the inconsistencies that existed among her accounts of the events to the police, at the preliminary hearing, and at trial. However, the existence of a favorable plea agreement did not render Harmon's testimony inherently unreliable. (See *People v. Jenkins, supra*, 22 Cal.4th at p. 1012.) Moreover, inconsistencies in a witness's

testimony are commonplace in criminal trials. Under these circumstances, the jury is properly instructed, as it was in this case, that inconsistencies may be considered in assessing the weight and credibility of the testimony. Neither a favorable plea agreement nor inconsistencies in Harmon's account of the events demonstrate the trial court abused its discretion in allowing the testimony pursuant to section 1099.

B. The Plea Agreement was Properly Admitted

Appellant contends the plea agreement suggested the trial court vouched for the truthfulness of Harmon's testimony and, therefore, should have been excluded. He claims his position is fortified by the prosecutor's closing argument regarding the truthfulness of Harmon's testimony. Appellant is incorrect.

"[T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. [Citation.] . . . '[W]hen an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility.' [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 821 ("*Fauber*").) However, "Portions of an agreement irrelevant to the credibility determination or potentially misleading to the jury should, on timely and specific request, be excluded." (*Id.* at p. 823.)

In *Fauber*, the prosecutor and a witness entered into a plea agreement requiring a particular sentence if the witness pled guilty to a certain offense and testified truthfully at Fauber's trial. The agreement indicated, """In the event of a dispute, the truthfulness of [the witness's] testimony will be determined by the trial judges who presided over these hearings."""" (*Id.* at pp. 821-822, fn. 4.) Although our Supreme Court ultimately found there was no possibility the admission of this evidence prejudiced the defense, it did express the following concern: "The provision . . . arguably carried some slight potential for jury confusion, in that it did not *explicitly* state what is implicit within it: that the

need for such determination would arise, if at all, in connection with [the witness's] sentencing, not in the process of trying defendant's guilt or innocence." (*Id.* at p. 823.)

Here, the applicable provision *did* explicitly state that the trial court's assessment was relevant only to sentencing and would not occur until that time. The jury was properly instructed that the trial court's "only role . . . with respect to this . . . witness's credibility *is when the trial is over*, [the court] decide[s] whether or not [the court] believe[s] for purposes of punishment that this witness has been truthful." (Italics added.)

Contrary to vouching for Harmon's testimony, the trial court expressly indicated it had had not reached the point where it was required to assess the credibility of Harmon's testimony. Moreover, the trial court instructed the jury, both when Harmon testified, and at the close of the evidence, that the jury was solely responsible for assessing Harmon's credibility. There is nothing in the record to demonstrate the jury was ever made aware of the trial court's ultimate findings on Harmon's credibility or her sentence.

The prosecutor's argument to the jury that direct examination and cross-examination combine to create a "truth pressure cooker" and that "[w]itnesses will seldom be able to allude the keen perception of the court and the jury," does not add any weight to appellant's contention. Nothing in this portion of the argument refers to Harmon's testimony or suggests the trial court vouched for the credibility of Harmon.

Appellant's argument that the plea agreement was inadmissible as improper judicial vouching lacks merit. Moreover, we find, as our Supreme Court did in *Fauber*, that the admission of the plea agreement did not prejudice the defense. In light of the instructions given, the jury could not have reasonably understood Harmon's plea agreement relieved it of the duty to decide whether her testimony was credible. (*Id.* at p. 823.)

C. The Non-Statutory Motion to Dismiss

Prior to the commencement of Crystal Harmon's trial testimony, her counsel revealed to the prosecutor that Harmon had indicated she: (1) knew Bush and Madrigal were going to Parmley's apartment to steal his marijuana; and (2) told the men of the location of the marijuana. The prosecutor and the trial court expressed concern over this revelation because Harmon's plea bargain was offered, in part, due to the impression that she had been a "frightened girl" who "was at the mercy of" men who had "just [gone] crazy." After some discussion about the issue, including an exchange about whether the prosecutor was going to move to withdraw Harmon's guilty plea, the trial court took a break in order to allow the prosecutor and Harmon's counsel to speak with Harmon.

When court resumed, there was no discussion of withdrawing Harmon's plea. However, defense counsel made an oral motion to dismiss "based on state and federal due process grounds." Counsel offered an argument that spanned 21 lines of reporter's transcript. In sum, he maintained the magistrate who held appellant to answer following the preliminary hearing did so based on "credibility judgments" and Harmon's initial account that she did was not "part of any type of conspiracy to rob or harm in any way the occupants [of the apartment]." Having learned this portion of Harmon's account of the events preceding the murder had changed, counsel appeared to take the position that Harmon's testimony formed the basis for the holding order yet was inherently unreliable.[2] The court denied the motion.

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[2] The parties do not dispute that following. Appellant was initially charged in case number SA066499 with committing crimes related to Parmley's murder. A preliminary hearing was conducted in which Harmon testified. Appellant was held to answer for the offenses but the case was dismissed and refiled by the prosecution. In the second filing, Harmon was added as a defendant. A second preliminary hearing was conducted, pursuant to Proposition 115, wherein Harmon's prior preliminary hearing testimony was admitted. We grant appellant's request to take judicial notice of the portion of the first preliminary hearing containing Harmon's testimony, but only as a record of what Harmon said in her testimony, not for the truth of what she said. (See Evid. Code, § 452,

Latching on to trial counsel's argument, appellant contends the trial court erred by denying the motion. He maintains the magistrate incorrectly held him to answer following the preliminary hearing because Harmon's testimony was "necessarily false." His claim lacks merit.

Errors concerning a preliminary hearing are subject to limited review. "Denial of a substantial right at the preliminary hearing renders a defendant's commitment illegal and entitles him to a dismissal of the information on timely motion. [Citations.] Deprivation of a substantial right is properly addressed by a section 995 motion when the error is visible from the 'four corners' of the preliminary hearing transcript. By contrast, an error that is not known or visible at the hearing itself . . . may be called to the court's attention through a nonstatutory motion to dismiss. [Citations.]" (*People v. Duncan* (2000) 78 Cal.App.4th 765, 772.)

It appears defense counsel's short oral argument to the trial court amounted to an attempt to make a nonstatutory motion to dismiss. Although counsel articulated an inconsistency between Harmon's testimony at the preliminary hearing and the testimony she was about to offer at trial, said inconsistency did not demonstrate appellant was deprived of a substantial right at the preliminary hearing. Indeed, appellant cites no authority for the proposition that a nonstatutory motion to dismiss should be granted simply because a witness who testified at a preliminary hearing is due to testify at trial and make one or more statements that are inconsistent with his or her preliminary hearing testimony. His motion to dismiss was properly denied.

D. The Motion for New Trial

Appellant argues the errors he asserts on appeal required the trial court to grant his motion for a new trial. However, of the errors raised on appeal, the only error articulated in the new trial motion was the alleged judicial vouching of Harmon's testimony.

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subd. (d); *People v. Moore* (1997) 59 Cal.App.4th 168, 178; *People v. Murray* (1978) 77 Cal.App.3d 305, 307.)

Appellant has forfeited his claims that the new trial motion should have been granted on grounds that were omitted from the motion made in the trial court. (See *People v. Marks* (2003) 31 Cal.4th 197, 229.) In any event, we have rejected the claims on appeal. For those same reasons, they did not warrant a new trial. (See *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 127.) Appellant has failed to demonstrate the trial court abused its discretion in denying his motion for new trial.

IV. DISPOSITION

The judgment is affirmed.

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KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.