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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHN BONAVIA. Defendant and Appellant.	B278979 (Los Angeles County Super. Ct. No. BA432643)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman Shapiro, Judge. Affirmed.

Kevin Smith, 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, Chung L. Mar and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Bonavia was charged with robbing a taxi driver. (See Pen. Code, §§ 211, 212.5, subd. (a).) Prior to trial, Bonavia filed a motion in limine seeking the admission of a recorded statement that an investigator had obtained from a witness who was present when the alleged robbery occurred. The witness informed the investigator that he and Bonavia had fled without paying the cab fare, but denied that they had robbed the driver. Bonavia argued that the statement was admissible under the hearsay exception for declarations against penal interest. (See Evid. Code, § 1230.) The court excluded the statement, concluding that it was not truly against the witness's penal interest. The jury convicted Bonavia.

On appeal, Bonavia argues that the trial court erred in excluding the witness's recorded statement. We affirm.

FACTUAL BACKGROUND

A. Summary of Facts Preceding Trial

On April 15, 2012, at approximately 3:30 a.m., the Los Angeles Police Department received an emergency 9-1-1 call from Hakob Darbinyan, a taxi cab driver. Darbinyan told the operator that two male customers had attacked him inside his cab, and then stolen his money and fled into an apartment building on Franklin Avenue. Darbinyan also stated that he had pulled a shirt off of one of the assailants during the altercation.

Los Angeles police officer Cody Macarthur was dispatched to the scene of the incident. Macarthur observed that Darbinyan appeared to be very angry, and had abrasions on his knuckles, hands, knees and right elbow. Darbinyan told Macarthur the suspects had robbed him, and then fled into an apartment

building. Darbinyan gave Macarthur a blue shirt and a rope necklace that he had taken from one of the assailants.

Several years after the incident, law enforcement matched DNA evidence that had been found on the blue shirt and the rope necklace to defendant John Bonavia. On June 23, 2015, the District Attorney for Los Angeles County filed an information charging Bonavia with first degree robbery of a public transit operator. (See Pen. Code, §§ 211, 212.5, subd. (a).)

B. Bonavia's Motion to Admit the Out-of-Court Statements of Jordan Greenbaum

Prior to trial, Bonavia filed a motion in limine seeking to admit a recording of an interview his investigator had conducted with Jordan Greenbaum, who had identified himself as the person who had been in the cab with Bonavia on the morning of the incident.

1. Summary of Greenbaum's statements

Greenbaum told the investigator that he and Bonavia left a bar at approximately 2:00 a.m., and then hailed a taxi. Greenbaum stated that shortly after the taxi arrived at their apartment building on Franklin Avenue, he and Bonavia got into an argument with the driver regarding the amount of the fare. Greenbaum explained that they had confronted the driver because they believed he had been driving around "in circles to jack up the fare price." After the cab driver became "verbally aggressive," Greenbaum and Bonavia decided to "run off" without paying the fare.

Greenbaum stated that he fled into his apartment building, and waited inside for an hour. He then went back outside to look for Bonavia, whom he found hiding in a bush. Greenbaum

claimed that Bonavia told him he got into a "physical fight" with the cab driver. According to Greenbaum, Bonavia explained that "he [had] body slammed the cab driver [after] the cab driver lunged at him," and clarified that "he was [only] protecting himself" and that "[h]e had to get away from the cab driver and that was the only way he could and then he ran."

Greenbaum also told the investigator he had not taken any money or property from the taxi, nor had he seen Bonavia do so. Greenbaum also asserted that he believed Bonavia would have told him if he did take any money because they were "brothers." When the investigator asked Greenbaum whether there was any other information he believed might be important, Greenbaum stated: "I can honestly say, I mean I've been friends with [Bonavia] for God knows how long and I've never seen him rob anyone," adding that such conduct would be "outside his character."

2. Trial court proceedings regarding the recording

Bonavia filed a motion in limine arguing that all of the statements Greenbaum made during the interview were admissible under the hearsay exception for declarations against penal interest. (Penal Code, § 1230.) Bonavia contended that Greenbaum's statements had "generate[d] the risk of criminal liability" because he had admitted to "fleeing from a cab without paying the fare," and acknowledged that his accomplice (Bonavia) got into a physical altercation with the cab driver. Bonavia also argued that Greenbaum was "unavailable for trial [because he was] actively avoiding service of a trial subpoena, and his attorney ha[d] confirmed [he would] not appear at trial."

In support of the motion, Bonavia provided a declaration from his attorney stating that a process server had made two

attempts to serve Greenbaum with a trial subpoena. On both occasions, the process server was informed that Greenbaum was out of town. The declaration also stated that Greenbaum's attorney had informed defense counsel that Greenbaum did not intend to cooperate with the process sever, and would invoke his Fifth Amendment right against self-incrimination if compelled to testify at trial.

The court held several hearings regarding the admissibility of the recording. At the first hearing, held September 15, 2015, the court concluded that Bonavia had failed to make a sufficient showing that Greenbaum was unavailable to testify at trial, and denied the motion on that basis. Three days later, Bonavia's attorney submitted a supplemental declaration describing additional efforts the defense had made to serve Greenbaum with a trial subpoena. The court concluded that the supplemental declaration established Bonavia had "done everything that [could] reasonably be expected," and that the witness had no intent to testify.

The court expressed doubt, however, whether any of the statements Greenbaum had made during the interview were truly against his penal interest. The court asked defense counsel to identify which specific statements were against Greenbaum's interest. In response, counsel asserted that Greenbaum's admission that he "[h]e stole a cab ride" was the only statement that qualified as a declaration against his penal interest.

The prosecution argued that the court should exclude all of Greenbaum's statements, including his acknowledgment that he had run from the cab without paying the fare. The prosecution contended that Greenbaum's admission did not actually expose him to any criminal liability because, at the time he made the

statement, the statute of limitations for petty theft had already run.

The prosecution also argued that Greenbaum's statements lacked sufficient indicia of reliability because Bonavia had failed to provide any information regarding how the investigator had obtained the interview. The prosecutor asserted that it was unclear from the recording what the investigator had told Greenbaum about Bonavia's case, or whether the investigator had made any promises in exchange for Greenbaum's agreement to provide a statement. The prosecution also asserted that Greenbaum's statements were not truly inculpatory because he had claimed that he and Bonavia decided to run only after the cab driver attempted to charge them an inflated fare.

Defense counsel maintained that the statements were admissible because Greenbaum had subjected himself to criminal liability by admitting he had run without paying the fare, and by acknowledging he was with Bonavia when the alleged robbery occurred. Counsel conceded, however, that the statements Bonavia had allegedly made to Greenbaum regarding the physical altercation with the taxi driver contained multiple levels of hearsay, and that defense counsel had been unable to identify a valid "exception for [the second layer]."

The trial court found that Greenbaum's statements denying he or Bonavia had taken any money from the cab driver were inadmissible because they were not against his penal interest. The court also indicated that Greenbaum's assertion that he ran without paying the fare was likely to be inadmissible because the statute of limitations for petty theft had expired before he made the statement. The court did not, however, specifically rule.

The next day, defense counsel renewed its motion to admit the entire recording. The court questioned whether any part of Greenbaum's statement was truly against his interest in its entirety.

C. Evidence at Trial

At trial, Darbinyan testified that at approximately 2:00 a.m., two male customers had entered his taxi, one of whom was wearing a blue shirt. The defense stipulated that Bonavia was the person wearing the blue shirt. According to Darbinyan, the men requested that he drive them to an address on Franklin Avenue. When Darbinyan arrived at the location, one of the men asked Darbinyan if he could make change for a $100 bill. Darbinyan told the man he had change, and started to remove a stack of bills from the middle console of his vehicle. When Darbinyan turned on a light, he discovered that the man had handed him a $1 bill. Darbinyan stated that he was then punched in the back of his head, and the men grabbed approximately $200 cash from the front-seat console. The assailants then exited the vehicle, and began running.

Darbinyan testified that he chased after the assailants, and saw one of the men jump over a gate. Darbinyan caught up to the second man, and grabbed him by the shirt. During an ensuing altercation, Bonavia removed the man's shirt, and was then pushed to the ground. The man eventually separated himself from Darbinyan, and fled into the apartment building. Darbinyan retained the man's shirt and called the police.

On cross-examination, Darbinyan acknowledged that on several prior occasions, customers had fled his cab without paying their fare. Darbinyan also admitted that he had

considered quitting his job because he was frustrated that the cab company never did anything to address the problem of fare jumping.

At closing argument, defense counsel asserted that Darbinyan's testimony was inconsistent and not believable. Counsel contended it was highly unlikely that a taxi driver would keep cash in a console that passengers could access. Counsel further contended that it was not credible that two men who had just assaulted and robbed a cab driver would then leave a shirt with the victim. Counsel argued that the more likely scenario was that Bonavia and the other man had decided to flee without paying the cab fare, and that Darbinyan then claimed to have been robbed so the police would respond: "What happened here is there was an argument. I don't know who was right. You don't know who was right. Two young men walked away, ran away, I don't know, you don't know. But, we know that [Darbinyan] had had enough of people not paying. We know that he thought he was right and we know he has a temper. And he got out and grabbed a hold of one of those young men and that young man [was] scared, tore free of his clothing and kept on running. That is what happened. That is not a robbery. If those young men were in the wrong about whatever the dispute of the fare was, it might be misdemeanor theft."

The jury found Bonavia guilty of first degree robbery. (See Pen. Code, §§ 212.5, subd. (a).) The court sentenced Bonavia to the low term of three years in state prison.[1]

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[1] The court sentenced Bonavia pursuant to a plea agreement that included two additional cases. In case no. SA91264, Bonavia pleaded guilty to one count of inflicting corporal injury on a

DISCUSSION

Bonavia argues that all of the statements Greenbaum made to the investigator were admissible under the hearsay exception for declarations against penal interest. (Evid. Code, § 1230.)[2]

A. Summary of Applicable Law and Standard of Review

"[He]arsay statements are generally inadmissible under California law[.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 710-711 (*Grimes*).) "'The chief reasons for this general rule of inadmissibility are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements.' [Citation.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610 (*Duarte*).) "[T]he rule[, however,] has a number of exceptions." (*Grimes*, *supra*, 1 Cal.5th at p. 710.)

One such exception, set forth in Evidence Code section 1230, permits the admission of any statement that "when made, . . . so far subjected [the declarant] to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (§ 1230.) "[T]he rationale underlying [this] exception is that 'a person's

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cohabitant within seven years of a prior domestic violence conviction (see Pen. Code, § 273.5, subds. (a) & (f)(1)), and was sentenced to five years in prison. The three-year prison term in this case was imposed concurrently to that sentence.

2 Unless otherwise noted, all further statutory citations are to the Evidence Code.

interest against being criminally implicated gives reasonable assurance of the veracity of his statement against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements." (*Grimes*, *supra*, 1 Cal.5th at p. 711.)

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.]" (*Grimes*, *supra*, 1 Cal.5th at p. 711.)

"Regarding the second requirement, our Supreme Court has admonished that '[o]nly statements that are specifically disserving to the hearsay declarant's penal interests are admissible as statements against penal interests. [Citations.]' Section 1230 does not authorize the admission of 'those portions of a third party's confession that are self-serving or otherwise appear to shift responsibility to others.' Nor 'does [it] . . . allow admission of non-self-inculpatory statements . . . made within a broader narrative that is generally self-inculpatory.' [Citations.]" (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 71.) Thus, "a hearsay statement 'which is in part inculpatory and in part exculpatory . . . [is generally] inadmissible." (*Duarte*, *supra*, 24 Cal.4th at p. 612.)

"'This is not to say that a statement that incriminates the declarant and also inculpates the nondeclarant cannot be specifically disserving of the declarant's penal interest.' [Citation.] Our Supreme Court [has] . . . explained, for example, that the exception permits the 'admission of those portions of a

confession that, though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.'" (*Gallardo*, *supra*, 18 Cal.App.5th at p. 71 [citing and quoting *Grimes, supra*, 1 Cal.5th at p. 716].) "[T]he nature and purpose of the . . . exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant." (*Grimes, supra*, 1 Cal.5th at p. 716.)

"That a hearsay statement may be facially inculpatory or neutral cannot always be relied upon to indicate whether it is 'truly self-inculpatory, rather than merely [an] attempt [ ] to shift blame or curry favor.' [Citation.] Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, also be exculpatory or have a net exculpatory effect." (*Duarte*, *supra*, 24 Cal.4th at pp. 611-612.)

"[W]hether a statement is self-inculpatory or not can only be determined by viewing the statement in context. [Citation.]" (*Grimes*, *supra*, 1 Cal.5th at p. 716.) "'[T]he court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*Id.* at p. 711.) "Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.'" (*Id.* at p. 716.)

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. [Citation.]." (*Grimes*, *supra*, 1 Cal.5th at pp. 711-712.)

B. The Trial Court Did Not Err in Excluding the Recording

Bonavia argues that the trial court abused its discretion in concluding that none of the statements Greenbaum made to the defense investigator qualified as a declaration against his penal interest.[3] At trial, Bonavia moved to admit three categories of statements that Greenbaum made during the interview: (1) Greenbaum's assertion that he and Bonavia got into an argument with the cab driver regarding the amount of the fare and then fled without paying; (2) Greenbaum's statement that neither he nor Bonavia took any money or property from the cab; and (3) Greenbaum's claim that Bonavia told him the cab driver initiated a physical altercation, and that Bonavia had fought back in self-defense.

Bonavia argues that Greenbaum's statement that he and Bonavia fled without paying the fare was admissible under section 1230 because Greenbaum effectively "confess[ed] to

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[3] At trial, the court found that Bonavia had established Greenbaum was "unavailable to testify" (see generally § 240, subd. (5) [declarant is unavailable when the "proponent . . . has exercised reasonable diligence but has been unable to procure [declarant's] attendance by the court's process"]), but had failed to show that any of Greenbaum's statements were truly against his penal interest. Because we conclude the court did not abuse its discretion in concluding that Greenbaum's statements were not against his penal interest, we need not review the court's finding that he was unavailable to testify.

misdemeanor theft." Although Greenbaum's admission that he fled without paying the fare appears to be inculpatory on its face, several factors persuade us that the trial did not err in excluding the statement. (See generally *Duarte*, *supra*, 24 Cal.4th at p. 612 ["'an approach which would find a declarant's statement wholly credible *solely* because it incorporates an admission of criminal culpability is inadequate'"].)

First, the interview transcript shows that Greenbaum did not merely assert that he and Bonavia fled without paying the cab driver. Instead, Greenbaum's admission of nonpayment was accompanied by other statements suggesting his conduct may have been justified. Greenbaum claimed that before fleeing, he and Bonavia got into an argument with the cab driver because they believed he had inflated their fare by driving in circles. Greenbaum further asserted that the cab driver became "verbally aggressive" toward them during the argument. Greenbaum's assertions as to what occurred prior to having fled tended to "shift responsibility" (*Grimes*, *supra*, 1 Cal.5th at p. 715), to the cab driver and "cast a more sympathetic light on" his own actions. (*Duarte*, *supra*, 24 Cal.4th at p. 613.) Such statements are generally not admissible under section 1230. (*Id.* at pp. 612-613 [statements tending to shift blame to others, or mitigating culpability of own conduct, inadmissible under section 1230]; *Grimes*, *supra*, 1 Cal.5th at p. 715 [section 1230 inapplicable to statements that "appear to shift responsibility to others"].)

Second, considered in context, Greenbaum's admission that he fled without paying was "in part exculpatory" (*Duarte*, *supra*, 24 Cal.4th at p. 612) because it served as an implicit denial that he had committed the greater offense of robbery. As Bonavia concedes in his appellate brief, Greenbaum's statements during

the interview suggest that he "knew . . . Bonavia had . . . been charged with robbery."[4] Given such knowledge, Greenbaum's claim that he and Bonavia had merely run without paying the fare was "self-serving" (*Grimes, supra*, 1 Cal.5th at p. 715) in that it tended to exonerate him of the more serious offense of robbery. (See *People v. Shipe* (1975) 49 Cal.App.3d 343, 353 [trial court properly excluded statements that "exculpated [the declarant] of the greater offense . . . while admitting lesser transgressions"]; *Duarte*, *supra*, 24 Cal.4th at p. 612 ["facially inculpatory" statement "may, when considered in context, also be exculpatory or have a net exculpatory effect"].)[5]

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[4] During the trial court proceedings, defense counsel did not disclose what the investigator had told Greenbaum about Bonavia's case prior to conducting the interview. Greenbaum's statements during the interview, however, strongly imply that he was aware that Bonavia had been charged with robbery. For example, when the investigator asked Greenbaum whether there was any other information he thought might be important, he stated that he had known Bonavia for a long time, and had never seen him rob anyone. Greenbaum further asserted that such conduct would be out of character.

[5] In his appellate brief, Bonavia appears to argue that Greenbaum's admission that he ran without paying the cab driver was against his penal interest because, in addition to exposing him to liability for petty theft, he "expos[ed] himself to [a]. . . felony first degree robbery charge" by acknowledging he was present during the incident. The only portion of Greenbaum's statement that tended to expose him to the robbery charge, however, was his admission that he was with Bonavia on the morning of the incident. His additional statement that he ran without paying the driver clearly served to exculpate him of that robbery charge.

Third, regardless of whether the statements were generally against Greenbaum's own penal interest, the trial court could reasonably infer the statements were not sufficiently trustworthy because he had an incentive to protect Bonavia. (See *Grimes*, *supra*, 1 Cal.5th at p. 716 ["sometimes a declarant who makes an inculpatory statement may have a substantial incentive to exculpate others. . . . A trial court in that situation may reasonably conclude that the declarant's incentive to protect his friends renders the . . . the statement inadmissible"]; *Duarte*, *supra*, 24 Cal.4th at p. 614 ["even when a hearsay statement runs generally against the declarant's penal interest . . ., the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission"].) During the interview, Greenbaum repeatedly referenced his longstanding friendship with Bonavia. Greenbaum described Bonavia as a "brother," contended they had been friends for "God knows how long" and noted that Bonavia had provided him with financial support in the past. Given this relationship, the trial court could reasonably conclude Greenbaum had an incentive to protect Bonavia, thus rendering his claims that he and Bonavia had merely evaded payment of the cab fare inadmissible for lack of trustworthiness.

In sum, while Greenbaum's admission that he and Bonavia evaded paying the cab fare appears inculpatory on its face, the trial court was justified in concluding the statement was nonetheless inadmissible under section 1230 because: (1) the admission was accompanied by other statements that tended to shift blame for their actions toward the cab driver; (2) the statement tended to exculpate Greenbaum from the greater

offense of robbery; and (3) the statement served to protect a person who Greenbaum acknowledged to be a close friend.[6]

The court also acted properly in excluding the second and third categories of statements Greenbaum made at the interview, in which he denied that he or Bonavia had stolen any money from the cab and asserted that Bonavia had said the cab driver initiated the physical altercation. On their face, these statements were "self-serving" and exculpatory in nature, which defense counsel acknowledged during the trial court proceedings. When asked what part of Greenbaum's statement was "against his penal interest," counsel stated, "He stole a cab ride." Counsel then confirmed that no other portion of his statement was actually against his penal interest. Counsel also specifically acknowledged that the statements Bonavia had allegedly made to Greenbaum about the altercation with the cab driver involved multiple hearsay, and that the defense had not been able to identify an exception applicable to the second hearsay level. (See *People v. Williams* (1997) 16 Cal.4th 153, 199, fn. 3 ["The admission of multiple hearsay is permissible where each hearsay level falls within a hearsay exception"].)

Bonavia now argues, however, that these additional statements were "collateral" to Greenbaum's inculpatory admission that he had evaded payment of the cab fare, and therefore "admissible under the rationale of *Grimes* [*supra,* 1

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[6] The Attorney General argues that Greenbaum's admission that he evaded payment of the fare was not against his penal interest because the statute of limitations on petty theft had already run at the time he made his statement. Having concluded that the statement was properly excluded for other reasons, we need not address this issue.

Cal.5th 698]." Even if we assume Bonavia has preserved these claims for appeal, his contention fails on the merits. In *Grimes*, our Supreme Court held that section 1230 does not preclude the admission of "those portions of a confession that, though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.' [Citation.]" (*Grimes, supra,*1 Cal.5th at p. 715.) Thus, a statement that "tends to exculpate another, rather than to shift blame or curry favor, [may be admissible] . . . even though the exculpatory portion of the statement is not independently disserving of the declarant's interests." (*Ibid.*)

Greenbaum's statements that he and Bonavia did not take any money, and that Bonavia told him the taxi driver initiated the physical altercation, do not fall within the rule of *Grimes*. Both statements served to minimize Greenbaum's own criminal culpability, and shift blame to the cab driver for what occurred. The statements were therefore inadmissible under section 1230. (*Grimes*, *supra*, 1 Cal.5th at pp. 714-715 [section does not permit admission of any portion of confession that is "self-exculpatory," "self-serving" or that "otherwise appear[s] to shift responsibility to others"].)[7]

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[7] Bonavia also argues that the trial court's erroneous exclusion of Greenbaum's statement qualified as a violation of his Fifth Amendment right to due process and Sixth Amendment right to present a defense. (See generally *U.S. v. Paguio* (9th Cir. 1997) 114 F.3d 928, 934 ["The accused's right to present witnesses in his own defense may be implicated where an absent declarant's testimony is improperly excluded from evidence"].) Because we conclude the trial court did not improperly exclude Greenbaum's statements, these constitutional claims also fail.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, 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.