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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RODRICK CLAY HALL, Defendant and Appellant.	B267218 (Los Angeles County Super. Ct. No. BA413482)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed, as modified.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Rodrick Clay Hall (defendant) of murdering his half brother. In this appeal, defendant argues that the trial court erred in not granting him a new trial due to newly discovered evidence and in imposing a $5,000 restitution award without making it part of the oral pronouncement of sentence. We reject defendant's first argument and accept his second; we accordingly affirm his conviction but vacate the restitution award.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In early 2013, defendant lived in one unit of a duplex with his aunt, Wanetta Peavy (Peavy); defendant's half brother and grandmother lived in the other unit. One Saturday morning in June 2013, defendant heard his half brother yelling at the grandmother in their unit. When defendant entered that unit, he saw his half brother, Peavy, and his grandmother. His half brother was "angry," was "ranting and raving," was throwing objects (namely, the TV's remote control), and was threatening to kill the grandmother. The half brother had some sort of long kitchen knife in his hand, which defendant called a "butcher" knife. The half brother escorted defendant out of the unit's front door, closed the door, and locked it.

Defendant then retrieved a loaded gun he knew was hidden in the duplex's backyard and went back to his unit to get the front door key for his half brother's unit. Defendant shouted through and banged on the half brother's front door for a few seconds, and then he unlocked the door and entered. Within 30 seconds, defendant fired a single bullet at his half brother that pierced the half brother's arm, both his lungs, and his heart.

Less than a minute after the gunshot, a neighbor heard a man shout, "Die, bitch, die" from the duplex.

Defendant immediately left the unit and changed clothes in his own unit. By the time he was leaving his unit, the police had arrived. When an officer asked defendant his name, defendant gave a false name that was a variation on his real name (either "Clay Hall" or "Rick Clay") and walked away. Defendant thereafter disposed of the gun by tossing it into the sewer or some bushes.

Defendant's half brother died soon thereafter.

II. Procedural Background

The People charged defendant with murder (Pen. Code, § 187, subd. (a))[1] and further alleged that he personally discharged a firearm (§ 12022.53, subd. (d)).

Defendant went to trial. At trial, defendant took the stand and testified that he "really believe[d]" and had "no doubt" that his half brother was going to hurt his grandmother. He also conceded that he was "major pissed" at his half brother.

The trial court instructed the jury on the crimes of murder (both first and second degree) and on voluntary manslaughter (both due to heat of passion and due to imperfect self-defense and defense of others). The court also instructed the jury on perfect self-defense and defense of others.

The jury found defendant guilty of second degree murder and found the firearm allegation to be true. In so finding, the jury necessarily rejected both types of self-defense and defense of others.

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

The trial court sentenced defendant to prison for 40 years to life, comprised of 15 years to life for the murder plus an additional 25 years for the personal discharge of the firearm. At the sentencing hearing, the court imposed a $280 restitution fine but no restitution award. In the minute order and abstract of judgment, however, the court imposed a $5,000 restitution award.

Defendant filed this timely appeal.

DISCUSSION

I. Denial of New Trial Motion

Defendant argues that the trial court erred in denying his new trial motion. We review such denials for an abuse of discretion. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.)

A. Pertinent facts

In a postarrest interview, defendant told police that his aunt, Peavy, was in the duplex unit when he shot his half brother. However, defendant did not call Peavy as a witness at trial. Instead, five and a half months after the jury returned its verdict, he filed a motion for new trial on the ground that Peavy's testimony constituted "newly discovered evidence." The motion proffered that Peavy would testify that, just before the shooting, defendant's half brother held a "large butcher knife" and threatened both Peavy and the grandmother. In support of the motion, defendant did not submit a signed affidavit from Peavy. Instead, he submitted (1) an unsigned affidavit from Peavy, (2) a signed affidavit from defendant's attorney stating that, according to Peavy, the facts outlined in her unsigned affidavit were the "absolute truth," and (3) two affidavits—one signed and one unsigned—from two of Peavy's cousins stating that, soon after

the shooting, Peavy had told them the facts outlined in Peavy's unsigned declaration.

The trial court denied the motion for a new trial. The court cited three reasons: (1) Peavy's proffered testimony was not "newly discovered" evidence because "she ha[d] been known to [defendant] and everybody else since day one"; (2) Peavy's proffered testimony was not credible because her declaration (a) was inconsistent with her recorded statements to a 911 operator immediately after the shooting in which she denied knowing who did the shooting, and (b) was inconsistent with defendant's trial testimony regarding *when* his half brother had the knife in his hands; and (3) Peavy's declaration was unsigned and was thus incompetent evidence. The court denied defendant's further requests (1) to call Peavy as a witness at the hearing on the motion, and (2) to grant Peavy immunity to testify, finding that the potentially incriminating portion of her proffered testimony—namely, that Peavy moved the knife to the table—was not in actuality incriminating.

B. Analysis

A trial court may grant a new trial in a criminal case on the basis of newly discovered evidence. (§ 1181, subd. 8.) To obtain such relief, a defendant must establish that (1) the evidence itself—"'and not merely its materiality'"—is "'newly discovered'" because it "'could not with reasonable diligence have [been] discovered and produced . . . at . . . trial'"; (2) the evidence is "material"—that is, it is not cumulative and would "'render a different result probable on a retrial'"; and (3) "'these facts [are] shown by the best evidence of which the case admits.'" (*People v. Beeler* (1995) 9 Cal.4th 953, 1004 (*Beeler*), quoting *People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*); *People v. Mehserle*

(2012) 206 Cal.App.4th 1125, 1151.) Motions for a new trial on this ground are "disfavor[ed]." (*People v. Love* (1959) 51 Cal.2d 751, 757.)

The trial court did not abuse its discretion in denying defendant's motion for a new trial.

To begin, defendant's motion was procedurally defective. The statute authorizing new trials requires a defendant to "produce . . . the affidavits of the witnesses by whom such evidence is expected to be given . . . ." (§ 1181, subd. 8; *Beeler*, *supra*, 9 Cal.4th at p. 1005.) Here, defendant only produced (1) an unsigned affidavit by Peavy, and (2) the affidavits of others attesting to Peavy's recitation of the facts set forth in her unsigned affidavit. This is insufficient. Peavy's unsigned affidavit is not "an evidentiary document" (*Witchell v. De Korne* (1986) 179 Cal.App.3d 965, 975) and is consequently entitled to "little, if any, credence" (*People v. Cox* (1991) 53 Cal.3d 618, 697, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390). And the other affidavits consist of Peavy's out-of-court statements, which are hearsay and thus also entitled to no weight. (Evid. Code, § 1200 et seq.; *Cox*, at p. 697 [hearsay cannot impeach a verdict].)

Defendant's motion was also substantively without merit because Peavy's testimony was neither newly discovered nor material.

Peavy's testimony is not newly discovered because defendant knew Peavy was present when he shot his half brother. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 309 [evidence not newly discovered when "defendant was aware" of that evidence "during trial"].)

Defendant argues that Peavy's testimony should be deemed to be newly discovered because the People had charged her with being an accessory after the fact to the half brother's murder and, although those charges had been dismissed, the threat of prosecution still remained. We reject this argument for four reasons. First, this argument is inconsistent with the reason Peavy gives in her unsigned affidavit for not coming forward earlier—which is not fear of prosecution but rather because "the people [she] need[ed] to discuss [her testimony] with [were] the very people who ha[d] held [her] as an emotional hostage." Second, this argument is inconsistent with defendant's conduct at the time of trial insofar as he could have asked the court to grant Peavy immunity under the law in effect at that time (see *In re Williams* (1994) 7 Cal.4th 572, 610; *People v. Masters* (2016) 62 Cal.4th 1019, 1051), but never did. Third, this argument rests on the premise that Peavy faced a threat of prosecution, but the conduct Peavy admits to—moving the knife to the table and telling defendant to leave immediately after the shooting—is not incriminating, so there is no need for immunity. (See *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 819 [privilege against self-incrimination only applies to *incriminating* statements].) Lastly, even if Peavy's testimony had been incriminating and necessitated a grant of immunity, "there is no California case supporting" the proposition that evidence known all along becomes newly discovered simply because the source of that evidence could have asserted their privilege against self-incrimination. (See *People v. Prantil* (1985) 169 Cal.App.3d 592, 611-612.)

Peavy's proffered testimony is also not material. Defendant already testified that his half brother was angry and carrying a

knife, and that defendant "really believe[d]" and had "no doubt" that his half brother was going to hurt his grandmother. The jury nevertheless rejected his claim that he acted to defend her, due no doubt to the contrary evidence that defendant was "major pissed" at his half brother; shouted, "die, bitch, die" after shooting him; fled the scene; evaded police; and disposed of the gun. Peavy's proffered testimony—namely, that the half brother was angry and had a knife—would have added nothing to the evidence already before the jury. Additionally, Peavy's testimony was not relevant to establish either perfect or imperfect defense of others. Imperfect defense of others requires proof that a defendant "actually . . . believe[d] in the need to defend," while perfect defense of others also requires proof that the defendant's belief was "objectively reasonable." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Peavy was not competent to testify about what defendant actually, subjectively believed (*Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [testimony "regarding the state of mind of another person" is inadmissible "speculation"]), or about what a reasonable person would have thought under the circumstances (*Humphrey*, at pp. 1098-1099 [expert may not testify to what a reasonable person would have done]; Evid. Code, § 800 [lay witness may only opine on matters "[r]ationally based on [her] perception"]).

Additionally, Peavy's proffered testimony was not material because it was not credible. (*People v. Howard* (2010) 51 Cal.4th 15, 43 [trial court may consider credibility in determining whether the result would differ]; *Delgado*, *supra*, 5 Cal.4th at p. 329 [same].) According to the proffer, Peavy saw the half brother carrying the knife *after* the half brother escorted defendant out of the unit and watched defendant shoot the half

brother "[w]ithin one or two seconds" of reentering the unit. This testimony is inconsistent with Peavy's own statements on the 911 call, where she denied knowing who shot the half brother. This testimony is also inconsistent with defendant's testimony at trial, where he stated that his half brother had the knife *before* he escorted defendant out of the unit and that defendant shot his half brother 30 seconds after reentering the unit.

Defendant offers two further arguments. First, he asserts that the trial court erred in refusing to convene an evidentiary hearing at which he could call Peavy to testify. As a procedural matter, it is unclear whether a trial court may consider anything beyond the affidavits called for by the new trial statute. (Compare *People v. Pic'l* (1981) 114 Cal.App.3d 824, 878-879 [new trial motions based on newly discovered evidence "must be decided solely upon affidavits"], disapproved on other grounds by *People v. Kimble* (1988) 44 Cal.3d 480, 498, with *People v. Shoals* (1992) 8 Cal.App.4th 475, 485, fn. 4 [noting that some courts still entertain live testimony].) In any event, the absence of Peavy's live testimony is of no moment because the trial court evaluated defendant's new trial motion on the assumption that what Peavy offered up in her unsigned declaration was true; having her come to court and repeat it would not have altered the court's analysis or ruling.

Second, defendant contends that an attorney's "lack of diligence to discover evidence" is not a basis for denying a new trial motion. (*People v. Martinez* (1984) 36 Cal.3d 816, 825-826.) This is true, but irrelevant. Defendant's attorney did not need to "discover" Peavy; defendant *himself* knew she was a percipient witness to the shooting. Even if any lapse by defendant's trial counsel were relevant, it is of no consequence because defendant

has not demonstrated that Peavy's proffered testimony would have affected the outcome of his trial.

II. Imposition of Restitution

Defendant also argues that we must vacate the trial court's $5,000 restitution award because the court did not orally impose that award during sentencing, but instead imposed the award in the minute order and abstract of judgment after the fact. Because this addresses whether the restitution statute authorizes an award under these circumstances, our review is de novo. (*In re Tommy A.* (2005) 131 Cal.App.4th 1580, 1586.)

Defendant is correct. In *People v. Zackery* (2007) 147 Cal.App.4th 380, 387-389, the court held that a trial court may not impose a mandatory restitution *fine* for the first time in a minute order; *Zackery's* logic applies with even greater force to a discretionary award of restitution, for which a "defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution." (Compare § 1202.4, subds. (b) & (c) [mandatory restitution fines] with *id.*, subd. (f)(1) [discretionary restitution award].) The People respond that the imposition of a restitution *fine* is mandatory and may be corrected at any time. However, the trial court's error in this case deals not with a restitution *fine*, but with a restitution *award*; the former is mandatory, the latter is discretionary. Accordingly, we vacate the $5,000 restitution award without prejudice to the People exercising their right, under section 1202.46, to seek a restitution award following a properly noticed hearing.

DISPOSITION

The $5,000 restitution award is vacated. The judgment is otherwise affirmed.

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_____, J.

HOFFSTADT

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.*

GOODMAN

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