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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.

EVERETT COX,

Defendant and Appellant.

B226840

(Los Angeles County
Super. Ct. No. TA109051)

APPEAL from a judgment of the Superior Court for Los Angeles County,
Allen J. Webster, Jr., Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Steven D.
Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant and appellant Everett Cox appeals from a judgment sentencing him to a prison term of 30 years to life, plus 25 years to life, after a jury found him guilty of second degree murder (Pen. Code,¹ § 187, subd. (a)) and found that he committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and intentionally discharged a firearm in the commission of the crime, causing great bodily injury and death (§ 12022.53, subd. (d)). He contends his statements to the police (in which he confessed to shooting the victim) were improperly admitted in violation of his *Miranda*² rights, and the additional term of 25 years to life imposed under section 12022.53, subdivision (d) violated double jeopardy.³ We affirm the judgment.

BACKGROUND

In light of the limited issues on appeal, we need not discuss in much detail the offense or the evidence presented at trial. Suffice to say that Louis Pickett, a member of the Underground gang, was shot at a gathering of the Grape Street Crip gang on October 3, 2009, and died a few hours later, in the early-morning hours of October 4, 2009. There were around 700 people at the gathering, known as Hood Day, celebrating the Grape Street gang's birthday. Pickett was there with his friend, Johmel Howlett, who was a Grape Street member.

¹ Further undesignated statutory references are to the Penal Code.

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

³ Defendant had also contended in his opening brief that he was entitled to an additional day of custody credit. After that brief was filed, the trial court filed an amended abstract of judgment, correcting the mistake. In his reply brief, defendant notes that the issue is now moot.

After the shooting, Howlett told Los Angeles Police Department Detectives Nathan Kouri and Thomas Eiman that Pickett and a Grape Street member known as “G-Red” were fighting at the Hood Day gathering, and he saw G-Red shoot at Pickett, who was on the ground. Defendant, a Grape Street gang member who was known as “Little Suspect” or “Little Red”, was taken into custody on October 21, 2009, and was questioned by Detectives Kouri and Eiman. During that interview, which is the subject of defendant’s first contention on appeal, defendant admitted he shot Pickett because Pickett had disrespected him. While in custody, defendant made several telephone calls that were recorded. In one of those calls, defendant apologized to his mother, and told her “it’s not premeditated, you know, it’s like spontaneous because you know -- I ain’t -- I ain’t planned it like. It ain’t like I went to get -- I went and got the gun, you know -- you know.”

The jury found defendant guilty of murder in the second degree, and found the firearm and gang allegations to be true. Defendant waived his right to a jury trial on prior conviction allegations, and the trial court found that defendant suffered a prior conviction for a serious crime within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court sentenced defendant to 15 years to life on the murder count, doubled under the Three Strikes law, and an additional 25 years to life for the firearm allegation (§ 12022.53, subd. (d)); the court stayed the sentence for the gang enhancement (§ 186.22, subd. (b)(1)(C)). Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. Waiver of Miranda Rights

At trial, defendant moved to exclude evidence regarding his statements to the police detectives on the ground that the detectives obtained those statements without properly admonishing defendant and obtaining defendant’s waiver of his

Miranda rights. The prosecutor argued that the statements were admissible because defendant understood his rights and impliedly waived them.

The prosecutor presented a video recording and transcript of the beginning of the detectives' interview of defendant. The video and transcript showed that at the start of the interview, the detectives asked defendant for certain identifying information, such as his name, address, height, weight, birth date, telephone number, and social security number. They confirmed that he was a Grape Street member, and asked what clique he belonged to and what his moniker was. Defendant told them he belonged to the Peda Roll clique and was called "Little Suspect." When asked if he was called by another name, he told them that his family calls him "Little Red," but that no one on the street called him that.

After a short discussion about where defendant grew up, Detective Kouri started talking about why they were there, i.e., to investigate a crime. He told defendant that his and his partner's job is to gather the facts. Defendant asked him what they had, and Detective Kouri told him that it was "overwhelming." Detective Eiman asked defendant whether he had ever been read his rights before. Defendant said he had, about three or four times. The following discussion then took place:

"DETECTIVE EIMAN: So you know -- you know your rights?

"EVERETT COX: Yes, sir.

"DETECTIVE EIMAN: (Inaudible) (Muffled)

"DETECTIVE KOURI: Well, what are they? What are your rights?

"EVERETT COX: (Inaudible) (Muffled) right to remain silent. I have a right to attorney if one is not appointed to me, then you all will give me one.

"DETECTIVE KOURI: Uh-huh.

"EVERETT COX: (Unintelligible) you know.

“DETECTIVE KOURI: Two -- that’s two of them. There’s four of them, man. Don’t be skipping out on me.

“EVERETT COX: Tell me the other two.

“DETECTIVE EIMAN: Anything you say may be used against you in court.

“EVERETT COX: Yeah. (Unintelligible)

“DETECTIVE EIMAN: That’s true.

“DETECTIVE KOURI: So you have the first one: You have the right to remain silent.

“EVERETT COX: Uh-huh.

“DETECTIVE KOURI: Second one: Anything you say may be used against you in court. Do you understand?

“EVERETT COX: Uh-huh.

“DETECTIVE KOURI: You have the right to the presence of an attorney before and during any questioning. Do you understand?

“EVERETT COX: Uh-huh.

“DETECTIVE KOURI: That was -- that was the one you were talking about. Here’s -- actually, here it is. If you cannot afford an attorney, one will be appointed for you free of charge before any questioning if you want. Do you understand? That’s the four of them. Do you understand pretty much?

“EVERETT COX: Yes, sir.”

The detectives then began questioning defendant about the crime, and he ultimately confessed to shooting Pickett.

Defendant’s trial counsel argued that defendant’s statements should not be admitted because the detectives never asked defendant if he wished to waive his *Miranda* rights, and defendant never expressly waived them. The prosecutor

argued that a waiver of *Miranda* rights may be implied when a defendant has been advised of his rights, acknowledges his understanding of those rights, and proceeds to answer questions or makes a statement. The prosecutor pointed to, among other cases, *Berghuis v. Thompson* (2010) ___ U.S. ___ [130 S.Ct. 2250] (*Berghuis*), a case that was decided a day before the hearing on defendant's motion to suppress.

In ruling on the motion, the trial court stated that it looked at the totality of the circumstances, including defendant's age (he was 21 at the time of the interview), the fact that the detectives did not appear to be aggressive or assertive and defendant did not appear to be threatened or emotional, and that defendant appeared to understand his rights. The court found that defendant knowingly and intelligently waived his *Miranda* rights, that it was an implied waiver, and that any statements he made to the police therefore were admissible. Defendant challenges the trial court's finding on appeal.

“[T]he accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused ‘in fact knowingly and voluntarily waived [*Miranda*] rights’ when making the statement. [Citation.] The waiver inquiry ‘has two distinct dimensions’: waiver must be ‘voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,’ and ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’ [Citation.]” (*Berghuis, supra*, 130 S.Ct. at p. 2260.) As the California Supreme Court has explained, “[a]lthough there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was [voluntary,] knowing[,] and intelligent under the totality of the circumstances surrounding the interrogation.’ [Citation.] On appeal, we conduct an independent review of the trial court's legal determination and rely upon the trial court's finding on disputed facts if supported

by substantial evidence. [Citation.]” (*People v. Williams* (2010) 49 Cal.4th 405, 425.) Defendant does not dispute any factual findings made by the trial judge in this case, and contends the question whether the exchange between the detectives and defendant is sufficient to find an implied waiver presents an issue of law.

Defendant concedes, as he must, that a suspect may be found to have impliedly waived his right to remain silent by failing to unambiguously invoke his right and answering questions put to him by the police, with knowledge of his right to remain silent. This is the Supreme Court’s holding in *Berghuis*. (*Berghuis*, *supra*, 130 S.Ct. at p. 2262 [“Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent”].) But he argues that the totality of the circumstances in this case -- particularly the fact that the detectives had already obtained his admission that he was a gang member⁴ and told him they had overwhelming evidence against him before the discussion of his *Miranda* rights took place -- show that the interrogation was impermissibly coercive, and that he answered the detectives’ questions without full awareness of the consequences of waiving his rights. We disagree.

It cannot seriously be questioned that defendant understood his *Miranda* rights. As the trial court noted, defendant was 21 years old at the time of the interview, and appeared to be reasonably intelligent. He said he had been read his rights three or four times before the incident here, he recited two of the four rights to the detectives, and he responded affirmatively when Detective Kouri asked, after he read each of the rights to him, whether he understood that right.

⁴ Defendant does not challenge the admission of his statement regarding his gang membership. He simply argues that his pre-*Miranda* admission of gang membership (which he asserts is “essentially an element of the charges”) is part of the totality of the circumstances that must be considered when determining whether there is an implied waiver.

The interrogation was not shown to have been unduly coercive. The trial court remarked, and the video confirms, that the interview was fairly relaxed and casual, and the detectives did not act in an aggressive or assertive manner. The fact that the detectives told defendant that they had overwhelming evidence against him -- which defendant concedes does not violate *Miranda* -- and that defendant had already admitted his gang membership does not turn a casual, non-aggressive interview into a coercive interrogation.

We also fail to see how those facts have any tendency to show that he did not have full awareness of the consequences of waiving his rights, as defendant asserts. Defendant expressly acknowledged that he understood when Detective Kouri told him that he had the right to remain silent and that anything he said may be used against him in court. There is nothing to suggest that, despite this acknowledgment, defendant did not understand that any statement he made -- including a confession -- could be used at trial.

In short, despite the unusual way in which the detectives gave defendant his *Miranda* rights, the evidence establishes that he understood those rights, and his conduct in answering the detectives' questions constitutes an implied waiver of his right to remain silent. (*Berghuis, supra*, 130 S.Ct. at p. 2262 [“the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford”].) Therefore, the trial court did not err by allowing evidence of defendant's confession to be admitted at trial.

B. *Double Jeopardy*

Defendant contends that the imposition of a 25-years-to-life sentence enhancement imposed section 12022.53, subdivision (d), in addition to his sentence for murder, violates principles of double jeopardy. As defendant

acknowledges, the California Supreme Court rejected this argument in *People v. Izaguirre* (2007) 42 Cal.4th 126, 133-134. We are bound by the Supreme Court's holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.