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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GUILLERMO QUIROZ,

Defendant and Appellant.

B287491

Los Angeles County
Super. Ct. No. KA111747

APPEAL from an order of the Superior Court of
Los Angeles County, Mike Camacho, Judge. Affirmed.

Alex Green, 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, Assistant
Attorney General, Steven D. Matthews and Ryan M. Smith,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Guillermo Quiroz of attempted voluntary manslaughter and assault by means of force likely to produce great bodily injury. The jury found true allegations that Quiroz personally used a dangerous and deadly weapon—a heavy ceramic pot full of dirt—in the commission of the attempted manslaughter, and that he personally inflicted great bodily injury on the victim, Cody Andrew Ramirez. On appeal, Quiroz contends the trial court erred in denying his *Miranda* motion¹ to exclude from the prosecution’s rebuttal case statements he made when he and his attorney met with detectives before his arrest. He also asks us conditionally to reverse his conviction and to remand the case for the trial court to consider his eligibility for pretrial mental health diversion under Penal Code section 1001.36.²

We find no error in the trial court’s denial of Quiroz’s *Miranda* motion and therefore affirm his conviction. We decline to remand the case because, in our view, section 1001.36 is not retroactive.

FACTS AND PROCEDURAL BACKGROUND

1. *In a drunken melee at a wedding, Quiroz drops a large, heavy ceramic planter near the prone victim’s head*

On January 30, 2016, Cody Ramirez and his fiancée Jamie Hobbs went to a wedding at the DoubleTree hotel in Claremont. Ramirez had a lot to drink and he was drunk. As the wedding

¹ *Miranda v. State of Arizona* (1966) 384 U.S. 436.

² Statutory references are to the Penal Code. References to rules are to the California Rules of Court.

was winding down, Ramirez and Hobbs went outside to the front of the hotel.

Quiroz and his wife Nery Vanessa Miranda also were at the wedding. Quiroz and Miranda knew Ramirez's brother, who had died, but they didn't know Ramirez well. Quiroz had quite a bit to drink and he was intoxicated. "[J]ust about everybody" was drinking that night.

Around 11:45 p.m., Quiroz and Miranda decided to leave; they went outside to have a cigarette first. Quiroz was talking with Ramirez. Quiroz said something about Ramirez's deceased brother and Ramirez "got upset." What happened next is in dispute. According to Miranda, Hobbs "got irate," "started cursing," and "socked" Quiroz in the face. Hobbs and Miranda argued; Miranda claims Ramirez "charge[d]" at her, then "grab[bed]" her and "pushe[d] [her] into a planter." Ramirez says he never "put hands on" anyone.

Hobbs's friends took her inside the hotel "trying to just calm her down."

Dylan Webster was another guest at the wedding. By 11:30 p.m., he'd had four or five drinks and was "[d]efinitely impaired." Webster saw Miranda "get pushed." He "decided . . . to defend her" and hit Ramirez with his fist. Ramirez fell to the ground. Webster kicked Ramirez in the head; Ramirez was bleeding.³

Quiroz joined in. When Hobbs and her friends came back outside, they saw Ramirez lying on the ground "and like all of

³ In a negotiated disposition, Webster pled to assault by means of force likely to produce great bodily injury for two years, to be served in local custody under realignment.

them on top of him, like beating him.” Quiroz and Webster “were by his face or by his head” and it “looked like they were stomping or kicking his head.”

In the meantime, an Uber driver arrived at the hotel to pick up a fare. While waiting in his car, the driver saw “a group that was just arguing or having some type of altercation.” The driver heard “loud talking”; it “seemed like . . . someone was yelling”; “people were mad or arguing.” A man shoved another man. “Then punches got thrown,” “[s]omeone got basically laid out,” and the driver started recording with his cell phone. It was “[b]asically like a knockout, he just fell to the ground.”

The Uber driver posted the video on social media. Ramirez contacted him about the video. The cell phone video was played for the jury at trial.

Quiroz and Miranda left “immediately.”

Claremont Police Department Detective Christopher Casas arrived at the scene. He went into a bathroom at the hotel and found Ramirez with “a lot of blood on his face” and clothing. Two women were “trying to tend to him with paper towels.” “Everybody was screaming and yelling.”

Casas called Quiroz and Miranda. Casas asked them how the pot had been broken. According to Miranda, she told Casas she “didn’t know about a pot.” According to Casas, they told him “someone tripped over the pot.”

Ramirez was air-lifted to a hospital. He had a broken nose, a four-centimeter cut to his forehead that required eight stitches, and bruises on his scalp. He was discharged a few hours later.

2. *Quiroz and his attorney meet with police, present Quiroz's version of events, and answer questions*

On January 31, 2016—the day after the incident—Quiroz and his attorney, Babak “Bobby” Shamuilian, went to the police station. Quiroz and Shamuilian met with two detectives and a deputy district attorney. One of the detectives was Sergeant Hector Tamayo. We have listened to the audio recording and read the transcript of the meeting.

Tamayo told Quiroz and Shamuilian, “[s]it wherever you’d like.” He introduced a deputy district attorney who was in the room, Lisa El-Farra. Shamuilian gave El-Farra a card and each told the other “[n]ice to meet you.” Tamayo said, “[H]ey, the reason I called you is, is because on the day of the, of this incident I guess you spoke to an officer and gave him a statement of your version of what happened.” Quiroz said, “Um hum.” Tamayo continued, “[B]ut there was a lot going on. So since then I’ve talked to other people and gotten their, you know, statements as to what happened and what not.” Shamuilian said, “Right.” Tamayo went on: “And um so that’s why I called you, to see, you know, if you wanted to talk to me or tell me anything about it, or um, to ask if you had seen the video that’s out there.” Shamuilian said he hadn’t seen the video but his client had.

Shamuilian told Tamayo he didn’t know “what the . . . other guy’s claiming happened in the fight,” but Quiroz “was really defending his wife,” who had been “attacked by . . . the individual who is probably injured.” Shamuilian said Quiroz had been hit and “kind of like was out of it”; then he “woke, kind of gets up, there’s everything going on and picks up a, a flower pot that his wife was kind of pushed into . . . and he slams it on the ground, just to kind of make a loud noise and, shut up, guys, stop

type of thing.” Shamuilian added, “I don’t know if someone’s claiming that was used as a weapon or something like that.” Tamayo said, “Yeah, well, from seeing the video, . . . it appears to be, yeah.”

Shamuilian told Tamayo he’d “love to see the video.” Tamayo asked Quiroz, “You’ve seen it already?” and Quiroz answered, “Um hum.” Tamayo apparently played the video, then asked Quiroz, “Is that the video that you saw?” Quiroz said, “Um hum.” Tamayo asked, “Okay. So that’s you with the pot right here?” Quiroz said, “Straight down on the ground.” Apparently addressing his client, Shamuilian said, “I don’t want you making any statements.”

Tamayo said, “Okay. So that’s one of the videos that we have. And that’s pretty clear as to what happened.” Shamuilian said, “Yeah.” Quiroz said, “I see a pot hitting the ground and not moving. Just pot on the ground, that’s it.” Shamuilian told Tamayo that Quiroz “recalls like during the . . . fight and stuff, . . . other people were jumping in.” Quiroz—apparently referring to the video—added, “You saw someone do a flying jump kick.” Shamuilian continued, “Someone kicking him in the face and stuff like that.” “[H]e was purely kind of trying to just defend himself and his wife. [Then] . . . they were like chasing him and . . . he was just trying to get out of there.”

A second detective asked Quiroz if he recognized anyone in the video. Quiroz answered, “I don’t.” The detective said, “No. Just you dropping the pot.” Quiroz responded, “Yeah cause that’s what I remember after I got clocked, I said this fight needs to end and I grabbed that pot and I threw it on the ground. Ding, ding, loud noise, people expand [*sic*], it’s over.”

Shamuilian stated Quiroz was “not a bad guy” or a “trouble maker,” had no criminal record, was a veteran who served in Iraq, was in school, and was married with a child. Tamayo said, “[T]he thing that’s disturbing is, you know, you got a guy that’s sitting on the ground, he’s bleeding out and you’re dropping a pot on his head. I mean . . . that’s the part that’s . . . pretty hard to justify.” Shamuilian responded, “Of course.” He added, “I . . . completely see your side.”

Tamayo said, “[W]hat about just saying hey stop, I’m gonna call the police or something like that.” Quiroz responded, “Well have you ever been in a fight with a wife and she throws a glass behind the wall you’re at, to just kind of . . . scare you away?” Tamayo said, “Yeah. Okay.” Quiroz continued, “Um maybe you heard a case of that, but I kind of dropped the planter and you know just trying to make my point, not to hurt anyone, but only to make a, a point to say stop. . . . This has to end. That’s it.”

Quiroz said Ramirez and his wife got upset after Quiroz mentioned Ramirez’s deceased brother and “next thing you know the guy is throwing my wife into that planter on the ground” Shamuilian said Quiroz “was defending his wife and himself once, once he was attacked.”

Eventually Shamuilian said, “I think at this point we’re kind of like, we’ve gone over the same stuff. . . . [W]e don’t make any statements once, once there’s law enforcement involved. Just a general, but I wanted to put it out there” Tamayo responded, “Yeah. And . . . that’s the whole thing, is I mean if there’s some kind of justification for this” Shamuilian said he “fe[lt]” Quiroz did “have some justification.” He added, “That’s why we’re down here so quickly, we’re trying to cooperate. We’re

not trying to . . . hide the ball.” Shamuilian added they would not “be making any further statements.”

Tamayo stated, “Okay. Um I appreciate you coming in, you bringing him in. Um unfortunately you are going to be charged with a crime, okay. Um so you are gonna have to go with me.” The detectives then handcuffed Quiroz and led him away. Shamuilian continued to speak with El-Farra for a minute or two.

3. *The charges and the Miranda hearing*

The People charged Quiroz with attempted murder (count 1) and assault by means of force likely to produce great bodily injury (count 3).⁴ The People alleged that Quiroz personally used a dangerous and deadly weapon—a “potted plant”—in the attempted murder and that, as to both counts, he personally inflicted great bodily injury on the victim.

Trial began on November 20, 2017. The next day, outside the jurors’ presence, the court heard motions. Shamuilian filed a trial brief raising 11 issues; *Miranda* was not one of them.⁵ The

⁴ In the original information, filed March 7, 2016, the People charged Quiroz only with attempted murder. At the conclusion of a trial in July 2017, the jury was unable to reach a verdict and the court declared a mistrial. On August 8, 2017, the People filed an amended information, adding a charge of assault with a deadly weapon (count 2). (Although the charge was labeled count 3, the prosecutor orally amended the information to allege it as count 2.) On September 7, 2017, the People filed a second amended information adding assault by means of force likely to produce great bodily injury as count 3. On November 22, 2017, the court dismissed count 2 on the People’s motion.

⁵ The record on appeal does not contain a prosecution trial brief for the retrial. In the first trial, the prosecutor filed a brief

prosecutor, James Perry, raised the issue of Quiroz's statements to police with the court. Perry stated Quiroz's statements were "obviously . . . party admissions." He said there was no *Miranda* issue with the statements Quiroz and his wife made to Casas on the speakerphone the night of the fight.

Perry continued: "It's really the second set of statements that were made when the defendant and his attorney went to the station." Perry said Quiroz was not handcuffed nor was he "told he was under arrest at the time." He sat at the table with his lawyer, two detectives, and a deputy district attorney. "He made a number of statements during that interview that the People may intend to elicit during the course of this trial should we see fit."

The court stated, "[G]iven what I've heard . . . in that the defendant responded to a station in company of counsel, may have been questioned or may have volunteered certain information relevant, I don't see how that would be a violation of *Miranda* because, even though it was questions elicited perhaps in response to interrogation type questions, I don't think it was a custodial setting." The court asked Shamuilian if he "wish[ed] to litigate whether or not it was a *Miranda* violation." Shamuilian responded it might be "appropriate" to "have a *Miranda* hearing on that."

The court asked for more details "as to how this statement was received and under what circumstances." Perry noted Quiroz came down to the station with his attorney. He "wasn't actually

addressing Quiroz's statements to Casas that night but not his statements in the meeting the next day. The prosecution did not seek to introduce Quiroz's statements to Tamayo in the first trial.

placed under arrest until the very end of the proceeding.” There were “no handcuffs” and “no guns present.” Perry said there were “discussions between counsel and the detectives” and Quiroz “interjected certain statements even after being told to be quiet a couple of times by Mr. Shamuilian.”

The court discussed the legal definition of “custody.” Shamuilian told the court police had been to Quiroz’s home “to find him” so he offered to bring Quiroz down to the station even though no warrant had been issued. Shamuilian said, “We were basically going down to surrender him.” The court asked if Shamuilian “on [his] own decided to just go ahead and take [his] client to the station absent a formal invitation by law enforcement.” Shamuilian answered, “It was implicit that I should bring my client down to the station.”

The court asked Shamuilian if he told the detectives and the prosecutor that Quiroz was “invoking a privilege against self-incrimination.” Shamuilian said, “I think I made it clear from the get-go that he wouldn’t be making any statements.” (The transcript does not support that assertion. While, fairly early on, Shamuilian told Quiroz, “I don’t want you making any statements,” it was not until the end of the meeting that Shamuilian told the detectives, “[W]e don’t *sic* be making any further statements.” At that point, the detectives asked no further questions.)

The court responded, “I get that”; “[i]t’s hands off” Quiroz for law enforcement once “they know he’s represented.” But, the court, continued, “The problem is that, when you voluntarily bring your client to them and somehow a conversation begins even though it was contrary to . . . your strategy and not having your client make any statements, there seems to be some type of

implicit waiver here when Mr. Quiroz is now answering questions in the presence of you even though that's contrary to your advice perhaps to him in the first place." The court noted, "This is really unusual when we have counsel present at the time questioning is occurring." And—even if law enforcement had been told Quiroz "is not going to make any statements"—"then counsel shows up with his client and his client starts answering questions."

The court heard further argument and then ruled. The court noted Quiroz "certainly" was exercising his Sixth Amendment right to counsel, and his Fifth Amendment rights against self-incrimination had been asserted on his behalf. "Yet, Mr. Quiroz on his own starts volunteering information." Moreover, the court said, "in this case, it really wasn't a custodial setting in my mind because the defendant voluntarily came down, albeit with the understanding they may have to surrender. I don't think that transforms it into a custodial setting in and of itself." The court said it was "factoring in" that Quiroz "came in with counsel as well as with a clear impression that his rights were going to be protected, but he doesn't have to take advantage of those rights, which evidently he didn't do contrary to your advice, Mr. Shamuilian." The court concluded Quiroz's statements in the meeting were admissible.

4. *The prosecution introduces Quiroz's statements to impeach Quiroz's expert at trial*

Quiroz did not testify at trial. He called as witnesses a number of family members and friends who testified to his good character. He called Webster. He called an expert in "photogrammetry" to testify about the distance of the broken pot to where Ramirez was lying.

Quiroz also called Dr. Deborah Miora, a clinical and neuropsychologist. Miora had evaluated Quiroz and concluded he suffered from Post-Traumatic Stress Disorder (PTSD). Miora testified “[o]ne of the hallmarks” of PTSD is “a fight/flight reaction.” That reaction, Miora said, “is not consistent” with the human capacity “to think about our behavior, to make decisions, deliberating about them, to weigh the consequences of our behavior. So, when in a [PTSD] mode, the person isn’t thinking.” She continued, “[I]t’s like being an animal. When an animal is frightened, they react. They don’t think.”

Defense counsel gave Miora a hypothetical: He asked her to consider a person with PTSD who has no violence in his past, is intoxicated, and “is exposed to an experience where a loved one or a family member is being assaulted in [his] presence.” Would that person, counsel asked, “think like the rest of us under those circumstances?” Miora answered, “If activated at that brain-based level and experiencing threat or danger, that individual is going to be most likely to react from that fight/flight triggered aspect of the human brain that I was talking about and that’s unfortunately where thought goes out the window.”

On cross-examination the prosecutor asked Miora, “If somebody specifically made a statement that they knew what their actions were under the circumstances and they made those decisions for a specific reason, that would undermine your opinion today; correct?” Miora responded, “Not necessarily. We often say and believe what we say but evidence may show to the contrary. That’s one of the . . . great sort of mysteries about human nature We can have things going on at different levels and really believe them and they aren’t necessarily so.”

On rebuttal, the prosecutor called Detective Tamayo. Tamayo testified he met with Quiroz and his attorney on January 31, 2016. The recording of the meeting was played for the jury.

5. *The verdicts and sentence*

On December 7, 2017, the jury acquitted Quiroz of attempted murder. It convicted him on the lesser charge of attempted voluntary manslaughter as well as assault by means of force likely to produce great bodily injury. The jury found true the allegations that Quiroz used a dangerous or deadly weapon and personally inflicted great bodily injury on the victim.

Quiroz's counsel filed a motion asking the court to grant him military diversion for veterans under sections 1170.9 and 1170.91 and rules 4.413 and 4.414. The court denied the motion, stating, "the court . . . certainly cannot find that this is an unusual case that would warrant probation."

The court sentenced Quiroz to five years and six months in the state prison. The court chose the low term of 18 months for attempted voluntary manslaughter, citing as mitigating factors Quiroz's "service to the country, as well as the posttraumatic stress disorder that he suffers as a result." The court added three years for the infliction of great bodily injury and one year for Quiroz's use of a deadly weapon. The court stayed the sentence on count 3 under section 654.

DISCUSSION

1. *The trial court did not violate Quiroz's Fifth Amendment rights by admitting his statements to police*

Quiroz contends he "went to the police station under the compulsion of arrest" and was therefore in custody. Quiroz

asserts he could not have waived his *Miranda* rights because police never advised him of those rights. The Attorney General argues Quiroz was not in custody.

We find no *Miranda* violation. Quiroz came to the police station with his lawyer, sat in an interview room with his counsel by his side, and chimed in while his counsel presented his side of the story in an effort to persuade the detectives not to file charges against Quiroz.

- a. **Quiroz's insistence that he picked up the pot and dropped it to end the altercation was a defense strategy he and his counsel chose and presented to the jury**

At the outset, we note Quiroz's *Miranda* argument rests on an inaccurate premise. He asserts the prosecution used the statements he made during the meeting "both [to] attack Dr. Miora's testimony that a person with PTSD is not thinking but only reacting as a result of his triggered fear . . . and then to hammer away during closing argument that appellant's statement showed that he knew what he was doing when he dropped the pot rather than simply reacting as a result of his PTSD."⁶ But it was *Quiroz* who first raised the contention that he intentionally dropped the pot to get everyone to stop fighting and disperse. In his opening statement, defense counsel Shamuilian told the jurors, "[I]t's disorder. [Quiroz's] pleas of trying to get it to end have not worked. That's all that he wants. At this point he just wants to get out of there. . . . Mr. Quiroz didn't bring any weapons to this wedding. . . . While he's out

⁶ Quiroz makes this argument only as to the attempted voluntary manslaughter count, not on the assault count.

there, the only thing that he sees that he could do to try to make a distraction or a loud noise to make it break up, he sees a pot. He picks it up; he slams it down as hard as he can to make the loudest noise he can. Ding ding ding, it's over. Let's just move on, guys." That statement closely parallels what Quiroz told the detectives in the meeting: "I said this fight needs to end and I grabbed that pot and I threw it on the ground. Ding, ding, loud noise, people expand [*sic*], it's over."

Later in his opening statement, Shamuilian said, "The evidence will show that [Quiroz] did not want to kill Cody Ramirez. . . . [His] intent was to break up the fight. And his other efforts to kind of deescalate this situation didn't work."

To be sure, Shamuilian also talked about Quiroz's PTSD. He told the jurors, "The evidence will show that this was a triggered reaction. And the PTSD may help you guys understand what may have been going on in [Quiroz's] mind at the time." Shamuilian also spoke at length about self-defense and defense of others. He told the jury, "You're going to hear evidence about self-defense and defense of another. You're going to hear that Mr. Ramirez attacked Vanessa Miranda. She was in imminent danger of suffering great bodily injury." Later Shamuilian said, "[Quiroz] was defending himself and his wife."

Even though the trial court found no substantial evidence of self-defense or defense of another—as Ramirez was "already on the ground" when Quiroz dropped the pot—it ultimately instructed the jury on those principles.

In his closing argument, Shamuilian harkened back to his opening statement: "He's trying to get everyone to just back off, break it up, move on. . . . And his pleas to stop and break it up in every other method are not successful." Later, discussing the

jury instruction on provocation that “would have caused a normal average person to act out rashly,” Shamuilian told the jurors, “He acted rationally. He’s trying to end this thing and move on with his night.”

Shamuilian also argued Quiroz was defending his wife. Citing Miora’s testimony, Shamuilian then said, “[t]he evidence showed this was a triggered reaction like fight-or-flight.” “A person going through a PTSD episode doesn’t think like the rest of us and would not be able to formulate the specific intent to kill.” Shamuilian blended his defense-of-another argument with his PTSD argument: “He didn’t have the intent, wasn’t able to formulate the specific intent required to convict for an attempted murder and its lesser included charges. He was acting in defense of his wife.”

The prosecutor conceded Quiroz has PTSD. But he noted Quiroz and his wife told Casas that night—before anyone knew the Uber driver had videotaped the incident—that “no pot was thrown.” The prosecutor also said, “But then we have defendant’s statement later at the station . . . oh, I threw it on the ground. I was just trying to get everybody to scatter.”

b. In any event, Quiroz was not in custody when he volunteered his version of events to detectives

An interrogation is custodial for purposes of requiring advisements under *Miranda* when a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. (*People v. Moore* (2011) 51 Cal.4th 386, 394-395.) In *Miranda* jurisprudence, “‘custody’ is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion.” (*Howes v. Fields* (2012) 565 U.S. 499,

508-509.) Custody consists of a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. (*Moore*, at p. 395; *People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) When there has been no formal arrest, the question is how a reasonable person in the defendant's position would have understood his situation. (*People v. Boyer* (1989) 48 Cal.3d 247, 271.) All of the circumstances of the interrogation are relevant to this inquiry, including the location, length, and form of the interrogation, the degree to which the investigation was focused on the defendant, and whether any indicia of arrest were present. (*Ibid.*)

When reviewing a trial court's ruling on a claimed *Miranda* violation, we accept the court's resolution of disputed facts and inferences and its credibility evaluations if substantial evidence supports them. We independently determine from those facts whether the challenged statements were illegally obtained, applying federal constitutional standards. (*People v. Jackson* (2016) 1 Cal.5th 269, 339; *People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in the prosecution's case-in-chief. (*Jackson*, at p. 339; *People v. Peevy* (1998) 17 Cal.4th 1184, 1193-1196.)

The trial court was right when it said this is an unusual set of facts. Neither Quiroz nor the Attorney General has cited a case—nor have we found one in our own research—that presents circumstances such as these. Shamuilian took Quiroz to the police station. After the fact, he said he took him there to surrender. But the tenor and content of the exchange at the meeting reflects an effort by Shamuilian—with Quiroz chiming in—to give the detectives Quiroz's side of the story and convince

them he was a good person whose wife was attacked by a drunk, combative man and who dropped the pot to bring an end to the altercation.

It is true the detectives never told Quiroz he was free to leave, and at the end of the meeting they arrested him. Of course we don't know whether the detectives had decided to arrest Quiroz before the meeting even began. But any such decision does not mean Quiroz was in custody. The determination of custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323-324 [officer's subjective belief whether person is a suspect, undisclosed to that person, is irrelevant for *Miranda* purposes]; *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [reconsidering issue without regard to uncommunicated subjective impressions of police and concluding defendant was not in custody].) The test is how a reasonable person in the suspect's position would have understood his situation. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442.)

Quiroz arrived at the station with his attorney, he was not handcuffed, and the detectives displayed no guns. (Cf. *People v. Kopatz* (2015) 61 Cal.4th 62, 78, 80 [defendant taken in police car to detective bureau for questioning was not in custody; among other factors, "[t]he officers did not handcuff defendant or display any weapons"].) The interview itself was investigatory and not "hostile, menacing, or accusatory." (*Id.* at p. 81, quoting *People v. Zamudio* (2008) 43 Cal.4th 327, 345.) The detectives did not ask Quiroz accusatory, confrontational, or persistent questions. (Cf. *People v. Saldana* (2018) 19 Cal.App.5th 432, 459.) Tamayo began by saying he'd heard from others what happened and

called Quiroz “to see . . . if you wanted to talk to me or tell me anything about it.” Quiroz pointed out the pot had gone “[s]traight down [to] the ground,” suggesting he did not throw the pot at or near Ramirez. Quiroz continued to volunteer information, as did Shamuilian, in an apparent effort to convince the police and prosecutor not to file charges or arrest Quiroz. “Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment.” (*Miranda, supra*, 384 U.S. at p. 478.) Quiroz had his attorney with him throughout the meeting. Quiroz simply did not face the sort of physical or psychological coercion that underlies the *Miranda* rule.

2. *Quiroz is not entitled to a conditional remand*

In a supplemental brief, Quiroz asks us to reverse his conviction conditionally and to remand the case to the trial court so he can request pretrial mental health diversion. The Attorney General opposes Quiroz’s request, arguing the newly enacted statute on which he relies is not retroactive. We agree.

Effective June 27, 2018, the Legislature created a pretrial diversion program for defendants with diagnosed and qualifying mental disorders. (§ 1001.36, subd. (b)(1)(A).) The statute defines pretrial diversion as “the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication” (§ 1001.36, subd. (c).) Here, of course, Quiroz’s case has been adjudicated. He has been in prison since early 2018.

The language and legislative history of the statute make clear section 1001.36 provides only for a *pretrial* diversion

program designed to *prevent* the needs and costs associated with trial and incarceration. The Legislature enacted the program to mitigate the entry and reentry of individuals with mental health disorders into the criminal justice system. (§ 1001.35, subd. (a).) Diversion after trial, sentencing, and incarceration would not serve that purpose. Moreover, the Legislature limited the mental health treatment to a maximum of two years before criminal proceedings are reinstated or the charge dismissed. (§ 1001.36, subd. (c)(3).) This time limitation is consistent with the nature and purpose of a pretrial diversion program. Within two years, a court can determine whether a defendant has performed satisfactorily in diversion to earn dismissal of his charges, but if he does not perform well criminal proceedings can resume within a reasonable period of time.

The Legislature’s analysis states the new legislation would “grant[] courts the ability to divert those suffering from mental illness into treatment at an early stage in the proceedings. [Assembly Bill No.] 1810 seeks to reduce recidivism rates for mentally ill defendants, and to avoid unnecessary and unproductive costs of trial and incarceration.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) pp. 2-3, as amended Aug. 23, 2018.)

In *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), the Fourth District Court of Appeal held section 1001.36 to be retroactive. On December 27, 2018, our Supreme Court granted review on its own motion and denied a request for depublication. (*Frahs*, review granted on specified issues Dec. 27, 2018, S252220.) The Court designated the issues: “Does Penal Code section 1001.36 apply retroactively to all cases in which the judgment is not yet final? Did the court of appeal err by

remanding for a determination under Penal Code section 1001.36?” (*Ibid.*)

On May 23, 2019, the Fifth District Court of Appeal reached the opposite conclusion from *Frahs* in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*).⁷ On July 1, 2019, in an opinion certified for partial publication, the Sixth District disagreed with *Craine* and agreed with *Frahs*. (*People v. Weaver* (2019) 36 Cal.App.5th 1103, petn. for review filed Aug. 1, 2019.)⁸

Until our high court decides the issue, we must decide this case with the statutory language and legislative history available to us. We respectfully find the *Craine* court’s analysis more persuasive. Accordingly, we deny Quiroz’s request for a conditional reversal and remand.

⁷ The Fifth District also held section 1001.36 not to be retroactive in an earlier unpublished case: *People v. Rocco* (Jan. 22, 2019, F074772) [nonpub. opn.]. On April 24, 2019, the Supreme Court issued a “grant and hold” order in that case. (*Ibid.*, review granted Apr. 24, 2019, S254264.)

⁸ In four unpublished cases, three other divisions of our Second District have concluded section 1001.36 is retroactive. (See *People v. Knight* (Apr. 23, 2019, B284886) [nonpub. opn.], review granted July 10, 2019, S256081; *People v. Williams* (Apr. 29, 2019, B290706) [nonpub. opn.], review granted July 10, 2019, S255686; *People v. Propps* (May 8, 2019, B281522) [nonpub. opn.], review granted July 17, 2019, S256322; *People v. Phillips* (June 4, 2019, B286715) [nonpub. opn.].) The *Knight* case was a two-to-one decision with a vigorous dissent.

DISPOSITION

We affirm Guillermo Quiroz's conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.