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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EDRIC DASHELL GROSS,

Defendant and Appellant.

B275865

(Los Angeles County
Super. Ct. No. SA081636)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Kathryn A. Solorzano, Judge. Reversed.

John P. Dwyer, 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, Scott A. Taryle and David W. Williams,
Deputy Attorneys General, for Plaintiff and Respondent.

After the jury was unable to reach a verdict at his first trial, Edric Dashell Gross was convicted at a second trial of the willful, deliberate and premeditated murder of Jacqueline Ovsak in April 2001 and Dana Caper in October 2002. Gross and the two victims were homeless individuals living in Santa Monica.

On appeal Gross contends the trial court committed prejudicial error by excluding evidence tending to support his defense that Caper's former boyfriend had murdered her. Gross also contends the court's erroneous ruling requires reversal of his conviction for murdering Ovsak because the prosecutor argued, based on the similarity between the two crimes, that the same individual had killed both women. We agree the evidence, which had been admitted at Gross's first trial, was improperly excluded at his second trial and there exists a reasonable probability Gross would have obtained a more favorable outcome at the second trial were it not for that error. We reverse the judgment and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

1. The First Trial

Gross was charged by information in October 2013 with two counts of murder with multiple-murder, rape and burglary special circumstance allegations as to the 2001 murder of Ovsak and multiple-murder and rape special circumstance allegations as to the 2002 murder of Caper. During the initial trial in summer 2015, the prosecution announced it was not proceeding on the burglary special circumstance allegation associated with the murder of Ovsak. The trial ended in a mistrial when the jury was unable to reach a verdict. Polled by the court, the foreperson stated the vote was four for guilty, eight for not guilty as to the

murder of Ovsak; three for guilty, nine for not guilty as to the murder of Caper.

2. *The Second Trial*

Gross's retrial began on May 11, 2016. On May 31, 2016 the People moved to exclude any evidence David Bedrin, Caper's former boyfriend, had killed Caper on the ground the proposed third-party-culpability testimony was speculative and did not reliably link Bedrin to the crime. After hearing argument the court granted the motion in part, excluding testimony from Dennis Morgan that Bedrin had asked Morgan to provide him with an alibi for the time of the murder. The court ruled the testimony was hearsay and lacked sufficient trustworthiness to be admissible under Evidence Code sections 1250 and 1252. Gross was permitted to introduce other circumstantial evidence of Bedrin's culpability.

At the conclusion of the trial the jury convicted Gross of both counts of willful, deliberate and premeditated murder and found true the multiple-murder special circumstance allegations. (The jury was not asked to make findings on the rape special circumstance allegations.) The court imposed two concurrent sentences of life without the possibility of parole and ordered payment of statutory fines and fees.¹

¹ Gross argues, and the People agree, one of the two multiple-murder special circumstance allegations should have been stricken by the court. (*People v. Hardy* (1992) 2 Cal.4th 86, 191 [when a jury returns two multiple-murder findings, the court "should strike one of the two multiple-murder special-circumstance findings . . . as duplicative"]; accord, *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 49.) As a consequence, the court erred in imposing life-without-the-possibility-of parole sentences on both murder counts. As Gross also argues, and the

a. *The People's evidence as to Ovsak's murder*

On April 5, 2001 a construction worker found Ovsak's body on the bedroom floor of a vacant house scheduled for demolition. Ovsak had been squatting in the house for several months and had been seen inside the house the previous day.

Ovsak's body was naked from the waist down except for a pair of socks; she was wearing two sweatshirts. A telephone cord was wrapped around her neck. Toxicology tests showed she had no alcohol or illegal drugs in her system. A forensic pathologist testified Ovsak died from asphyxiation caused by manual strangulation; the ligature mark on her neck from the telephone cord was likely post-mortem. There was no indication of injury from a sexual assault.

DNA extracted from a swab of Ovsak's left nipple matched Gross's DNA. Ovsak's and Gross's DNA was also recovered from a black T-shirt found next to Ovsak. Samples from other items in the house had mixtures of Ovsak's DNA and DNA from other persons; Gross was excluded from having contributed DNA to those objects.

b. *The People's evidence as to Caper's murder*

Caper's body was found on October 29, 2002 on a steep hillside above the Pacific Coast Highway in Santa Monica near a small campsite used by homeless individuals. It appeared her body had been dragged from the encampment to the hillside.

Caper, who had been killed one or two days before she was found, was strangled by hand. She was naked from the waist

People concede, the minute order and abstract of judgment also improperly reflect imposition of a parole revocation fine and a crime prevention fine. These errors are mooted by our reversal of the judgment.

down but was wearing several shirts. Caper had what may have been defensive wounds on her hands and arms, bruising around her neck, jaw and eyes and an abrasion on her neck that could have been from a ligature. There was no evidence of a sexual assault. Toxicology tests showed she had no alcohol or illegal drugs in her system.

DNA extracted from swabs of Caper's nipples matched a reference sample from Gross. What Corrie Maggay, the People's DNA expert, described as a very large amount of DNA was recovered from underneath Caper's fingernails. That DNA also matched Gross's DNA. Maggay testified Gross's DNA under Caper's fingernails was consistent with Caper having scratched Gross, was beyond what would be expected after consensual sex and was consistent with substantial contact between Caper and Gross at or near the time of Caper's death. Maggay explained her opinion as to timing was based on the rate at which DNA degrades and testified that the DNA recovered from Ovsak and Gross was not significantly degraded.

c. The defense case

i. DNA

The defense theory was that Bedrin had murdered Caper and an unknown assailant had killed Ovsak. In his opening statement defense counsel conceded Gross's DNA had been found on Caper's and Ovsak's breasts and under Caper's fingernails, but, through cross-examination of Maggay and testimony from a defense expert, challenged the significance of that evidence.

Maggay acknowledged that laboratory tests do not reveal when foreign DNA was deposited on another person's body, agreed that washing would be a significant factor affecting DNA found under an individual's fingernails and conceded that the

studies of DNA degradation upon which she relied did not involve homeless persons, who are exposed to environmental factors not generally encountered by others.

Richon Tate, the defense expert, testified Bedrin could not be excluded from the DNA found on one portion of Caper's shirt (the probability of a random match was 1:1300). Tate also testified that DNA from mouth skin cells left by saliva can be detected on a person's body or clothing four or five days after it was deposited, there was no test to determine how long foreign DNA had been under a person's fingernails, and it was not possible to distinguish based on the amount of foreign DNA underneath a person's fingernails whether it came from consensual or nonconsensual contact.

ii. *Ovsak*

The parties stipulated that latent fingerprints were lifted from glass fragments found at the crime scene. Four prints belonged to Ovsak. A fifth print was not identified, but Gross was excluded as the person who had left it. In addition, a defense witness who worked across the street from the house where the body was found testified he had seen homeless people going into the house a number of times over the preceding months and saw a woman and two day laborers near the house on the day before Ovsak's body was discovered.

iii. *Caper*

Michael Puterbaugh testified he knew Caper and Bedrin, who had lived together as a couple at Bedrin's campsite, a small cave Bedrin had dug out on the Pacific Palisades hillside. According to Puterbaugh, shortly before Caper's death, she and Bedrin broke up after she threatened to report Bedrin to the police for inducing her to take methamphetamine and then

having sex with her. Puterbaugh also testified that he saw Bedrin burying something near his campsite several days after Caper's death and reported this observation to the police. A search of the area unearthed bits of wire, a short rope and some nylon strap material.

A portion of Santa Monica Police Detective John Henry's testimony from Gross's first trial was read as part of the defense case. Henry testified he interviewed Bedrin one month after Caper's death. Bedrin initially claimed he had not been Caper's boyfriend and never had sex with her. He subsequently admitted he had lied about both matters and offered to take a lie detector test.

Bedrin was in prison in Arizona and did not testify at either trial after invoking his privilege against self-incrimination.

d. *The excluded testimony regarding Bedrin*

At the first trial Dennis Morgan, who lived in a tent near Bedrin's campsite, testified he knew both Bedrin and Caper when they lived together at the campsite. According to Morgan, the evening of Caper's murder Bedrin approached him at a nearby food line and asked him for an alibi, "to talk to the police and tell them that I was with him [at the time of the murder]." Morgan refused. Later that evening Bedrin again asked Morgan if he could tell the police the two men had been together, inquiring, "Can I tell them that I was with you and where we was at?" Morgan again refused to provide a false alibi for Bedrin. Morgan claimed he told Detective Henry about both conversations with Bedrin.

At the first trial Detective Henry described his interview with Morgan, which took place about three days after Caper's murder. According to Henry, Morgan told him that Bedrin had

asked Morgan to tell the police that Caper had not been living with Bedrin for a while, so the police would not connect him to her death. Henry also testified that Morgan told him Bedrin said he did not have an alibi for the time of Caper's death, but denied that Morgan told him that Bedrin had asked Morgan to provide an alibi.

As discussed, the trial court granted in part the People's motion to exclude evidence concerning Bedrin's possible culpability. The court ruled Morgan's testimony about Bedrin's statements to him was hearsay and, although potentially admissible as evidence of Bedrin's consciousness of guilt under Evidence Code section 1250, lacked trustworthiness, as required by Evidence Code section 1252, because Morgan did not tell Detective Henry that Bedrin had asked him to provide an alibi.² The court also excluded the portion of Henry's testimony concerning his interview with Morgan.

DISCUSSION

1. *The Trial Court Abused Its Discretion in Excluding as Inadmissible Hearsay Morgan's Testimony That Bedrin Had Requested a False Alibi*

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 725; accord, *People v. Clark* (2016) 63 Cal.4th 522, 590 "[t]he standard of review for the court's

² The trial court's ruling improperly focused on the trustworthiness of Morgan's testimony, rather than the trustworthiness of the statements by the declarant (Bedrin), as contemplated by Evidence Code sections 1250 and 1252.

[evidentiary] ruling, along with its determination of issues concerning the hearsay rule, is abuse of discretion”]; *People v. Jones* (2013) 57 Cal.4th 899, 956 [“a trial court’s decision to admit or exclude a hearsay statement . . . will not be disturbed on appeal absent a showing of abuse of discretion”].) “The scope of discretion always resides in the particular law being applied, i.e., in the “legal principles governing the subject of [the] action” Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion.” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) “An order that implicitly or explicitly rests on an erroneous reading of the law necessarily is an abuse of discretion.” (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.)

The trial court committed legal error—a clear abuse of its discretion—in ruling Morgan’s testimony from the first trial that Bedrin had asked him to provide Bedrin with a false alibi constituted hearsay. Gross did not intend to introduce Bedrin’s statements to Morgan for their truth. (See Evid. Code, § 1200, subd. (a) [“[h]earsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated”].) Indeed, “[b]ecause a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated.” (*People v. Jurado* (2006) 38 Cal.4th 72, 117; see *People v. Mayfield* (1997) 14 Cal.4th 668, 741, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 [“pleas for help, were not hearsay because they were not admitted for the truth of the matter stated”].)

Recognizing the trial court's error in ruling Morgan's testimony constituted hearsay, the Attorney General argues the testimony was nonetheless properly excluded because it was "purely speculative, and therefore irrelevant and inadmissible." The Attorney General explains Bedrin could have been asking for Morgan's help because the police would naturally suspect a murder victim's (innocent) ex-boyfriend, not because he was the perpetrator of the crime. In support of his argument the Attorney General cites *People v. De La Plane* (1979) 88 Cal.App.3d 223, 243-244, in which Division Four of this court upheld the trial court's ruling that certain proffered evidence—testimony concerning burglaries of defendant's and defense counsel's homes that had occurred after the individual the defense contended was the real perpetrator of the murder had been subpoenaed to appear as a witness—was too speculative to be admitted as third-party-culpability evidence at trial.

Here, in contrast to *De La Plane*, no unduly speculative inferences were required to establish the relevance of Morgan's testimony that Bedrin had asked him to provide an alibi for the time of Caper's murder. Although Bedrin's requests to Morgan may have been innocent, as the Attorney General suggests, they were also reasonably interpreted, as the trial court found, as evidence of Bedrin's consciousness of guilt. The court permitted Gross to introduce other evidence to support his theory that Bedrin had murdered Caper and excluded the Morgan testimony only because it incorrectly found it to be inadmissible hearsay. The testimony should have been allowed.

2. The Trial Court's Error Was Prejudicial

We assess the impact of the trial court's error in excluding Morgan's testimony concerning Bedrin's request for an alibi

under the state-law “reasonably probable” harmless error standard, that is, whether “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Seumanu* (2015) 61 Cal.4th 1293, 1317 [applying *Watson* standard to claims of evidentiary error under California law]; *People v. Partida* (2005) 37 Cal.4th 428, 439 [same].)³ Because a hung jury is a more favorable result than a guilty verdict (*People v. Walker* (2015) 237 Cal.App.4th 111, 118; *People v. Soojian* (2010) 190 Cal.App.4th 491, 521), the question is whether it is reasonably probable at least one juror would have entertained a reasonable doubt as to Gross’s guilt if Morgan’s testimony had been introduced at his second trial, as it was at the first.

Gross contends the difference between the outcome of the first trial, where the jury heard Morgan’s testimony and failed to reach a verdict, and the second trial, where the evidence was excluded and Gross was found guilty of murdering Caper, persuasively demonstrates the prejudice caused by the trial court’s erroneous ruling. (See, e.g., *People v. Kelley* (1967)

³ Because the trial court did not prevent Gross from presenting a third-party culpability defense, excluding only a portion of his evidence implicating Bedrin in Caper’s murder, the court’s error was one of state evidentiary law only, properly reviewed under the *Watson* standard, not the stricter beyond-a-reasonable-doubt standard applicable to federal constitutional error. (See *People v. McNeal* (2009) 46 Cal.4th 1183, 1203; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) “[T]he routine application of provisions of the state Evidence Code law does not implicate a criminal defendant’s constitutional rights.” (*People v. Jones*, *supra*, 57 Cal.4th at p. 957.)

66 Cal.2d 232, 245 [hung jury at first trial and guilty verdict at second trial where evidence was improperly admitted and which otherwise was substantially similar “demonstrates almost to a certainty the prejudicial nature of the error”]; see also *People v. Linder* (1971) 5 Cal.3d 342, 347-348 [although the People’s case was independently convincing, erroneous exclusion of evidence corroborating defendant’s alibi at second trial, which had been admitted at first trial ending with a hung jury, was prejudicial]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 634.)

The Attorney General insists the DNA evidence linking Gross to the two victims was overwhelming, discounting defense counsel’s efforts to limit its persuasive force through cross-examination and the testimony of a defense expert, and argues the two trials were not sufficiently similar to warrant the inference that Morgan’s testimony was the difference between a jury split in favor of acquittal in the first trial and the guilty verdicts at the second trial. In particular, the Attorney General emphasizes that the People introduced Gross’s police interviews at the first trial but not the second trial. As a result, the second jury did not hear Gross’s claims that he had consensual sexual contact with both Ovsak and Caper. However, as explained in Gross’s reply brief, during the interviews Gross lied to the police, which the prosecutor at the first trial had argued was evidence of his guilt. In addition, defense counsel at the second trial argued, albeit without the benefit of Gross’s statements, that the DNA found on the victim’s bodies was consistent with consensual sexual contact. The omission of the police statements at the second trial, therefore, did not markedly strengthen the People’s case.

The People also introduced additional expert testimony regarding the DNA found on Ovsak and Caper at the second trial, describing in greater detail factors affecting DNA degradation rates. Viewing the record as a whole, it is highly doubtful the jury gave much weight to this supplementary material or, for that matter, to defense counsel's efforts to challenge its significance. Rather, as a practical matter, the only meaningful difference between the two trials was Morgan's testimony regarding Bedrin's requests for his help in providing an alibi. Even though the People presented substantial evidence that Gross had murdered Caper (as they had at the first trial, as well), it is reasonably probable, if that testimony had not been erroneously excluded at the second trial, at least one juror would have had a reasonable doubt whether Gross committed the murder. Thus, the court's evidentiary error requires reversal of the Caper conviction.

The evidentiary error also necessitates reversal of Gross's conviction for Ovsak's murder. As discussed, the prosecutor argued to the jury, given the similarity of the two crimes, the same individual must have committed both of them. That is, because Gross had killed Caper, he must have killed Ovsak as well.⁴ Given this presentation, if it is reasonably probable at

⁴ The prosecutor argued, in part, "This was a signature crime. This was a person who killed in the same way, the same type of women, leaving DNA on their body. I would submit to you, ladies and gentlemen, the same person killed Dana C. and Jackie O. And let's look at some of those similarities. . . ." The prosecutor then spent considerable time comparing details regarding the condition of the victims' bodies and the two murder scenes that were strikingly similar.

least one juror would have questioned whether Gross killed Caper, it is also reasonably probable the same juror would have had a reasonable doubt whether Gross murdered Ovsak. Indeed, as the Attorney General appears to concede, the DNA evidence connecting Gross to Ovsak's murder was somewhat weaker than that relating to Caper: Although Gross's DNA was found on Ovsak's left breast and Ovsak's and Gross's DNA was recovered from a black T-shirt found next to Ovsak's body—arguably consistent with consensual contact, as well as an assault—none of Gross's DNA was found under Ovsak's fingernails, as it had been under Caper's.⁵ The linkage between culpability for the two crimes and the prejudicial impact of the erroneous exclusion of Morgan's testimony on the question of Gross's guilt for murdering Ovsak, as well as Caper, were convincingly evidenced by the jury deadlock at the first trial as to both charges. As with Caper, the only significant difference between the two trials was Morgan's testimony. The different outcomes of the two trials, therefore, establishes prejudice. (*People v. Linder, supra*, 5 Cal.3d at pp. 347-348; *People v. Kelley, supra*, 66 Cal.2d at p. 245.) Reversal of both convictions is necessary.

⁵ Contrary to the Attorney General's assertion in his respondent's brief, this DNA evidence, although certainly incriminating, did not establish that Gross "was present at the time of [Ovsak's] death."

DISPOSITION

The judgment is reversed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.*

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