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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL MARTINEZ, Defendant and Appellant.	2d Crim. No. B263419 (Super. Ct. No. 2010006451) (Ventura County)

Miguel Martinez appeals the judgment following his conviction for first degree murder, committed during the commission or attempted commission of robbery and burglary on February 19, 2010 (Pen. Code, § 187, subd. (a); count 1),[1] and accessory after the fact of a robbery/burglary occurring on February 17, 2010 (§ 32; count 2). The jury found not true the special allegations in count 1 that a principal was armed with a firearm during the commission of the offense (§ 12022, subd.

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

(a)(1)), and that the offense was committed while appellant was engaged in the commission or attempted commission of a burglary and/or robbery (§ 190.2, subd. (a)(17)(A)(G)).

The trial court sentenced appellant on count 1 to an indeterminate term of 25 years to life in prison, and on count 2 to a determinate term of two years in prison consecutive to the term imposed on count 1. Appellant contends that statements he made to police on two separate occasions were admitted in violation of his *Miranda*[2] rights. He also contends that his sentence constitutes cruel and unusual punishment. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Appellant was friends with Jose Ochoa and knew Ochoa owned a gun. On February 17, 2010, appellant drove Ochoa to the Tokyo Spa massage parlor in Oxnard. Ochoa told appellant he planned to "[g]o in and get some cash" and instructed appellant to wait in the vehicle. Ochoa entered the Tokyo Spa, held a gun to the proprietor's head and demanded money. Ochoa took $140 in cash, a laptop computer, a small television and three cell phones. After Ochoa returned to the vehicle, appellant drove to Ochoa's house. Ochoa gave appellant $20.

Two days later, on February 19, 2010, Ochoa told appellant that he intended to get more money to buy beer. That night, appellant drove Ochoa and appellant's brother, Gabriel Lopez, to the A-1 Spa in Oxnard. While appellant waited in the vehicle, Ochoa confronted the proprietor, Sun Cha Kay, by grabbing her and pointing a gun at her head. When she resisted, Ochoa shot her in the head, killing her. Ochoa and Lopez

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

returned to the vehicle without taking anything. Appellant drove them back to Ochoa's house.[3]

At 4:30 p.m. on February 22, 2010, Detectives Adam Wittkins and Mike Young of the Oxnard Police Department contacted appellant on a street in Oxnard.[4] The detectives were dressed in civilian clothes and driving an unmarked police vehicle. Their guns and badges were in plain view. They asked appellant if he would speak with them at the police department. Appellant agreed to do so. The detectives "told him that no matter what he told [them], that he would be free to go and [they] would give him a ride home."

Young drove them to the police station. Appellant sat in the passenger seat and was not handcuffed. During the ride, the detectives again "told him that he would be free to go and that [they] would give him a ride home." He said "okay" or something to that effect. When they got to the station, they went into an interview room.

The detectives wore their sidearms during the interview, but at no point did they brandish their weapons. Nor did they promise appellant he would receive a lesser charge or sentence by cooperating with them. His movement was not restricted during the interview, and appellant was not told that he had to stay and complete the interview. In general, the detectives told appellant, who was 17, that he had his whole life

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[3] Appellant had three prior juvenile adjudications: tagging and fighting incidents when he was 13 years old, and theft of a Playstation from a school mate when he was 14 years old.

[4] At the time of trial, Wittkins was working as an investigator for the District Attorney's Office.

ahead of him and should not lie because it would not look good in the future.

The interview lasted about an hour and was recorded. Initially, appellant denied any involvement in the robberies. Toward the end of the interview, he started crying and admitted that he drove Ochoa's vehicle to the Tokyo Spa on February 17, 2010, and that he parked the vehicle near the Tokyo Spa. Ochoa said he planned to rob the spa and would be back. Appellant described the items of stolen property that Ochoa brought back to the vehicle. Appellant told the detectives that when Ochoa returned, Ochoa said, "Let's jam." Appellant then drove Ochoa and the stolen property back to Ochoa's residence. Ochoa gave appellant $20 of the money taken during the robbery.

Appellant also admitted that he drove his brother, Gabriel Lopez, and Ochoa to the A-1 Spa on February 19, 2010. When they arrived, Ochoa told appellant to park and wait in the vehicle while Ochoa and Lopez went inside. Appellant knew they were going to commit a robbery. Ochoa and Lopez were gone for five or ten minutes. When they returned, Ochoa told appellant they had not taken anything. Appellant drove them back to Ochoa's house. Appellant said he was not aware of the homicide until he read about it in the newspaper.

Following the interview, appellant was not arrested. Detective Young gave appellant a ride home. En route, appellant agreed to show them the locations where he had parked the vehicle during the two robberies.

On the afternoon of March 9, 2010, Detectives Jeff Kay and Bakari Myers contacted appellant and two companions on the street near appellant's residence. Detective Kay asked appellant if they could speak with him about what happened at

the massage parlors. Appellant agreed to speak to the detectives and said they could talk at appellant's residence, but appellant was concerned about what his companions would think about his leaving with the officers. Detective Kay told appellant they would tell his friends, as a ruse, that they were going to conduct a probation search at his house. Appellant agreed to the ruse.

Upon entering appellant's residence, the detectives informed appellant's mother they would be speaking with appellant in his bedroom. Appellant's mother "seemed okay with it."

Detective Kay explained to appellant why they were there and the topics they wanted to discuss with him. Detective Kay said he was the case agent for the homicide that occurred at the massage parlor. He said he knew appellant was involved and that he "wanted to know how [appellant] felt about it and what was going on inside his mind when things were happening that night." Detective Kay asked, "Are you cool with that?" Appellant replied, "Yeah." Detectives Kay and Myers then interviewed appellant for approximately an hour and a half. They recorded the interview.

The detectives were not aggressive with appellant during the interview. At no point did they tell him he was required to speak with them. Nor did they tell him he could not leave. Appellant never asked to leave or to terminate the interview. Appellant was not handcuffed or otherwise restrained. Following the interview, the detectives left the residence. Appellant was not arrested at that time.

At trial, appellant moved to suppress the statements made during both interviews. The trial court denied the motion following an evidentiary hearing. With respect to the

stationhouse interview, the trial court stated: "He's not in custody. He's told multiple times that he's not in custody. He's told he can leave and they're going to take him home when they're done. And in terms of being coercive, basically he stonewalled them for 45 minutes. They ask him questions and he [told] them 'I don't know what you're talking about. I didn't do it.' So as opposed to being overwhelmed by them, that's not true at all. In fact, what he actually said was de minimis in terms of his admissions. He gave them very little. [¶] So I don't think in any way that he was overcome by their tactics. He held up really well, and so I don't find anything inappropriate about this at all."

The trial court reached the same conclusion regarding the residential interview. It found: "This is clearly not a detention. I mean, he's in otherwise [his] own house; let's them come in. They have a conversation with his mother which he translates saying we're going to talk to [appellant] in the bedroom. This is pretty low key too. The last one was fairly low key. This is very calm. [¶] They don't -- I mean, they talk to him about . . . 'We know better. Some of this you're not telling the truth,' but it's not done in any kind of confrontational way. And I agree at any time he could have told them, 'I'm done. Leave.' [¶] In fact, at the end they talk about . . . 'If you have anything else, give me a call.' 'Okay.' I mean, it's all very cordial. So this is not a custodial interrogation."[5]

DISCUSSION

A. No Miranda Violation

Before interrogation of a person in custody, the police must advise the person of his or her right to remain silent and

[5] A video recording of the stationhouse interview and an audio recording of the residential interview were played during trial.

right to an attorney and that any statements may be used as evidence. (*Miranda*, *supra*, 384 U.S. at p. 444; *People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1400.) Appellant contends the pre-arrest statements he made to the police without such advisements were admitted into evidence in violation of his *Miranda* rights. We disagree.

"It is settled that *Miranda* advisements are required only when a person is subjected to 'custodial interrogation.' [Citations.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 970 (*Davidson*).) Whether appellant was interrogated is not at issue here; both parties agree interrogations took place. The contested issue involves the element of custody. "On appeal, we defer to the trial court's factual findings supported by substantial evidence and independently determine from the factual findings whether appellant was in custody for *Miranda* purposes. [Citation.]" (*Ibid.*)

Courts consider a number of circumstances in determining whether an interrogation is custodial. These include: "[W]hether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated;

whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.]" (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) However, no single factor is dispositive: "Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest. [Citation.]" (*Ibid.*; see *Davidson*, *supra*, 221 Cal.App.4th at p. 970.)

(1) Stationhouse Interview

The trial court considered each of these factors and concluded that appellant was not in custody during the hour-long stationhouse interview. The court observed that the detectives told appellant multiple times that he was not in custody and that they were going to take him home when they were done. The court further found that the interview was not coercive in that appellant refused to answer many of the questions. Toward the end, he made some admissions, but he was not in any way "overcome" by the detectives' tactics.

We agree with the trial court that appellant was not subjected to a custodial interrogation. He was not in custody merely because parts of the interrogation were accusatory. In *People v. Moore* (2011) 51 Cal.4th 386 (*Moore*), the defendant was interrogated for one hour and 45 minutes after he had agreed to go to the sheriff's station to give a statement. Some of the questions were accusatory. But the detectives "expressly told

defendant he was not under arrest and was free to leave . . . . Defendant was not handcuffed or otherwise restrained, and there was no evidence the interview room door was locked against his leaving." (*Id.* at p. 402.) In concluding that the defendant was not in custody for *Miranda* purposes, our Supreme Court reasoned: "While the nature of the police questioning is relevant to the custody question, police expressions of suspicion, with no other evidence of a restraint on the person's freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody. [Citation.]" (*Id.* at pp. 402-403.)

Like the defendant in *Moore*, appellant agreed to be interviewed by detectives. During the interrogation, there was no restraint on appellant's freedom of movement. At any time he could have walked out or told the detectives he wanted a ride home. From the beginning, the detectives made it clear they were not going to arrest appellant. When the interrogation ended, Detective Young drove him home as promised. "It is clear from these facts that [appellant] was not in custody 'or otherwise deprived of his freedom of action in any significant way.'" (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) "[A] reasonable person in appellant's circumstances would have believed . . . that he was not under arrest and was free to terminate the interview . . . if he chose to do so." (*Moore*, *supra*, 51 Cal.4th at p. 403; see *Oregon*, at p. 495 [interrogation was noncustodial where defendant was not placed under arrest, came voluntarily to the police station and was permitted to leave the station after the interview]; *California v. Beheler* (1983) 463 U.S. 1121, 1122-1125 [same].)

Nor were the detectives' statements to appellant coercive. The trial court described the interview as "fairly low key." Detective Wittkins told appellant he wanted to help him, and said that appellant had his whole life in front of him and needed to come clean. Detective Young told appellant that the interview was appellant's "one bite at the apple." As the People point out, a law enforcement officer can urge an interviewee to be truthful and remorseful. (*People v. Andersen* (1980) 101 Cal.App.3d 563, 578-579; see also *People v. Seaton* (1983) 146 Cal.App.3d 67, 74 [permissible for officer to promise a suspect that it was "in his best interests" to tell the truth and for officer to promise to talk to the prosecutor on defendant's behalf].) And telling a murder suspect his answers could affect the rest of his life has been held to be an accurate statement, and not coercive. (*People v. Jones* (1998) 17 Cal.4th 279, 298, superseded by statute on other grounds as stated in *People v. Johnson* (2013) 222 Cal.App.4th 486, 497.) The record reveals no improper promises of leniency by detectives that would have rendered appellant's statements involuntary.

(2) *Residential Interview*

The trial court made similar findings regarding the residential interview, noting that it was "low key," "calm" and "cordial." But the most persuasive evidence of its lack of a custodial nature is that it occurred in appellant's own home with his mother's express approval. "An interrogation conducted within the suspect's home is not *per se* custodial. [Citation.] On the contrary, courts have generally been much less likely to find that an interrogation in the suspect's home was custodial in nature. [Citations.] The element of compulsion that concerned the [Supreme] Court in *Miranda* is less likely to be present where

the suspect is in familiar surroundings. [Citation.]" (*United States v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1083.)

Here, there was nothing about the residential interview that would render it custodial in nature. Neither detective raised his voice or otherwise became overbearing or confrontational. And because the interview took place at his home, appellant could have asked the detectives to leave at any time. Moreover, appellant requested that the interview occur there rather than on the street. He also agreed to a ruse regarding a probation search so that his associates would not realize he was cooperating with law enforcement. As with the first interview, a reasonable person in appellant's circumstances would have understood that he was not under arrest and was free to terminate the interview at any time. (*Moore*, *supra*, 51 Cal.4th at p. 403.)

B. No Cruel and Unusual Punishment

Appellant contends his sentence of 25 years to life for first degree felony murder is cruel and unusual punishment in that it is grossly disproportionate to his offenses and should be reduced based upon *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), (superseded by statute on other grounds as stated in *People v. Chun* (2009) 45 Cal.4th 1172, 1186). "Since the determination of the applicability of *Dillon* in a particular case is fact specific, the issue must be raised in the trial court. Here, the matter was not raised below, and is therefore waived on appeal." (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) In any event, an analysis on the merits refutes appellant's contention.

A punishment violates the federal Constitution if it is grossly disproportionate to the severity of the crime. (U.S.

Const., 8th Amend.; *Graham v. Florida* (2010) 560 U.S. 48, 59-60.) Similarly, a punishment violates the California Constitution if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*Dillon*, *supra*, 34 Cal.3d at p. 478.) In determining whether a sentence is cruel and unusual, California courts: (1) review the nature of the offense or the offender; (2) measure the punishment at issue against punishments prescribed for more serious crimes in the jurisdiction; and (3) measure the punishment at issue against punishments prescribed for the same crime in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*), superseded on other grounds as stated in *People v. Caddick* (1984) 160 Cal.App.3d 46, 51.)

Lynch and *Dillon* merely provide guidelines for a cruel and unusual punishment analysis, and the importance of each prong depends on the facts of each case. (See, e.g., *People v. Ayon* (1996) 46 Cal.App.4th 385, 398-399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) "Determinations whether a punishment is cruel or unusual may be made based on the first prong alone," i.e., the nature of the offense and the offender. (*Ayon,* at p. 399.)

Here, appellant was convicted of first degree murder. The evidence shows that he aided two separate robberies at separate times, and while he was not the shooter and did not personally commit the underlying robberies, he joined in the crimes and served as the getaway driver in both incidents. He did so because he wanted more money to buy beer. There can be no dispute that murder is a serious crime, and that armed robbery and the use of a gun in the commission of a crime present

a significant degree of danger to society. Life sentences pass constitutional muster for those convicted of aiding and abetting murder, and for those guilty of felony murder who did not intend to kill. (See *People v. Kelly* (1986) 183 Cal.App.3d 1235, 1244-1247.)

Appellant's reliance on *Dillon* is misplaced. There, a 17-year-old defendant, intending to steal some marijuana, shot and killed an armed man who was guarding the marijuana field. The man pointed a shotgun in the defendant's direction and the defendant, fearing for his life, shot him in a moment of panic. (*Dillon*, *supra*, 34 Cal.3d at pp. 482-483.) A jury convicted the defendant of first degree felony murder and attempted robbery. (*Id.* at p. 485.) The defendant was sentenced to life in prison. Our Supreme Court determined the sentence for first degree murder was cruel and unusual under the circumstances, and reduced it to murder in the second degree. (*Id.* at p. 489.) Expert testimony established that the defendant was unusually immature, intellectually and emotionally. (*Id.* at pp. 483, 488.) His companions all received minor sentences, the defendant had no prior record and the jury had expressed reluctance at finding the defendant guilty of first degree felony murder. (*Id.* at pp. 487-488.) Those circumstances are not present here.

Moreover, numerous post-*Dillon* cases have rejected cruel and unusual punishment challenges to life sentences imposed on minors for felony murder. (See, e.g., *People v. Em* (2009) 171 Cal.App.4th 964, 971-977 [upholding consecutive 25-year-to-life terms (for murder and firearm enhancement) imposed on 15-year-old accomplice in gang robbery]; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 87-89 [rejecting 17-year-old's cruel and unusual punishment challenge to sentence of 25 years to life for

burglary-murder]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 486-487 [affirming 26-year-to-life sentence for 14-year-old gang member who aided and abetted robbery-murder].) Indeed, successful challenges to a sentence based on *Dillon* are extremely rare. (See, e.g., *Em*, at p. 977; *In re Nunez* (2009 173 Cal.App.4th 709, 725 ["rarest of the rare"]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196 ["exquisite rarity"].) We conclude that appellant has not demonstrated that his sentence is cruel and unusual.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Charles W. Campbell, Jr., Judge
Superior Court County of Ventura

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