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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCIAL RIOS,

Defendant and Appellant.

B267325

(Los Angeles County  
Super. Ct. No. NA098106)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Mark C. Kim, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Lance E. Winters, Assistant Attorney General, Paul M.  
Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff  
and Respondent.

## INTRODUCTION

Defendant Marcial Rios appeals from the judgment entered following his conviction for second degree murder. He contends the trial court erred in admitting his post-arrest statements to police, because he had unequivocally invoked the right to counsel and because his subsequent confession was coerced by promises of leniency for his wife. We affirm.

## FACTUAL AND PROCEDURAL HISTORY

### I. *Procedural background*

The Los Angeles County District Attorney (the People) filed an amended information charging defendant and Jose Torres<sup>1</sup> with the April 28, 2013 murder of Enrique C.<sup>2</sup> (Pen. Code, §187, subd. (a)).<sup>3</sup> The information also alleged as sentencing enhancements that defendant used a handgun to commit the murder (§ 12022.53, subds. (b)-(e)(1)), and that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Prior to trial, defendant moved to exclude all of his statements made following his arrest. The trial court denied the motion and the case proceeded to trial. The jury found defendant guilty of second degree murder and found true the firearm and gang allegations. The court sentenced defendant to a total term of 40 years to life in state prison. Defendant timely appealed.

### II. *Evidence at trial*<sup>4</sup>

#### A. *The shooting*

On April 28, 2013, at about 3:00 a.m., a group of people gathered outside an apartment complex on Junipero Street in Long Beach. The group included Maira Medina, her brother Miguel Medina, Precious Trejo along

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<sup>1</sup> Following opening statements at trial, Torres pleaded no contest to manslaughter (Pen. Code, § 192, subd. (a)). He is not a party to this appeal.

<sup>2</sup> Pursuant to California Rules of Court, rule 8.90 (b)(5), we refer to the victim in this case by first name to protect his personal privacy interests. No disrespect is intended.

<sup>3</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

<sup>4</sup> Because defendant's appeal focuses entirely on issues surrounding his post-arrest interview, we provide a limited review of the underlying facts for background purposes.

with her mother and sister,<sup>5</sup> Miguel's girlfriend, and the victim, Enrique. Miguel, who used the nickname "Mono," was a member of the Barrios Small Town (B.S.T.) gang. Enrique was drunk, refusing to leave and was "being disrespectful" and "loud and obnoxious." After Enrique would not stop "pushing up on" Miguel, the two men got into a fist fight that lasted no longer than ten minutes. Maira testified that Miguel was winning because he was sober and Enrique was drunk. At some point during the fight, Enrique took off his shirt, revealing a Longo gang tattoo on his stomach.

Afterward, Miguel handed Maira his phone with a number already dialed. Following his instructions, she spoke to the person who answered and told him, "my brother wants you to come pick him up." Within a few minutes, defendant arrived in a car with two other men. Defendant was Miguel's longtime friend and was also known by the nickname "Popeye." According to Maira, defendant got out of the car and started talking to Miguel. The two men who had arrived with defendant started arguing with Enrique, after which all three began pushing each other. At this point, Maira testified that she went into the apartment complex toward the Trejo apartment on the second floor. As she reached the door of the apartment, she heard one gunshot.

Precious testified that a group of people arrived in a car and began fighting Enrique. She heard Miguel tell the other people to "Leave it alone, back off." Enrique was "trying to get up to walk away or go in a different direction," but she saw the people "grab him and pull him to the street." Precious heard Enrique say, "Stop, stop. I'm done," and, "I don't want no problems." Precious was about 40-45 feet away when she heard one gunshot. The same group of people then left in the car and Miguel ran in a different direction.

Enrique sustained a fatal gunshot wound to the left side of his head. It was a gunshot wound, meaning the muzzle was pressed against the skin of the victim's head when the trigger was pulled. There was no exit wound and projectile fragments were recovered from inside his skull, consistent with a small caliber projectile such as a .22 or .25 caliber bullet. Enrique also had

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<sup>5</sup> We refer to members of the Medina and Trejo families by their first names for the sake of clarity; we intend no disrespect.

other fresh injuries, including a black eye, scrapes and bruises across his face, bleeding lips and chin, and cuts, bruises and scratches to his arms, hands, and legs. Police recovered an unfired .22 caliber bullet near the scene.

B. *Gang testimony*

Long Beach Police detective Hector Gutierrez testified that the shooting occurred in territory controlled by the Eastside Longo gang, a rival gang to B.S.T. He testified that both Miguel and defendant were B.S.T. members based on their own statements to him, and that Enrique, the victim, was a member of the Eastside Longo gang. When presented with a hypothetical matching the facts of the case, Gutierrez opined that the shooting was done for the benefit of, at the direction of, and in association with a gang.

C. *Defendant's arrest and statements*

The police arrested Miguel shortly after the incident in 2013<sup>6</sup> and Torres in early 2014. They then issued a warrant for defendant's arrest. Defendant was taken into custody on April 12, 2014, as he was crossing the border from Mexico into California. He was transported to the Long Beach police station on April 15, 2014. That evening, he was placed into a cell with two civilian agents of the police who were paid to pose as inmates and have conversations with defendant. These conversations were recorded and portions were played for the jury. The agents were in the cell with defendant for a total of about five hours. The agents had performed a similar operation with suspect Torres, so they were familiar with the facts of the case.

During their conversations with defendant, the agents told him they were gang members, and one said he had been arrested twice for murder and had been cleared of the charge both times. During the recording, the agent asked defendant, "okay, you shot him one time in the head," and defendant responded "yeah, that's it." Defendant then stated that Miguel ran and the "other fool jumped in the car with me." The agent asked if that person saw defendant "blast that fool?" Defendant responded "Yeah, all of them seen me, dog." Defendant then stated that he thought Miguel's girlfriend was the one who would "rat on me." The informant asked "after you shot . . . the fool [] he was laid out?" Defendant responded "Mm-hmm," and then added that the

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<sup>6</sup> Miguel apparently was never charged in connection with the shooting.

next day, he told Miguel to “take care of his hyna [slang for girlfriend]” because she saw what happened. But Miguel “didn’t do it” and “the hyna fucking do rat.” The agent also asked defendant what he did with the “cuete [slang for gun] afterwards” and if he was sure it was gone. Defendant responded that “it was a revolver” and further identified the gun as a “.22.”

Long Beach Police detectives Hugo Cortes and Peter Lakovic interviewed defendant the following day, April 16, 2014. Police had detained Graciella Cruz, defendant’s wife,<sup>7</sup> that same morning. According to Cortes, Cruz was the registered owner of the car defendant drove to and from the scene on the night of the shooting and then drove to Mexico. Cortes testified that although they connected Cruz to the car during their initial investigation in 2013, they did not question or detain her earlier because they were still trying to identify everyone involved and thought defendant might try to contact her or return home if she remained out of custody.

Defendant’s interview on April 16, 2014 was recorded and lasted about an hour and a half. The audio tape and transcript of portions of the interview were introduced at trial. At the beginning of the interview, Detective Cortes advised defendant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Cortes also had advised defendant that his wife was in custody, and defendant raised the subject of that detention repeatedly during the interview.<sup>8</sup>

Defendant initially denied any knowledge of or involvement in the shooting. However, as the interview progressed, he admitted that “a girl called me” and he drove to the scene with Torres and another man. Once they arrived, defendant claimed Miguel was fighting with Enrique. Defendant tried to help, but Enrique started hitting him so he fought back. According to defendant, Miguel started telling him that “this is Penguin’s house,” and that Enrique was “disrespecting the house”; defendant did not know who Penguin was, but thought it meant he was in trouble and might

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<sup>7</sup>Cruz is referred to at various times in the record and briefs as defendant’s wife, girlfriend, and/or the mother of his children. Defendant clarified prior to trial that he and Cruz were married.

<sup>8</sup>We discuss the portions of the interview related to defendant’s constitutional claims in further detail below.

get killed.<sup>9</sup> Defendant stated that after that, “the gun came out, you know? And, and, he got shot, they shot . . . the guy and he took off running.” When Lakovic asked who shot Enrique, defendant responded “I didn’t shoot him.” Defendant then admitted he had the gun but again claimed he did not do the shooting. After further questioning, he admitted that he shot Enrique, claiming he “was pushed to” because he was “scared” of what Miguel told him about Penguin’s house. Asked where he shot Enrique, defendant stated “I think somewhere by the head. . . . As he was on the ground you know, and like, I was scared, so I don’t know, you know, everything happened fast.”

Defendant identified the gun as a .22 revolver and said he took the gun out of his jacket and shot Enrique once. He did not know Enrique’s name or who he was, but felt he had to shoot and kill Enrique because “it’s either I do this or they going to come either for me or my family.” According to Cortes, defendant claimed he was contacted by Penguin after the shooting and thanked for his actions. Defendant also stated that he got rid of the gun in an alley after the shooting.

## DISCUSSION

Defendant contends the trial court erred in admitting the incriminating statements he made during his interview with police. First, he contends the statements were obtained in violation of his *Miranda* rights because the detectives failed to cease questioning him after he had unequivocally invoked his right to counsel. Alternatively, he argues his statements were involuntary and the product of promises by detectives regarding his wife. We disagree with both points.

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<sup>9</sup>Defendant’s statements on this issue are not entirely clear. Initially when he mentioned Penguin during the interview, defendant seemed to be suggesting that Miguel told him about Penguin and that Enrique was shot (at this point defendant had not admitted being the shooter) for disrespecting “Penguin’s house.” After further questioning by the detectives, defendant seemed to claim that Enrique shoved defendant while saying “like, what, this is Penguin’s house,” causing defendant to realize that Enrique was connected to Penguin who was “somebody” important, and leading defendant to believe he had to react or put himself, Miguel, and his family in danger.

## **I. *Factual background***

### **A. *Defendant's interview on April 16, 2014***

At the outset of the interview, Detective Cortes mentioned that “we were very late” the day before and did not “have a chance to come back and talk to you.” However, Cortes did ask defendant the previous day if defendant knew “why you were here” and told defendant they wanted to talk to him regarding the “incident, the homicide investigation.” Defendant acknowledged this statement and that the detectives previously showed him a photo depicting him and the “two other subjects” who were already in custody, Miguel Medina and Torres. Cortes then identified the homicide “that happened at 15th and, uh, Junipero involving you and . . . these two other subjects.”

After taking down defendant’s identifying information, Cortes stated that “before . . . I start asking any questions I have to advise you of your rights.” Cortes then provided the following advisement: “[Y]ou have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have him present with you while you are being, uh, questioned. If you cannot afford to hire an attorney one would be appointed to represent you before any questioning is done, do you understand each of these rights that I explained?”<sup>10</sup> Defendant responded “yes.”

Cortes then told defendant they believed he was responsible for the shooting and asked if defendant knew “who and why people would accuse you of ... being responsible for this man’s death?” Defendant maintained that he did not know, nor did he know anyone who lived near the incident. He admitted he was “involved” in the B.S.T. gang “back in the days when I was a kid,” used the gang moniker of “Popeye,” and was friends with Miguel, but claimed he was no longer associated with the gang.

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<sup>10</sup> The parties stipulated at trial that the *Miranda* form produced by the Long Beach Police Department included the final question “understanding these rights, do you wish to talk to me now?” but that “courts have found that failure to ask that question does not violate the defendant’s rights under *Miranda*.” Cortes testified that he gave the advisement from memory and did not ask that question in defendant’s interview.

Cortes next asked, “when was the last time you spoke to Miguel?” Defendant responded, “Mm, can I have a lawyer present or?” Cortes replied, “Yeah, that’s, you can, you can . . . [¶] you know, have anything that you want, you know, right now. You know, it’s really up to you. Is that, is, if that’s, that’s what you want, you know, that’s, that’s okay. You know, um, right now you were advised, you know, once you got arrested, you know, why you got arrested. . . . [¶] And what’s going on with the case.” Defendant stated, “Mm-hmm. [¶] . . . Well, I don’t know what was going on. You haven’t told me nothing [sic].” Cortes then explained, “basically that, you know, you’re the one that, that killed the man. And that’s why you got arrested. [¶] . . . Okay? And everything happens for a reason and everything . . . can be . . . explained. . . . We were hoping that, you know, you would talk to us regarding . . . what happened. You know, but, you know, obviously, you know, you, you, uh, uh, seem not to be interested and that’s, that’s your right.” Defendant replied, “No, I’m interested but I want to know what’s going on. . . . [¶] You can tell me what’s going on.”

Next, Defendant asked who was accusing him and “why are they saying it was me?” Cortes told defendant that witnesses identified him and his friends, and asked defendant to explain it. Defendant replied, “I understand.” Cortes then stated, “Okay, is there anything that, uh, you know, you . . . could explain to us before . . . we, uh, take you back?” Defendant responded, “Yeah, I would like to know why you brought up my [wife] yesterday.” Cortes told defendant he believed defendant’s wife, “harbored you, she helped you, you know, flee . . . the area.” Cortes continued, “She’s in custody right now, you know, so I’m going to go talk to her and she is going to be booked--.” Defendant asked “what can I do to let her, to get her out of there, ‘cause she don’t got nothing to do with this [sic].” Cortes responded that defendant should be “honest with us.” Defendant again reiterated that Cruz had nothing to do with the shooting, and Cortes replied that “right now there’s, there’s enough evidence, you know, to, to indicate otherwise.”

Cortes acknowledged that the police did not believe defendant’s wife was involved in the homicide, but only with “helping you out.” Defendant again asked, “well, what can I do with this for her to get out [unintelligible]



she done nothing to do with this [*sic*].” Cortes responded, “Tell us, tell us the truth. [Lakovic is] an honest man, I’m an honest man, and if that’s the case.” Defendant told the detectives he had “a kid that is sick” and his wife was the “24 hour nurse” for the child, and again asked if they will let his wife go. Cortes replied that “the truth is more important than, you know, her actions, okay?”

Upon defendant’s continued entreaties to release Cruz, Cortes stated “If she’s not involved, [unintelligible] directly with the homicide.” Defendant insisted that his wife was not involved. In response to additional requests by defendant, Cortes again stated “we’ll let her go, that’s no problem. . . . You know, . . . I’m a fair man, okay?” Defendant asked the detectives to “promise you guys will let her go,” to which Cortes responded, “if she’s not involved with the homicide.” Defendant insisted repeatedly that his wife did not do anything. While he would not “go into details” on her involvement, Cortes told defendant that “it’s enough . . . to give us enough . . . probable cause to bring her out here.”

Lakovic further stated to defendant that “The only way we’re going to know that she doesn’t have anything to do with it is if you tell us. She is part of our investigation. . . . [¶] If you’re not going to tell us what happened, she is part of the stepping stones that we’re going to use . . . [¶] [t]o do our entire investigation. . . . [¶] If you’re honest and you say, here is what happened, you know, A through Z, and we see that, okay, she, she’s not involved, cool. You know, we’re good with that.” Defendant responded that he would “be honest with you but just let my wife go, okay?” He then started to explain how he just told his wife he was “going to Tecate to work for my sister,” which was the reason he left for Mexico, but Cortes interjected that “we know a lot more. . . . [¶] we’re not BS’ing you, you know.”

Defendant responded, “Me either. . . . I can just be like, well, I want a lawyer and that’s it, you know? I don’t want to do that, you know? I want to work with you guys and you guys have to work with me.” The detectives told defendant that they were trying to work with defendant, “but we have to know what happened . . . . [¶] [U]nfortunately, when incidents happen, it involves a lot of people,” and as a result, “we’re just going to go after everywhere.” After defendant requested the detectives “promise” that they

would let his wife go “right now,” Lakovic replied that they would, “after we talk to you,” adding, “[i]f you’re honest.”

After again agreeing to talk to the detectives, defendant asked, “supposing she helped me and all that, none of that, all right, nothing is going to follow her or any of that, right?” Lakovic responded that “if we let her go now, we don’t have any intentions of letting her go and then arresting her tomorrow, if that’s what you’re asking.” Defendant complained that a future arrest of his wife would be unfair, to which Lakovic responded, “That’s what I’m saying, as long as you’re honest with us and you explain how she didn’t know anything and we believe you and . . . [¶] fill in all the blanks.” Defendant stated he would tell the truth. Lakovic replied that the detectives had “no problems” with letting Cruz go, but “it’s all up to you.” Defendant then complained that he felt like he was getting “set up.” Cortes responded, “Okay. Explain, um, well, first of all, you know, you had mentioned you need, you want to talk to a lawyer.” Defendant asked, “But you guys said if you...you guys are going to let my wife go, right?” Both detectives again agreed that they would let Cruz go.

Later, defendant asked whether he would be able to talk to his wife to make sure the police were letting her go. Cortes replied, “We’ll take you over . . . so you can talk and, you know, so you can see that we’re not, we’re not playing games.” Defendant subsequently began to talk about the events surrounding the shooting, as detailed above.

#### B. *Motion to suppress*

Prior to trial, defendant moved to exclude his post-arrest statements, arguing that they were made in violation of his unequivocal request for counsel and in exchange for coercive promises of leniency. The trial court listened to the entire recording of the police interview and heard argument from the parties. The court then denied the motion.

First, the court considered whether defendant was properly given the *Miranda* warnings, concluding that he was fully advised and waived those rights. Next, the court examined whether defendant subsequently invoked his right to an attorney. Defendant’s counsel argued that defendant had not previously waived his rights, and his statement unambiguously invoked his right to counsel. The People argued defendant did not make a clear

invocation, but rather a “reasonable officer could interpret this as a clarification of his rights.” The People also argued that defendant’s statements later in the interview evidenced his understanding of his rights.

The court found that the request “was not clear and unambiguous.” If defendant “had indicated, I want a lawyer,” then “[a]ll conversation has to end right there.” Here, however, “defendant was advised, he says, can I have a lawyer present or? And then he asks questions about what the detectives know, what other co-participants may have pled to, what is going on with his wife.” The court also found it was clear from defendant’s subsequent statements “that he knew that he had a right to an attorney but he has not wanted to exercise his right. . . . So that explains the first statement that he made . . . can I have a lawyer present or, that’s an inquiry. That’s not a clear unambiguous request for one.”

Finally, the court turned to the issue of coercion. Defendant’s counsel argued that the timing of Cruz’s detention suggested that its purpose was to induce defendant to speak. The court asked the prosecutor why Cruz was detained the same day as the interview, rather than earlier in the investigation. The prosecutor stated that the police were monitoring her when they could not find defendant, hoping that he would return to her. The prosecutor also argued that the benefit pointed out by detectives “was a natural consequence of a truthful and honest course of conduct” and did not render defendant’s statement involuntary. The court noted that the detectives had already promised to let Cruz go and told defendant they did not believe she was involved in the homicide “before they receive[d] any information at all,” and that there was no promise defendant “had to say the right thing in order for his wife to be let go.” As such, the court did not find any coercion based on those promises. The court relied on the fact that it was defendant who first brought up the subject of his wife during the interview. The court also noted that the detectives told defendant multiple times that if he was honest with them and they believed Cruz was not involved, they would let her go, but they did not say “we will let her go if you tell us what we want to hear,” which would be coercive. As such, the court found defendant’s subsequent statements were voluntary. In addition, the court found that even after defendant was purportedly induced to confess, he gave “about five

variations as to what happened,” the first several of which were attempts “to mitigate himself” and included his claim that he was not the shooter. Thus, “during the entire statement in which he talks about the homicide, [defendant] has only one effort, that is, to mitigate himself. [¶] Based on the totality of the circumstances, from the start to finish, the court finds that there is no coercion.”

## **II. *Standard of review***

“In reviewing the trial court’s denial of a suppression motion on *Miranda* and involuntariness grounds, ““we accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.”” [Citations.] Where, as was the case here, an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review. [Citation.]” (*People v. Duff* (2014) 58 Cal.4th 527, 551.) To the extent there are conflicting facts, “we accept the version favorable to the People if supported by substantial evidence.” (*People v. Weaver* (2001) 26 Cal.4th 876, 921.)

## **III. *Miranda Waiver***

Defendant contends that his question during the interview, “Mm, can I have a lawyer present or?” was an unequivocal request for an attorney. Because the detectives continued to question him without an attorney present, he claims his subsequent statements were obtained in violation of his *Miranda* rights and are therefore inadmissible. We conclude that defendant did not unequivocally assert his right to counsel and therefore the trial court did not err in admitting his statements.

“Under the familiar requirements of *Miranda*, . . . a suspect may not be subjected to custodial interrogation unless he or she ‘knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent.’ [Citation.]” (*People v. Sims* (1993) 5 Cal.4th 405, 440.) “Statements elicited in violation of this rule are generally inadmissible in a criminal trial.” (*People v. Mayfield* (1997) 14 Cal.4th 668, 732, overruled in part on another

ground in *People v. Scott* (2015 61 Cal.4th 363, 390.) The waiver of a defendant's *Miranda* rights may be express or implied. (See, e.g., *People v. Whitson* (1998) 17 Cal.4th 229, 247–250 [defendant's indication that he understood his rights and his subsequent response to questions indicated a waiver of *Miranda* rights]; *People v. Medina* (1995) 11 Cal.4th 694, 752 [same]; *People v. Sully* (1991) 53 Cal.3d 1195, 1233 [defendant impliedly waived his *Miranda* rights when, after being admonished of his rights, he responded affirmatively that he understood them and then gave a tape-recorded statement].)

“The rule that interrogation must cease because the suspect requested counsel does not apply if the request is equivocal, ‘[r]ather, the suspect must unambiguously request counsel.’” (*People v. Sapp* (2003) 31 Cal.4th 240, 266, quoting *Davis v. U.S.* (1994) 512 U.S. 452, 459 (*Davis*).)

Once a defendant has waived his or her right to counsel, “if that defendant has a change of heart and subsequently invokes the right to counsel during questioning, officers must cease interrogation unless the defendant's counsel is present or the defendant initiates further exchanges, communications, or conversations. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 484–485.) For a statement to qualify as an invocation of the right to an attorney, however, the defendant ‘must unambiguously request counsel. . . . [H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.’ (*Davis*[, *supra*, 512 U.S. at p.] 459.) ‘[A] reviewing court—like the trial court in the first instance—must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant.’ [Citations.]” (*People v. Cunningham* (2015) 61 Cal.4th 609, 645-646 (*Cunningham*).)

Thus, initially we must determine whether defendant validly waived his *Miranda* rights in the first instance. We conclude that he did. After being advised of his rights within the first few minutes of the recorded

interview, defendant responded affirmatively that he understood them. He then proceeded to respond to questions and provided information about his prior gang affiliation. Any question that defendant understood his right to an attorney and initially waived it was dispelled when he later told detectives, “I can just be like, well, I want a lawyer and that’s it, you know?” As such, the record amply supports the trial court’s conclusion that defendant knew of and waived his right to counsel at the start of the interview.

In light of defendant’s initial *Miranda* waiver, we turn to consider whether his subsequent statement, “Mmm, can I have a lawyer present or?” was an unambiguous invocation of the right to “immediate presence of an attorney.” (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126 (*Gonzalez*).) Based on our review of the transcript and audio recording of defendant’s interview, we conclude that defendant’s statement was ambiguous. At most, a reasonable officer could have understood defendant’s inquiry as an indication of his indecision, or that he might want an attorney, rather than an unequivocal request for one. (See, e.g., *Cunningham, supra*, 61 Cal.4th at pp. 646-647 [defendant’s statement, “I committed an armed robbery yes.’ . . . ‘Should I have somebody here talking for me, is this the way it’s supposed to be?” was, at most, “an indication he might want an attorney, in which case the detectives still would not have been required to terminate the interrogation”]; *Gonzalez, supra*, 34 Cal.4th at p. 1126 [defendant’s conditional statement that he wanted a lawyer “if he was going to be charged” “was not an invocation of right to counsel”]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 524, [defendant’s statement “I was just thinkin’, maybe I shouldn’t say anything without a lawyer and then I thinkin’ ahh.” was too ambiguous to amount to an invocation]; *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070–1072 [“I think I would like to talk to a lawyer” was not an unequivocal request for counsel]; *Dormire v. Wilkinson* (8th Cir. 2001) 249 F.3d 801, 803–804 [defendant’s request to call his girlfriend was immediately followed by “Could I call my lawyer?” was equivocal]; *Diaz v. Senkowski* (2d Cir. 1996) 76 F.3d 61, 63–65 [“Do you think I need a lawyer?” held to be equivocal].)

Defendant argues that his statement was unambiguous, in part because he did not use “equivocal” words such as “maybe” or “might.” While

the use of such words can undoubtedly serve to signal equivocation, courts have not required their presence to find a defendant's statement ambiguous. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 124, 128-131 [defendant's query—"Did you say I could have a lawyer?"—was a clarification of rights rather than an unambiguous invocation]; *Gonzalez, supra*, 34 Cal.4th at p. 1126 [defendant's conditional statement that he wanted a lawyer "if he was going to be charged" was not an invocation of right to counsel]; *Lord v. Duckworth* (7th Cir.1994) 29 F.3d 1216, 1219-1221 ["I can't afford a lawyer but is there any way I can get one?" was equivocal]; *Connecticut v. Anonymous* (1997) 694 A.2d 766, 770-775 ["Do I still have a right to an attorney?" was equivocal]; *Poyner v. Murray* (4th Cir.1992) 964 F.2d 1404, 1410 ["Didn't you tell me I had the right to an attorney?" was equivocal].) Moreover, the use of "or" at the end of defendant's statement here underscores the equivocal nature of the request. (See *People v. Roquemore* (2005) 131 Cal.App.4th 11, 24 ["Can I call a lawyer or my mom to talk to you?" was equivocal].)

We also reject defendant's suggestion that the detectives' subjective understanding of his request for counsel supports the opposite result. Whether a suspect has invoked the right to counsel "is an objective inquiry." (*Davis, supra*, 512 U.S. at p. 459; *People v. Roquemore, supra*, 131 Cal.App.4th at p. 27 [the subjective beliefs of the interrogating officers that defendant invoked *Miranda* rights "are irrelevant to the constitutional admissibility of evidence issue"].)

Here, where defendant's statement was otherwise ambiguous, evidence of the subjective beliefs of one of the detectives does not alter that conclusion. Nor were the detectives required to seek clarification, given the ambiguity of defendant's request. There is no requirement that officers interrupt an interrogation to ask clarifying questions following a suspect's ambiguous or equivocal responses that might or might not be construed as an invocation of the right to an attorney. (*Davis, supra*, 512 U.S. at pp. 461-462; see *People v. Farnam* (2002) 28 Cal.4th 107, 181.)

#### **IV. Coercion**

Defendant also asserts that his confession to detectives was inadmissible because it was based on the detectives' promises that they

would let his wife go if he confessed. “An involuntary confession may not be introduced into evidence at trial. [Citation.] The prosecution has the burden of establishing by a preponderance of the evidence that a defendant’s confession was voluntarily made. [Citations.] In determining whether a confession was voluntary, “[t]he question is whether defendant’s choice to confess was not ‘essentially free’ because his [or her] will was overborne.” [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.]” (*People v. Carrington* (2009) 47 Cal.4th 145, 169; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 347 (*McWhorter*) [“In determining whether or not an accused’s will was overborne, ‘an examination must be made of “all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” [Citation.]’ [Citation.]”].)

A confession “elicited by any promise of benefit or leniency,” whether express or implied, is involuntary and therefore inadmissible. (*People v. Holloway* (2004) 33 Cal.4th 96, 115.) “However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, “[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,” the subsequent statement will not be considered involuntarily made. [Citation.]” (*Ibid.*)

“Additionally, although coercive police conduct is a necessary predicate, such conduct does not compel a finding that the resulting statement is involuntary. [Citation.] A confession is involuntary only if the coercive police conduct at issue and the defendant’s statement are causally related. (*Colorado v. Connelly* (1986) 479 U.S. 157, 164, fn. 2, & 167; [*People v. Jablonski* [(2006) 37 Cal. 4th 774,] 814 [The police misconduct “must be ... the ‘proximate cause’ of the statement in question, and not merely a cause in fact.”]; see, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1095–1096 [the defendant’s statements were not coerced by false threats of arrest; the sole cause appearing in the record for his cooperation during the interview was the desire to exculpate himself]; *Williams* [1997] 16 Cal.4th [635] 661 [promises of leniency were ‘not the motivating cause of [the] defendant’s



admissions’].)” (*Cunningham, supra*, 61 Cal.4th at p. 643; see also *McWhorter, supra*, 47 Cal.4th at p. 347 [“The statement and the inducement must be causally linked.”].)

Defendant asserts that he was coerced into confessing to the homicide by promises of leniency for his wife. The Attorney General counters that the detectives did not promise to let Cruz go in exchange for a confession, rather, they merely explained to defendant the natural benefit that would occur if he truthfully provided details to substantiate his claim that Cruz was not involved. Both sides cite to *McWhorter, supra*, 47 Cal.4th 318 and the cases analyzed therein. We agree that these cases are instructive.

In *McWhorter*, the defendant was charged with the murders of a former next door neighbor and her son. (*McWhorter, supra*, 47 Cal.4th at p. 324.) The defendant committed the murders to steal \$3,000 from the victims’ apartment, which he then gave to his wife. (*Id.* at p. 343.) Following defendant’s arrest, police sought to speak with his wife, Billie, whom they believed was possibly a co-conspirator. Billie agreed and was transported to the station for an interview. (*Ibid.*) During the defendant’s interview, officers discussed both Billie and defendant’s mother, telling defendant he was “dragging everybody within your family into this thing.” (*Id.* at p. 350.) The officers also suggested to defendant that unless he confessed, his mother would become a witness and would have to “ride this roller coaster with you.” In another instance, defendant told the police he did not want his mother involved and the detective pointed out that she was going to have to become involved unless he told them the truth. (*Id.* at pp. 343-344.)

With respect to the defendant’s wife, the detective told defendant “she was not convinced Billie was not somehow involved in the crimes, and had not yet decided if Billie was ‘going to go with you too.’” Defendant insisted his wife was not involved, told officers she was “scared to death” and asked them to “please let her go.” (*Id.* at p. 351.) The officers stated that they did not think Billie was involved in the actual murders, but could be found an accessory after the fact, and told defendant, “The ball’s in your court. You call the shots on, on what’s gonna happen tonight . . . with Billie.” (*Ibid.*) “Defendant responded, ‘I don’t see why you can even think about arrestin’ my wife for anything.’ Sergeant Johnson replied, ‘Because you’re not bein’

truthful.’ Defendant asked, ‘Because you want me to admit to murder?’ Sergeant Johnson replied, ‘Cause I’m, I’m, no, I want you to tell me the truth.” (*Ibid.*)

After further discussion, the officer told defendant, “[Y]ou may think I’m trying to pressure you by holding Billie over your head. I’m just being realistic. That’s all, I’m being realistic.’ Defendant responded, ‘Well it sounds to me like you want me to admit to, admit to it so you’ll let her go.’ Johnson replied, ‘No, you know what, you know what I want you to do? I want you to tell me the truth. And so far you haven’t been telling me the truth.” (*McWhorter, supra*, at p. 351.) After admitting to killing the victims, “defendant stated, ‘Now will you let my wife go please.’ Sergeant Jordan explained he would still have to talk to Billie, but then said ‘if what you’re telling me is true” he would release Billie. (*Id.* at p. 352.)

The trial court found defendant’s confession was voluntary, and the Supreme Court agreed.<sup>11</sup> First, “[w]ith regard to the comments about defendant’s mother, we do not read Sergeant Johnson’s remarks as ‘threatening’ to involve her as a witness in the case unless defendant confessed. Rather, the officers, in essence, were telling defendant that by lying about having borrowed the money from his mother, he himself was involving her in the case as a potential witness, which was an accurate observation.” (*Id.* at pp. 348-349.) Moreover, officers could “appropriately state as fact that because of comments he’s made, . . . as a result thereof he is bringing others into the picture, including his mother,” and also could properly “challenge him to ... change that information or admit that it’s inaccurate information.” (*Id.* at p. 349.) In similarly rejecting the defendant’s claim that the officers made “threats to involve [his] wife criminally,” the court focused on evidence that the defendant’s wife had been brought to the station for legitimate questioning as a potential witness or

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<sup>11</sup> The trial court did find that a subsequent statement by an officer, made after defendant’s initial confession, that “You have my word as a man to man that she [Billie] goes if you give me enough details about the homicides that I can show . . . specifics” was coercive and therefore suppressed additional confessional details provided by defendant after that point. (*Id.* at pp. 344, 352.) This ruling was not challenged on appeal and the Supreme Court did not reach it. (*Ibid.*)

accessory, as well as the fact that defendant initiated the conversation about his wife. (*Id.* at pp. 353-358.)

In concluding the officers' statements regarding defendant's wife were not coercive, the *McWhorter* court analogized to the facts of *People v. Jackson* (1971) 19 Cal.App.3d 95; *People v. Abbott* (1958) 156 Cal.App.2d 601; and *People v. Howard* (1988) 44 Cal.3d 375 (*Howard*). In *Jackson*, officers arrested defendant and his wife and placed them in separate rooms for interrogation. (*Jackson, supra*, 19 Cal.App.3d at p. 98.) Defendant brought up the subject of his wife, asking why she was being held and stating, "I'll give up the right to remain silent just to get my wife out of this, nothing more." (*Id.* at pp. 98-99.) Defendant also told officers that his wife had a heart condition and he did not "want to put her through any more than I already have." (*Id.* at p. 99.) The officer told defendant that "after I got [sic] through talking to her and comparing what you told me with what she says, if I have reason to feel she's not involved in it, I'm sure as hell not going to book her." (*Ibid.*) The *Jackson* court concluded that "there were no inducements nor, of course, were there any threats. At most there was a simple statement of fact by the officer that defendant's wife would be released if further investigation convinced him and his superiors that she had no connection with the crime despite the suspicious circumstances which defendant, by his own admissions, had created." (*Id.* at p. 100.) The court further observed that "there were reasonable grounds for the detention of defendant's wife," including that following the homicide, defendant and his wife had left an apartment potentially used in planning the crime and were possibly leaving the state. (*Ibid.*) Thus, "[s]ince the simultaneous arrests of defendant and his wife occurred before defendant's confession, and since they were both based on reasonable grounds the trial court properly held that there was no coercion or inducement. . . ." (*Ibid.*; see also *Abbott, supra*, 156 Cal.App.2d at p. 605 ("[T]he officers made it clear to defendant that [his girlfriend] would not be prosecuted if their investigation failed to disclose evidence of her guilt, but this was not a threat to prosecute her if defendant did not confess the crime nor a promise to release her if he did. The fact, alone, that the principal motive for a confession is that it will probably result

in the exoneration of another person who is suspected of complicity in the offense does not render the confession involuntary. . . . [Citations.]”)

Similarly, in *Howard, supra*, 44 Cal.3d at pp. 395-396, officers detained defendant’s girlfriend and son as possible accomplices or witnesses to the murder. During defendant’s interview, officers urged defendant “to square your part of this thing away” and telling defendant he “wouldn’t want somebody else, especially someone you loved – ride [*sic*] a beef for you.” (*Id.* at p. 396.) They also played portions of audio recordings of their interviews of defendant’s girlfriend and son, during which the former was heard crying. (*Ibid.*) Defendant asked officers for reassurance that “[t]his isn’t gonna involve [his son]?” and they confirmed that it would not, stating, “We don’t want your boy, Gary. We want the main parties in this.” (*Ibid.*) The court found no inducement, stating that the officers “did not imply that the fate of defendant’s son and of [his girlfriend] depended upon defendant stating what they wanted to hear.” (*Id.* at p. 398.) As such, the police statements at issue merely pointed out the benefits flowing “naturally from a truthful and honest course of conduct,” and did not induce the defendant’s subsequent confession. (*Ibid.*)

Similarly, here, defendant raised the subject of his wife’s detention during his interrogation. Further, the detectives testified that they had valid reasons for waiting to detain Cruz until after defendant was found, and for believing she might have been involved in harboring him or helping him to flee. The record contains substantial evidence to support these conclusions. Detectives acknowledged that they did not believe Cruz was involved in the homicide and did not threaten otherwise. They also told defendant repeatedly that if he told the truth and could establish she was not involved, they would let her go. Under these circumstances, the detectives’ statements were not improper promises made to induce defendant to confess; rather, they urged defendant to tell the truth and pointed out that his truthful statements could have the natural consequence of removing suspicion from his wife. (See *People v. Montano*, 184 Cal.App.2d 199, 210 [“The fact, alone, that the principal motive for a confession is that it will probably result in the exoneration of another person who is suspected of complicity in the offense does not render the confession involuntary.”].) The cases holding otherwise,

including those distinguished by *McWhorter*, have done so under very different circumstances. (See, e.g., *People v. Trout* (1960) 54 Cal.2d 576, 584–585 [concluding a defendant’s confession was coerced when police held the defendant’s wife in custody for the purpose of securing a confession from the defendant, even though police had no grounds to believe the defendant’s wife was involved, and further told the wife—who told defendant—that they would let her go if her husband confessed], overruled on another ground as stated in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17; *McWhorter*, *supra*, 47 Cal.4th at p. 354 [distinguishing *Trout*]; *People v. Rand* (1962) 202 Cal.App.2d 668, 670, 674 [reversing conviction based on coercive statements by a police officer who told the defendant if the defendant did not know who owned marijuana cigarettes police found in his apartment, the officer would have to arrest the defendant’s wife and have their children “lock[ed] up” in juvenile hall].)

In addition, apart from the discussion regarding his wife, the evidence of the remaining circumstances of defendant’s interrogation supports the conclusion that defendant’s confession was voluntary. Defendant was 32 years old at the time, and the record does not reveal any physical or mental limitations that would affect his ability to decide whether to speak to the detectives. Moreover, neither the length nor the tone of the interrogation was particularly coercive. (See, e.g., *People v. Cunningham*, *supra*, 61 Cal.4th at p. 644 [considering length and physical circumstances of interrogation, whether tone of questioning was “particularly harsh or accusatory,” defendant’s maturity, prior contacts with law enforcement, and welfare and mental state]; *Williams*, *supra*, 16 Cal.4th at p. 660 [same].)

Finally, we agree with the trial court’s finding that defendant’s confession was not caused by any promises made by the detectives. Significant time elapsed between the detectives’ agreement to let Cruz go and defendant’s ultimate confession that he shot Enrique. In the interim, defendant offered multiple versions of the incident, the majority of which did not implicate him as the shooter. Defendant’s shifting explanations thus reflected his attempt to mitigate his own culpability, rather than any compulsion to confess in exchange for leniency for Cruz. (See, e.g., *People v. Carrington*, *supra*, 47 Cal.4th at p. 170-171 [no causation or coercion where

defendant confessed one hour after comments regarding possible leniency were made, and defendant was confronted with incriminating evidence in the interim]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 59 [“His resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information”].)

In addition, defendant had repeatedly expressed a willingness to speak with the detectives prior to any discussion of his wife, including asking them for details about the case and stating that he was “interested” in discussing it. As such, it does not appear the detectives’ statements to defendant regarding his wife overcame his will to resist or his ability to freely determine whether he wanted to talk to the detectives, such that the discussion regarding Cruz was the proximate cause of defendant’s later incriminating statements. (See *People v Guerra, supra*, 37 Cal.4th 1067, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151 [no causal link where defendant exhibited same willingness to cooperate throughout interview and continued to deny his involvement following officer’s threats].) Accordingly, based on the totality of the circumstances, we conclude defendant’s statement was voluntary and therefore admissible.

### **DISPOSITION**

The judgment of the trial court is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.