

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES WALTER MARTIN,

Defendant and Appellant.

3 Crim. C022364
(Super. Ct. No. 86F06757)

FILED

JAN 29 1997

COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON, Clerk

BY _____ Deputy

In 1995 a jury convicted Charles Martin of the 1986 murder and robbery of a drug dealer, Charles Stapleton. On appeal, he contends the trial court committed reversible error by admitting a 1986 tape recorded statement of his then-girlfriend and mother of his three children under the past recollection recorded exception to the hearsay rule. (Evid. Code, § 1237.) He argues the statement was inadmissible because the declarant could not testify they were true statements of fact and there was no foundational showing the statement was trustworthy. We disagree and affirm the judgment.

FACTS

On December 7, 1986, some children discovered a wallet along the bank of the Sacramento River. As they continued to play in the water, they also discovered a box containing a corpse. The corpse was later identified as Charles Stapleton, a drug dealer who had been stabbed eight times in the neck, back and throat. His skull was also fractured.

The wallet contained defendant's identification. Three days later, Bonnie Permenter, gave a tape-recorded statement to the investigating police officers. Permenter, who was then 17 years old and a heavy drug user, told the officers defendant had told her that he and a friend had talked about "bumpin' off" a drug dealer. When defendant showed up with money and drugs about two weeks later, he told Permenter, "All I did was rob him." Permenter believed defendant's friend was the mastermind behind the robbery.

Permenter also gave the officers a confused chronology of events, often changing the dates and times when events occurred. Essentially, she told the officers that defendant had come home with money and drugs and had sulked for a day. The following night he decided to go fishing. He had a padlocked box in his car, and when asked, explained he had tools in the box. His car got stuck in the sand at the river and he called Permenter to help pull the car out of the sand. Eventually, they were forced to call a tow truck. Defendant was panicky and fidgety while they waited for the tow truck. The rest of the day Permenter was

in and out of the house and trailer where she was residing with defendant and his parents. Defendant disappeared.

Permenter lived with defendant on and off for four or five years in Illinois. He fathered three of her children. She continued to abuse drugs and alcohol. They eventually split up. He was arrested in Florida in 1994.

DISCUSSION

The dispositive issue presented by this appeal is whether Permenter's 1986 tape-recorded statement was properly admitted under the "past recollection recorded" exception to the hearsay rule. Section 1237 of the Evidence Code provides: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement. . . ."

Defendant argues the statement was inadmissible because Permenter did not testify the statement she made was a true

statement of fact, and therefore, the foundational requirements of section 1237 were not satisfied. The court conducted an evidentiary hearing pursuant to Evidence Code section 402 to determine the admissibility of the statement. The pertinent testimony from the 402 hearing can be summarized as follows.

Permenter testified she will always love the defendant because they had three children together and it would upset her if her testimony sent him to prison. She admitted she did not want to testify or talk to the prosecutor's investigator; she had abused alcohol and methamphetamines for many years; she was currently drinking and using cocaine; and she believed her lack of memory might be due to her drug use.

Reflecting back on the events of December 1986, Permenter's recollection was intermittent. She vaguely remembered reading an article in the newspaper about a body being found in the river. But she did not have any memory of the 1986 interview. She denied saying defendant had told her he had hit or robbed anyone or confessed to being involved in a murder, but she said that if she had spoken to the police in 1986, she would have told the truth. She recognized the voice on the tape as hers and conceded that her memory would have been fresher at the time she made the statement than it was at the time of trial.

A defense expert testified that long-term methamphetamine and alcohol use could affect one's memory.

The trial court ruled: "In this case I'm satisfied that her statement that if she had made a statement to the police that it would have been truthful and accurate would -- that along with

the other elements satisfies all of the required elements of past recollection recorded. [¶] I'm also further satisfied that this type of a statement being made to her even while using the drug methamphetamine which is a stimulant and not a depressant that that is the type of thing one would logically remember. [¶] The fact that she then later gave a statement to police about those statements made to her reinforces the fact that she at that time recalled the statements. [¶] And for her to now at this point even nine years later say that she has absolutely no recollection of someone making such statements to her implicating the declarant in a murder that I'm satisfied that her -- that she is feigning loss of memory as to those original statements made to her."

The trial court's ruling is consistent with recent case law. In *People v. Cummings* (1993) 4 Cal.4th 1233, the defendant sought to exclude a jail informant's statement to a detective. The informant testified his conversations with the defendant occurred while they were being transported to court appearances, but he "had no recall of the conversations with [defendant] or [the detective], had been undergoing detoxification, was sometimes delusional, and was still having drug-related problems at the time of trial." (*Id.* at p. 1293.) He testified, however, he had told the detective the truth. (*Ibid.*)

The Supreme Court concluded: "As the trial judge recognized, whether an adequate foundation for admission of [the informant's] statement to [the detective] had been established turned on whether [the informant's] testimony that his statement

was true was reliable. . . . [The informant] had sufficient recall of the events that the trial court had a sufficient basis for concluding that his testimony was reliable. The judge was aware that [the informant] had testified that he was delusional and did not know what the facts were, and had said that he did not recall, but, after extensive argument, admitted the evidence. We cannot conclude that she abused her discretion in doing so. She heard the testimony and had the best opportunity to assess the credibility of the witness. Her conclusion that [the informant] testified truthfully and reliably when he said that his statement to [the detective] was true is supported by the record." (*Id.* at pp. 1293-1294.)

The court in *People v. Miller* (1996) 46 Cal.App.4th 412 applied the *Cummings* rationale on similar facts. "Here, the witness acknowledged talking to the detective on November 22 and she asserted that she was trying to tell the detective the truth at that time. She remembered discussing with him statements she overheard about shooting police officers; however, she was unable to recall if she told the detective that Hunter was one of the people who made such a statement. Despite her current lack of memory as to what she had told the detective regarding Hunter, there was a sufficient basis, as there was in *Cummings*, upon which the trial court could conclude that her statements to the detective were reliable and met the requirements of Evidence Code section 1237. As such, there was no violation of either defendant's rights to confrontation or cross-examination. As in *Cummings*, both defendants had a full opportunity to and did

question the witness about her bias, lack of recall and other matters pertinent to her credibility." (*Id.* at p. 424.)

Cummings and *Miller* are dispositive. The trial court had the same opportunity to assess the declarant's credibility. He made an express finding she was feigning her lack of memory and there is ample evidence to support the court's finding. By her own admission, Permenter loved defendant and did not want to play a part in sending him to prison. Her motivation to feign memory loss was thus blatant. The court observed, nevertheless, that she did recall the general time frame, other pertinent events in her life at the time, and even vague details about the discovery of the body from newspaper accounts. Most significantly as the court pointed out, she testified she would have told the police the truth. Hence, we conclude the trial court did not abuse its discretion in finding a sufficient foundation for admitting the evidence. The defendant's ability to challenge the declarant's credibility before the jury adequately protected his constitutional right to confrontation.

Defendant insists that *People v. Simmons* (1981) 123 Cal.App.3d 677, and not *Cummings* and *Miller* is controlling. We disagree. In *Simmons*, the declarant suffered from amnesia at the time of trial. He could not recall any event recorded in his prior statement, making the statement, or any circumstance surrounding its preparation. (*Id.* at p. 682.) He did testify that to the best of his knowledge, he had no reason to lie when he made the statement. But, as the court pointed out, "One who has no knowledge as to the truth or falsity of a representation

may honestly say it is either true or false to the best of his knowledge with neither rejoinder having any evidentiary value." (*Id.* at p. 683.)

Permenter did not suffer complete amnesia as the declarant in *Simmons*, but had the same selective memory lapses as the *Cummings* informant who, like Permenter, was suffering the effects of drug abuse. Since the essence of the exception is the assessment of the reliability of the statement, and that determination is dependent on the credibility of the declarant, the trial court occupies the best vantage point from which to decide whether the statement is reliable. Here, as in *Cummings* and *Miller*, we defer to the trial court's exercise of discretion, and based on the substantial evidence in the record to support the trial court's findings, we affirm the ruling. Although as defendant emphasizes, there are many internal inconsistencies in Permenter's recitation of the chronology of events over a two or three day period, the judge, and ultimately the jury, had the prerogative to evaluate her credibility and weigh her testimony accordingly.

The Attorney General's contention the defendant waived his right to object to the admissibility of the statement is at odds with the record. To the extent there is any ambiguity surrounding defense counsel's remarks at the time the statement was admitted, she clearly renewed her objection later at trial.

Finally, since we have concluded the statement was properly admitted, there is ample evidence to support the verdict. The statement together with defendant's identification found at the

same place as the body, his flight immediately following the murder, his prolonged disappearance, and the discovery of one of the victim's Cadillacs at defendant's friend's house, constitutes substantial evidence to support the convictions for murder and robbery.

The judgment is affirmed.

RAYE _____, J.

We concur:

BLEASE _____, Acting P.J.

MORRISON _____, J.

PROOF OF SERVICE

I am a citizen of the United States and am employed in the City and County of San Francisco. I am over the age of 18 years and am not a party to the within action. My business address is 1795 Union Street, San Francisco, California. On the date specified below, I served the following:

APPELLANT'S PETITION FOR REVIEW

on the interested parties by placing a true and correct copy thereof in a sealed envelope with postage prepaid thereon and placing the same in an United States Postal Service Mail Box addressed as follows:

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I declare under the penalty of perjury that the foregoing is true and correct. Executed this 7th day of March, 1997.

