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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. HECTOR LUNA, Defendant and Appellant.	2d Crim. No. B281315 (Super. Ct. No. 2013007745) (Ventura County)

A jury found Hector Luna guilty of possession of methamphetamine for sale (Health & Saf. Code, § 11378), possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)), possession of methamphetamine while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)), and possession of ammunition by a felon (Pen. Code, § 30305, subd. (a)(1)). The jury also found true an allegation that Luna was personally armed with a firearm when he possessed methamphetamine for sale (Pen. Code, § 12022, subd. (c)). Luna admitted allegations that he suffered a prior serious or violent felony conviction and

served a prior prison term (Pen. Code, §§ 667, 667.5, subd. (b)). The trial court sentenced him to eight years in state prison.

Luna contends the trial court erred when it admitted out-of-court statements from his son and ex-wife under the "prior inconsistent statement" exception to the hearsay rule. (Evid. Code, § 1235.) He also contends his admission to the prior conviction and prior prison term allegations was not knowing and voluntary. (*In re Yurko* (1974) 10 Cal.3d 857, 863 (*Yurko*).) We affirm.

FACTUAL AND PROCEDURAL HISTORY

Police went to a Ventura apartment to execute an arrest warrant. When they arrived, Luna and two other people were on the front porch. Officer Therrien and Corporal Knackstedt each saw a backpack lying on the ground at Luna's feet.

Luna ran into the apartment as police approached. An officer pursued Luna and apprehended him inside. Officer Therrien then searched Luna and recovered a cell phone and set of car keys belonging to Luna's ex-wife, Alaine. When he searched the phone, Officer Therrien found text messages related to drug sales. When other officers searched the car, they found a latex glove filled with ammunition inside the car's glovebox. Alaine said the ammunition did not belong to her.

Luna's nine-year-old son, J., told officers at the scene that the backpack on the porch belonged to his father. Alaine told Officer Griffin that Luna was carrying the backpack when he got out of her vehicle at the apartment earlier that day. Officer Therrien searched the backpack and found a loaded revolver, a plastic baggie containing 15 grams of methamphetamine, a

digital scale, a used glass pipe, another plastic baggie containing screws wrapped in pieces of plastic, and five cell phones.

J. was 12 years old at the time of Luna's trial. He testified that he could not remember much of what happened on the day of Luna's arrest. He remembered he was present when his father was arrested, that he was truthful when he spoke with police that day, and that he showed police the phone Luna gave him after his arrest. J. also remembered calling his grandmother with Luna's cell phone. But he did not remember who was with him at the apartment, how he got there, or that he told police that the backpack found on the porch belonged to his father. The prosecutor asked J. to explain why he did not remember. He answered, "I have no idea. I just don't remember that day."

The prosecutor asked another witness who was with Luna on the porch, "What did you hear [J.] tell the police about the backpack?" The witness replied, "That that was his dad's."

When she testified, Alaine could not recall whether she told police that Luna had a backpack when he got out of her car at the apartment. She did recall that she lent Luna her car that day, that the bullets found in the glovebox were not hers, that she had to work that day, that Luna's mother took her to the apartment to get her car after Luna was arrested, that J. was crying when she arrived, and that Luna left dirty laundry in her car. Officer Griffin subsequently testified that Alaine told him that Luna had a backpack with him when she dropped him off at the apartment.

Corporal Knackstedt testified that Luna was sitting on a cooler when he approached the porch. At first, he testified that the backpack was next to the cooler "later on," but he

clarified on cross-examination that the backpack was next to the cooler when he "got to the porch."

While the jury deliberated, counsel for Luna stated, "We are waiving jury on the bifurcated priors." The prosecutor requested a personal waiver from Luna. The trial court asked: "So, Mr. Luna, in the [c]omplaint it is alleged that you have suffered prior convictions, felony convictions, which have penal consequences if you're found guilty of the charges, the primary charges. You have a right to have a jury trial on those matters. It would be tried by this jury. My understanding is that you wish to waive that right and to try all of those matters to the [c]ourt, have the [c]ourt make the factual determination as to whether those are true; is that correct, Mr. Luna?" Luna said that it was.

The prosecutor then added: "There are—I guess technically there's [*sic*] the three waivers, so it would be the waiver to have the jury try it, it would be the waiver to have his attorney cross-examine each of the witnesses presented by the prosecution to prove the special allegations, and he would have the right against—" "Self-incrimination," added the court. It continued: "So you understand that and you still want to waive those rights[,] correct?" Luna replied, "Yes, sir."

The jury returned and announced its verdict. After the jurors exited the courtroom, Luna's counsel stated, "We'd simply be admitting the special allegations at this time." The court accepted the admission and found true the prior conviction and prior prison term allegations.

DISCUSSION

Prior inconsistent statements

Luna contends the trial court erred when it admitted prior out-of-court statements from his son and ex-wife as inconsistent with their testimony at trial. We agree. But the error was harmless.

Prior out-of-court statements are admissible at trial if they are inconsistent with a witness's testimony. (Evid. Code, § 1235; *People v. Sam* (1969) 71 Cal.2d 194, 210.) "Normally, the testimony of a witness that [they do] not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation]." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219 (*Johnson*).) But we do not apply this rule mechanically: "'"'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement.'" [Citation.]' [Citation.]" (*People v. Homick* (2012) 55 Cal.4th 816, 859 (*Homick*), alterations and fn. omitted.) "[F]or example, '"[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.]"'" (*Ibid.*) '"'As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of [their] prior statements is proper. [Citation.]"'" (*Ibid.*)

We review the trial court's admission of evidence for abuse of discretion. (*Homick*, *supra*, 55 Cal.4th at p. 859.) The court abused its discretion if it "based its decision on impermissible factors [citation] or on an incorrect legal standard [citations]." (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) Whether the court "applied the correct legal standard to an issue in exercising its discretion is a question of law [citation] requiring

de novo review [citation]." (*Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1463 (*Eneaji*).)

The trial court abused its discretion when it admitted the prior out-of-court statements of J. and Alaine because it did so "'based on an application of improper criteria.'" (*Eneaji*, *supra*, 229 Cal.App.4th at p. 1463.) Before it admitted J.'s prior statement, the court stated its rationale: "I think the fair interpretation of the totality of the evidence was that [J.] *did not recall* that backpack or its ownership. And, therefore, the statement that's sought to be elicited will qualify as being inconsistent with his prior testimony." (Italics added.) Before it admitted Alaine's prior statement, the court stated: "The [c]ourt finds an exception based on [Alaine's] *failure of recollection* thereby constituting an inconsistent statement with a specific recollection at the time." (Italics added.) But a witness's lack of recollection is not the proper standard to admit evidence under Evidence Code section 1235 (*Johnson*, *supra*, 3 Cal.4th at p. 1219); deliberate evasiveness is (*Homick*, *supra*, 55 Cal.4th at p. 859). And while evasiveness may generally be inferred from the court's admission of the evidence (*People v. Ledesma* (2006) 39 Cal.4th 641, 712; see Evid. Code, § 402, subd. (c)), we cannot make such an inference here because the court explicitly stated its reasons for admitting the prior statements of J. and Alaine (*McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 705; see also *People v. Tinker* (2013) 212 Cal.App.4th 1502, 1506 [it is "improper to manufacture an implied finding where the trial court has already made an explicit and contrary finding"]).

The Attorney General asserts the trial court's admission of J.'s and Alaine's prior out-of-court statements "must be upheld if the evidence was admissible under any hearsay

exception." (*People v. Karis* (1988) 46 Cal.3d 612, 635.) That assertion is correct. But the Attorney General cites no other exception under which the statements were admissible. Because the court made no evasiveness finding here, and because we cannot imply such a finding on this record, the statements were not admissible as prior inconsistent statements. (*Johnson*, *supra*, 3 Cal.4th at p. 1219.) The trial court's admission of J.'s and Alaine's prior out-of-court statements therefore reflected an "'erroneous understanding of applicable law,'" and was an abuse of discretion. (*Eneaji*, *supra*, 229 Cal.App.4th at p. 1463.)

But the error was harmless. (*People v. Partida* (2005) 37 Cal.4th 428, 439; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) Both Officer Therrien and Corporal Knackstedt testified that they saw a backpack lying near Luna's feet when they approached the apartment. To the extent Corporal Knackstedt's testimony regarding precisely when he saw the backpack next to the cooler was contradictory, he clarified on cross-examination that the backpack was next to Luna when he "got to the porch."

Moreover, there was additional evidence from which jurors could have inferred Luna's guilt: He ran into the apartment when police officers approached. (*People v. Brooks* (1966) 64 Cal.2d 130, 138 ["flight supports an inference of consciousness of guilt"].) He had drug-related text messages on his phone. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 498 [text messages provided evidence of pimping and pandering].) Viewed in a light most favorable to the jury's verdict, it is not reasonably probable the verdict would have been more favorable to Luna absent the erroneous admission of J.'s and Alaine's prior out-of-court statements. (*People v. Alexander* (2010) 49 Cal.4th 846, 918.)

Prior conviction and prior prison term allegations

Luna contends the trial court erred when it accepted his admission to the prior conviction and prior prison term allegations because he did not know what rights he was waiving and did not personally admit the allegations. We disagree.

A defendant may personally admit a prior conviction or prior prison term allegation, or may authorize and adopt an admission made by counsel. (Pen. Code, § 1025; see *People v. Berumen* (1969) 1 Cal.App.3d 471, 476 (*Berumen*) [defendant bound by counsel's admission].) The admission must be knowing and voluntary. (*Yurko*, *supra*, 10 Cal.3d at p. 863.) Thus, before the trial court accepts the admission, the defendant must be advised of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. (*Ibid.*; see *Boykin v. Alabama* (1969) 395 U.S. 238, 243.) We "examine the record of 'the entire proceeding' to assess whether [Luna's] admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances. [Citation.]" (*People v. Mosby* (2004) 33 Cal.4th 353, 361 (*Mosby*).)

The totality of the circumstances indicates that it was. Luna personally waived his right to jury trial, his right to cross-examine witnesses, and his privilege against self-incrimination. His attorney then admitted the priors. The proper procedure was followed. (*Yurko*, *supra*, 10 Cal.3d at p. 863; *Berumen*, *supra*, 1 Cal.App.3d at p. 476.)

We find unpersuasive Luna's argument that counsel's post-verdict admission was invalid because the trial court did not repeat the required waivers after the jury announced its verdict. He cites no authority for the proposition that a brief delay between the waivers and admission somehow divorces the two.

(Cf. *Mosby*, *supra*, 33 Cal.4th at p. 361 [instructing courts to look beyond plea colloquy to determine if plea knowing and voluntary].) An admission even without the required waivers may be knowing and voluntary if it occurs immediately after trial. (*People v. Lloyd* (2015) 236 Cal.App.4th 49, 53; see *Mosby*, at pp. 364-365.)

Finally, we reject Luna's contention that counsel's admission was merely anticipatory. "At this time" means at present, not at some point in the future.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

David R. Worley, Judge

Superior Court County of Ventura

Greg May, under appointment by the Court of Appeal, for Defendant and Appellant.

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