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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO BOLIVAR, Defendant and Appellant.	B284882 Los Angeles County Super. Ct. No. KA111345

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed and remanded for resentencing.

Reyes Valenzuela, 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, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Manuel Flores and Vanessa Lopez were shot while sitting in the back seat of Flores's car parked in his driveway. Lopez died and Flores survived. A jury convicted Alejandro Bolivar of the first-degree murder of Lopez and the attempted willful, deliberate, and premeditated murder of Flores, and found true firearm allegations. We affirm the judgment and remand for the trial court to exercise its discretion whether to strike the firearm enhancements.

BACKGROUND

An information charged Bolivar with the July 19, 2015 murder of Lopez (Pen. Code,[1] § 187, subd. (a)) and the attempted murder of Flores (§§ 664, 187, subd. (a)). On each count, the information alleged that Bolivar personally used and intentionally discharged a firearm, causing great bodily injury and/or death. (§ 12022.53, subds. (b)-(d)). An amendment by interlineation added an allegation that the attempted murder of Flores was willful, deliberate, and premeditated. Bolivar pleaded not guilty.

1. *The fight between Flores and Bolivar in March 2015*

At trial, Flores testified[2] that he lived in Montclair for about six months with his girlfriend, Anna Gutierrez. They fought and broke up in early 2015, and Gutierrez started dating Bolivar.

During Flores's birthday party in March 2015, there was a knock on the door at the Montclair apartment. When Flores opened the door, someone who turned out to be Bolivar

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[1] All subsequent statutory references are to the Penal Code.

[2] Flores was unavailable to testify, and his testimony at the preliminary hearing was read into the record.

immediately hit him hard over the head with something like a bat; the reason was that Gutierrez had continued to talk and argue with Flores. In the ensuing fight, Flores sustained head injuries. As he headed to the hospital for treatment, he saw Gutierrez talking on her phone. He grabbed the phone and talked to the "new boyfriend," telling him Gutierrez was being manipulative and "instigating things." Flores's injuries required stitches over his eye and on the back of his head.

At the time of the fight, Flores was dating Celina Salazar. She testified that she saw the man who attacked Flores come out of the apartment building with blood on his hands. He told her to tell Flores to leave his girlfriend alone, or he would kill him. When Salazar told Flores about the threat, he said the "girlfriend" was his ex-girlfriend Gutierrez.

2. *The shooting of Flores and Lopez*

Flores did not see Bolivar or Gutierrez after the night of the fight. He moved to his parents' house in Pomona, and started dating Vanessa Lopez. Early in the morning of July 19, 2015, they came back from a night on the town, and Flores parked his car (a gold Maxima) in his parents' driveway; he often sat outside in his car and smoked marijuana. He and Lopez got into the back seat, with Flores behind the passenger seat and Lopez behind the driver's seat. They made out and Flores smoked marijuana, with the two back doors open and the driver's side window rolled down. At some point Lopez began to perform oral sex on Flores.

Flores looked up and toward the driver's side back door, and saw a black gun with a chrome barrel. A split second later, he looked down and saw his cheek; he did not remember hearing the shot or feeling pain. He fell over the center console. Flores heard his father call his name, and he pushed himself up and told

his father he was okay. Lopez was lying face down next to Flores, with her head on the car seat and her hair over her face.

Flores's sister called 911 at around 3:00 a.m. Flores told the operator he had been hit in the mouth and did not know who shot him. A bullet had gone through Flores's mouth and into his head, lodging in his neck. He wore a halo for three months, and then a neck brace.

Lopez was dead of a gunshot wound to her head, caused by a hollow-point bullet recovered from her head at the autopsy. Stippling caused by gunpowder particles was consistent with a gun fired from one to three feet away.

Flores's father told police he heard two gunshots, looked outside, and saw a male run southbound on the street and get into a car.

3. *The investigation of the shooting*

When Detective Richard Machado responded to the scene, it was still dark. The Maxima was tucked into a very dark corner by the garage, three other cars were parked in the driveway, and so it was hard to see the Maxima from the street. He thought the shooting was something personal: "It was clear to me that someone had walked up on the car and aimed at them specifically."

Two nine-millimeter cartridge casings found in the back seat of the Maxima had been fired from the same handgun.

Around July 21, Detective Andrew Bebon learned that Gutierrez might have been involved in the shooting, which led him to the fight in Montclair at Flores's birthday party. After learning that a man named "Alex" might also be involved, Detective Bebon searched Gutierrez's Facebook page, which

led him to Bolivar's Facebook page, and then to DMV records and Bolivar's address.

Officers conducted surveillance at Bolivar's address, and saw Bolivar leave in a car with a woman who looked like Gutierrez and two other males. A sheriff's deputy made a traffic stop, and Bolivar and Gutierrez gave him their cell phone numbers. Detective Machado obtained cell phone records, and the data showed that Bolivar's phone was near the scene at the date and time of the shooting. Text messages between Bolivar's phone and Terrell Hammond's phone around the time and date of the shooting showed Hammond urging Bolivar to " 'Be safe, foo,' " Bolivar saying, " 'I'm a killer solo,' " referred to Pomona, and then (at 2:55 a.m.): " 'Need you to hold a strap though,' " which meant, "I need you to hold the gun."

On December 10, 2015, officers served search warrants and searched Bolivar's, Gutierrez's, and Hammond's residences. Bolivar voluntarily went to the police station, where he was interviewed by Detective Machado and another detective. Bolivar admitted he knew Flores and had beaten him up, but claimed he knew nobody in Pomona, and had no need to go there.

The detectives arrested Bolivar,[3] and put him in a jail cell with a *Perkins*[4] agent with a recording device in his pocket, posing as a fellow arrestee. No one else was in the cell. The jury heard portions of the recording.

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[3] As described below, it is unclear whether the detectives advised Bolivar of his right to counsel after his arrest, or the next day.

[4] *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*).

4. ***The recording of the jailhouse conversation***

Bolivar asked the undercover agent what the detectives would need to book him for murder. They had told him a man and his "honey" had been shot, and the woman died. Bolivar had fought with Flores earlier that year over Flores's former girlfriend (Gutierrez), and Bolivar worried that Flores told the police he was the shooter. He didn't know the female victim's name, but the man was Manuel Flores. "He said he was going to smoke me, fool. So, I fucked him up." The detectives had asked him about the shooting in the driveway, he told them he was done talking, and they arrested him. " 'I know they don't have the strap, I know they don't.' "

Bolivar thought Flores "is telling on me, fool." The undercover agent asked if Bolivar thought Flores could identify him as being at the shooting, and Bolivar said, "He knows who I am." He didn't know if there were cameras nearby, "I don't even drive my car" (a Charger, which stood out), and he hadn't touched the bullets. The agent asked if there was any light near the parked car, and Bolivar said, "No, it was dark as fuck." Bolivar said he didn't cover his face, but Flores didn't get a chance to look at him. As for the gun, "I took that motherfucker apart," throwing the pieces away on the freeway and into the ocean. One of the bullets was a hollow-point.

Bolivar described Flores and said he couldn't stand him. At around 3:00 a.m., he found Flores and his "honey" outside sitting in the car; it was all dark, nobody was there, and he was wearing dark clothing. Bolivar "walked up and 'Pow, pow.' And I left." He shot Flores in the head first, and then he hit the "honey" just once. They were both in the back seat with the door open, and "I think she was sucking him."

5. *The defense case*

Bolivar waived his right to testify. The defense presented evidence of a March 2015 text from Gutierrez to Flores, and a post from Gutierrez's Facebook account on July 17, 2015.

6. *Verdict and sentencing*

The jury found Bolivar guilty of first-degree murder and attempted willful, deliberate, and premeditated murder, and found the firearm allegations true. The trial court sentenced Bolivar to a total of 82 years to life in prison.

DISCUSSION

1. *The trial court properly denied the motion to suppress the recording of the jailhouse conversation*

Defense counsel moved to suppress the recording of Bolivar's December 10, 2015 conversation with the *Perkins* agent. The motion described Bolivar's interview with the detectives and his arrest, followed by advisements under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) before Bolivar spoke with the undercover agent. The motion argued that the agent's subsequent "pro-active" questioning violated Bolivar's Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination. The conversation with the agent was "tantamount to a second government interrogation," entitling Bolivar to have his *Miranda* advisements repeated and a chance either to waive his rights, or have a lawyer present. The prosecutor responded that *Miranda* did not apply to conversations between inmates and undercover police agents,

and stated that Bolivar had received his *Miranda* advisements the next day, December 11.[5]

The trial court conducted a hearing, at which the prosecutor again stated that Bolivar was advised of his *Miranda* rights on December 11, after his recorded conversation the day before. Defense counsel did not contradict that statement, and argued that although *Perkins* applied, "this is not a conversation; this is an interrogation" . . . "a pure police interrogation on the most critical aspects of the case." The court reviewed portions of the transcript of the conversation and concluded: "This was not a police interrogation in any respect[ ]. It was simply a conversation, at least at that stage, between two inmates or at least purported inmates; but, nonetheless, I don't see how *Miranda* would apply in the light of the *Perkins* authority much less the right to counsel." The court admitted the recorded conversation.

On appeal, Bolivar argues that the police violated his Fifth Amendment right to have counsel present under *Miranda* when the undercover agent questioned Bolivar after he had invoked his right to remain silent.

In *Perkins*, the Supreme Court held that a conversation between an incarcerated suspect (who had not been given *Miranda* warnings) and an undercover agent posing as a fellow inmate was not custodial interrogation, and therefore did not require warnings under *Miranda*. (*Perkins*, *supra*, 496 U.S. at p. 294.) "It is the premise of *Miranda* that the danger of

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[5] Detective Machado testified at the preliminary hearing that he gave Bolivar *Miranda* warnings at the time of his arrest on December 10.

coercion results from the interaction of custody and official interrogation. . . . When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners." (*Id*. at p. 297.) Although custodial questioning by a suspect's captors who appear to control the suspect's fate may create "mutually reinforcing pressures" weakening the suspect's will, "where a suspect does not know that he is conversing with a government agent, these pressures do not exist." (*Ibid*.) "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. . . . [¶] *Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates." (*Id.* at pp. 297-298.)

Bolivar argues that the undercover agent violated *Miranda* by "ask[ing] questions in the same manner as a police officer would," after Bolivar had invoked his *Miranda* rights and had not waived them.[6]

In *People v. Guilmette* (1991) 1 Cal.App.4th 1534 (*Guilmette*), the defendant had invoked his right to remain silent and his right to an attorney before police recorded a phone call he made to his rape victim, who was acting as a police agent and asking questions suggested by the police. (*Id.* at p. 1538.) The court held the recording was admissible under *Perkins*, regardless of the defendant's earlier invocation of his *Miranda*

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[6] Bolivar acknowledges that the record is unclear whether the detectives gave him *Miranda* warnings, and he invoked his right to remain silent and have the assistance of counsel, before his conversation with the *Perkins* agent.

rights: "It is true, as appellant contends, that in *Perkins* there was no *Miranda* warning, no invocation of *Miranda* rights, and that the issue presented to the court was whether the undercover agent was required to give Perkins a *Miranda* warning. These distinguishing facts, however, do not change or alter the basic nature of the respective conversations by Perkins and appellant herein. . . . Statements made under these circumstances simply do not implicate *Miranda*, and a noncoercive atmosphere is not transformed into a coercive one because one suspect is warned and the other is not." (*Guilmette*, at p. 1541.)

Division Two of this appellate district recently agreed in *People v. Orozco* (2019) 32 Cal.App.5th 802 (*Orozco*). The defendant's baby had died of blunt trauma while under his care. Police read the defendant his *Miranda* rights, and jailed him after he continued to ask for an attorney. (*Orozco*, at pp. 806-808.) The police put the baby's mother in an interview room with the defendant, after telling her she had a right to know what happened, and suggesting she could get a full explanation. Police recorded the conversation. An officer interrupted to report autopsy results indicating the baby had died from a beating; later, the officer briefly pulled the mother out of the room to ask her to take a polygraph test because defendant had refused, to " 'stimulate conversation' "; and after the defendant broke down and confessed to the mother that he struck the baby once and it killed her, the officer returned, said, " '[t]ime's up,' " and escorted the mother from the room. (*Id.* at pp. 808-809.)

The defendant moved to suppress his confession as a violation of *Miranda*, but the trial court allowed the confession into evidence, citing *Perkins*. (*Orozco*, *supra*, 32 Cal.App.5th at p. 810.) On appeal, the defendant argued (among other

arguments) his confession should have been suppressed because he invoked his *Miranda* right to counsel, and the police violated *Miranda* when they sent the baby's mother (who was an agent of the police) to speak to him. (*Orozco*, at p. 812.)

Edwards v. Arizona (1981) 451 U.S. 477 prohibits only further *interrogation* by the authorities once a suspect invokes his *Miranda* rights. (*Orozco*, *supra*, 32 Cal.App.5th at p. 813.) Such interrogation is " 'express questioning' " or " 'words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response,' " requiring " ' a measure of compulsion above and beyond that inherent in custody itself.' " (*Ibid*.) We judge whether a conversation is interrogation "by what the suspect perceives, not what the police intend," so "there is no 'interrogation' when a suspect speaks with someone he does not know is an agent of the police." (*Id*. at pp. 813-814.) Lacking a police-dominated atmosphere and compulsion, when " 'an incarcerated person speaks freely to someone' that he thinks is a lover, a family member, a friend or *even a fellow criminal*" (italics added), the purpose of *Miranda* and *Edwards* "is simply not implicated in such situations." (*Orozco*, at pp. 813-814.) California cases such as *Guilmette*, *supra*, 1 Cal.App.4th 1534, and *People v. Plyler* (1993) 18 Cal.App.4th 535, 544-545, have uniformly come to the same conclusion. (*Orozco*, at pp. 813-814.)

Even assuming Bolivar had invoked his right to remain silent and have the assistance of counsel *before* he told the undercover agent he shot Flores and Lopez, we conclude the *Perkins* agent did not conduct an "interrogation" for *Miranda* purposes. The transcript shows that Bolivar had no idea the *Perkins* agent was not another inmate; they discussed their

respective cases and police tactics, and Bolivar volunteered details about the shooting, the traffic stop, his interview with the detectives, and his arrest. The agent asked questions, but in the context of comparing ideas about the investigation and discussing what Bolivar knew about the shooting. Bolivar at first scoffed at the police's suggestion that someone saw him at the scene, saying he told them, " 'somebody seen me when I wasn't there?' " and had denied he had done it. He insisted he was safe because he knew they didn't have the gun, but then said Flores must have identified him because he didn't leave anything behind. Finally, he described how he took the gun apart and threw it away, and described shooting Lopez and Flores in the back seat of the parked car. From Bolivar's perspective, this was a conversation with another inmate who did not compel or coerce him to talk, not an interrogation.

Bolivar enlists *Massiah v. United States* (1964) 377 U.S. 201, 204, which bans police from using an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged. Bolivar had not yet been charged, and as *Perkins* confirmed, when formal charges have not been made, the Sixth Amendment right to counsel does not attach to require exclusion of a confession to an undercover police agent. (*Perkins*, *supra*, 496 U.S. at p. 299; see *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1283.)

Bolivar's reply brief argues that *Perkins* was wrongly decided, and urges us to follow Justice Marshall's dissent. A dissent is not authority, and we agree with *Orozco* that the seven-justice majority opinion controls. (*Orozco*, *supra*, 32 Cal.App.5th at pp. 815-816.)

The trial court correctly denied Bolivar's motion to suppress his recorded statement.

2. *No evidence supported a provocation instruction*

Noting the evidence of turmoil between Bolivar and Flores over Gutierrez, the trial court considered (on its own motion) whether to instruct the jury with CALCRIM No. 522, which provides that provocation may reduce murder from first degree to second degree, or to manslaughter.[7] The prosecutor argued there was no evidence that Bolivar had been provoked, as the fight with Flores was four months before the shooting. After remarking that no evidence showed that Lopez had provoked Bolivar (making the instruction unnecessary and perhaps misleading), the court removed CALCRIM No. 522, and asked the defense: "Do you wish that to be over defense objection?" Counsel responded: "Okay."

On appeal, Bolivar argues that the trial court should have given the instruction, because there was sufficient evidence of provocation to show he did not act with premeditation and deliberation and thus was guilty only of second degree murder. We disagree.

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[7] CALCRIM No. 522 provides: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]" Bolivar does not argue the court should have instructed the jury on heat of passion or voluntary manslaughter.

The trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, but even on the defendant's request, there is no duty to instruct unless substantial evidence supports the requested instruction. (*People v. Avila* (2009) 46 Cal.4th 680, 705, 708.) As CALCRIM No. 522 instructs, what would otherwise be first-degree murder may be mitigated to second degree murder if the defendant was provoked. (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1480-1481.) " 'Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation.' " (*Id*. at p. 1494.) While the provocation sufficient to reduce murder to manslaughter must result in a heat of passion (*id*. at p. 1481), the defense may also argue that a lesser degree of provocation "played a role in preventing the defendant from premeditating and deliberating." (*People v. Rogers* (2006) 39 Cal.4th 826, 880.) If there is "evidence of provocation [that] would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately, the trial court is required to give instructions on second degree murder under this theory." (*People v. Wickersham* (1982) 32 Cal.3d 307, 329.) "[A] subjective test applies to provocation as a basis to reduce malice murder from the first to the second degree: it inquires whether the defendant in fact committed the act because he was provoked.

The rationale is that provocation may negate the elements of premeditation, deliberateness and willfulness that are required for that degree of the crime." (*People v. Jones* (2014) 223 Cal.App.4th 995, 1000.) The evidence must support a finding of provocation that "preclude[d] the defendant from subjectively deliberating or premeditating." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

Here, no evidence of provocation required the giving of CALCRIM No. 522, or any other instruction defining provocation adequate to reduce first degree to second degree murder, or to justify a finding of attempted murder without premeditation and deliberation. Such evidence would have to support a jury finding that Bolivar formed the intent to kill in *direct response* to the provocation, and that Bolivar acted *immediately*. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 329.) The only evidence of provocation Bolivar points to is that in March 2015, four months before the shooting, Bolivar severely beat Flores, and that Bolivar told the *Perkins* agent that Flores had threatened to kill him. The July 2015 shooting could not have been a direct response to a fight and threats four months earlier, much less an immediate act after Bolivar formed an intent to kill prompted by those long-ago events. "The issue is whether the provocation precluded the defendant from deliberating." (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) All the evidence—the forensic evidence showing that both victims were shot in the head at close range after the killer walked up to the car in a dark and private area of the driveway, the text messages before the shooting between Bolivar's and Hammond's cell phones, and Bolivar's recorded statements to the *Perkins* agent after his

arrest—supports a finding that the murder of Lopez, and the attempted murder of Flores, were premeditated and deliberate.

3. *We remand for the trial court to exercise its discretion under Senate Bill No. 620*

Bolivar argues that remand is necessary to allow the trial court to exercise its discretion whether to strike the firearm enhancements on counts 1 and 2.

The trial court imposed firearm enhancements of 25 years to life under section 12022.53, subdivision (d), on each of counts 1 and 2. Bolivar argues that his case should be remanded to allow the trial court to exercise the discretion conferred under Senate Bill No. 620, effective January 1, 2018, to strike the section 12022.53 firearm enhancements.

We agree with Bolivar that, as a defendant whose sentence is not yet final on appeal, he is entitled to the trial court's exercise of its discretion whether to strike the firearm enhancements, a discretion it did not possess when it sentenced him in August 2017. At sentencing, "the trial court gave no indication whether it would exercise discretion to strike the firearm enhancement . . . if it had such discretion." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) We recognize that the trial court remarked that the victims had been "ambushed" and that Bolivar's murder of Lopez was "heartless, vicious and inexcusable behavior," justifying consecutive terms. Nevertheless, "speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.)

We therefore remand to allow the trial court to decide in the first instance, at a hearing at which Bolivar has the right

to be present with counsel, whether to exercise its discretion to strike the firearm enhancements. (*People v. Rocha* (2019) 32 Cal.App.5th 352, 359-360.)

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to consider, at a hearing at which the defendant has a right to be present with counsel, whether to exercise its discretion under Senate Bill No. 620 to strike the firearm enhancements imposed in counts 1 and 2. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P.J.

LAVIN, J.