



The People v. andrew Ramirez

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P. v. Ramirez CA4/2

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OPINION

Affirmed.

I. INTRODUCTION

Defendant Andrew Ramirez appeals from his conviction of murder with a robbery special circumstance (Pen. Code,¹ §§ 187, subd. (a), 190.2, subd. (17)) and various enhancements.

Defendant first makes a multi-pronged attack on the admission of his pretrial confession. He argues: (1) the trial court erred in finding that valid Miranda² admonishments were given; (2) the trial court erred in finding he waived his right to remain silent; (3) the trial court erred in finding he waived his right to counsel; (4) the trial court erred in finding a voluntary, knowing, and intelligent waiver of his rights; (5) he was denied due process because his confession was involuntary; and (6) he was denied a fair and full Miranda hearing because of prosecutorial misconduct and ineffective assistance of counsel. He further argues he was denied his due process rights to a fair trial and fair hearing on his motion for new trial because of prosecutorial misconduct and ineffective assistance of counsel; he was prejudiced by the jury's learning he had committed a gang-related robbery-kidnapping shortly after the current murder; the cumulative effect of the errors was prejudicial; and the 10-year gang enhancement was unauthorized. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

On the night of April 20, 2007, Marvin McLeod, Daniel Aguirre, Andrew Contreras, and other friends attended a party in South Colton, where they all consumed beer. Around midnight, the group of friends was standing around a car when three men approached. Two of the men walked through the group of friends and tried to grab their property. The shortest of the three men wore a bandana over



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his face and held a shotgun; one of the men ordered the friends to empty their pockets. Contreras was holding a flashlight and refused to give it up. The gunman pointed the shotgun at Contreras's chest and said, "You want to die tonight?" and "You better give it to me or I'm going to blast you."

Aguirre grabbed the barrel of the gun and pushed it toward the ground. The gunman stepped off the curb and ordered Aguirre to step back. McLeod began pushing the gunman. Aguirre testified that the gunman simultaneously struck him on the side of the head with the barrel of the shotgun and fired it at McLeod's head. Aguirre was momentarily knocked unconscious. Another of the group of friends testified that he saw the gunman hit Aguirre with the butt of the gun and then take two steps back and wait one to two minutes before firing at McLeod.

McLeod died from a firearm injury to his head. The lack of stippling indicated the barrel of the shotgun was more than two or three feet away when the gun was fired.

Aguirre testified he believed the gunman had a tattoo going up his neck, but none of the witnesses was able to identify the gunman. Defendant has the Colton ZIP Code tattooed on his face.

On May 11, 2007, the police initiated a traffic stop of a vehicle containing four men. After a short chase, the four men got out of the vehicle and fled. The police apprehended the driver and one of the passengers, who was a documented South Side Colton gang member. The police later learned defendant had been one of the passengers who got away. The police found a pistol grip shotgun and two other weapons in the car.

The police arrested defendant on June 12, 2007. He was interviewed at the police station, and during the interview, he told the detectives that on the night of the shooting, someone had grabbed the gun. He did not want to lose it, so he pulled it back and then pushed it toward the victim. The gun went off, and he ran. He did not mean for anyone to get hurt. He refused to say who was with him. He claimed he did not know the gun was loaded. He denied wanting to take property from the victims and denied saying anything like, "It's time," when he approached the victims. A DVD of the interview was played for the jury, and the jury was provided with a transcript of the audio portion.

Because defendant raises no challenge on appeal to the true finding on the gang enhancement allegation, evidence concerning that allegation has been omitted from the statement of facts.

The jury found defendant guilty of robbery murder while personally and intentionally discharging a shotgun, which proximately caused death. (§§ 187, subd. (a), 190.2, subd. (a)(17), 12022.53, subds. (b)-(d).) The jury also found true a gang-benefit allegation. (§ 186.22, subd. (b)(1)(C).)

The trial court sentenced defendant to prison for life without the possibility of parole, with consecutive enhancements of 25 years to life for the firearm use (§ 12022.53, subd. (d)), and 10 years for the gang-benefit allegation (§ 186.22, subd. (b)(1)(C)).



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Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Alleged Miranda Violations

Defendant argues: (1) the trial court erred in finding that valid Miranda admonishments were given; (2) the trial court erred in finding that he waived his right to remain silent; (3) the trial court erred in finding he waived his right to counsel; (4) the trial court erred in finding a voluntary, knowing, and intelligent waiver of his rights; (5) he was denied due process because his confession was involuntary; and (6) he was denied a fair and full Miranda hearing because of prosecutorial misconduct and ineffective assistance of counsel.

1. Standard of Review

"In reviewing the trial court's determinations of voluntariness, we apply an independent standard of review, doing so 'in light of the record in its entirety, including "all the surrounding circumstances--both the characteristics of the accused and the details of the [encounter]."' [Citations.]" (People v. Neal (2003) 31 Cal.4th 63, 80 (Neal) In conducting our review, however, ""we accept the trial court's factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence." [Citation.]" [Citation.]" (People v. Richardson (2008) 43 Cal.4th 959, 992-993.)

2. Additional Background

Defendant moved in limine to exclude his confession on the grounds that he never agreed to speak to the detectives, his statements were induced through express and implied promises of leniency, and he expressly invoked his right to counsel but the detectives ignored his request and continued questioning him.

The trial court held an Evidence Code section 402 hearing, at which the court heard the testimonies of defendant and the interviewing officers, Detectives Robert Wilson and Jack Morenberg. The trial court had previously reviewed a DVD of the interview and a transcript of the interview³ and had also reviewed a portion of a copy of a VHS videotape of the interview but found that the quality of the videotape was no better than that of the DVD. The trial court stated that, although it had used headphones and had listened to key passages on the DVD over and over, it could not make out the statements in which defendant contended he had asked for an attorney.

The DVD and the transcript of the interview indicate that police Detectives Wilson and Morenberg interrogated defendant on June 12, 2007. At 12:43 p.m., defendant was led into the interview room



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and was given some water. The detectives entered the room at 12:56 p.m. Detective Wilson informed defendant that he was under arrest and read defendant each of his rights. As to each question, defendant replied, "Yes." Detective Wilson then said, "Okay. These rights in mind you want to talk to me today about what's going on? I've got some questions I'd like to ask you." Defendant initially remained silent.

The detectives told defendant they had "some good information that it might have been an accident . . . which would make a big difference for you," and "It's a big, big difference between some type of accident and a purposeful shooting."

Defendant started crying and said he was scared. The detectives continued to suggest the shooting might have been an accident but that defendant had to be forthcoming, and stated that they had even heard from defendant's girlfriend that it had been an accident. Defendant made an unintelligible response. Detective Morenberg stated, "All you have to do, Andrew, is just tell us your part in this and how it came about. That's all. That's the best thing for you. That's the best tactic for you to minimize your involvement." Detective Wilson added, among other things, "I'm not gonna lie to you that yeah, are [sic] gonna be a problem but the more honest you are about it and you sit there and if you just keep, keep doing it and compounding it. You know these guys, these guys aren't giving you any help. The people who identified, you know, identified you in this shooting. You know, did it hap, [sic] was it an accident. You're a young kid. I, I think that maybe you know, you went down there and it was something that A, you guys thought a cool idea and something got out of hand and you know push came to shove and maybe, maybe the gun accidentally went off." Detective Morenberg stated they had heard someone had grabbed the gun and tried to pull it away and asked defendant to confirm that.

The detectives discussed what they had heard about how the shooting had taken place. Detective Wilson said, "You know things happen. This guy lost his life but whether, whether it happened; your version is an accident. That's what makes the difference." Detective Morenberg then said, "That is if that's, if that's what you're gonna say. Your girlfriend is telling us that and the other people are saying that's what happened. We just need to hear it from you. There's a big difference between first-degree murder and manslaughter."

Detective Wilson next said, "I can deal with the DA if you're cooperative. If you're not cooperative I'm just goin' in there and hey, yeah you know, he's not, he's not being cooperative. Then we just throw everything at him because he doesn't you know he doesn't want to, try to do anything but sit there and You know you feel bad, I can see you feel bad. Like I said don't, don't throw it all away for that. You're a young kid."

The detectives told defendant not to let the other participants pin it all on him and told defendant he was the "easiest to identify." Detective Wilson, apparently referring to defendant's tattoo, said, "Look . . . what's on the side of your head[,] man." Defendant responded, "I know. . . . If I was to hire a good



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lawyer, one that could defend me wouldn't that look bad against me or anything. I just like, I feel like, like, like trapped like . . . like a cell." Detective Morenberg responded, "Look Andrew you're not trapped. Here, ask me a question. There's not trapped. There, you, you know how this works, you talked to some of the other guys okay. We have certain bits of information. Identification, we got different secret stuff that I can't tell you about. You know, we know your girlfriend talked to you about it." Defendant, who was crying, asked "what girlfriend?" The following dialogue ensued:

"Detective Morenberg: What's her name Jeannie right?

"[Defendant]: (Unintelligible)

"Detective Morenberg: (Unintelligible) okay we don't, don't get them involved with it okay.

"[Defendant]: Alright then.

"Detective Morenberg: Kay. Let, let's not, we don't want to have her involved or get anybody else involved with it alright. She's gonna have a baby soon, right?

"[Defendant]: We don't know yet. She doesn't know yet.

"Detective Morenberg: Not sure?

"[Defendant]: No.

"Detective Morenberg: Okay. Well . . .

Finally, at 1:08 p.m., approximately 11 minutes into the interview, defendant said "Alright, I want to cooperate. (Crying) I want to cooperate, I just don't." Defendant's confession then ensued until, at 1:36 p.m., at page 24 of the transcript of the interview, defendant said it would be better if he spoke with an attorney because he was scared and confused.

Defendant testified that he had stated near the beginning of the interview, "I don't want to talk to you guys without a lawyer." Neither of the detectives responded, but "[i]t was like they just ignore me and kept on asking me the questions like I never even said." Defendant testified that he just stayed quiet, and he later again asked for an attorney: "I know I asked for it that one time. When they kept on asking me, I stayed quiet. I can't say that I--the exact time. I know I asked for an attorney a few times." He stated that when he had said he felt trapped, he had asked for an attorney. He stated that after he asked for an attorney, one of the detectives told him that if he talked to them "that it would not be a murder, that he would try me for manslaughter and a few robberies." That statement had influenced his decision to talk, because he did not believe the detectives would lie to him, and he thought they had the power to determine what he could be convicted of. Defendant claimed he had



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requested an attorney after his girlfriend had been mentioned, and he denied that he had really said he did not want to involve his girlfriend.

Detective Wilson testified that defendant had not said he wished to speak to a lawyer "[a]t any time prior to his telling [the detective] what happened." Instead, defendant had said, "I don't want . . . [to] say anything that fucks me in the end." Defendant never said he wanted counsel at the time he said he felt trapped; instead, he asked if it would look bad if he hired a good attorney.

Detective Morenberg testified that defendant had not asked to speak to an attorney in any of the unintelligible portions of the tape. If defendant had done so, Detective Morenberg would have asked follow-up questions to clarify defendant's wishes. When defendant indicated his desire to speak with an attorney near the end of the interview, Detective Morenberg had continued to ask him questions to clarify that he was invoking the right to counsel.

Following arguments of counsel, the trial court found that, in context, Detective Morenberg did not make a promise of leniency when he asked defendant whether he wanted to go to jail for two robberies and a murder. The court observed that throughout the interview, defendant never responded in any way that would indicate he thought a deal was being offered. As noted, the trial court found that defendant had invoked his right to counsel on page 24 of the transcript of the interview, and all statements after that would be suppressed. The trial court further found, however, that defendant had not invoked his right to an attorney before that. The trial court stated it believed the officers' testimony about what defendant had said in the unintelligible portions of the interview. The trial court found that defendant had not been coerced; the trial court noted that the videotape showed "an individual who, though upset and scared, basically wanted to tell his story to the police."

3. Voluntariness of Confession

Defendant contends that, although standard Miranda admonishments were given, the detectives vitiated those admonishments by later saying defendant could be punished for remaining silent; the trial court erred in finding a voluntary, knowing, and intelligent waiver of his rights; and he was denied due process because his confession was involuntary. Although defendant frames his arguments under a variety of separate headings, his challenge ultimately boils down to the argument that his confession was involuntary.

"[T]he primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves." (Davis v. United States (1994) 512 U.S. 452, 460.) No precise words or formulation of the warnings is necessary to meet Miranda requirements. (Florida v. Powell (2010) __ U.S. __ [130 S.Ct. 1195, 1204, 175 L.Ed.2d 1009].) Instead, "[t]he inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" (Id. at p. __ [130 S.Ct. at p. 1204]). Here, Detective Wilson read the standard Miranda warnings, and defendant acknowledged each. Defendant's challenge, however, is based on other statements the detectives



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made. Defendant argues the trial court erred in finding a voluntary, knowing, and intelligent waiver of his rights. He asserts the detectives relied on "promises, threats, trickery, cajoling and badgering" to induce him to confess.

"A statement is involuntary [citation] when, among other circumstances, it 'was "'extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight'" [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.' [Citations.]" (Neal, supra, 31 Cal.4th at p. 79.)

Defendant maintains the detectives coerced him by suggesting his girlfriend need not be involved. The detectives told defendant, "[w]e even got your girlfriend tellin' us it was an accident." Defendant made an unintelligible response. After more comments by the detectives, Detective Morenberg told defendant that defendant's girlfriend and others were saying the killing had been an accident.

We discern nothing coercive about the exchange.

Defendant argues his confession was involuntary because Detective Morenberg suggested there was a "big difference between first degree murder and manslaughter." The detective's representation was in fact a correct statement that, if the killing had resulted from an accident, defendant could potentially be charged with manslaughter rather than murder. The detectives did not tell defendant that an unintentional discharge of a firearm during a robbery was the same as an accident or that defendant could be charged only with manslaughter if he did not intend to kill the robbery victim.

Defendant contends Detective Wilson's statements that he could "deal with the DA if you're cooperative" and "If you're not cooperative I'm just goin' in there and hey, yeah you know, he's not, he's not being cooperative," were both a threat of punishment for remaining silent and an improper offer of leniency for confession. Threatening to inform the prosecutor that a suspect refuses to cooperate violates the suspect's right to remain silent. (United States v. Harrison (9th Cir. 1994) 34 F.3d 886, 891.) However, offering to note a defendant's cooperation with the district attorney is permissible, at least when the police do nothing to suggest they can influence the decisions of the prosecutor. (People v. Carrington (2009) 47 Cal.4th 145, 174; People v. Jones (1998) 17 Cal.4th 279, 297-298.)

In Neal, our Supreme Court held that the trial court had erred in admitting defendant's three confessions. First, the interrogator, Detective Martin, intentionally continued questioning the defendant after the defendant invoked his rights to counsel and to remain silent. (Neal, supra, 31 Cal.4th at pp. 80-81.) Second, Martin "went beyond his deliberate violation of Miranda in order to make both a promise and a threat to defendant Specifically, Martin told the defendant, "'I mean this is your one chance. I am the bus driver in [a] Greyhound bus and you are the passenger back there. I mean this--make believe that I am driving the bus and you want to get off the bus. It's going to be up to the bus driver, me, you know to let you off that bus. You know closer to home or I can



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take you all the way to Timbuktu. Now I am the one you need to tell hey I want to get off this bus.' If you 'try and cooperate,' 'I can make it as best as I can for you. But believe me, if you don't try and cooperate . . . , the system is going to stick it to you as hard as they can . . . , they are going to just hit you as hard as they can,' that is, '[c]harge you with a heavier [sic] charge as they can, you know first degree murder or whatever.'" (Neal, *supra*, at p.81.)

The Supreme Court stated: "Promises and threats traditionally have been recognized as corrosive of voluntariness. [Citations.] Here we have both a promise and a threat. Each was made by Martin long after he should have brought the first interview to an end upon defendant's repeated invocation of both his right to remain silent and right to counsel. Specifically, Martin threatened defendant, in Martin's Greyhound bus metaphor, to drop defendant off closer to Timbuktu than to home if he did not cooperate. Martin also promised defendant, if he did cooperate, to make it as good for him as he could." (Neal, *supra*, 31 Cal.4th at pp. 84-85, fn. omitted.) The court held that "[b]oth the promise and the threat had the effect plainly intended by Martin," because defendant's statements indicated he had expected Martin to "help him out" as indicated. (Id. at p. 85.) The court held, in light of the totality of the circumstances, which included that the young, inexperienced defendant of low intelligence had been subjected to isolation, food deprivation, and lengthy interrogation, that the defendant's confessions had been involuntary. (Id. at pp. 84-85.)

Here, even if we assume for purpose of argument the detectives' remarks crossed the line, that would not end our inquiry, because no one factor is dispositive. Instead, we must determine, in light of the totality of the surrounding circumstances, whether defendant's confession was involuntary. (See Neal, *supra*, 31 Cal.4th at pp. 82-85.) Here, the probation report indicates defendant had completed 11th grade, but there was no indication he was of low intelligence. He was given water immediately upon entering the interview room, and the interview began within minutes. Eleven minutes after being read his Miranda rights, defendant said he wanted to cooperate. The interview was conducted in a standard police interrogation room during the middle of the day. In contrast, the defendant in Neal was described as being of low intelligence. He had been placed in a cell without a toilet and was not taken to a bathroom or given water until the next morning. He was confined incommunicado, and he was not given food for more than 24 hours in custody and more than 36 hours since his last meal. (Neal, *supra*, at p. 84.)

In Neal, the interviewing officer made explicit threats for failure to cooperate and promises of leniency for cooperation. (Neal, *supra*, 31 Cal.4th at pp. 81-85.) In *People v. Holloway* (2004) 33 Cal.4th 96, in contrast, the court held that a detective did not cross the line "by mentioning a possible capital charge or suggesting that defendant might benefit in an unspecified manner from giving a truthful, unmitigated account of events." (Id. at p. 117.) To the extent the detective implied that a blackout or accident defense might help the defendant avoid the death penalty, "he did no more than tell defendant the benefit that might 'flow[] naturally from a truthful and honest course of conduct" (Id. at p. 116.) In *People v. Maestas* (1987) 194 Cal.App.3d 1499, the court likewise rejected the defendant's contention that his confession had been induced by threats. The court explained that



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"the gist of the comments cited by [the defendant] was not that he would be punished for not confessing but that his concealment of the identity of the person who shot the victim tended to reflect negatively on the extent of his involvement. The comments explain the possible consequences, depending upon his motivations and involvements in the shooting, and as such do not constitute 'threats' or 'false promises of leniency.'" (Id. at pp. 1506-1507, fn. omitted.) Here, the detectives' remarks were ambiguous and, in context, were more like those found unobjectionable in *Holloway* and *Maestas* than like those condemned in *Neal*.

In *Neal*, the court observed that "[b]oth the promise and the threat had the effect plainly intended" by the interviewer--the defendant initiated a second interview because he felt the detective would be able to help him, and he began the second interview by stating, "you gotta tell them that I helped you out, so that they help me out when I go to court." (Neal, supra, 31 Cal.4th at p. 85.) The defendant later made statements indicating he believed the interview would move him closer to going home and communicating with his mother. (Ibid.) Here, in contrast, as the trial court observed, defendant never made a single statement suggesting he believed the detectives would provide any benefit if he cooperated, or conversely, that he believed there would be any negative consequences if he remained silent.

In *Neal*, in addition to making improper threats and promises, the officer had continued to interrogate the defendant in a deliberate violation of *Miranda* after the defendant had invoked his rights. (Neal, supra, 31 Cal.4th at pp. 80-81.) No such circumstance occurred in the present case before defendant made his confession.

In *Neal*, the court found a single circumstance that weighed in favor of voluntariness, i.e., that the defendant's confession had been induced in part by his guilty conscience. (Neal, supra, 31 Cal.4th at p. 85.) Here, likewise, that circumstance weighs heavily in favor of voluntariness. Throughout the interview, defendant repeated that he had not meant for the shooting to happen, he had not intended to hurt anyone, he was sorry, and he had not wanted anyone dead. Moreover, defendant's confession tended to be exculpatory: The shooting had been an accident, it had all happened too fast, he had not aimed the gun at anyone, he had not had his finger on the trigger. However, he consistently refused to identify any of the other participants.

Weighing all of the circumstances, we conclude defendant's confession was voluntary and the trial court did not err in admitting it into evidence.

4. Waiver of Right to Remain Silent

Defendant next argues the trial court erred in finding that he waived his *Miranda* rights to remain silent. More specifically, he maintains the detectives began interrogating him before he ever waived his rights, and his silence was itself an invocation of his right to remain silent.



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A defendant need not expressly waive his Miranda rights for a confession to be valid; rather, the trial court may find the defendant impliedly waived his rights. (Berghuis v. Thompkins (2010) __ U.S. __ [130 S.Ct. 2250, 2262, 176 L.Ed.2d 1098] (Berghuis); North Carolina v. Butler (1979) 441 U.S. 369, 373, fn. 4.) An implied waiver may be found when the defendant is advised of and acknowledges his rights and then proceeds to answer questions. (People v. Hawthorne (2009) 46 Cal.4th 67, 87.) Whether there has been an implied waiver is determined based on "'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' [Citation.]" (North Carolina v. Butler, supra, at pp. 374-375.)

In Berghuis, the United States Supreme Court held: "Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (Berghuis, supra, __ U.S. __ [130 S.Ct. at p. 2262].) In that case, the court held the defendant had made an implied waiver of his rights when he responded to a detective's question after remaining silent for nearly three hours, and he had told the officers neither that he wanted to remain silent nor that he wanted to talk to them. (Id. at pp. 2260, 2262-2263.)

In this case, Detective Wilson read defendant his rights at 12:57 p.m. Like the defendant in Berghuis, defendant neither expressly invoked nor waived his rights, but instead remained mostly silent. Eleven minutes later, however, at 1:08 p.m., defendant expressly said he would cooperate. We conclude the trial court did not err in finding defendant voluntarily waived his right to remain silent.

5. Waiver of Right to Counsel

Defendant argues the trial court erred in finding that he waived his right to counsel.

Defendant asserts he twice invoked his right to counsel early in the interview, and the detectives violated his rights when they continued the interrogation. After hearing the testimony of defendant and the detectives and after reviewing the recording and transcripts of the interview, the trial court made a factual finding that defendant never invoked his right to counsel until well into the interview. With respect to the first purported invocation, the trial court found the more reasonable interpretation was that defendant was concerned with not involving his girlfriend, who was possibly pregnant. The trial court pointed out that Detective Morenberg showed no reaction on the videotape that would have been expected if defendant had in fact invoked his right to counsel at that point.

Although defendant asks this court to make its own factual determinations based on our viewing the recorded interview, the trial court's factual findings were based, in part, on the credibility of the witnesses. It is not our function on appeal to reassess the credibility of witnesses. (See, e.g., People v. Richardson, supra, 43 Cal.4th at pp. 992-993.) We conclude substantial evidence supports the trial court's factual findings as to what defendant said--or did not say--during the interview. (People v. Williams (1997) 16 Cal.4th 635, 660.)



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6. Prosecutorial Misconduct and Ineffective Assistance of Counsel at Miranda Hearing

Defendant argues he was denied a fair and full Miranda hearing because of prosecutorial misconduct and ineffective assistance of counsel. Specifically, he argues the prosecutor committed misconduct by (1) failing to enhance the original VHS videotape to make it more intelligible; (2) failing to inform the trial court that the interview transcripts were incomplete; and (3) failing to inform the trial court that the detectives had returned to the interview room and attempted to renew the interrogation. In the alternative, he argues he received ineffective assistance of counsel, because his trial attorney did not attempt to enhance the videotape and did not object to the incompleteness of the transcript and the detectives' misleading testimony.

a. Additional background

After defendant invoked his right to counsel, the detectives continued to speak to him; Detective Morenberg asked him if he wanted to talk about a robbery that had occurred the preceding Friday. Defendant said he did not; he wanted only to lie down and think. The detectives left the room at 1:40 p.m.

However, at 1:57 p.m., the detectives returned and gave defendant a legal pad so he could write an apology to the victim's family. They also placed a photo lineup in front of him and asked him to identify the other persons involved. Defendant twice said he did not want to answer any more questions. He took up a pen and appeared prepared to write something on the legal pad, but then said he did not want to. The detectives left the room at 2:00 p.m. The discussion that took place was not transcribed.

b. Prosecutorial misconduct

The People contend defendant has forfeited any claim of prosecutorial misconduct because he never raised proper objections in the trial court.

A defendant may not complain on appeal of prosecutorial misconduct unless he raised a timely objection in the trial court. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Here, the prosecutor informed defense counsel on the record that the DVD and VHS used at the Evidence Code section 402 hearing were both copies. Defense counsel knew the prosecution had not enhanced the videotape, and defense counsel observed he would have a week before trial to determine whether the DVD could be enhanced. However, defense counsel never raised any objection to the use of the unenhanced recording. Moreover, defense counsel also did not object that the transcript was incomplete or raise the issue that the detectives had returned to the interview room after the defendant had invoked his rights. We conclude defendant has forfeited any claims of prosecutorial misconduct. (*People v. Hill*, supra, at p. 820.)



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c. Ineffective assistance of counsel

Defendant contends, in the alternative, that his trial counsel provided ineffective assistance by failing to enhance the videotape and failing to inform the trial court that the transcript was incomplete or that the detectives had attempted to reinitiate the interview.

To demonstrate ineffective assistance of counsel, a defendant has the burden of proving both that (1) his counsel's performance was deficient under an objective standard of professional responsibility, and (2) there is a reasonable probability that, in the absence of his counsel's errors, a more favorable determination would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Holt* (1997) 15 Cal.4th 619, 703.) We apply highly deferential review to the actions of defense counsel. In doing so, we presume that counsel exercised reasonable professional judgment and that the challenged actions constituted sound trial strategy. (*Bell v. Cone* (2002) 535 U.S. 685, 698.) Thus, we do not second guess counsel's actions; if the record does not reflect why counsel acted or omitted to act, we affirm unless counsel was asked for and failed to provide an explanation, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

With respect to the failure to enhance the tape, we note that during the pendency of this appeal, this court ordered the trial court to settle the record as to which VHS tape it had reviewed at the in limine hearing, because that tape was not marked as an exhibit. The trial court thereafter conducted proceedings at which the prosecutor and defendant's trial counsel appeared. The prosecutor noted there were several copies of the VHS tape in existence, and it was not clear which was the original. Defendant's trial counsel concurred and recalled they had agreed a duplicate would suffice. Defendant's trial counsel further stated he had listened to both the DVD and VHS versions of the recording; he had concluded the DVD was superior in quality; and he had hired sound experts to enhance the DVD but had never been able to obtain a copy that was higher in quality than the one the trial court had reviewed. Defendant's trial counsel made the strategic decision that the VHS tape would not help defendant and would only be confusing and less audible for the jury. The trial court marked a copy of the VHS tape as an exhibit.⁴

We conclude, on the basis of the record before us, that counsel took appropriate actions in attempting to enhance the recording, but simply determined that such efforts would be futile. Defendant has not shown that his trial counsel failed to act as a reasonably diligent advocate. (*Strickland v. Washington*, supra, 466 U.S. at p. 689.) Nor has defendant shown any reasonable probability that efforts to enhance the VHS would have resulted in a more favorable outcome. (*Ibid.*)

With respect to defense counsel's failure to inform the court the transcript was incomplete or that the detectives had returned to the interview room after defendant had invoked his right, we note the trial court found that defendant had unequivocally invoked his constitutional rights in the exchange that appears on page 24 of the transcript of the interview. The trial court excluded any further statements defendant made after that. Even if the trial court knew the detectives later attempted to



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reinitiate the interview, such information would not have altered the trial court's ruling or its evaluation of the facts--the trial court already knew the detectives had continued to ask questions after defendant invoked his rights. Thus, we conclude defendant has failed to show any prejudice from his counsel's failure to raise the issue. (Strickland v. Washington, supra, 466 U.S. at p. 689.)

B. Prosecutorial Misconduct and Ineffective Assistance of Counsel at Trial

Defendant argues he was denied his due process rights to a fair trial and fair new trial hearing because of prosecutorial misconduct and ineffective assistance of counsel. He claims the prosecutor committed misconduct by violating the trial court's ruling that the DVD of defendant's interview should be edited to redact references to a home invasion robbery in which defendant had participated after the murder of McLeod. He claims his counsel provided ineffective assistance by (1) failing to object to the admission prejudicial evidence of other crimes through the DVD of the interview, (2) allowing the jury to use inadequate equipment to view the confession during deliberations, and (3) not ensuring that the jury viewed the confession on the same equipment used during the trial.

1. Additional Background

During trial, defense counsel asserted he and defendant's family could hear defendant invoke his right to counsel on the DVD when it was played for the jury, and defense counsel objected to the accuracy of the transcript that was provided for the jury. The trial court stated it had "tried to listen carefully" when the DVD was played for the jury, but the trial court had not heard an affirmative request for a lawyer. The trial court reaffirmed its ruling that defendant's statements were voluntary and there had been no Miranda violation.

During discussions, the trial court stated the prosecutor should have the original VHS tape available if the jury wanted to review it. The prosecutor noted she had played the DVD on her computer, and the trial court ordered her to obtain a computer for the jury to use or have the DVD transferred to another disk that could be played by the jury. The court suggested the original VHS tape could be substituted for the DVD that had been played for the jury, and the parties agreed.

On the first day of deliberations, the jury requested the recording of defendant's confession. The clerk's transcript reflects that it was provided to the jury but does not identify which exhibit was provided.⁵ The next day, the jury asked, "Can we view the video on a different set with better sound or can we get head phones for each so [sic] hear better." The trial court told the jury it would have to use the equipment in the jury room, and the trial court affirmed to defense counsel that the equipment worked. Defense counsel did not object.

After the jury returned its verdict, defendant filed a motion for new trial under section 1181 on the ground his statements to the police should have been suppressed when he first asked for an attorney.



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The transcript of defendant's police interview that was offered into evidence stated, "If I was to hire a good lawyer, one that could defend me wouldn't that look bad against me or anything, I just like, I feel like . . . trapped like . . . in a cell." Defendant argued that what he actually had said was, "All I want is a lawyer, or an attorney. I don't got nothing bad against me or anything. I just, I feel like . . . trapped like . . . in a cell." Defendant offered a declaration stating, "I clearly remember telling the detectives I wanted a lawyer and that I felt trapped. They just responded by telling me I wasn't trapped and continued on with their questions. They ignored my request for a lawyer."

The trial court denied the motion.

2. Analysis

Defendant's complaint about his counsel's failure to request better equipment for the jury to use is based on mere speculation. The bare fact that the jury requested better equipment does not establish there was any difference between the jury room equipment and the equipment used during the trial. We have viewed both the DVD and the VHS versions of the interview, and it is apparent that both are of poor sound quality. Moreover, it is pure speculation that with better equipment the jury would have perceived something on the recordings the trial court did not. Finally, defense counsel was not asked for any explanation of his failure to object.

We conclude defendant has failed to establish any reasonable possibility that the outcome would have been more favorable if defense counsel had requested better equipment for the jury room. (Strickland v. Washington, *supra*, 466 U.S. at p. 689.)

Defendant contends he was denied a fair hearing on his motion for new trial, apparently because the new trial motion was not based on any enhanced version of the DVD. However, defendant has not raised any specific argument or cited any authority to support his contention that the hearing on his motion for new trial was not fair. We therefore deem the contention waived. (People v. Stanley (1995) 10 Cal.4th 764, 793.)

C. Other-Crimes Evidence

Defendant argues he was prejudiced by the jury learning he had committed a gang-related robbery-kidnapping shortly after the victim was killed. He further contends the error stemmed from deliberate prosecutorial misconduct and from ineffective assistance of counsel.

1. Additional Background

During the pretrial hearing regarding the admission of defendant's confession, the prosecutor indicated she did not intend to play a recording of defendant's confession for the jury. The trial court ordered that, before the recording could be played for the jury, any reference to defendant's prior



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robberies must be redacted. During trial, Corporal Sean McFarland was allowed to testify about contacts defendant had with other gang members; the trial court ruled, however, that his testimony could not disclose that one of the contacts involved a robbery. Corporal McFarland testified that defendant had been contacted in the presence of South Side Colton gang members on June 8, 2007. The trial court then instructed the jury, "The other thing you also just heard [Corporal McFarland] testify to is a police investigation dealing with [defendant] after the date of the alleged incident in this case. Once again, that was limited to your consideration as to whether or not [defendant] was an active gang member at the time of the commission of this offense and for no other purpose. Again, what you choose to do with that information, it[]s relevance, is totally up to your determination. What you cannot do is allow those investigations that were done by the police officer to enter into your discussions as far as this case. [¶] Again, whether or not he had police contact or not, what the police investigation was about--do not speculate about that. Do not even consider in any way the nature of that. The only information--or the only purpose for which it was offered was to allow you to consider whether or not that goes to his status as alleged of being a gang member, okay?"

The prosecutor later decided to play the recording of defendant's confession to the jury. The recording that was played included Detective Morenberg's statement, "You kinda, you're gonna have to make a decision if you want to settle for going to jail for a couple of robberies which is cool. Or if you just want to go to jail for a robbery, two robberies and a murder." Detective Morenberg later stated, "And this, this other deal, this robbery and this is actually a kidnapping technically. I don't know how you got involved in that but you need to tell us your involvement and, and I'm hearing that, that freakin' Tommy was there and wherever that guy is there's trouble." The jury learned defendant had been identified as a participant in a robbery-kidnapping on Friday night (June 7, 2007), and the detective mentioned involvement by "Perez" and "Rascal," whom Corporal McFarland had named as a gang member.

The trial court observed the statements on the recording did not appear to apply to the present case, but defense counsel had not objected. Defendant's counsel explained that he thought both statements were ambiguous, and he had discussed the issue with the prosecutor. The trial court proposed giving a limiting instruction. After discussion, defense counsel agreed. The trial court summarized, "Any way we can phrase it, whether it's a limiting instruction through [the prosecutor] or through [defense counsel], takes it out of the mind any and all possibility that perhaps there was a kidnapping here that wasn't charged and the witnesses didn't show, and that kind of thing. And also that they don't try to speculate that, oh, he did a kidnapping somewhere else." After further discussion, defense counsel suggested the trial court instruct the jury that the detective told defendant untruths as part of police interrogation tactics, which is why the jury could not consider matters that were not in evidence. During cross-examination, defense counsel elicited from Detective Wilson that police interrogation practices included deception, lies, and falsely informing a suspect there was evidence when there was none.

The trial court instructed the jury as follows: "The statement of the accused [defendant], was taken by



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two police detectives who told [him] things that were not true in order to entice him to tell what he knew about the April 20th, 2007, death of Marvin Michael McLeod. [¶] It is lawful for the police to lie to a suspect in order to gain information and the jury is not to hold those lies against the police in determining what happened in this case. Likewise, because the police were employing deceit and artifice to gain a statement from [defendant], the jury is to give no weight to any of the statements by the two detectives as to any of the crimes that the two detectives made mention of attributed to this defendant. [¶] The jury is hereby ordered not to speculate about any such crimes because that's not relevant as to the matter to be determined by the jury. It was just part of an investigative technique."

2. Analysis

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order." (People v. Crew (2003) 31 Cal.4th 822, 839.) However, as noted, a criminal defendant may not complain on appeal of prosecutorial misconduct unless he raised a timely objection in the trial court. (People v. Hill, supra, 17 Cal.4th at p. 820.) Defendant raised no such objection, and the People argue his claim was therefore forfeited.

Defendant contends, in the alternative, that his trial counsel provided ineffective assistance by failing to object. Although defense counsel was never asked his reasons for agreeing to the trial court's proposed remedy--a curative instruction--the record supports a conclusion that the trial court followed a sound strategy. The trial court's instruction that police officers may use deception during interrogation gave the jury potential grounds to question the detectives' credibility. Accordingly, we cannot say defense counsel's conduct fell below objective professional norms. (Strickland v. Washington, supra, 466 U.S. at p. 689.) Moreover, there was no reasonable likelihood a result more favorable to defendant would have been reached even if defense counsel had objected. (Ibid.)

D. Cumulative Error

Defendant argues the cumulative effect of the errors was prejudicial. Because we have found no individual errors, his argument of cumulative error is moot.

E. Gang Enhancement

Defendant argues the 10-year gang-benefit enhancement was unauthorized because he was sentenced to life without the possibility of parole. The trial court imposed a gang-benefit enhancement of 10 years under section 186.22, subdivision (b)(1)(C).⁶

To support his argument, defendant cites People v. Lopez (2005) 34 Cal.4th 1002 (Lopez), in which our Supreme Court held that a defendant who commits a gang-related violent felony that is punishable by life imprisonment is not subject to the 10-year gang-benefit enhancement under section 186.22, subdivision (b)(1)(C) but, rather, is subject to a minimum parole eligibility term of 15 years under



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section 186.22, subdivision (b)(5).⁷ (Lopez, supra, at p.1010.)

Lopez is distinguishable from the present case. In Lopez, the defendant was sentenced to a term of 25 years to life for first degree murder (Lopez, supra, 34 Cal.4th at p. 1005), whereas, defendant here was sentenced to life without the possibility of parole for special circumstance robbery-murder. It would make no sense and would serve no purpose to include a minimum parole date on such a term. The purpose of sentencing the defendant to additional enhancements, such as the 10-year gang-benefit enhancement, is to protect against the eventuality that the defendant's sentence might one day be reduced on direct appeal or habeas corpus. (See, e.g., People v. Garnica (1994) 29 Cal.App.4th 1558, 1564.)

Moreover, our Supreme Court has twice suggested, albeit in dicta, that the minimum parole eligibility provision was never intended to apply to persons sentenced to life without parole. In Lopez, the Supreme Court examined the history of the Street Terrorism and Prevention (STEP) Act and noted that a 1988 enrolled bill report which analyzed the financial impact of the provision stated: ""This proposed provision relating to life terms [former section 186.22, subdivision (b)(3), now section 186.22[,], [subdivision] (b)(5)] would apply to all lifers (except life without possibility of parole)."" The court concluded that, "at the time the STEP Act was enacted, the predecessor to section 186[,], [subdivision] (b)(5) was understood to apply to all lifers, except those sentenced to life without the possibility of parole." (Lopez, supra, 34 Cal.4th at p. 1010.) Similarly, in People v. Montes (2003) 31 Cal.4th 350, the court examined in detail the 1988 enrolled bill report, which summarized the terms that would be affected by what is now section 186.22, subdivision (b)(5), and noted that the terms of first degree murder would be affected only when there were no special circumstances. (People v. Montez, supra, at p. 358; fn. 10.)

Because a term of life without parole contains no anticipated parole date, it would be anomalous to include a minimum parole date on such a term. Accordingly, we conclude the trial court properly imposed a the 10-year enhancement under section 186.22, subdivision (b)(1)(C).

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

We concur:

MCKINSTER J.

KING J.



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1. All further statutory references are to the Penal Code unless otherwise indicated.
2. Miranda v. Arizona (1966) 384 U.S. 436 (Miranda).
3. As the trial court pointed out, many statements made during the interview, especially those made by defendant, are difficult to discern. A first transcript was prepared by a secretary unfamiliar with the case, and a second transcript was made after Detective Wilson listened to the recording and provided some clarification based on his recollection of what had been said.
4. In a footnote to his appellant's opening brief, defendant complains he never received notice of the hearing to settle the record, and he requests this court to order the Attorney General to obtain the original VHS from the Colton Police Department or to order a new hearing. We may disregard contentions raised in a footnote under a heading that gives no notice of the claim. (People v. Crosswhite (2002) 101 Cal.App.4th 494, 502, fn. 5.)
5. The court suggested the new copy of the DVD should be marked as exhibit 46; however, no exhibit 46 was marked during the trial, so it appears the jury must have listened to exhibit 45, the DVD of the interview.
6. "Except as provided in paragraphs (4) [life terms for certain enumerated felonies] and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (§ 186.22, subd. (b)(1)(C).)
7. "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5).)

