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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOSE GUZMAN OCHOA, Defendant and Appellant.	2d Crim. No. B264429 (Super. Ct. No. 2010006451) (Ventura County)

Jose Guzman Ochoa appeals after a jury convicted him of first-degree murder (Pen. Code,[1] §§ 187, subd. (a), 189), false imprisonment by violence (§ 236), and attempted robbery (§§ 211, 664), and two counts each of burglary (§ 459), robbery (§ 211), and forcible oral copulation (§ 288a, subd. (c)(2)(a)). Personal firearm use allegations (§ 12022.53, subd. (b)) were found true as to all counts. The jury also found true allegations that appellant committed the murder while engaged in the commission of an attempted robbery and burglary (§ 190.2,

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

subds. (a)(17)(A) & (G)). As to the forcible oral copulation counts, the jury further found that appellant committed the offenses during a burglary (§ 667.61, subd. (e)(2)) and kidnapped the victim (*id.*, subd. (e)(1)), and personally used a dangerous or deadly weapon (*id.*, subd. (e)(3)). The trial court sentenced appellant to a state prison term of life without the possibility of parole plus 70 years to life, plus 17 years and four months. He contends (1) his incriminating statements to the police should have been suppressed; (2) his trial counsel provided ineffective assistance; and (3) irrelevant evidence was erroneously admitted. We affirm.

STATEMENT OF FACTS

The Tokyo Spa Crimes

On the afternoon of February 17, 2010, Jackie Y. and Marlene B. were working at the Tokyo Spa in Oxnard. Appellant entered the establishment through the rear entrance and grabbed Jackie by the neck. He pointed a gun at her, demanded money, and dragged her toward the hallway. Marlene saw what was happening and began screaming. Jackie told Marlene to give appellant money and Marlene gave him cash from her purse.

Appellant removed a roll of tape from his pocket and told Marlene in Spanish to bind Jackie's hands with the tape. He also gathered up several electronic items, including a phone, a laptop computer, and a portable television. After Jackie's hands were bound, appellant dragged Marlene away at gunpoint and told her, "I'm going to fuck you." Appellant took Marlene into one of the massage rooms, dropped his pants, and ordered her to fellate him. He placed his penis in her mouth while holding the gun to her head. He proceeded to place his penis in her vagina and also attempted to perform anal sex. He was unable to

maintain an erection and forced her to continue performing oral sex on him. After moving her in to a hallway, he placed his penis in her vagina again and made her continue to fellate him.

In the meantime, Jackie freed herself, ran outside, and screamed for help. She went to an adjacent business and called 911. Jackie ran back inside the Tokyo Spa and yelled out that she had called the police. Appellant fled the scene with the electronic items before the police arrived.

The A-1 Spa Crimes

On the night of February 19, 2010, Julie Puka was working at the A-1 Spa in Oxnard. Shortly before 8:00 p.m., Puka was in a massage room with a customer when she heard yelling and arguing and the sound of someone being struck. She came out of the room and saw a man walking away from her down the hallway. Sun Cha Kays, the owner of the spa, was lying on the floor and bleeding from a gunshot wound to the head. Kays also suffered blunt force injuries to her face and head. She died as a result of the gunshot wound.

Investigation; Appellant's Confessions and Admissions

A few hours after Kays' murder, appellant was involved in a fight at the Q Club sports bar in Oxnard. The bar's owner, Jose Gonzalez, saw appellant and four other people kicking a man who was lying on the ground. Gonzalez shot one of the assailants with a stun gun and the others dispersed. After Gonzalez put the stun gun in his pocket, appellant forcibly removed it and unsuccessfully tried to use it on Gonzalez. Appellant complied with Gonzalez's demand that he leave, but returned shortly thereafter. The police were summoned to the scene. Appellant was uncooperative and it took three officers to

restrain him. He was arrested and transported to the police station.

The police questioned appellant the following day. Portions of the video-recorded interview were played for the jury. Appellant said that on February 19 he and his friends Gabriel Lopez and Miguel Martinez[2] decided to rob the A-1 Spa in order to obtain money for drugs. Appellant said he was "high" on marijuana and beer and "wasn't thinking in the right mind." Appellant and Lopez went into the establishment and Martinez waited in appellant's SUV. Appellant grabbed Kays while Lopez attempted to remove a television monitor. Appellant pointed a pistol at Kays' head and she started screaming. Appellant struck her in the head with the gun and it accidentally fired. He did not intend to shoot Kays. After the murder, appellant left the gun at his mother's house in Oxnard. Appellant also admitted that he forced Marlene B. to perform oral sex on him at the Tokyo Spa.

The following day, the police found the murder weapon while executing a search warrant at appellant's mother's residence. The police also found several of the electronic items stolen from the Tokyo Spa. It was stipulated at trial that the bullet that killed Kays was fired from the gun found at appellant's mother's residence and that DNA found on the muzzle of the weapon matched Kays' DNA profile. Gunshot residue and Kays' blood were found on appellant's clothing.

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[2] Martinez was also convicted of first degree murder and was sentenced to a state prison term of 25 years to life plus 2 years. We affirmed the judgment. (*People v. Martinez* (Oct. 12, 2016, B263419) [nonpub. opn.].)

DISCUSSION

I.

Motion to Exclude

Appellant contends the court erred in denying his motion to exclude the incriminating statements he made to the police during his post-arrest interview. He claims, as he did below, that the statements were obtained in violation of his *Miranda*[3] rights and were involuntary and coerced. We conclude that the motion to exclude was properly denied.

A.

Miranda

Miranda establishes that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [Fn. omitted.]" (*Miranda*, *supra*, 384 U.S. at p. 444.) In reviewing appellant's *Miranda* claim, "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.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 992; see also *People v. Thomas* (2011) 51 Cal.4th 449, 476 (*Thomas*).)

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

Appellant was interviewed by Oxnard Police Detectives Humberto Jimenez, Sharon Giles, and Jeffrey Kay. Before the interview began, Detective Jimenez informed appellant of the crimes he was suspected of committing and gave the required *Miranda* advisements. After appellant stated that he understood his rights, the detective asked him, "do you wish to talk to me right now?" Appellant responded, "Well, I'd rather just go home to tell you the truth." Detective Jimenez replied, "I know. You want to talk to us, yes or no? Have those rights in mind?" Appellant asked, "Am I gonna get held if I say no or—." The detective stated, "You do what you want" and added, "I just . . . want to get your side of the story." Appellant reiterated, "I'd rather just go home. Just if I need a lawyer, I'll get a lawyer." Detective Jimenez replied, "Okay."

Detective Sharon Giles, who was also present, asked appellant, "But you understand that, . . . you're under arrest right now? You understand what he said, right?" Appellant responded, "What is that though?" After reiterating that appellant was suspected of committing kidnapping, rape, and robbery, Detective Giles said, "we'd like to talk to you" and asked, "you want to talk to us?" Appellant responded, "Well, yeah, it doesn't matter." Detective Jimenez asked, "Is that — what's that?" Appellant replied, "Yeah, that's fine."

In concluding that appellant's confessions and admissions were admissible, the court rejected counsel's assertion that appellant invoked his right to counsel when he stated, "I'd rather just go home. Just if I need a lawyer, I'll get a lawyer." Appellant contends that this ruling was erroneous. He further contends, for the first time on appeal, that his statement, "I'd rather just go home" constitutes an invocation of his right to

remain silent. The latter contention was not raised below and is thus forfeited. In any event, neither contention has merit.

"The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 387-388 (*Berghuis*).)

If the suspect makes a clear and unequivocal request for counsel, the officers must "immediately cease questioning." (*Davis v. United States* (1994) 512 U.S. 452, 454 (*Davis*).) When a suspect's request for counsel or invocation of the right to remain silent is ambiguous, the police may "continue talking with him for the limited purpose of clarifying whether he is waiving or invoking those rights. [Citations.]" (*People v. Johnson* (1993) 6 Cal.4th 1, 27, disapproved on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 879; see *Davis*, at p. 461.)

Appellant's statements "I'd rather just go home" and "Just if I need a lawyer, I'll get a lawyer" are not clear and unequivocal invocations of his *Miranda* rights. (See, e.g, *People v. Bacon* (2010) 50 Cal.4th 1082, 1104-1105 [defendant's statement "I think it'd probably be a good idea for me to get an attorney" was equivocal and ambiguous]; *Davis*, *supra*, 512 U.S. at pp. 455, 462 ["Maybe I should talk to a lawyer" was not a clear and unambiguous request for counsel]; *People v. Stitely* (2005) 35 Cal.4th 514, 535 [the statement "I think it's about time for me to stop talking" was not a clear and unambiguous invocation of the right to remain silent].)

Appellant's statements could have been objectively construed as a reflection of his uncertainty whether he was actually free to go home if he refused to answer any questions, and his acknowledgement that he would get an attorney in the future if he ultimately needed one. After the detectives clarified that appellant was under arrest and once again asked if he wanted to talk to them, appellant replied, "it doesn't matter" and "Yeah, that's fine." These statements, when considered in context, reflect that appellant was willing to talk to the detectives without an attorney being present. (See, e.g., *Berghuis*, *supra*, 560 U.S. at p. 386 ["had [defendant] wanted to remain silent, he could have said nothing in response to [the detectives'] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation"].)

Even if the statements should have been excluded, the independent evidence of appellant's guilt was overwhelming. Marlene B. identified appellant as her assailant and Kays' blood and gun residue were found on his clothing. Moreover, the weapon used to kill Kays and items stolen from the Tokyo Spa were found in his mother's residence. Accordingly, any error in admitting his incriminating statements was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Thomas*, *supra*, 51 Cal.4th at p. 498 [error in admitting statements obtained in violation of *Miranda* reviewed under the federal "harmless beyond a reasonable doubt" standard set forth in *Chapman*].)

B.

Voluntariness

The standards for determining whether a defendant's statements were voluntary are well-settled. "In reviewing the

voluntary character of incriminating statements, "'[t]his court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.] With respect to the conflicting testimony, the court must 'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.'" [Citation.]' [Citation.] 'In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] . . . When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 404 (*Maury*).)

"A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a resulting confession is involuntary.' [Citation.] The statement and the inducement must be causally linked. [Citation.]" (*Maury*, *supra*, 30 Cal.4th at p. 404.)

Appellant asserts that the "*combined impact*" of several "coercive factors" rendered his statements involuntary. He offers that he had no prior criminal record and was

"physically and emotionally exhausted" when the interview was conducted. He faults the detectives for falsely claiming to have DNA evidence against him and for "refus[ing] to let [him] call his wife, telling [him] he could do that after the interview." He contends the detectives also "exploited [his] fierce loyalty to his family" by making "statements that could only be interpreted as threats to 'tear up' [his] mother's house if he did not tell them where the gun was, and promises not to do so if he did tell them."

The trial court correctly found that appellant's statements were voluntary. As the People note, "appellant appears calm and collected" during the recorded interview. Moreover, the false assertion that appellant's DNA had been found inside Marlene's vagina was a proper interrogation tactic. (See, e.g., *People v. Smith* (2007) 40 Cal.4th 483, 505-506, and cases cited therein.)[4]

Telling appellant that he could not call his wife until the interview was completed did not render his statements involuntary. *Haynes v. Washington* (1963) 373 U.S. 505, which appellant cites in support of this point, is inapposite. The defendant in that case was told he could not call his wife until after he had signed a written confession. (*Id.* at p. 509.) Here, appellant was not coerced to sign a confession; indeed, he was not compelled to do or say anything at all. He was merely told he

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[4] Appellant acknowledges that he knew the assertion was false. He claims, however, that this proves he "had to talk to the police not because he wanted to, but because he had to in order to protect himself from false police narratives, which he had learned by that time, the officers were free to fabricate at will and with impugnity." Even if this were so, it would not render his incriminating statements involuntary.

could call his wife after he had completed an interview he was free to terminate at any time.

Finally, we reject appellant's claim that the detectives improperly "exploited" his family loyalty such that his incriminating statements about the location of the gun were rendered involuntary or coerced.[5] Appellant was merely warned of the negative consequences his wife and family would face if their homes were subjected to search warrants, a consequence that would most surely come to pass if appellant did not disclose the location of the gun. The fact that he may have admitted where the gun was in order to "protect" his family in this regard does not render the admission involuntary or coerced.

II.

Ineffective Assistance of Counsel

Appellant contends that his trial counsel provided ineffective assistance by "fail[ing] to investigate and present evidence of drug induced psychosis, or, drug psychosis syndrome, on appellant's part." He claims this evidence would have been admissible to prove he lacked the specific intent to commit the

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[5] Appellant initially claimed that the gun had been discarded in a field. He also said he was currently staying at his wife's residence in Oxnard and that his parents and siblings lived in another residence nearby. Detective Kay, who suspected that appellant was lying about discarding the gun, said he would get a search warrant for appellant's wife's house. The detective told appellant, "I don't want to go and tear up your wife's house" and said that his wife would be "real upset if I have to go in there and start cutting couches" and "open and tearing up carpet." The detective then said, "That's why I want to know where this gun is." At that point, appellant admitted that the gun was at his parents' house and told the detective where it could be found.

charged crimes by reason of a mental disorder (§ 28), and that he would have achieved a more favorable result had the evidence been admitted. He also faults counsel for failing to request that the jury be instructed on voluntary intoxication (CALCRIM No. 3426) as to the charges that he committed burglary and robbery at the A-1 Spa.

To establish ineffective assistance of trial counsel, a defendant must prove that (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to the defendant. (*Maury*, *supra*, 30 Cal.4th at p. 389; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) If a defendant makes an insufficient showing on either one of these components, his or her ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland*, at p. 687.) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

The record in this case does not establish that defense counsel failed to investigate whether appellant was suffering from drug-induced psychosis when he committed the charged crimes, much less that an investigation would have led to the discovery of evidence supporting such a defense. Because appellant does not demonstrate that counsel's representation was deficient in this regard, his claim of ineffective assistance fails.

(*People v. Holt*, *supra*, 15 Cal.4th at p. 703; *Strickland*, *supra*, 466 U.S. at p. 687.)

Appellant fares no better in claiming that counsel provided ineffective assistance by failing to request that the jury be instructed on voluntary manslaughter as to the charges that he committed burglary and robbery at the A-1 Spa. "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent." (§ 29.4, subd. (b).) "Normally, merely showing that the defendant had . . . used drugs before the offense, without any showing of their effect on him, is not enough to warrant an instruction on [voluntary intoxication]. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1241; see also *In re Avena* (1996) 12 Cal.4th 694, 723.) Rather, to be entitled to an instruction on voluntary intoxication, the defendant must show not only that he consumed intoxicating substances, but also that "he became intoxicated to the point he failed to form the requisite intent[.] [Citation.]" (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661.)

In his statements to the police, appellant admitted that he entered the A-1 Spa with the intent to commit a robbery. Although he also said he was "high" on marijuana and beer and "wasn't thinking in the right mind," by his own admission he was able to form the specific intent to commit the burglary and robbery at the A-1 Spa. Because any request for an instruction on voluntary intoxication would have been futile, counsel's failure to request the instruction does not amount to ineffective assistance. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 [counsel does not render ineffective assistance by failing to request factually and legally unsupported jury instructions].)

III.

The Q Club Bar Evidence

Appellant contends that evidence of the circumstances leading to his arrest at the Q Club bar was admitted in violation of his constitutional right to a fair trial.[6] The evidence was presented through the testimony of Q Club's owner, Jose Gonzalez, and the arresting officer, Ricardo Vega. Appellant asserts that this testimony was irrelevant and constituted "highly inflammatory" and "prejudicial propensity evidence" that should have been excluded under Evidence Code sections 1101 and 352.[7]

The People respond that appellant forfeited his Evidence Code sections 1101 and 352 claims to the extent he

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[6] In the heading for his argument, appellant claims that the evidence was also admitted in violation of his right to the effective assistance of counsel. His argument, however, makes no reference to such a claim. Accordingly, we decline to consider the claim. (See *People v. Dixon* (2007) 153 Cal.App.4th 985, 996 [appellate court may consider contentions forfeited if not supported by sufficient argument or authority].)

[7] Subdivision (a) of Evidence Code section 1101 (with exceptions not relevant here) provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

challenges Gonzalez's testimony. They note that appellant merely objected to Gonzalez's testimony on grounds of relevance, yet objected under Evidence Code sections 1101 and 352 when Officer Vega subsequently testified. The People also contend the evidence was relevant because it "allowed the jury to understand how appellant's clothing came to be in the possession of the police on the night of the murder. That the evidence of the bar incident also included testimony about violent conduct by appellant only explained why he was arrested and in police custody." They further claim that any error in admitting the evidence was harmless.

We agree with appellant that the evidence was irrelevant and should have been excluded on that ground. "No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.)

The challenged evidence does not satisfy this test. Contrary to the People's assertion, the circumstances that led to appellant's arrest and the confiscation of his clothing were simply not relevant to any contested issue that was of consequence to the jury's determination of his guilt or innocence. Testimony offered to explain why the police acted as they did in a given situation is relevant only if the good faith or reasonableness of the particular action is at issue. (*People v. Lucero* (1998) 64 Cal.App.4th 1107, 1109-1110.) That is not the case here. The jury merely needed to know that appellant had been arrested on the night of Kays' murder and that the police had obtained his clothing. Instead of informing the jury of the unrelated violent conduct that led to

appellant's arrest, an instruction not to speculate as to the reasons for the arrest would have sufficed.

Although the evidence should have been excluded, reversal is not required. As we have noted, overwhelming evidence supports the convictions. Indeed, appellant admitted his guilt. The error in admitting the challenged evidence was thus harmless under any standard of review. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman*, *supra*, 386 U.S. 18.)

DISPOSITION

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

Emry J. Allen, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.