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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANNY MCMANUS, Defendant and Appellant.	B260306 (Los Angeles County Super. Ct. No. TA128597)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Affirmed as modified with directions.

Siri Shetty, 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, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Danny McManus guilty of attempted murder (Pen. Code, §§ 664, 187, subd. (a)),[1] attempted carjacking (§§ 664, 215, subd. (a)), and shooting at a motor vehicle (§ 246). Defendant appeals and argues (1) the trial court erred in denying his motion to suppress statements he made to the police while in custody, (2) the restitution award was unsupported by the evidence, and (3) section 654 prohibited the trial court from imposing separate sentences for attempted murder and attempted carjacking. We disagree with defendant's first two contentions, but agree with the last. We therefore modify the judgment to correct the sentencing error, and as modified, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Shooting of Yesenia Blanco

On May 9, 2013, at around 2:00 a.m., Yesenia Blanco was shot while driving home in the City of Lynwood. An information was filed, charging defendant with attempted murder, attempted carjacking, and shooting at a motor vehicle. As to all counts, the information also alleged that defendant had personally discharged a firearm, which caused great bodily injury or death (§ 12022.53, subd. (d)), and that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

At trial, Blanco testified that, on May 9, 2013, she was driving home when she saw two men at a stop sign at the corner of Josephine and Lindbergh streets. One of the men approached her car on the driver's side. Part of his face was covered by a

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

white bandana. As he approached her car, he pointed a gun at her and said, "Give me your car." Blanco "stepped on it and . . . ducked." She was shot behind the ear, lost consciousness, and her car crashed. She now suffers from seizures, memory problems, and headaches.

II.

Defendant's Recorded Confession

Defendant was arrested on June 7, 2013. After being transported to the police station and given *Miranda*[2] warnings, defendant gave the following recorded statement to Detectives Fernando Sarti and Uyoon Nam.

"[Sarti]: Let's, let's start over the whole, the whole thing . . . . So let's start from the beginning. That night, on Josephine and Lindbergh, right before that, where were you guys at?

"[Defendant]: Uh, we were coming from Banning and Peach. Basically we were hanging out at that liquor store, and then they closed and that's when we left. And uh, uh I had the, the gun, a .38, and, and I was walking with uh, Bam Bam[3] down Banning and turned left on Lindbergh. And then uh, Bam Bam brought it to my attention why don't we just get a car. I'm like [unintelligible]. He's like you have a gun. [Unintelligible] and we went to Josephine 'cause we thought since Josephine and Lindbergh, since they're always busy no matter what day, or no matter what time of day it is, wanted to see who will stop. And

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602] (*Miranda*).

[3] Bam Bam was identified in other testimony as a Banning Street gang member.

there was a few cars that passed through, but like they weren't like good cars. They were like Hondas and stuff, you know like the little gangster cars and shit. And then we saw her car. I believe it was a red Cadillac . . . . I stopped in front of the car and I pointed a gun at her, but she swerved around, and that's when I shot the, uh at the window. And then when I shot it, I ran uh down Lindbergh towards Louis, uh Street, on, before Lindbergh Road or whatever, that dead end street right there."

Defendant said he then got his skateboard, skateboarded to the river, threw the gun in the riverbed, and went to Downey to tell "Casper" what happened. Defendant said he and Bam Bam decided to take a car because "we needed uh, to get to places that we were trying to get to, instead of walking. We thought it would be easier and faster to get it by car instead of walking and getting caught up." Defendant said he and Bam Bam wore hats and pulled sweaters over their faces. When a car began to stop, "I pulled the gun, that's when she freaked and swerved around me and that's when I shot her. But I only saw her. I didn't see no one else 'cause I wasn't paying attention [unintelligible]." Defendant shot four times, "[b]ut like the one that hit the windshield, and then like I . . . a couple of other times, I don't know where in the car, but I just, once I did that, I ran away as fast as possible."

Defendant said after the shooting, he told "Big Homie" what happened. Sarti asked whether defendant told "Big Homie" where he got the gun, and defendant said, "I told him I got it from my uncle's house, and yeah he said why [unintelligible] do that? [Unintelligible] dumb because now you basically, shots fired, and now you can be in trouble and shit. Not going to lie, like adrenaline got me when, when the lady was in front of me.

Even though it was adrenaline, I still panicked, but like I'm not going to lie. That was my first time shooting a gun, like a handgun." Defendant said he started shooting because "I just wanted a car." After the shooting, four members of his gang beat him up.

Sarti asked if defendant knew he hit the woman inside the car. Defendant said he had not known: "I really did not know until you said that we were in the back of your car and yeah, I got fucking freaked out, man. . . ."

III.
Evidence Code Section 402 Hearing

Defendant's counsel moved pursuant to Evidence Code section 402 to suppress defendant's recorded confession. Counsel argued that defendant's recorded confession at the police station followed *unrecorded* statements made in the police car before receiving a *Miranda* advisement. The court excused the jury and held an Evidence Code section 402 hearing, at which Sarti was the sole witness.

Sarti testified that on June 7, 2013, Sergeant Choi[4] detained defendant for loitering. Sarti came to the area where defendant was detained and moved him into his police car, telling Sergeant Choi, "I need to talk to him real quick." Sarti asked defendant what he was doing in the area, and defendant said he was working at one of the pallet yards. Sarti then told defendant that he "had received some information from a citizen that he had something to do with that shooting that happened on Josephine and Lindbergh where somebody was shot." Defendant responded that he "did have something to do with it."

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[4] The record does not reveal Sergeant Choi's first name.

Once defendant made that statement, Sarti told Sergeant Choi he was taking defendant to the station. Sarti drove defendant first to the pallet yard, and then to the station.[5] Sarti testified that during the drive to the pallet yard, defendant "just started talking . . . rattling." Defendant said he had not seen Shy Boy and Wicked since they were stopped by the police on May 10. Defendant also said he had stolen from his uncle a .38 caliber revolver used in the shooting. Sarti "believed" he may have asked defendant "why would he steal something from his uncle. Because he said he stole a gun from his uncle. I said, 'Why would you do that?' " Defendant said "he was angry at his uncle because his uncle owed him money," although it is not clear from Sarti's testimony whether defendant made this statement before or after Sarti's question.

On the way from the pallet yard to the station, defendant "continue[d] to just ramble on about the dealings within Banning, Paragons, because they're going at it right now, all of the youngsters, where they were clicked up before. We talked about that kind of stuff." Defendant did not say anything further about the shooting—"[A]ll he talked about was the fact about the gun and being upset at his uncle for selling a car."

The conversation in the car lasted "four, five minutes." At the station, defendant was placed in an interview room, read his *Miranda* rights, and questioned about his role in the shooting.

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[5] Sarti testified that "there's about four or five pallet yards in that area that get extorted by the Banning Street gang members. There's been incidents where they, the owners of those businesses, have been beaten up pretty badly." Sarti therefore drove to the pallet yard "to see if [defendant's] telling me the truth, that he was actually working at the pallet yard."

Defense counsel then clarified as follows:

"Q. Now, you are saying that the only information that he gave you on the ride is in regards to his uncle and the gun, right?

"A. From what I recall, yes.

"Q. He didn't mention anything else about how the crime occurred, where he was, or anything like that?

"A. No."

The trial court then engaged in the following exchange with Sarti:

"The court: Now, why [did] you put [defendant] in your car?

"[Sarti]: Because I wanted to talk to him.

"The court: About the shooting?

"[Sarti]: Yes.

"The Court: Okay. So you put him in your car specifically to get information about the shooting, because in your mind you thought he was a suspect because of the information you received?

"[Sarti]: I was following up on information that I received, yes. [¶] . . . [¶]

"[The court]: Okay. Another question. You didn't have the Chad 477 card,[6] no other *Miranda* waiver or warning with you?

"[Sarti]: Not at the time I did not.

"[The court]: . . . . [O]n June 10, 2013, how long had you been a deputy sheriff?

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6 The "Chad 477 card" referred to by Sarti and the court is a card routinely carried by police officers that contains the *Miranda* warnings.

"[Sarti]: 14, 15 years.

"[The court]: And were you able to or do you have the expertise to administer the *Miranda* waiver, *Miranda* rights without referring to a card? I mean, isn't it something you can do from memory since you have been a law enforcement officer for 14 years?

"[Sarti]: I would say yes. But I didn't feel secure doing it because I sometimes mix it up."

Following Sarti's testimony, defense counsel moved to exclude all of defendant's statements to police "from the time that he got into the car to the time that he ended his recorded statement at the station. Because it does appear that it was one continuous conversation. Detective Sarti definitely deliberately made contact with [defendant] for the purpose of questioning him on the shooting. He was clearly conversing with him in the back of the vehicle until they got to the station, whatever route they might have taken. He was clearly talking to him about the shooting."

The prosecutor noted that he was seeking to introduce only those statements defendant made after he received a *Miranda* warning at the station, *not* any statements made in the car, and he asked for the opportunity to do some additional legal research on the admissibility of those statements.

The court told the parties that it had some concerns about Sarti's conduct. "[M]y concerns are: [Sarti] went there with the express purpose of basically talking to [defendant] with respect to what he believed [defendant] was a suspect in this particular case. . . . And he actually asked [defendant] to leave Sergeant Choi's custody car, get in his car. [¶] So it seems to me, knowing why he went there, I would think the very least he would

basically be in a position to at least . . . if you couldn't record it, at least give [defendant] his *Miranda* rights." Further, the court said, "it's kind [of] difficult for me to accept the fact that this particular experienced officer, 14 years on the job, been a detective since 2007, did not have any sort of *Miranda* warning or Chad form on his person.

"Moreover, his partner is with him, Detective [Nam], and apparently neither of you asked the question did she have a *Miranda* warning slip or Chad 477 card. . . . [T]hirdly, Sergeant Choi is out there. And so it seems [to] me that we've got three veteran police officers, probably with a combined experience of over 30 years, you know, collectively, yet he indicates that he could not give [defendant] the *Miranda* waivers because he might mess them up. Which is kind of hard to understand. You know, I kind of have a problem accepting that.

"And even once he made the statement, I'm here to talk about a murder or a shooting or something, even if [defendant] at that particular point in time said, 'I had something to do with that,' it would seem to me, as an experienced police officer, you would stop and you would give him the *Miranda* waivers." The court noted, however, that Sarti had "been very candid about what he had to testify to, very forthright, very professional." The court then recessed for the day to review the recorded police interview with defendant and to allow counsel to do additional legal research.

The following court day, the parties argued the significance of Sarti's testimony in light of *Oregon v. Elstad* (1985) 470 U.S. 298 [105 S.Ct. 1285] (*Elstad*) and *Missouri v. Seibert* (2004) 542 U.S. 600 [124 S.Ct. 2601] (*Seibert*). Defense counsel argued that the most reasonable interpretation of Sarti's testimony was

that Sarti deliberately interrogated defendant in the patrol car without first giving him *Miranda* warnings, such that under *Elstad* and *Seibert* defendant did not knowingly and intelligently waive his *Miranda* rights at the police station. The prosecutor disagreed, urging that there was no evidence that Sarti had interrogated defendant in the police car.

The court noted that what distinguished *Elstad* from *Seibert* was the deliberateness of the police officers' failure to give *Miranda* warnings. In *Elstad*, there was " 'a simple failure to administer the warnings unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise [his] free will.' " In *Seibert*, in contrast, "there was definitely a scheme, a tactic, an agenda to basically get this information from Ms. Seibert using – how shall I put it – strong arm tactics, including squeezing [her] arm. And then ultimately giving her a break after 30, 40 minutes of drilling[.]"

The coercive police tactics present in *Seibert*, the court said, are "not what happened in [this case]." In this case, "there was some sort of conversation that occurred there in the car, I guess, about what happened with the shooting as well as other issues that may be tangentially relevant, maybe not relevant at all . . . . [¶] . . . There's nothing that would suggest that [defendant] was ever coerced, was threatened, that they ever used any sort of forceful tactics to get him to talk about the case. Even in his statement to the police he gives all kind[s] of information . . . . He gives information that they're not even asking for. Seems to me that he's quite comfortable, he's quite at ease, he . . . has no problems communicating with Sarti. He's very articulate. He give[s] a lot of insight, a lot of his youthful naiveté, I agree. But it just seems to the court when you look at the totality of the

circumstances, there is nothing that suggests any sort of coercive or dilatory tactics on the part of Sarti to get [defendant] to talk. [¶] . . . [So] it seems to me that there's nothing in the case law that would suggest, as I read both of these cases, that precludes admission of [defendant's admission]."

Based on the foregoing, the court denied the motion to suppress and allowed the prosecution to admit into evidence defendant's recorded postwarning confession.

IV.

Trial Testimony

A. Sarti's Testimony

After the court denied the motion to suppress, Sarti took the stand, and defendant's recorded confession to the police (described above) was played for the jury.

On cross examination by defense counsel, Sarti testified that after he put defendant in his police car on June 7, he asked defendant what he was doing in the area, and told defendant that he had received information from a citizen that defendant had been involved in a shooting at Josephine and Lindbergh. Defendant replied, "I did have something to do with that." Sarti told Sergeant Choi he was going to take defendant to the station and then drove away. He drove first to the pallet yard where defendant claimed to work, and then to the police station. Sarti testified that on the way to the pallet yard, he did not ask defendant any questions. Nonetheless, defendant talked about "where he got the gun. He was upset [about] the fact that his uncle owed him some money. And he talked about taking the gun from his uncle. He talked about the gang." The following colloquy ensued between Sarti and defense counsel:

"Q. So he just said something to the effect of, I got the gun from my uncle?

"A. No, not necessarily like that.

"Q. What did he actually say?

"A. He spoke about how his uncle owed him some money for selling a car that belonged to him.

"Q. So, Detective, how did the statement start? He said?

"A. He was rambling on. . . . [¶] . . . [¶] [H]e started talking about Wicked and Shy Boy and how he hadn't seen them. Then he talked about Bam Bam.

"Q. Okay. But I'm asking you about the gun situation. So how does that conversation transition into talking about a gun? . . . [¶] . . . [¶]

"A. He[] just rambled it off.

"Q. [He] just randomly said this?

"A. Yes.

"Q. Okay. So you pick him up at this location. And you picked him up from another deputy. And you just say, hey I want to talk about the shooting. And he just says, yeah, I was involved in it. Is that what you are saying happened?

"A. Yes.

"Q. Then he got in the back of your car. And then you're on your way to this pallet yard and he just says – you know, he's talking to you. And then he says, 'Yeah, I got the gun from my uncle, you know, I was really mad and he owed me some money.' Is that what you are saying happened?

"A. Yes.

"Q. And so he just started talking to you about that?

"A. Yes. That and other things.

"Q. And you weren't – and you were not asking him any questions?

"A. No, I was not.

"Q. You were just listening?

"A. Yes.

"Q. He's just blurting out to you about how this shooting occurred, correct?

"A. Not how the shooting occurred.

"Q. He's not saying that to you?

"A. How it occurred?

"Q. Yeah. He's not talking about the shooting?

"A. No.

"Q. He's not talking to you about what happened out on the street?

"A. With the shooting?

"Q. With the shooting[.]

"A. No.

"Q. He doesn't give you any of the facts about that?

"A. No.

"Q. He doesn't say anything until you get to the station?

"A. Correct. . . . [¶] . . . [¶]

"Q. And the only thing he talked about in relation to the shooting is the gun?

"A. Yeah. That's it. [¶] . . . [¶]

"Q. And that's the only thing he talked about?

"A. No. He talked about other things.

"Q. In terms of the shooting?

"A. That I recall, yes."

Defense counsel also asked Sarti about his written report of the investigation; Sarti agreed that the report said that on the

way to the station, defendant admitted to being involved in the shooting and said "something" about the gun.

B. Gang Testimony

Detective Grant Roth testified as a gang expert that defendant and Bam Bam were members of the Banning Street gang. He was asked the following hypothetical question: assuming that a member of Banning Street gang, accompanied by Bam Bam, shot a woman after attempting to take her car in the gang's territory, would the crime have been "committed for the benefit of, at the direction of, or in association with a criminal street gang . . . ?" Roth opined that "this crime was committed for the benefit, at the direction and association for the benefit of the Banning Street gang . . . ."

V.

Verdict, Judgment, and Appeal

The jury found defendant guilty of all charges and found true the firearm and gang allegations. The court sentenced defendant to 42 years to life on count 1, consisting of seven years for attempted murder, ten years for the gang enhancement, and 25 years for the firearm enhancement. The court further sentenced defendant to a concurrent term of 37 years and six months on count 2, and a 40-year term on count 3, which the court stayed under section 654. Defendant appealed.

DISCUSSION

I.

The Trial Court Did Not Err by Admitting Defendant's Postwarning Confession

Defendant's primary contention on appeal is that the trial court erred by denying the motion to suppress defendant's stationhouse confession, which he urges was taken in violation of *Miranda*. Defendant concedes that the arresting officers advised

him of his *Miranda* rights at the station immediately before he confessed, but he urges that his stationhouse confession followed an earlier custodial interrogation during which *Miranda* warnings were deliberately withheld. Therefore, defendant contends, pursuant to *Seibert*, *supra*, 542 U.S. 600, both his pre- and postwarning statements must be suppressed.

It is undisputed that defendant was "in custody" both while he was in the police car and at the station, and thus that any prewarning admissions that resulted from an interrogation could not properly have been admitted—and were not admitted—in the People's case in chief. However, for the reasons that follow, we conclude that the trial court did not err in permitting the People to introduce evidence of defendant's *postwarning* confession during its case-in-chief because that confession was not the product of "a two-step questioning technique based on a deliberate violation of *Miranda*" (*Seibert*, *supra*, 542 U.S. at p. 620 (conc. opn. of Kennedy, J.)).

A. Applicable Law

1. Overview

"Under the familiar requirements of *Miranda*, designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under 'inherently coercive' circumstances, 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. [Citations.]" (*People v. Sims* (1993) 5 Cal.4th 405, 440, overruled on another ground in *People v. Bradford* (1997) 14 Cal.4th 1005, 1039-1040.) A suspect is "in custody" under *Miranda* if he or she " ' "has been taken into custody or otherwise deprived of his

freedom of action in any significant way," ' even if he 'may not have been formally arrested.' " (*People v. Tom* (2014) 59 Cal.4th 1210, 1232–1233.)

A defendant may waive the rights conveyed in the warnings " ' "provided the waiver is made voluntarily, knowingly and intelligently." [Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]' [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 501–502.) The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1249.)

" 'In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda*[, *supra*,] 384 U.S. 436, we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we " 'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." [Citations.]' "

(*People v. Whitson* (1998) 17 Cal.4th 229, 248; see also *People v. Smith*[, *supra*,] 40 Cal.4th [at p.] 502 ["In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained. [Citations.]"].)

2. *Oregon v. Elstad*

Oregon v. Elstad, *supra*, 470 U.S. 298 is the first of two United States Supreme Court cases that have addressed the admissibility of confessions made after "midstream" *Miranda* warnings—i.e., *Miranda* warnings given after a defendant has made some initial incriminating statements. In *Elstad*, officers went to an 18-year-old suspect's home to execute an arrest warrant. (*Elstad*, *supra*, at pp. 300–301.) While one officer told Elstad's mother they had a warrant for her son's arrest, another officer asked Elstad if he knew why the officers were there. Elstad said no. The officer asked if Elstad knew a person by the name of "Gross," and Elstad said yes, and added that he had heard there had been a burglary at the Gross home. The officer then told Elstad that he thought he was involved in the burglary, and Elstad said, " ' "Yes, I was there." ' " (*Id.* at pp. 300–301.)

Officers transported Elstad to the police station, where they advised him for the first time of his *Miranda* rights. Elstad indicated he understood those rights and wished to speak with the officers. He then confessed to his involvement in the burglary. (*Elstad*, *supra*, 470 U.S at p. 301.)

At trial, Elstad moved to suppress his confession, urging that his prewarning statement in response to questioning at his house "let the cat out of the bag" and tainted his subsequent

confession. The court ruled that the statement, "I was there," had to be excluded because Elstad had not been advised of his *Miranda* rights, but Elstad's subsequent confession at the police station was admissible. The Oregon Court of Appeals reversed the conviction, and the United States Supreme Court granted certiorari, reversed the judgment of the Court of Appeals, and affirmed the conviction. (*Elstad*, *supra*, 470 U.S. at pp. 302–303.)

The court explained that prior to *Miranda*, the admissibility of an accused's in-custody statements were judged solely by whether they were "voluntary" within the meaning of the Fifth Amendment's due process clause. The court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis "by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment." (*Elstad*, *supra*, 470 U.S. at pp. 302–303.) The court noted, however, that "[*v*]*oluntary* statements 'remain a proper element in law enforcement.' *Miranda*[, *supra*,] 384 U.S. at [p.] 478. 'Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.' [Citations.]" (*Elstad*, 470 U.S., *supra*, at p. 305.)

The court rejected Elstad's contention that his police-station confession was tainted by the earlier failure of the police to provide *Miranda* warnings, and thus had to be excluded as the "fruit of the poisonous tree." The court explained that such contention "assumes the existence of a constitutional violation" that was not present: "The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself. It may be

triggered even in the absence of a Fifth Amendment violation. [Fn. omitted.] The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm. [Citations.] [¶] But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." (*Elstad*, *supra*, 470 U.S. at pp. 306–307.) Thus, in the absence of coercion or improper tactics, the suspect, once warned, "is free to exercise his own volition in deciding whether to make a statement to the authorities." (*Id*. at p. 308.)

The court noted that because *Miranda* warnings may inhibit persons from giving information, "they need be administered only after the person is taken into 'custody' or his freedom has otherwise been significantly restrained. [Citation.] Unfortunately, the task of defining 'custody' is a slippery one, and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.' [Citation.] If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. *It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances*

calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (*Elstad*, *supra*, 470 U.S. at p. 309, italics added.)

The court continued: "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to *an unwarned but noncoercive question, as in this case*. . . . We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." (*Elstad*, *supra*, 470 U.S. at pp. 312–314, italics added.)

In Elstad's case, the state "has conceded the issue of custody and thus we must assume that [the arresting officer] breached *Miranda* procedures in failing to administer *Miranda* warnings before initiating the discussion in [Elstad's] living room. This breach may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation'

or it may simply have reflected [the officer's] reluctance to initiate an alarming police procedure before [the officer] had spoken with [Elstad's] mother. Whatever the reason for [the officer's] oversight, *the incident had none of the earmarks of coercion*. [Citation.] Nor did the officers exploit the unwarned admission to pressure [Elstad] into waiving his right to remain silent." (*Elstad*, *supra*, 470 U.S. at p. 309, italics added.) Thus, Elstad's initial statement in his living room, though inadmissible under *Miranda*, did not disable Elstad from later effectively waiving his right to remain silent after receiving appropriate *Miranda* warnings.

The court concluded: "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. . . . We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts have, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. [Fn. omitted.] The relevant inquiry is whether, in fact, the second statement was also voluntarily made.

As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver. *We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings*." (*Elstad*, *supra*, 470 U.S. at pp. 317–318, italics added.)

3. <u>*Missouri v. Seibert*</u>

In *Missouri v. Seibert*, *supra*, 542 U.S. 600, the court "test[ed] a police protocol for custodial interrogation that call[ed] for giving no warnings of the rights to silence and counsel until interrogation has produced a confession," then giving a *Miranda* warning and "lead[ing] the suspect to cover the same ground a second time." (*Seibert*, *supra*, at p. 604 (plur. opn.).) In *Seibert*, following the death of a mentally ill teenager in Seibert's mobile home, police took Seibert to the police station and questioned her without *Miranda* warnings for 30–40 minutes. During the questioning, the officer squeezed Seibert's arm and repeatedly suggested that she intended the teen to die in an intentionally-set fire. After Seibert finally admitted she intended the death, and after a brief break, the officer turned on a tape recorder, gave

Seibert *Miranda* warnings, and obtained a confession after confronting Seibert with her prewarning statements. (*Id*. at p. 605.)[7]

After being charged with first degree murder, Seibert sought to exclude both her prewarning and postwarning statements. The arresting officer testified at the suppression hearing that he "made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.' [Citation.] He acknowledged that Seibert's ultimate statement was 'largely a repeat of information . . . obtained' prior to the warning." (*Seibert*, *supra*, 542 U.S. at pp. 605–606 (plur. opn.).)

The trial court suppressed the prewarning statement but admitted the responses given after the *Miranda* recitation. The Missouri Supreme Court reversed, and the United States

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[7] "[Officer]: 'Now, in discussion you told us, you told us that there was a[n] understanding about Donald.'

"Seibert: 'Yes.'

"[Officer]: 'And what was the understanding about Donald?'

"Seibert: 'If they could get him out of the trailer, to take him out of the trailer. [¶] . . . [¶]

"[Officer]: 'Trice, didn't you tell me that he was supposed to die in his sleep?'

"Seibert: 'If that would happen, cause he was on that new medicine, you know . . . .'

"[Officer]: 'The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?'

"Seibert: 'Yes.' " (*Seibert*, *supra*, 542 U.S. at p. 605.)

Supreme Court granted certiorari. (*Seibert*, *supra*, 542 U.S. at pp. 606–607 (plur. opn.).)

Seibert produced no majority opinion, but five justices agreed that Seibert's postadvisement statements were inadmissible. Because Justice Kennedy " 'concurred in the judgment[] on the narrowest grounds,' " his concurring opinion represents *Seibert*'s holding. (See *People v. Camino* (2010) 188 Cal.App.4th 1359, 1370, citations omitted.)

Justice Kennedy noted that although the *Miranda* rule "has become an important and accepted element of the criminal justice system[,] . . . not every violation of the rule requires suppression of the evidence obtained." (*Seibert*, *supra*, 542 U.S. at pp. 618–619 (conc. opn. of Kennedy, J.).) To the contrary, evidence is admissible "when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." (*Ibid*.)

Justice Kennedy opined that *Elstad* reflected "a balanced and pragmatic approach to enforcement of the *Miranda* warning," noting that an officer may not realize that a suspect is in custody and warnings are required, or may not plan to question the subject at that time. (*Seibert*, *supra*, 542 U.S. at p. 620 (conc. opn. of Kennedy, J.).) In light of these realities, he wrote, "it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." (*Id*. at p. 620.)

The case before the court, however, presented different considerations than *Elstad* because the police in *Seibert* used what Justice Kennedy characterized as "*a two-step questioning*

technique based on a deliberate violation of Miranda." (*Seibert*, *supra*, 542 U.S. at p. 620 (conc. opn. of Kennedy, J.), italics added.) He explained that the technique "is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use. [¶] Further, the interrogating officer here relied on the defendant's prewarning statement to obtain the postwarning statement used against her at trial. The postwarning interview resembled a cross-examination. The officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them. See App. 70 (' 'Trice, didn't you tell me that he was supposed to die in his sleep?'). . . .

"The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. . . . When an interrogator uses *this deliberate, two-step strategy,* predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps." (*Seibert*, *supra*, 542 U.S. at p. 621 (conc. opn. of Kennedy, J.), italics added.)

Justice Kennedy concluded the admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless "the deliberate two-step strategy" was employed. If the strategy was employed, "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures

should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. [Citation.] Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand." (*Seibert*, *supra*, 542 U.S. at p. 622 (conc. opn. of Kennedy, J.).)

4. Synthesizing *Elstad* and *Seibert*

"[T]he type of two-step questioning that falls within Justice Kennedy's narrow concurrence is the type used in *Seibert*, where officers *in a calculated manner* first obtained unwarned incriminating statements from a suspect, and then used those incriminating statements in the warned interrogation in order to undermine the midstream *Miranda* warnings." (*U.S. v. Gonzalez-Lauzan* (11th Cir. 2006) 437 F.3d 1128, 1136, italics added.) In situations where the two-step strategy was not deliberately employed, *Elstad* continues to govern the admissibility of postwarning statements. (*U.S. v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1158.)

B. Substantial Evidence Supports the Trial Court's Conclusion That Law Enforcement Did Not Deliberately Engage in a Two-Step Process to Thwart Defendant's Miranda *Rights*

Defendant contends that his prewarning statements were the product of a custodial interrogation and thus were obtained in

violation of *Miranda*. He further contends that the *Miranda* violation was deliberate and was part of an intentional two-step interrogation technique. He thus urges that, under *Seibert*, his postwarning statements should have been suppressed.

The People concede that Sarti's question in the police car—"Why would you do that [take your uncle's gun]?"—although "likely just small talk en route to the station," may have constituted an interrogation within the meaning of *Miranda*.[8] They urge, however, that any *Miranda* violation was not deliberate, and thus that defendant's postwarning confession was admissible under *Elstad*.

In light of the People's concession, we assume that some of defendant's prewarning statements made during the drive to the police station were obtained in violation of *Miranda*. Our inquiry, therefore, is whether any prewarning *Miranda* violation was *deliberate*, thus requiring the exclusion of defendant's postwarning statements.

To determine whether an officer's *Miranda* violation was deliberate—and thus whether *Elstad* or *Seibert* controls—courts consider "objective evidence and any available subjective evidence, such as an officer's testimony." (*U.S. v. Williams*, *supra*, 435 F.3d at p. 1158.) Relevant "objective" factors include "the completeness and detail of the questions and answers in the first round of questioning, the degree to which the content of the

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[8] The People argue that Sarti's initial statement to defendant—that a citizen had implicated defendant in the shooting—was not an interrogation. In light of the People's concession that Sarti's question may have constituted an interrogation, we need not decide whether Sarti's initial statement was also an interrogation.

rounds overlap, the timing and setting of the questioning, the continuing involvement of particular law enforcement personnel, and the degree to which later questions treated the second round as continuous with the first." (*U.S. v. Briones* (8th Cir. 2004) 390 F.3d 610, 613.)

California reviewing courts are bound by the trial court's factual findings if supported by substantial evidence, and we must accord "great weight" to the trial court's conclusions. (*People v. Camino*, *supra*, 188 Cal.App.4th at p. 1372.) If the trial court did not make express factual findings, we " 'infer "a finding of fact favorable to the prevailing party on each ground or theory underlying the motion." [Citation.]' [Citation.]" (*People v. Munoz* (2008) 167 Cal.App.4th 126, 132–133.)

In the present case, the trial court found that Detective Sarti and his partner did not deliberately use a two-step interrogation method to circumvent *Miranda*.[9] The court further found Sarti to have been "very candid about what he had to testify to, very forthright, very professional." As we now explain, the court's findings are supported by substantial evidence.

1. Subjective Evidence of Intent

The interrogating officer in *Seibert* testified that he made a " 'conscious decision' " to withhold *Miranda* warnings, using an interrogation technique he had been taught: question first, then

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[9] The court said: "[I]t seems to the court, [in] *Seibert*, there was definitely a scheme, a tactic, an agenda, to basically get this information from Ms. Seibert using –how shall I put it – strong arm tactics, including squeezing her arm. And then ultimately giving her a break after 30, 40 minutes of drilling, then turning on a tape record[er]. [¶] *But that is not what happened in McManus*."

give the warnings, and then repeat the question " 'until I get the answer that she's already provided once.' " (*Seibert*, *supra*, 542 U.S. at pp. 605–606 (plur. opn.).) Sarti gave no such testimony here.

Defendant urges that Sarti's claimed reason for withholding *Miranda* warnings until reaching the station—"because he feared mixing them up if he recited them from memory"— is not credible, and thus that we should presume Sarti's actual reason for withholding warnings was illegitimate. But the trial court found Sarti to be candid and forthright in his testimony, and nothing about Sarti's answer compels the conclusion that Sarti offered an implausible reason for delaying *Miranda* warnings. Accordingly, we defer to the trial court's credibility finding. (E.g., *People v. Williams* (2015) 61 Cal.4th 1244, 1262 ["We defer to the trial court's credibility assessments 'based, as they are, on firsthand observations unavailable to us on appeal.' "].)

2. Objective Evidence of Intent

Completeness and detail of the questions and answers in the first round of questioning. Following *Seibert*, many courts have considered the thoroughness and detail of the prewarning interrogation as objective evidence of intent. In *Seibert*, the court noted that the unwarned interrogation "was conducted in the station house, and the questioning was systematic, exhaustive, . . . managed with psychological skill. . . . [T]here was little, if anything, of incriminating potential left unsaid." (*Seibert*, *supra*, 542 U.S. at p. 616 (plur. opn.).) In contrast, courts have found no deliberate intent to circumvent *Miranda* where the initial questioning "was brief and spare." (*U.S. v. Moore* (2d Cir. 2012) 670 F.3d 222, 231 [no deliberate *Miranda* violation where officer's unwarned questions were "limited to the

location of the gun" and did not extend to "[defendant's] involvement in the attempted robbery or carjacking, . . . who else was involved in either of those incidents, or . . . how [defendant] obtained the gun."]; see also *U.S. v. Williams* (2d Cir. 2012) 681 F.3d 35, 37, 44 [while executing search warrant, officers asked defendant " 'whose firearms they were?' " and defendant answered that they were his; *held*: no deliberate *Miranda* violation because the question and answer "were neither complete nor detailed"]; *Reinert v. Larkins* (3d Cir. 2004) 379 F.3d 76, 80, 91 [officer asked defendant " 'what happened?' " and defendant responded, " 'I think I killed him. I think I stabbed him;' " *held*: no intentional *Miranda* violation because officer's failure to read defendant his rights, "though unfortunate and unexplained, seems much more likely to have been a simple failure to administer the warnings rather than an intentional withholding that was part of a larger, nefarious plot."].)

In the present case, Sarti testified that while defendant was in custody he asked—at most—a single question before advising defendant of his *Miranda* rights: Why defendant stole a gun from his uncle.[10] The question does not appear to have been designed to elicit an inculpatory response, and defendant's apparent answer—that he stole the gun because his uncle owed him money—did not, in fact, inculpate defendant. Therefore, like *Elstad*, and in stark contrast to *Seibert*, the "first round of interrogation" was not so complete or so detailed as to require the

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[10] Defendant does not claim that the only other question Sarti asked—"what [defendant] was doing in that area"—was a custodial interrogation. In any event, defendant's answer—that he was working at one of the pallet yards—was not incriminating.

conclusion that it was part of a deliberate attempt to circumvent *Miranda*.

The degree to which the pre- and postwarning statements overlap, and the officers' reliance on defendant's prewarning statements to obtain postwarning confession. In *Seibert*, the court noted that the interrogating officer "relied on the defendant's prewarning statement to obtain the postwarning statement used against her at trial," such that the postwarning interview "resembled a cross-examination." (*Seibert*, *supra*, 542 U.S. at p. 621 (conc. opn. of Kennedy, J.).) Subsequently, reviewing courts have considered the overlap between a defendant's prewarning and postwarning statements and the manner in which the interrogating officers used the prewarning statements to obtain the postwarning confessions, admitting postwarning statements that were not obtained by deliberate manipulation of prewarning admissions. (See, e.g., *Bobby v. Dixon* (2011) 565 U.S. 23, 31 [132 S.Ct. 26,31] ["unlike in *Seibert*, there is no concern here that police gave [defendant] *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. . . . Nor is there any evidence that police used [defendant's] earlier admission to forgery to induce him to waive his right to silence later"]; *U.S. v. Williams*, *supra*, 681 F.3d at p. 44 [no evidence of deliberateness where defendant "was not led 'to cover the same ground a second time'—the type of objective evidence that raises *Seibert* deliberateness concerns because it suggests a focused attempt to make the defendant feel locked into his recently elicited inculpatory statements."]; *U.S. v. Moore*, *supra*, 670 F.3d at p. 231 ["Whereas the initial questioning focused exclusively on the location of the gun, the second questioning was broad and

systematic: it focused on the attempted robbery and carjacking, where Moore got the gun, who else in town had guns, and whether Moore had any information about cold homicide cases. The two rounds of questioning did not appreciably overlap."].)

In the present case, there was very little overlap between the substance of defendant's pre- and postwarning statements. As we have said, prewarning, defendant admitted only that he had something to do with the shooting and had stolen the gun used in the shooting. Postwarning, defendant said he had been hanging out at a liquor store with Bam Bam earlier in the day; he and Bam Bam decided to use defendant's gun to "get a car;" Bam Bam suggested getting a car, but defendant came up with the plan to do it; he and Bam Bam put sweaters over their faces and wore hats so they would not be recognized; defendant and Bam Bam stopped Blanco because she was driving a "good car[]"; defendant shot at Blanco four times; defendant ran from the scene after the shooting and threw the gun into the riverbed; defendant spent the night at Casper's house; [fellow gang member] Nene had no role in the shooting; defendant was disciplined by his gang for the botched carjacking; and defendant had not known before talking to Sarti that the woman driving the car had been injured. Plainly, unlike in *Seibert*, defendant's postwarning confession was *not* " 'largely a repeat of information . . . obtained' prior to the warning." (*Seibert*, *supra*, 542 U.S. at pp. 605–606 (plur. opn.).) Rather, as in *Elstad*, the postwarning statements were far more detailed and inculpatory than the brief prewarning statements.

Moreover, like *Elstad*, and unlike *Seibert*, Sarti did not use defendant's prewarning statements to obtain the postwarning confession. We have carefully reviewed the transcript of

defendant's postwarning confession, and we find no examples of Sarti leading defendant during the postwarning interview to repeat any prewarning admissions—or, indeed, of making any reference to the defendant's statements in the police car. To the contrary, unlike in *Seibert*, where the postwarning interview "resembled a cross-examination" (*Seibert*, *supra*, 542 U.S. at p. 620–621 (conc. opn. of Kennedy, J.), here the detective's postwarning questions were consistently open-ended—i.e.: "[W]here were you guys at?"; "[W]hat time of day are we talking about?"; "Why did you guys decide to take the car?"; "[D]id you guys talk about how you guys were going to do it?"; "Who was in the car?"; "[D]id the car stop, or did it keep going?"; "How many times did you shoot?"; and "What made you start shooting?"[11]

In his opening brief on appeal, defendant suggests that he and Sarti "had previously discussed most details of the crime during the ten minute ride to the police station," but the only evidence he cites—Sarti's statement, "Let's start over . . . let's start from the beginning"—is too thin a reed to support that conclusion. Defendant also suggests that he "made statements during the recorded interview" that support an inference that his unrecorded conversation with Sarti was far more extensive than Sarti admitted. But defendant's only support for this assertion is his statement during the recorded interview that he had not known victim Blanco had been hit "until you [Sarti] said that in

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[11] Sarti testified during cross-examination that there were times during defendant's recorded statement that Sarti "referr[ed] to [the] earlier conversation"—but that testimony is not supported by the transcript of the recorded conversation.

the back of your car"—a statement about which Sarti testified at the Evidence Code section 402 hearing.[12]

The continuity of police personnel and the timing and setting of the first and second interrogations. Where officers have, *prewarning*, conducted a detailed interrogation and obtained a confession, the continuity of police personnel and length of time that separates the pre- and postwarning interrogations have been held significant. (See *People v. Camino*, *supra*, 188 Cal.App.4th at p. 1376 [although substantial evidence supported the trial court's finding that officers did not deliberately use a two-step technique, "this is a close case because of the continuity between the two interviews and because of the comprehensiveness of the first interview, which left 'little, if anything, of incriminating potential . . . unsaid.' "].) In the present case, however, this factor is of minimal significance because the officers did not obtain a confession prewarning. (See *U.S. v. Gonzalez-Lauzan*, *supra*, 437 F.3d at p. 1138 [although pre- and postwarning interrogations were close in time, this factor "carrie[d] little weight" because "the complete interrogation of [defendant] that follow[ed] the warnings bore little resemblance to his prewarning statement"].)

3. Conclusion—no evidence of a deliberate two-step interrogation designed to circumvent *Miranda*

In summary, nothing about the questions and answers in the police car—not their completeness and detail, overlap with

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[12] Sarti testified: "I told him I had received some information from a citizen that he had something to do with that shooting that happened on Josephine and Lindbergh *where somebody was shot*." (Italics added.)

postwarning questions, nor use in subsequent postwarning questioning—points to a deliberate use of a two-step technique to thwart defendant's *Miranda* rights. Although it would have been better practice to have administered *Miranda* warnings before taking defendant to the police station, the evidence before the trial court supported the conclusion that the detectives' failure to do so was not deliberately coercive. As Justice Kennedy suggested in *Seibert*, the detectives may not have given *Miranda* warnings before taking defendant to the station because they "may [have been] waiting for a more appropriate time" to question defendant. (*Seibert*, *supra*, 542 U.S. at p. 620 (conc. opn. of Kennedy, J.; see also *U.S. v. Williams*, *supra*, 681 F.3d at p. 42 [prewarning questioning did not evince a deliberate strategy to sidestep *Miranda*; instead, "it suggests that [the officer] was simply 'waiting for a more appropriate time' formally to question [defendant]"].) Under these circumstances, as Justice Kennedy noted, it would "be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." (*Seibert*, *supra*, at p. 620 (conc. opn. of Kennedy, J.).)

Because we have concluded that the detectives did not deliberately elicit incriminating statements through belated *Miranda* warnings, defendant's *postwarning* statements are admissible in the absence of "actual coercion or other circumstances calculated to undermine the [defendant's] ability to exercise his free will." (*Elstad*, *supra*, 470 U.S. at p. 309.) Defendant does not challenge on appeal the trial court's finding that defendant's confession was not obtained through coercion—i.e., that nothing suggested that defendant "was ever coerced, was ever threatened, [or] that [the detectives] used any sort of

forceful tactics to get him to talk about the case." The court's finding is supported by substantial evidence—namely, the absence of any evidence of threats or promises in exchange for a confession, as well as Sarti's testimony that defendant talked "freely" in the car. Accordingly, the trial court did not err in admitting defendant's postwarning confession.

II.

The Trial Court Did Not Abuse Its Discretion by Awarding Victim Restitution of $34,658

Following trial, the court awarded victim Yesenia Blanco restitution in the amount of $34,658, which included Blanco's outstanding balance on two student loans. Defendant contends this portion of the restitution award exceeded the trial court's discretion. For the reasons that follow, we disagree and affirm.

A. Background

Blanco testified at the restitution hearing that in about November 2010, she enrolled in a program to obtain an auto technician certificate. She obtained a student loan and a federal loan to help pay for the program. Blanco finished the program in March 2012, and was required to start repaying the loans in September 2012. She began making minimum payments of $49 per month. At that time, she was working fixing cars and as a manager for Taco Bell. However, as a result of the shooting, Blanco's memory is impaired and she suffers seizures. She has not been able to work since being shot, and her doctor has placed her on full disability until 2017. Blanco "think[s] [she] will" be able to do some kind of sedentary work in the future, but she will not be able to resume repairing cars.

Because she has no income, Blanco has not been able to make any payments on her student loans since the shooting. Her original loans were in the amount of $23,000; she currently owes

the Department of Education $13,588.65, and a private lender $914.84.

The prosecutor asked that Blanco be awarded the remaining balance on her student loans, plus lost earnings and other losses, as victim restitution. Defense counsel objected to the request for an award of Blanco's loan balance, noting that there was no evidence that Blanco would not be able to work as a mechanic at some point in the future.

The court ordered victim restitution to Blanco in the amount of $34,658, plus 10 percent interest from sentencing, for "medical, loan payoff, parking, gas, wage loss."[13]

B. Analysis

Section 1202.4 provides that a victim of crime "who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." (§ 1202.4, subd. (a).) The amount of the victim restitution award shall be determined by the court "based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) "To the extent possible, the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ." (*Ibid.*)

We review the victim restitution order for abuse of discretion. " ' " 'A victim's restitution right is to be broadly and liberally construed.' [Citation.] ' "When there is a factual and

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[13] The district attorney's request for restitution, which apparently was attached to its sentencing memorandum, is not part of our appellate record. We therefore cannot discern precisely how the victim restitution award was calculated.

rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court." ' [Citations.]" [Citation.]' [Citation.]" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 686.)

Defendant contends that the district court abused its discretion by awarding the entire unpaid balance of Blanco's student loans as victim restitution because "there was no evidence that [Blanco] was permanently incapacitated such that she would be unable to ever resume making payments on the loans." In so contending, defendant assumes that we should review the restitution award piecemeal—i.e., that we should consider whether each portion of the restitution award is supported by substantial evidence. In fact, our Supreme Court has held that a restitution award may be reversed only if the defendant demonstrates that the award, *considered as a whole*, exceeds the victim's compensable losses. (*People v. Giordano* (2007) 42 Cal.4th 644, 666 [despite trial court's "methodological imprecision" in calculating victim restitution award, no abuse of discretion where defendant did not show that the total restitution award exceeded victim's total losses].)

In the present case, there is no dispute that Blanco was employed prior to the shooting, and that she is expected to be totally disabled for at least four years. Based on the record before us—and regardless of the merits of defendant's contention regarding the compensability of Blanco's outstanding student loans—we do not conclude that $34,658 (i.e., approximately $8,664 per year for four years) exceeds Blanco's reasonably calculated losses.

III.
Defendant's Conviction on Count 2 (Attempted Carjacking) Should Have Been Stayed Under Section 654

Defendant contends the trial court erred, under section 654, by sentencing him for both attempted murder and carjacking (counts 1 and 2) because both crimes were part of a single course of conduct. This claim has merit.

A. Legal Standards

" ' "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." ' [Citation.] However, if the offenses were independent of and not merely incidental to each other, the defendant may be punished separately even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. [Citation.]" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1084–1085.)

" 'Whether the facts and circumstances reveal a single intent and objective within the meaning of Penal Code section 654 is generally a factual matter; the dimension and meaning of section 654 is a legal question.' [Citation.] We apply the substantial evidence standard of review to the trial court's implied finding that a defendant harbored a separate intent and objective for each offense. [Citations.]" (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414.)

In *People v. Nunez* (2012) 210 Cal.App.4th 625, the defendant escaped from a mental health inpatient facility and approached the victim, who was sitting in his parked car. Defendant "slammed" the victim's window and screamed at him. The victim opened the car door and pushed defendant back a couple of feet; defendant swung a hammer at the victim, striking him on the forearm and hand, entered the victim's vehicle, and drove away. (*Id.* at p. 628.)

Defendant was convicted of carjacking (count 1) and assault with a deadly weapon (count 2). The trial court separately sentenced defendant for the two convictions, concluding that the assault with a deadly weapon was not incidental to the carjacking for section 654 purposes because defendant did not need to assault the victim in order to take his car. (*People v. Nunez*, *supra*, 210 Cal.App.4th at p. 628.)

The Court of Appeal disagreed and reversed. Although it agreed with the People that a defendant can commit a carjacking without committing an assault with a deadly weapon, it concluded that was not what happened in this case because the assault with a deadly weapon was "the sole means of committing the carjacking. This course of criminal conduct was indivisible and the two crimes were committed so close in time that they were contemporaneous if not simultaneous." (*People v. Nunez*, *supra*, 210 Cal.App.4th at p. 629.) Further, "[i]t is apparent that appellant wielded the hammer to take the car. It is equally apparent the victim was not a 'shrinking violet.' That is to say, he was not going to peacefully surrender his car. Use of the hammer was not a 'gratuitous act of violence' or an 'afterthought.' [Citation.] Nor was use of the hammer motivated by animus unrelated to the taking of the automobile. That is to say, there

was no needless and vicious maiming of the victim after the defendant '. . . ha[s] consummated the purpose of his original crime.' " (*Id.* at p. 630.) Accordingly, defendant's use of the hammer "was 'incidental' to the carjacking, i.e., a means to taking the car. He cannot be separately punished therefor." (*Ibid.*)

B. Analysis

The present case is analogous to *People v. Nunez.* Here, defendant testified that he and Bam Bam decided to use defendant's gun to get a car "[b]ecause we needed uh, to get to places that we were trying to get to, instead of walking." Defendant stopped in front of Blanco's car and pointed his gun at her, but when she failed to stop, he shot at her window. When asked why he shot at Blanco, defendant said, "I don't know. It's just, I just wanted a car. I'm not going to lie . . . . I just wanted a car."

Defendant's testimony suggests that, as in *Nunez*, defendant had just one objective—to take Blanco's car. The gun used in the attempted murder was the sole means of committing the carjacking, and the two crimes (attempted murder and carjacking) were nearly simultaneous. Further, as in *Nunez*, the defendant had not yet obtained Blanco's car when he shot her. The use of the gun, therefore, was not a "needless and vicious maiming of the victim after the defendant '. . . ha[s] consummated the purpose of his original crime,' " but was instead a means of taking the car. (*People v. Nunez*, *supra*, 210 Cal.App.4th at p. 630.)

The People argue that there was substantial evidence to support the trial court's implied finding that defendant harbored separate objectives for the attempted murder and carjacking.

The People concede that defendant said he started shooting because he wanted a car, but suggests that this claim "was undermined by the fact that, after [defendant] shot at Blanco's car, he made no attempt to take the car, but immediately ran away." Thus, the People urge, the shooting "was not merely a means of attempting to commit a carjacking. Rather it was a gratuitous act of violence in response to Blanco's driving away instead of complying with [defendant's] demand to give him her car."

We do not agree. As we have said, when defendant shot at Blanco, he had not yet achieved his objective of taking her car, and thus shooting the gun was instrumental, not gratuitous. There was, moreover, no evidence that defendant harbored any personal animus towards Blanco; indeed, when he learned from Detective Sarti that he had injured her, he admitted to being "freaked out." Finally, the undisputed evidence is that immediately after she was shot, Blanco lost consciousness and crashed her car, and defendant "panicked." That defendant panicked and ran away *after* shooting Blanco does not reasonably suggest that defendant's motive *before* the shooting was anything other than acquiring a car.

For all of these reasons, we therefore find no substantial evidence that the attempted murder and carjacking were incident to separate objectives. Therefore, pursuant to section 654, the sentence imposed on count two must be stayed.

DISPOSITION

The judgment is modified to reflect that the sentence for attempted carjacking (count two) is stayed pursuant to section 654; in all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment reflecting this change, and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.