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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EFRAIN MENDOZA,

Defendant and Appellant.

B230056

(Los Angeles County  
Super. Ct. No. TA111906)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ricardo R. Ocampo, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Efrain Mendoza was convicted, following a jury trial, of one count of possession for sale of marijuana in violation of Health and Safety Code section 11359. The trial court sentenced appellant to the low term of 16 months in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in denying his motions to exclude his written confession and evidence that a firearm was found in his apartment. He further contends that the prosecutor committed misconduct in cross-examining him about the firearm. Appellant also requests that this Court review the in camera hearing on his motion to produce peace officer personnel records made pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. We affirm the judgment of conviction.

#### Facts

On April 22, 2010, Los Angeles County Sheriff's Deputies Wendy Gonzalez and Jonathon Cooper were on patrol in Compton. The deputies observed appellant and two other men standing next to a white truck that was in the parking area of an apartment building. Deputy Cooper saw a large amount of plastic packaging material outside the truck. Appellant and the two men appeared startled to see the deputies.

Deputy Cooper started to drive into the apartment's parking area, but appellant used a remote control to close the gate to the area. Deputy Cooper was able to enter the property on foot. He went to the white truck and saw a brick of what appeared to be marijuana on the front seat of the truck. The deputy got the remote control from appellant and opened the gate. Deputy Gonzalez drove the patrol car onto the property. Deputy Cooper told her about the marijuana. She looked in the truck and also saw the marijuana, and also a scale and plastic wrap. The deputies obtained the key to the truck from appellant, and unlocked the truck.

Appellant and the two other men were detained and placed in the back of the patrol car. Deputy Gonzalez told appellant that he needed to give his side of the story. The deputy verbally informed appellant of his *Miranda* rights, then gave him a form listing those rights. She went over the form with him, and he initialed it. Appellant then

provided a written statement admitting that the marijuana was his. Appellant made a similar verbal admission as well. At some point, appellant told deputies that there was a gun in his apartment, and gave them consent to search. The deputies searched the apartment and found a gun. They did not find any marijuana or other contraband.

Both deputies noticed a security camera above the door to appellant's apartment. Deputy Cooper removed it and booked it into evidence. There was no tape in the camera, and the camera was not attached to a recording device. The camera was wired to a television inside the apartment.

At trial, Deputy Cooper testified as a marijuana expert and opined that the marijuana was possessed by appellant for sale. He based his opinion on the amount of marijuana, the large amount of packaging material, and the scale. There was 5,000 grams of marijuana, enough for about 16,500 usable doses. He also based his opinion on the lack of devices for ingesting the marijuana and the fact that none of the men appeared to be under the influence of marijuana.

Appellant testified in his own defense at trial, and gave a different account of his encounter with deputies. Appellant explained that he had a security camera because he lived in a dangerous neighborhood. According to appellant, the security camera outside his apartment was attached to a videotape recorder inside the apartment and was always recording. Just before the deputies arrived on April 22, he was inside the house and his son was outside playing. On the security camera, he saw his brother come through the back gate and also saw a patrol car pull into the back alley.

Appellant went outside. He saw his son playing and his brother talking to the deputies. The deputies approached appellant and told him to open the gate. He told them that he did not have the remote to open the gate. Deputy Gonzalez got out of the patrol car, pointed her gun at the ground and told appellant to stop. Deputy Cooper went and talked to appellant's brother and a neighbor, then went to a car, retrieved the remote and opened the gate.

Deputy Gonzalez placed appellant in the back of the patrol car and drove onto the property. At some point thereafter, the other two men were placed in the car. Appellant

told Deputy Cooper that he owned one car, a Honda Civic. Appellant observed Deputy Cooper search a Chevy Silverado that belonged to appellant's brother, appellant's Civic and a truck. Deputy Cooper then searched another truck and found the marijuana.

The deputy asked appellant if the marijuana was his, and appellant said no. Appellant denied owning the truck where the marijuana was found. Appellant did not have keys to the truck. He only had keys to the Civic and his apartment. He threw them on the ground when ordered to do so.

Appellant acknowledged that he gave the deputies a written statement. He claimed that Deputy Cooper told him that if he did not sign the paper and admit owning the marijuana, the deputy would arrest appellant, and appellant's brother, neighbor and mother and then call social services to take appellant's son away. Deputy Cooper told appellant exactly what to write on the paper. Appellant denied that he read any of the language or warnings on the form, and denied circling the word "yes" and initialing parts 1 through 5 of the form. He wrote only "the weed in the truck is mine" and his signature.

Appellant explained that the truck where the marijuana was found belonged to a neighbor. It had previously belonged to appellant's brother. Appellant denied that he or his brother sold marijuana. Appellant believed that Deputy Cooper found the keys to the truck inside or near the truck.

Appellant did not have the tape from his video recorder. It disappeared while he was in custody. He believed that the deputies took it, and also pulled out the wires connected to the VCR. He believed that they did this because the tape showed everything that happened.

Appellant initially denied ever having seen any marijuana close up, but after a break admitted that he got a ticket for possession of marijuana while driving someone else's car. He claimed that he did not know there was marijuana in the car.

Appellant denied telling the deputies that there was a gun in his apartment or giving them consent to search. He admitted that there was a gun in the house, but claimed that it was there when he moved in.

Appellant's mother, Maria Mendoza, testified on appellant's behalf. She stated that on the day of appellant's arrest, he was sleeping and she was watching television. At some point, appellant got up and left the apartment. She was still watching television when he left. Later, the police knocked at the door. They searched the whole apartment and yanked cables from the wall that were attached to the television. A female deputy spoke to her in Spanish and asked her to sign a piece of paper. Mendoza signed the paper because the deputy told her that if she signed it, nothing would happen to her. Mendoza did not read the form because it was in English and she could only read Spanish. Mendoza had never seen marijuana, except on television. She had never seen appellant with marijuana. During this incident appellant's son was playing in a neighbor's apartment. He stayed there until after the police left.

In rebuttal, the prosecution called Mendoza and showed her the form she had signed. It was in English and Spanish. Mendoza acknowledged that it was her signature on the Spanish side of the form.

Deputy Gonzalez testified in rebuttal that she found a loaded firearm in appellant's kitchen cabinet. She also testified that Mendoza looked at the form before signing. The deputy denied threatening Mendoza in any way. She also denied that she threatened to take appellant's child away.

## Discussion

### 1. Appellant's written confession

Appellant contends that the trial court erred in denying his motion to exclude his written confession on the ground that it was involuntary and therefore obtained in violation of *Miranda*. We do not agree.

Where a defendant challenges the admission of his statement on the ground it is involuntary, the prosecution must establish voluntariness by a preponderance of the evidence. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Massie* (1998) 19 Cal.4th 550, 576.)

"Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health'" [Citation.] On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.]" (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1202; *People v. Boyette* (2002) 29 Cal.4th 381, 411.)

Here, at the hearing on appellant's motion to exclude, the prosecution relied on the testimony of Deputy Gonzalez to establish voluntariness. She testified that she told appellant that he "needed to give his side of the story." She then informed appellant of his *Miranda* rights, including his right to remain silent, and appellant completed a written form indicating that he understood those rights.<sup>1</sup> Following completion of the form, appellant made his written statement. The form was produced at the hearing.

Appellant presented no evidence at the hearing.

Appellant contends that his statement was not voluntary because the *Miranda* warning that he had the right to remain silent did not adequately inform him that he had the right to refuse to make a written statement (as opposed to a verbal statement). He further contends that the deputy's act of handing him a statement form and telling appellant that he "needed" to make a statement was coercive. In addition, appellant contends that the deputy's act of first telling to make a statement and *then* advising him of his *Miranda* rights was coercive.

Appellant has not cited, and we are not aware of, any authority holding that the standard *Miranda* advisement that a defendant has the right to remain silent is insufficient

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<sup>1</sup> There is no dispute that appellant was in custody for purposes of *Miranda v. Arizona* (1966) 384 U.S. 436.

to inform the defendant that he has the right to not make a written statement.

Accordingly, we reject his claim. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

We see no coercion in Deputy Gonzalez's statement. The deputy was questioned at the hearing about the precise language she used with appellant. She denied telling appellant that he "needed to make a statement." The deputy testified that she told appellant that he "needed to give his side of the story." The trial court implicitly found the deputy's account credible, stating in the course of its ruling that it did concern the court that "the words stated was he needed to give his side of the statement."

Deputy Gonzalez's statement that appellant "needed to give his side" of the story was not accompanied by any threat or promise. Generally, "mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by a threat or a promise does not render a subsequent statement involuntary." (*People v. Belmontes* (1988) 45 Cal.3d 744, 773, quoting *People v. Jimenez* (1978) 21 Cal.3d 595, 611, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The deputy's statement was simply a variation of such advice or exhortation, and did not render appellant's statement involuntary.

Appellant also sees coercion in the fact that Officer Gonzalez first told appellant that he needed to give his side of the story, and then advised him of his *Miranda* rights. Appellant believes that this undercut the *Miranda* warnings. We do not agree. Appellant listened to his rights, indicated that he understood them, and then made his written statement. If anything, the order of the *Miranda* warnings created a break in the officer's investigation which would support a finding of voluntariness.

There are no other circumstances which would show involuntariness. Appellant had not been in custody for long when he made his statement. There is no evidence that he was in poor mental or physical health, or was so lacking in education that he could not understand what was going on. Accordingly, his confession was voluntary.

## 2. Gun evidence

Before trial, the prosecutor stipulated that the search of appellant's residence would not be an issue at trial, noting that the search was not relevant because it uncovered only a firearm, and appellant was not charged with possession of the firearm. During his trial testimony, appellant claimed that his security camera was recording events on an attached VCR, including the arrival of the deputies and all subsequent events. The prosecutor cross-examined appellant about the recording, and appellant testified that he believed that the deputies had ripped out the wires leading to the VCR and stolen the video cassette. The prosecutor then sought and obtained permission from the trial court to introduce evidence showing the reason the deputies entered appellant's residence.

Appellant contends that the prosecutor committed misconduct in cross-examining him about the search of his residence, his counsel was ineffective in failing to object to that questioning and the trial court erred in denying his motion to exclude evidence that a firearm was found in that search. He contends that admission of the firearm evidence violated his constitutional right to due process.

At trial, appellant's defense was essentially that the deputies had fabricated the case against him. He claimed that his security camera was recording events on an attached VCR, including the arrival of the deputies and all subsequent events. The implication of appellant's testimony, intended or not, was that the recording would support his version of events. When the prosecutor cross-examined appellant about where the recording was, appellant testified that he did not know where it was but believed that the deputies had ripped out the wires leading to the VCR and stolen the video cassette.

We see no misconduct in the prosecutor's questioning. The prosecutor's cross-examination was done in response to appellant's testimony on direct examination. The prosecutor made no mention of any search or firearm.

Appellant's counsel was not ineffective in failing to object to these questions. Counsel is not required to make futile objections or advance unmeritorious arguments.



(*People v. Price* (1991) 1 Cal.4th 324, 386-387; *People v. Ochoa* (1998) 19 Cal.4th 353, 427-428, 432 [meritless motion to exclude]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1173; see also *People v. Grant* (1988) 45 Cal.3d 829, 864-865 [to prevail on ineffectiveness claim based on counsel's failure to make a motion, defendant must show that such motion would have been successful].)

Before delving further into this topic, the prosecution sought and ultimately obtained the court's permission to elicit evidence about the search. The prosecutor argued to the court that appellant's testimony about a missing videotape had put the residence search at issue. The prosecutor was concerned that it would "look like the police came on this property without any right and that they are barging into the home and destroying evidence. And I think that the search of the home, including the weapon, should be allowed. [¶] The reason for the search was because [appellant] admitted he had a weapon inside of the home."

The trial court ultimately agreed with the prosecutor that the defense was accusing deputies of going into his home without any reason and stealing the tape. Accordingly, the court ruled that the prosecutor could inquire about the reasons for the search. Even assuming for the sake of argument that the trial court erred in admitting evidence of the gun, we would see no prejudice to appellant under any standard of review.

The evidence against appellant was overwhelming. Appellant made both oral and written admissions to deputies that the marijuana was his. Deputy Cooper opined that the marijuana was possessed for purposes of sale, and the evidence clearly supported his opinion. There was about 5,000 grams of marijuana, quite a large amount which would provide 16,500 usable doses of .3 grams each. There was a roll of plastic wrap and a scale with the marijuana. There was no paraphernalia for ingesting marijuana.

The evidence supporting appellant's defense was inconsistent. He testified he used his security camera that had a live feed to his television and he observed police approach his brother outside. Appellant's mother testified that she was watching a television program when police arrived. Appellant testified that his son was playing outside when police arrived, and that he went outside to check on him. Appellant's mother testified that

appellant's son was next door at a neighbor's house the whole time. Appellant reversed his own story, first claiming that he had never seen marijuana up close, then admitting that he had received a ticket for possession of marijuana. Appellant's mother also contradicted herself. She testified that the written consent form given to her by police was only in English, but the prosecution produced the actual form, which was in both Spanish and English, and which had been signed by appellant's mother on the Spanish side.

Given the strength of the prosecution's case and the weakness of the defense case, we see no possibility that appellant would have received a more favorable verdict if the gun evidence had been excluded.

### 3. *Pitchess* motion

The trial court granted appellant's motion for discovery of the personnel records of Deputies Cooper and Gonzalez which involved complaints of dishonesty, writing false police reports or falsifying or destroying evidence. The court held an in camera hearing to determine if there were discoverable complaints. Appellant requests that this Court independently review the sealed transcript of the in camera *Pitchess* motion hearing.

When requested to do so by an appellant, an appellate court can and should independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

We have reviewed the transcript of the in camera proceedings and see no error in the trial court's rulings concerning disclosure.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.