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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROMAN MALDONADO,<br><br>Defendant and Appellant. | B267714<br><br>(Los Angeles County Super. Ct. No. PA079700) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Lance E. Winters, Assistant Attorney General; Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Roman Maldonado appeals from the judgment after his jury conviction of first degree murder for the stabbing death of his mother, Maria Perez. Appellant argues his statement to police should have been suppressed because he did not knowingly and intelligently waive his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also asserts several instructional errors: (1) that CALCRIM No. 3428, as modified, prevented the jury's consideration of his mental impairment in relation to first degree murder; (2) that CALCRIM No. 570 did not instruct on subjective provocation as relevant to reduce first to second degree murder; and (3) that the court erred in refusing to modify CALCRIM No. 372 to allow consideration of absence of flight as a factor in determining appellant's guilt. As to the first two instructional errors, appellant, in the alternative, raises claims of ineffective assistance of counsel. Finding that none of these arguments requires reversal, we affirm.

## FACTUAL AND PROCEDURAL SUMMARY

Appellant has an IQ of 61 and is considered intellectually impaired. In February 2014, appellant was 30 years old and living with his 55-year-old mother, who took care of him. Her children described Perez as a "yeller," but she had calmed down with age.

Appellant had left school after the tenth grade and was in a continuation school. He worked part-time at a swap meet and held a sign for a business at a corner. His relatives described him as quiet and mellow. He was known to make strange statements at times—that Perez was not his mother and that he was married with children.

In 2010, appellant was referred to a psychiatrist, Dr. Karina Shulman, for a mood disorder and methamphetamine use, and was at the time on antipsychotic medication. He presented with a history of auditory hallucinations due to drug use, but was not an active drug user at the time and showed no signs of psychosis, paranoia or delusions. Dr. Shulman took him off of the antipsychotic medication and prescribed antidepressants.

On February 13, 2014, appellant's sister Olga Partida picked appellant up from a health clinic and took him to a pharmacy, but they could not pick up his medication. Appellant then went home by bus. When Partida called her mother, Perez told her she was arguing with appellant because he did not want to go out to get his medication.

Around 3:30 p.m., two neighbors saw Perez lying face down in the doorway. Appellant was standing over her holding a knife and a phone. Perez called for help because appellant had stabbed her. By then, appellant already had called 911 to report he had "shanked" his mother because she had been making fun of him. He said he had stabbed her on different parts of the body. She was alert and breathing at the time, but appellant urged the paramedics to hurry because she was dying.

When police arrived, appellant was still holding the phone and a folded pocket knife; he dropped the knife when ordered to do so. A roll of about $55 in bills was found in his pocket. Based on the blood stains in the home, police concluded that there had been altercations around the bed in the bedroom, outside the bedroom door, and near the front door. There was no blood on Perez's purse in the bedroom.

Officer Evelyn Diaz spoke to Perez in Spanish. Perez insisted she was going to die. She told the officer she had been watching television in her bedroom when appellant asked for money. Perez refused, and appellant began to stab her. Perez tried to run out of the apartment, but appellant continued stabbing her and yelled for her to "die" in Spanish. Perez pleaded with him to stop.

As the paramedics were carrying Perez out on a gurney, appellant asked if he could kiss his mother. She died at the hospital later that afternoon. The autopsy revealed 69 stab wounds: 11 to the head, six to the neck, 16 to the chest and abdomen, eight to the back, and 28 to the arms and hands. The fatal wound perforated the carotid artery in Perez's neck, causing her to bleed out. There were two potentially fatal injuries to her lungs.

Later that night, appellant was interviewed at the jail. The interview was conducted entirely in English. Appellant gave the officers his name, date of birth, address and home phone number. He was then advised of his *Miranda* rights and responded affirmatively when asked if he understood them, but was not specifically asked to waive them. He was able to name his mother and siblings, but did not know his sister Olga's married name.

Appellant explained he had gone to see a doctor in North Hollywood about throat medication. His sister picked him up there, but they could not find a CVS pharmacy store at the address the doctor had given them. When appellant returned home, his mother became upset that he had not picked up his medicine, and she "kept yelling and cussing" at him as he tried to

explain to her he could not find the CVS store. At some point, she told him to turn off the TV and he "just shut up."

Appellant's account of how he obtained the knife he used in the attack was somewhat confusing because it mixed two trains of thought: that his mother had found the knife years earlier, and that he took the knife out of the kitchen drawer where she stored it. After the officers' follow-up questions, it became clear that, at some point during the argument, appellant went to the kitchen to pick up a folding pocket knife, which he put in his pocket, and when his mother started "cussing" again, he opened the knife, went back to the bedroom, and began stabbing her while she was still on her bed. She kept saying, "Stop, stop, stop," and he did. But he resumed stabbing her in the neck and back when she went to the family room. He then stopped to call 911, went to get his savings, and put them in his pocket. Appellant gave another somewhat confusing account about what he did with the knife at that point, suggesting he put it on the table, then folded it in his pocket, then took it out again, and dropped it when police ordered him to do so.

Appellant said his mother had been nagging that he go to a psychiatrist. He did not know whether he had been diagnosed with anything and could not remember the name of the medication he was on, but thought it was to help him sleep. He claimed his mother had been "cussing" him a lot "lately," calling him "pendejo" in Spanish, which offended him because it meant "stupid." Appellant said he stopped stabbing his mother because he liked her and it made him sad, and after calling 911, he thought that she was "a good mom." The officers were curious why appellant chose to stab his mother in the neck (and they

suggested he was stabbing her in the kidneys). Appellant explained he had seen that at the movies.

Appellant denied wanting to kill his mother, and said he wanted to "scare her," but he "was going too fast." After an inaudible statement, appellant agreed with one of the interviewing officers' suggestion that once he started, he could not stop. Appellant did not know how many times he had stabbed Perez, but thought it was "probably a lot of times." When asked by the officer if he thought that by stabbing his mother "a bunch of times," he might kill her, even though he did not want to, appellant agreed.

Appellant did not believe his mother was dead. When asked why, he responded, "Cause she's my mom," and wondered how the officers knew she had died. He could not say if her death made him sad or that he would do anything differently. He did not think he could leave the apartment because he had "nowhere to go." But he agreed that it was not "nice" to stab his mother, that stabbing someone was against the law, and that a person likely would die if stabbed repeatedly in the throat and kidneys. When asked specifically if he knew that what he did "was wrong," appellant responded, "I guess."

Appellant was charged with murder, with an allegation of personal use of a deadly weapon. (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1).) His attorney declared a doubt about his mental competence, and proceedings were stayed until February 2015, when appellant was found competent to stand trial. The case then was assigned to Judge Ulfig for trial.

In jail, appellant was diagnosed with and treated for a psychotic disorder, not otherwise specified. Dr. Haig Kojian, a forensic psychologist, evaluated appellant for the defense. He

found that appellant's verbal problem-solving skills were lower than the nonverbal, and his verbal comprehension score was 54. Based on his low scores, Dr. Kojian opined appellant was child-like in nature, with concrete thinking, impulsivity and limited ability to problem solve, even though he could still think and make decisions. Dr. Kojian also opined that some of appellant's reported statements about the alternative life he had in Mexico, and the fact that he referred to Perez as his "stepmother" during the evaluation, could be signs of delusion.

The jury convicted appellant of first degree murder and found the deadly weapon use allegation to be true. The court sentenced appellant to 25 years to life in prison on the murder count, plus one year for the enhancement. He was given 609 days of presentence credits and was assessed various fines and fees.

This appeal followed.

## DISCUSSION

### I

Appellant argues his *Miranda* waiver was neither knowing nor intelligent because of his intellectual deficiencies. We agree with respondent that the issue is forfeited because appellant did not raise it in the trial court, and the court made no findings on it. (See *People v. Linton* (2013) 56 Cal.4th 1146, 1170; *People v. Rundle* (2008) 43 Cal.4th 76, 121, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

The only issue raised in the trial court was the lack of an express waiver of appellant's *Miranda* rights, which defense counsel argued was necessary "for anybody, for any person who is questioned by the police." Contrary to appellant's

representation, counsel did not base this argument on appellant's mental deficiencies, but framed it in the broadest possible terms. The court rejected it as framed on the ground that an express waiver is not required. (See *People v. Medina* (1995) 11 Cal.4th 694, 752.) On the record before it, the court concluded appellant impliedly waived his rights because he responded that he understood them and then continued to answer questions.

Even were we to consider appellant's challenges to his waiver, we are not convinced that they require the exclusion of his statement. Whether a waiver was knowingly and intelligently made is determined on the totality of the circumstances surrounding the interrogation. (*People v. Neal* (2003) 31 Cal.4th 63, 79.) While a defendant's intelligence is one of the factors relevant to that determination, a low IQ is not "a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood." (*In re Norman H.* (1976) 64 Cal.App.3d 997, 1003 [15-year-old with IQ of 47 capable of waiving *Miranda* rights].)

The cases on which appellant relies are distinguishable. The two defendants in *Cooper v. Griffin* (5th Cir. 1972) 455 F.2d 1142, 1144 had IQ's in the range of 61 to 67, and no previous experience with the criminal process. Although the transcript of appellant's interview does not make clear whether he had heard the *Miranda* warnings before,[1] the probation report shows

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[1] Appellant was asked in quick succession whether *Miranda* warnings had been read to him ever before and whether he had prior arrests. He responded affirmatively after the second question. The court excised this portion of the transcript of the interview.

appellant had prior felony convictions and had served a prior prison term. Appellant does not dispute his criminal record, which is sufficient to infer he was familiar with the criminal justice system. (See *People v. Smith* (2007) 40 Cal.4th 483, 505 [prior arrest and incarceration sufficient to show familiarity with criminal justice system].)

Appellant's criminal record sets him apart from the defendants in *Moore v. Ballone* (4th Cir. 1981) 658 F.2d 218, and *U.S. v. Garibay* (9th Cir. 1998) 143 F.3d 534, as well. In addition, the defendant in *Moore* exhibited signs of mental derangement during the interrogation "by his frequent singing of a verse of the theme song of a television series in response to questions . . . ." (*Id*. at pp. 228-229.) In contrast, here, appellant answered the officers' questions appropriately, with minimal confusion that could be resolved through additional questioning and with no obvious signs of mental derangement. We are not convinced his confusion about his mother's death was a sign of a significant mental problem. That he had not realized she had died at the hospital is unsurprising since she had been alive when he last saw her at the scene of the crime.

Nor is there evidence that appellant passively agreed with the officers' questions out of a desire to please them. The totality of the interview shows he corrected the officers and provided important details in response to open-ended questions, which were then restated to him in order to get clarification or confirmation. That the officers asked some leading questions about the wrongfulness of his actions, with which appellant agreed, does not suggest he agreed without understanding the questions. The interview does not indicate that appellant's grasp of the English language was so poor that he feigned

understanding when he did not truly understand, as was the case of the defendant in *U.S. v. Garibay*, *supra*, 143 F.3d 534, 539.

We decline to speculate that appellant's waiver of his *Miranda* rights during the police interview was not knowing and intelligent, simply because he was of low intelligence and at other times had shown some signs of delusion.

II

Appellant raises several instructional errors, which we review de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Young* (2005) 34 Cal.4th 1149, 1202, internal quotations and citations omitted.) If an instruction appears ambiguous, "we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citations.]" (*Ibid.*) The arguments of counsel bear on "the probable impact of the instruction on the jury. [Citations.]" (*Ibid.*)

*A. CALCRIM No. 3428*

Appellant argues that, as modified, CALCRIM No. 3428 limited the jury's consideration of his mental deficits only as relevant to "malice aforethought," but not as to premeditation and deliberation. As given, the instruction read in part: "You have heard evidence that the defendant may have suffered from a mental disease, defect or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime." The jury was separately instructed on the elements of first and second degree murder with CALCRIM Nos. 520 and 521.

The California Supreme Court approved of so instructing the jury in *People v. Rogers* (2006) 39 Cal.4th 826, 881. Even though "the jury neither was informed that premeditation and deliberation were mental states, nor told that the mental state required for each crime was included in the definition of that crime . . . . ,'" there was no room for confusion "because no reasonable juror, when properly instructed on the elements of first degree murder, could fail to realize that premeditation and deliberation are mental states at issue in such a charge and to make the connection between the elements of the crime and the limited purpose of the admission of mental defect evidence." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 150, citing *Rogers* at p. 881.)

Appellant's argument focuses on another part of CALCRIM No. 3428, which told the jury that the People "have the burden of proving beyond a reasonable doubt that the defendant acted with the requisite intent or mental state, specifically: 'malice aforethought.' If the people have not met this burden, you must find the defendant not guilty of murder." Appellant argues that since this part of the instruction referred to "intent or mental state" to "malice aforethought," it precluded the jury's consideration of deliberation and premeditation as mental states. We disagree. The challenged portion of CALCRIM No. 3428 instructs on the People's burden of proof with regard to murder generally. The companion instruction on the People's burden of proof with regard to first degree murder appears in CALCRIM No. 521, which separately defines deliberation and premeditation. When read together, these instructions sufficiently advise the jury that the People must prove those additional mental states for purposes of first degree murder.

Moreover, the prosecutor explained to the jury that appellant's intellectual disability and mental illness were relevant to determining whether he was "able to commit a crime, and if so, what crime" he committed. The prosecutor argued the jury should consider appellant's mental and intellectual problems, "if [they] affected him at all," in relation to all required mental states, including premeditation and deliberation. There is no reasonable likelihood that the jury was misled to believe that premeditation and deliberation were not mental states for purposes of CALCRIM No. 3428.

Appellant also takes issue with the permissive language of CALCRIM No. 3428, which allows the jury to conclude that the defendant "may have suffered from a mental disease, defect or disorder" and to "consider this evidence" in deciding whether he acted with the requisite mental state, but does not require it to do so. Similar permissive language has been approved in the predecessor instruction CALJIC No. 3.32. (*People v. Nelson* (2016) 1 Cal.5th 513, 556.) Appellant incorrectly assumes that the jury was required to accept the expert testimony regarding appellant's mental problems even though CALCRIM No. 332 properly instructed the jury that it was "not required to accept" that testimony "as true or correct." (Cf. § 1127b [jury "may consider" but is not required to accept expert opinion]; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1253 ["[T]he jury may generally consider evidence of . . . mental condition in deciding whether defendant actually had the required mental states for the crime"]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207 ["The credibility of witnesses and the weight accorded the evidence are matters within the province of the trier of fact"].)

*B. CALCRIM No. 570*

In a related argument, appellant contends that CALCRIM No. 570 (heat of passion voluntary manslaughter) limited the jury's ability to consider provocation only as relevant to reduce murder to manslaughter, but not to reduce first to second degree murder. But the jury also was instructed with CALCRIM No. 521 that, for purposes of first degree murder, "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated," and with CALCRIM No. 522 that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter." Contrary to appellant's argument, the jury was instructed to consider "[t]he weight and significance of the provocation, if any" in relation to both the degree of murder and type of homicide appellant committed.

Appellant argues that CALCRIM No. 570 states an objective test to reduce murder to manslaughter, and that no other instruction apprised the jury that subjective provocation is sufficient to reduce first to second degree murder. Appellant is correct that the test of whether provocation can negate malice in order to reduce murder to voluntary manslaughter is objective, whereas the test of whether provocation can negate deliberation and premeditation to reduce first to second degree murder is subjective. (See *People v. Padilla* (2002) 103 Cal.App.4th 675, 678.) However, the argument that the standard jury instructions on murder and manslaughter are misleading on the issue of provocation, unless accompanied by an additional pinpoint instruction on inadequate, or subjective, provocation, has been rejected. (See *People v. Rogers*, *supra*, 39 Cal.4th at p. 880; *People v. Jones* (2014) 223 Cal.App.4th 995, 1001.)

CALCRIM Nos. 521, 522, and 570, when given together, are not likely to mislead the jury into concluding that the objective test applies both to reduce first to second degree murder and murder to manslaughter. (*People v. Jones*, *supra*, 223 Cal.App.4th at p. 1001.) CALCRIM Nos. 521 and 522 inform the jury that a rash, impulsive decision negates premeditation and deliberation, and that provocation may reduce first to second degree murder. There is no reasonable likelihood that the jury would understand these instructions to foreclose considering any evidence of provocation in connection with murder. Rather, a reasonable juror considering these instructions together would understand that provocation would reduce first to second degree murder if it causes a rash and impulsive action that negates premeditation or deliberation.

On the other hand, CALCRIM No. 570 requires more to reduce murder to voluntary manslaughter. "It is here, and only here, that the jury is instructed that provocation alone is not enough for the reduction; the provocation must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment." (*People v. Jones*, *supra*, 223 Cal.App.4th at p. 1001; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211 [provocation for purposes of voluntary manslaughter "has nothing to do with intent and everything to do with circumstances, specifically, whether the circumstances would have caused a reasonable person to act as defendant did"].)

We note that, apparently for strategic reasons, the closing arguments of both counsel did not focus on second degree murder. The prosecutor chose to argue that appellant committed first degree murder, while defense counsel argued appellant did not

commit murder at all. However, the theories suggested in closing argument "are not the exclusive theories that may be considered by the jury." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.) Since CALCRIM No. 522 separately instructed that provocation may reduce the degree of murder, CALCRIM No. 570 did not prevent the jury from considering whether the provocation caused appellant to act rashly and impulsively under CALCRIM No. 521. Hence, nothing in these instructions precluded "the jury from giving weight to any evidence of provocation in determining whether premeditation existed." (*People v. Rogers*, *supra*, 39 Cal.4th at p. 880.)

Because we find that the challenged instructions as given were neither incomplete nor misleading, we also deny appellant's argument that his trial counsel was ineffective for failing to object or ask for additional instructions.

*C. CALCRIM No. 372*

The trial court declined to give a modified version of CALCRIM No. 372 requested by the defense—that the absence of flight may show lack of consciousness of guilt. Appellant argues that was error, even as he acknowledges that California Supreme Court authority is to the contrary. (See *People v. Staten* (2000) 24 Cal.4th 434, 459; *People v. Green* (1980) 27 Cal.3d 1, 39–40 & fn. 26 [refusal of instruction on absence of flight as speculative was proper as "there are plausible reasons why a guilty person might refrain from flight"].) We are bound by that authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

There is no instructional error.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.