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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CATARINO GONZALEZ, JR., Defendant and Appellant.	B154557 (Los Angeles County Super. Ct. No. BA172833)

Appeal from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Reversed.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, and Scott A. Taryle and James William Bilderback II, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Catarino Gonzalez Jr. challenges his murder and attempted murder convictions on a variety of grounds, including the trial court's denial of his motion to exclude his incriminating statements to the police on the grounds they were coerced and obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We conclude appellant's incriminating statements were not coerced, but were obtained in violation of his right to counsel. Because we conclude the erroneous admission of his statements at trial was prejudicial, we reverse the judgment.

BACKGROUND AND PROCEDURAL HISTORY

Los Angeles Police Department Officer Filbert Cuesta was fatally shot inside his patrol car while on duty on August 8, 1998. His partner, Richard Gabaldon, was just getting out of the car when the shooting began. He was not injured. The crimes occurred near a home where a number of 18th Street gang members and others were gathered for a wedding reception.

A jury convicted appellant of first degree murder and found true three special circumstances: murder of a peace officer engaged in the performance of his duties, murder committed for the purpose of avoiding and preventing a lawful arrest, and murder committed by means of lying in wait. (Pen. Code, §§ 190.2, subds. (a)(5), (7), (15)). The jury further found that in committing murder, appellant personally and intentionally fired a gun, causing death. (Pen. Code, § 12022.53, subd. (d).) The jury also convicted appellant of attempting to murder Gabaldon, and found the attempt was willful, deliberate, and premeditated. The jury found appellant personally used a gun and personally and intentionally fired the gun in the commission of attempted murder.

At the conclusion of the penalty phase, the jury fixed the penalty at life in prison without possibility of parole. In accordance with the jury's penalty determination, the court sentenced appellant to life in prison without possibility of parole, enhanced by a term of 25 years to life under Penal Code section 12022.53, subdivision (d). In addition, the court sentenced appellant to a consecutive term of 15 years to life for attempted murder, enhanced by a 20-year term under Penal Code section 12022.53, subdivision

(c).[1]

DISCUSSION

1. The trial court erred by finding no *Miranda* violation and denying appellant's motion to exclude his incriminating statements to police.

Prior to trial, appellant moved to exclude the incriminating statements he made to the police during his interrogation. He contended his waiver of rights was inadequate, he invoked his right to counsel, which the police ignored, and his statements were involuntary. The trial court listened to tape recordings of three interrogations and conducted an evidentiary hearing at which both prosecution and defense witnesses testified. We summarize the pertinent portions of the interrogations and the evidence presented at the hearing on appellant's motion.

Appellant became a suspect shortly after the shooting, when other people whom the police interviewed identified him as the assailant. Based on information that appellant ran to the home of his sister and brother-in-law, Araceli and Joel Loza, the police obtained a search warrant for the Loza home and broke into the home during the Lozas' absence to execute the warrant. The Lozas called the police when they discovered their home had been broken into and ransacked. Detective Richard Henry told the Lozas that appellant was a suspect in the shooting and should turn himself in. The Lozas testified Henry warned them that if appellant did not turn himself in, he would be "shot like a deer" in the streets without being questioned. Henry denied making or communicating any threats to appellant's safety, but admitted he told the Lozas he did not want to see "anybody get hurt unnecessarily," and appellant should surrender so as not to be caught in a "fleeing felon" situation.

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[1] The trial court's minute order and the abstract of judgment cite Penal Code section 12022.53, subdivision (b), as authority for the enhancement. However, subdivision (b) provides for a 10-year enhancement term for personal use of a firearm, whereas subdivision (c) provides for a 20-year enhancement term for personal and intentional discharge of a firearm. This was true in 1998 and remains true today. Given the jury's finding and the length of the term, we assume the court relied upon subdivision (c), but mistakenly cited subdivision (b).

The Lozas told appellant what Henry said. Appellant agreed to turn himself in, but appeared to be frightened and said he feared the police would beat him. Joel Loza took appellant to Parker Center and insisted that the detectives photograph appellant's body and give Loza the photographs, as proof that appellant was not injured when he placed himself in police custody. Loza departed after receiving the photographs.

First interrogation

Henry and Detective Rich Aldahl began interviewing appellant at 10:30 p.m., about 20 minutes after appellant's surrender. When the detectives entered the room, appellant stated he was falling asleep. Aldahl asked appellant if he wanted to "talk about this a little bit" and appellant replied, "Yes, sir." Appellant told the detectives he was 20, his only nickname was "Cat," he was a member of the 18th Street Gang, and a prior gang-related gunshot wound prevented him from using one of his hands.

After obtaining additional basic biographical information about appellant, Aldahl attempted to advise appellant of his rights in accordance with *Miranda v. Arizona*, *supra*, 384 U.S. 436. Aldahl advised appellant of his right to silence and to have an attorney present during questioning. Appellant said he understood each of those rights. Aldahl then asked appellant if he wanted to waive his right to remain silent. Before appellant could answer, Henry initiated the following dialogue with appellant:

Henry: "Well, and also, if you can't afford–if you so desire and can't afford one, an attorney will be appointed for you, without charge before questioning. You understand that? You've had your rights read to you before, right?"

Appellant: "I have, yes, sir."

Henry: "And did you understand your rights before?"

Appellant: "Yes, I did."

Henry: "Okay. So if you, if you can't afford one, by law, they would give you one. You understand that part?"

Appellant: "So the situation is that–"

Henry: "It's just the standard *Miranda* rights we're giving you right now."

Appellant: "Oh, okay."

Henry: "But this is your opportunity to tell your side of the story. That's what I was talking to your brother about. So you want to talk to us about this?"

Appellant: "Sure."

Henry: "Okay."

Appellant: "Well, where do I start? From the party, or whatever?"

Appellant admitted he was at the wedding reception held in the yard of a residence near the scene of the shooting,[2] and that people at the party told him the police were looking for him because of his graffiti. Appellant was on probation and he was concerned that it would be revoked and he would go to prison for five years. Nonetheless, he continued to dance, drink and enjoy himself. He heard gunshots while he was dancing and fled over the back gate. He ran to his sister's house and stayed there overnight. He denied he had a gun at the party, and told the detectives he knew Cuesta and had a good relationship with him. Aldahl stated several people told the police appellant shot Cuesta. They asked him detailed questions about his activities and companions throughout the day and night prior to the shooting, including the names of other gang members at the reception. They asked about his girlfriend. When appellant said her first name was Alejandra but he was unsure of her surname, Henry stated, "Do you want me to get a dimmer over here, and every time you start bullshitting me, I just turn the lights low, or what?" Appellant replied, "No, sir." The detectives continued to interrogate appellant. He admitted his gang moniker was Termite, and he had previously

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2 According to Gabaldon's testimony at trial, he and Cuesta visited the site of the reception because they heard the music, saw a strobe light flashing, and saw 18th Street Gang members at the scene. In the front yard, they spoke to one gang member, then Maria Guzman, the bride/hostess. She told them there were a number of uninvited guests in attendance, including many gang members. The officers asked about particular individuals, including appellant, by moniker. The bride denied knowing any of them. The officers then told her she would have to "close" the party because the music was too loud and too many people were in the yard. The officers waited outside the party for five minutes to see if anyone left, but no one did. They returned to their squad car and slowly drove around the block. The shooting occurred after they completed their tour around the

owned guns and was able to fire them even after his hand was injured.

Aldahl asked appellant where he had obtained a gun depicted in a photograph of him. Appellant's claim that he did not know the name of the "homie" who sold it to him prompted the following exchange:

> Aldahl: "Don't start hedging on us again, man."
>
> Appellant: "No, I'm not."
>
> Henry: "Dimmer, man. Get that dimmer again."
>
> Aldahl: [Untranslatable.]
>
> Appellant: "[Untranslatable] me spooked [untranslatable]."
>
> Henry: "I'm not–I'm not getting you spooked, man, you know, that's what I'm trying–listen, look at me, man. Look at me. It's just–I'll buy that, okay? I'll buy that."
>
> Appellant: "[Untranslatable] you guys come at me with this little thing. And then–"
>
> Henry: "What little thing? No I was–"
>
> Appellant: [Untranslatable.]
>
> Henry: "I was joking. Here's the deal. I want to go over this again, okay? And this time fill in the blanks for me, all right?"
>
> Appellant: "Tell me where the blanks, and I'll fill them in."

The detectives then went through appellant's statement again in further detail. Aldahl told appellant his story did not "jive" with the stories told by other people they had interviewed. He said they wanted appellant to take a lie detector test to see if he was telling the truth. He asked appellant if he was willing to take a lie detector test. Appellant replied,

> "That um, one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing. Because my brother-in-law told me that if they're trying to charge you for this

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block, while they sat in the car, which was stopped in the street near the reception.

case you might as well talk to a public defender and let him know cause they can't [untranslatable]."

Aldahl: "Well, you can do that any time you want to. The thing is that– that we're going to book you tonight."

Appellant: "Yeah."

Aldahl: "If that's okay? And if you come out–if you come out telling the truth tomorrow, we'll let you go."

Appellant: "Book me on what?"

Aldahl: "On murder. That doesn't mean you're going to be filed on."

The detectives continued to speak to appellant, attempting to persuade him to submit to a polygraph test. Among other things, they told him they released his friend Casper after he took and passed a polygraph examination. After additional persuasion, appellant agreed to a polygraph test. He told the detectives he was "tired as hell" and wanted to sleep because he had not slept in 3 days.

Henry testified at the hearing on appellant's motion that his references to a dimmer were intended to let appellant know that the detectives knew he was lying, analogous to the use of a buzzer signaling a wrong answer in a television game show. There was no dimmer on the light switch in the interrogation room, and the detectives did not dim the lights at any time. He denied it was intended to be a threat of any sort. Henry thought appellant was "spooked" because the detectives knew he was lying.

Second interrogation and polygraph examination

The following day, polygraph examiner Ervin Youngblood, a civilian employee of the Los Angeles Police Department, interviewed appellant. Appellant told Youngblood he had slept only about 90 minutes because he was not put into a cell until about 1 a.m., and the cell was too hot for him to sleep well. At about 3 a.m., the jailers brought him food, but he did not eat it. At about 11 a.m. they brought him a pastrami sandwich that had mustard on it. He did not like mustard, and had to use the restroom after eating the sandwich. He felt weak and suffered from a week-old toothache. Youngblood testified at the hearing appellant appeared to be rested and alert and did not seem to be in pain.

Youngblood asked appellant whether the investigators advised him of his rights. Appellant said they had and admitted he waived his rights "to them." Youngblood asked appellant whether he was "also waiving your rights here today to talk to me also?" Appellant said he was.

Youngblood gave appellant a lengthy, detailed description of how the computerized polygraph machine worked. He told appellant the machine was extremely accurate and would detect any deliberate lie. He explained that appellant could not lie to himself, and any lie would trigger involuntary reactions that the machine would detect. At the hearing on the motion, Youngblood admitted his numerous statements about the technology throughout the pre- and post-examination interviews were an interrogation technique designed to convince appellant the polygraph was infallible.

Youngblood advised appellant to "be up front" about his involvement or knowledge of the crime "before this thing gets out of hand," and to explain any "extenuating circumstances, or whatever, while we have the opportunity." He suggested a less culpable scenario: appellant had problems with Cuesta and may have shot at him just to scare him. Youngblood stated that some officers were "heavy-handed" and picked on the same person repeatedly, causing a problem. He told appellant that "many times people have retaliated, okay. And sometime they do things to try to get somebody off their back, okay?" He suggested, "[I]f there's something that was not intended to turn out the way it was, if this was something that was even intended to scare this cop, make this cop back off or whatever, and then it got out of hand, all of that is important." He warned, however, appellant could not fail the test and then make such a claim for the first time. Youngblood asked appellant a number of questions about the crime and his activities at the wedding reception prior to the shooting.

After Youngblood completed his pre-test interview and prepared the test questions on his computer, appellant asked about counsel:

> Appellant: "Sir, I was going to ask you that, is there any, like–cause they told me about a public defender."
>
> Youngblood: "What about a public defender?"

Appellant: "They said that he would show up for anything."

Youngblood: "Oh, you have a right to a public defender. That's why I asked you did they–they told you about your rights."

Appellant: "They read me my rights, yeah."

Youngblood: "Yeah, sure."

Youngblood rehearsed the polygraph questions with appellant, and administered the examination. He invited appellant to look at the results, and explained that the computer found a "greater than 99 percent probability" appellant was deceptive when he denied shooting Cuesta. He reminded appellant of the machine's accuracy and characterized the results of the examination as "showing without a doubt that you are the person who shot and killed Cuesta." Youngblood told appellant his job as a polygraph examiner was completed, but because appellant had been respectful to him and the murder seemed out of character for appellant, he was going to give appellant a chance to "do the right thing" and tell him "what really went down and why it went down." He referred again to the existence of "heavy-handed" officers and said, "Now, if you intended to kill this man, that's one thing. But if it was not your intent to do that, if you–your intent was to scare, make this person back off because he was heavy-handed or whatever, don't try to come up with that later." He repeatedly appealed to appellant's decency and exhorted him to "do the right thing."

Finally, in answer to Youngblood's question regarding what was going through appellant's mind at the time of the crime, appellant answered, "I just wanted to scare him away." He subsequently told Youngblood he acted alone, shot at the officers from the corner, and threw his gun away as he fled the scene. Youngblood asked appellant if Cuesta had been "messing with you that day," and appellant replied Cuesta had been looking for him. Youngblood asked if appellant intended to shoot Cuesta or if he was merely "shooting at the car." Appellant responded, "I was just shooting." Appellant asked to call his mother, and Youngblood left to get the detectives.

Third interrogation

Detective Aldahl testified that when he entered the interrogation room after

Youngblood's departure, appellant seemed alert, calm and "fine." Aldahl pressed appellant for details regarding the crime. Appellant could not remember the number of rounds he fired. He admitted he shot at the car, but claimed he was just trying to scare the officers and did not know that anyone was in the car. He later attributed the shooting to drunkenness, stupidity and a desire to scare the officers. Appellant did not answer most of the Aldahl's questions. He repeatedly asked to see his mother. Aldahl repeatedly told appellant he could see his family after he told more details about the crime.

After appellant was told his family was on the way to the station, he raised the subject of counsel again:

> Appellant: "I don't have no public defender."
>
> Aldahl: "You didn't get one? You didn't get one–"
>
> [Interruption by another detective.]
>
> Aldahl: "What were saying? You said something about a public defender?
>
> Appellant: "Yeah."
>
> Aldahl: "You can have one any time you want, man. I told you that when I first advised you."
>
> Appellant: "Yeah, but already a lot of things went by, and I haven't had a public defender."
>
> Aldahl: "You want one right now? I mean, if that's the thing, then we're down [*sic*] talking. And I'm out of here."
>
> Appellant: "Really."
>
> Aldahl: "I can't talk to you until you talk to this–whoever you're going to talk to, so it's up to you. I'm just looking for some answers to the blanks here. I already know what happened. I know where you were standing from [*sic*] you shot. I know what distance it was. You know, I've got all the evidence from the crime scene. I just need to know the [*sic*] what your intent was."

Appellant told Aldahl he did not intend to kill Cuesta or shoot any officer. He also said he did not know the officer in the car was Cuesta.

Expert testimony

Dr. Richard Leo, an expert on the psychological effects of police interrogation techniques, testified in support of appellant's motion. He testified Youngblood and Aldahl used the Reid method of interrogation, which is designed to move a suspect from denial to admission. According to the method, the interrogator attempts to induce a sense of helplessness in the suspect by convincing him that the police have persuasive evidence of his guilt and no one will believe his assertions of innocence. The interrogator then offers minimizing and maximizing "themes," or ways of viewing the crime. Minimizing themes present possible rationalizations or excuses for the crime or portray it as involving a less culpable mental state. The themes are intended to induce the suspect to admit the suggested version of the crime. Interrogators frequently increase the pressure on the suspect by telling him that the minimized version of the crime is only available for adoption at that moment. Maximizing themes exaggerate the severity of the crime or its consequences to cause the suspect to fear he will be charged with that version if he does not admit the minimized version. The maximizing and minimizing themes effectively present implied threats of harsher treatment and promises of leniency. Polygraph examinations are used as an interrogation tool after the suspect is persuaded that the polygraph machine is infallible.

Leo found the three interrogations of appellant coercive in three respects. First, he believed Henry's references to the use of a dimmer would reasonably be understood as a veiled threat because a suspect trapped deep within "the bowels of the police station" would be helpless, vulnerable and terrified if the lights were extinguished. These feelings would be especially true for a suspect accused of murdering a police officer. Leo also found coercive the detectives' statement to appellant that they were going to book him for murder, but would release him if he passed a polygraph examination. Leo viewed the statement as an implied promise of leniency if appellant consented to the polygraph examination. Finally, Leo found coercive Youngblood's use of the Reid maximization and minimization techniques. He noted that Youngblood set forth his minimizing theme-appellant was simply trying to scare Cuesta-before the polygraph examination was given.

Appellant's prior experience

Appellant had been arrested and advised of his rights under *Miranda* on four prior occasions. On the first two occasions, he waived his rights and gave a statement. On the third occasion, which was approximately 18 months before Cuesta's shooting, appellant was advised of his rights, said he understood them, invoked his right to counsel, and did not make a statement. On the fourth occasion, he was advised of his rights, said he understood them, but he did not waive his rights or make a statement.

Trial court's findings and ruling on motion

The trial court denied appellant's motion in its entirety. With respect to the *Miranda* claim, it found appellant invoked his right to counsel during prior unrelated interrogations, he was properly advised of his rights at the start of the first interrogation in the present case, he knowingly and validly waived his rights, and his three subsequent references to counsel were insufficient to invoke his right to counsel because they were ambiguous. The court observed that appellant's prior experience in exercising his *Miranda* rights demonstrated he could have unambiguously invoked his right to counsel in this case if he intended to do so. With respect to the involuntariness claim, the court found no physical force was applied to appellant, and although the police "forcefully" urged appellant's family to persuade him to surrender, none of the interrogations were sufficiently coercive to render his statements involuntary. The court concluded appellant's arguments went to the weight rather than the admissibility of his statements.

Appellant contends the trial court erred in denying his motion, in that he did not waive his right to counsel, he repeatedly invoked his right to counsel but was ignored by the police, and his statements were involuntary.

a. Appellant's statements were obtained in violation of his right to counsel.

In *Miranda*, *supra*, 384 U.S. 436, the United States Supreme Court held that a person questioned by the police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to

remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Id.* at p. 444.) Statements obtained in violation of this rule may not be used to establish guilt. (*Ibid*.)

However, a suspect may knowingly and intelligently waive these rights following advisement and an opportunity to exercise them. (*Miranda*, *supra*, 384 U.S. at p. 479.) The waiver may be either express or implied, but it must be voluntary, that is, the product of a free and deliberate choice, and made with a full awareness of the nature of the right waived and the consequences of such a waiver. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) In determining whether these criteria are met, the totality of the circumstances must be considered, bearing in mind the particular background, experience and conduct of the suspect. (*Ibid.*; *North Carolina v. Butler* (1979) 441 U.S. 369, 374-376.) If the suspect was advised of his rights, said he understood them, did not request an attorney, and chose to speak to police, an implied waiver may be found. (*People v. Sully* (1991) 53 Cal.3d 1195, 1233; *People v. Johnson* (1969) 70 Cal.2d 541, 558, disapproved on another point in *People v. DeVaughn* (1977) 18 Cal.3d 889.) However, an implied waiver may not be inferred from the mere fact that a confession was eventually obtained. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 475.) The state must demonstrate the validity of the waiver by a preponderance of the evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034.)

Appellant was advised of all of his rights. He repeatedly acknowledged that he understood all of his rights and expressly waived his right to silence before Henry interrupted to complete the advisement regarding appointed counsel. After Henry completed the advisement, appellant expressly agreed to talk to the detectives and then answered their questions for awhile without asking for an attorney. By doing so, he implicitly waived his right to counsel. Accordingly, the evidence established a valid waiver at the start of the first interrogation.

Despite the waiver, appellant was free to invoke his rights to silence or counsel at any time during the first or subsequent interrogations. *Miranda* requires that the police

immediately terminate an interrogation if the suspect indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent or to speak with an attorney. (*Miranda*, *supra*, 384 U.S. at pp. 473-474.) Whether a suspect actually invokes the right to counsel is an objective inquiry. Invocation requires that the suspect "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis v. United States* (1994) 512 U.S. 452, 459 (*Davis*).) An ambiguous or equivocal reference to an attorney that would lead a reasonable officer in the circumstances to understand only that a suspect might be invoking his right to counsel is insufficient. (*Ibid.*)

We conclude appellant adequately invoked his right to counsel at the conclusion of the first interrogation session when he said "if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing." This was a sufficiently clear articulation of a desire to speak to counsel at that time or before further questioning by police officers or their representatives that a reasonable police officer in the circumstances should have understood the statement to be a request for an attorney. While the detectives said they were going to book him, and while appellant referred to getting an attorney if they were going to charge him, there was no basis for concluding that appellant was sophisticated enough to draw the same distinction between booking and charging that a police officer or attorney would draw. At a minimum, the detectives should have asked appellant whether he meant he wanted to consult an attorney if the police were going to keep him in custody. We believe reasonable officers in the position of Detectives Henry and Aldahl should have understood that appellant wanted counsel if the police were going to continue to detain him and subject him to further questioning. Indeed, Aldahl's reaction to appellant's reference to a public defender during the third interrogation strongly suggests he actually understood that appellant invoked his right to counsel at the end of the first interrogation. After appellant stated he did not have a public defender, Aldahl said, "You didn't get one?"

A suspect who invokes his right to counsel may not be further interrogated until

counsel is provided to him, unless the suspect initiates further discussions with the police and knowingly and intelligently waives the right to counsel. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128.) Absent a break in custody, any statements subsequently obtained by the police without providing counsel are presumed involuntary and are inadmissible in the prosecution's case-in-chief, even if the suspect expressly waives his right to counsel. (*Ibid.*) The prosecution has the burden of showing that subsequent events indicate a waiver of the right to the presence of counsel during interrogation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044.)

It is undisputed that the police failed to provide appellant with counsel and kept him in custody between the first and second interrogations. Accordingly, the statements appellant subsequently made to Youngblood and Aldahl were obtained in violation of *Miranda*. The trial court therefore erred by permitting the prosecution to introduce the statements in its case-in-chief at trial.[3]

b. Appellant was prejudiced by the admission of his improperly obtained statements.

The erroneous admission of a statement obtained in violation of *Miranda* does not require reversal if the admission of the evidence was harmless beyond a reasonable doubt. (*People v. Sims* (1993) 5 Cal.4th 405, 447.) Assessment of the prejudicial effect of the trial court's error in admitting statements appellant made during the second and third interrogations and polygraph examination requires a more detailed examination of the remaining evidence introduced at trial.

Apart from appellant's incriminating statements, the prosecution's case was based primarily upon two eyewitness identifications of appellant as the gunman, gunshot

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[3] A statement obtained in violation of *Miranda* is admissible to impeach the defendant if, as in this case, he testifies. (*Michigan v. Harvey* (1990) 494 U.S. 344, 350-351.) We do not consider the possible use of any portion of appellant's statements as impeachment because they were admitted as substantive evidence of his guilt, not impeachment. Moreover, had the court excluded appellant's statements to police, he may have declined to testify to avoid their admission as impeachment.

residue on clothing that may have belonged to appellant, and evidence of motive. Agapito Negron, who knew appellant, testified he saw a person wearing black clothing on the corner of Cochran and Carlin shoot at the police officers. He first testified he did not know the gunman's identity, but later testified it was appellant, who was shooting with his left hand. Negron also testified appellant had his Glock gun in his pants pocket at the wedding reception. Although he denied it at trial, Negron previously told police that appellant "flashed" his gun at the reception in an attempt to impress girls.

Appellant introduced evidence intended to discredit Negron by establishing grounds for bias. Ernest Standifer testified that days or a week before Cuesta's murder, he had a confrontation with Negron and a gang member known as Babyface. Standifer was walking down his street when Babyface said something to him and asked him where he was from. Standifer ignored him and crossed the street. Negron, who was driving past, stopped and got out of his truck. Negron began cursing Standifer, repeatedly threatened to shoot him, and spat in his face. Standifer punched Negron in the face. Babyface joined Negron and they beat Standifer. Appellant, who was Standifer's friend, arrived and broke up the fight. Appellant testified to a similar account, adding that he pulled Babyface off Standifer and told him to leave Standifer alone. According to appellant, Negron suffered a broken jaw, which was wired shut at the time of the wedding reception.

Appellant further testified that, on the day Cuesta was shot, one of Negron's girlfriends paged him and appellant went to the beach with her. When they returned together to the neighborhood, Negron saw them together and asked for a tape that was in his girlfriend's car. Appellant asked if they could play the tape. Negron, who appeared to be quite upset, responded, "Hell, no."

Sylvia Thomas testified she observed the shooting from the balcony of her second floor apartment on Cochran Avenue, which had a view of the northwest corner of Cochran and Carlin, where the gunman stood to fire at the police car. Earlier that night, she drove her sister to work. As she waited for her sister in her car in front of the apartment building, she saw three "guys" who looked like gang members walking toward

her location. She looked directly at them as they approached because she was concerned that they might pose a threat to her safety. She saw them for about 10 seconds.

After Thomas returned to her apartment, she went out on her balcony and watched for her boyfriend to arrive to pick her up. She was also watching the police car, which appeared to have its spotlights directed at the house from which a lot of noise was emanating. She saw three "Hispanic guys" walk along Cochran toward Carlin, on the opposite side of the street from her building. She recognized them as the same three men she had seen earlier that night while she was waiting in her car to take her sister to work. As they neared Carlin, one of them stepped forward, raised his hands, and started shooting. She saw "sparkles" and heard gunshots. She also could see the gunman's face and focused on it. She testified she was looking at his face even before the shooting. She was certain appellant was the gunman. She saw the side of his face as he was shooting and saw "his face directly" as he walked around in a sort of "C." After the shooting, she ducked and did not see where the three men went. She did not see the gun and did not know how appellant was holding or firing it, whether he used his left, right, or both hands.

A police officer worked with Thomas to create a computer animation intended to illustrate her observations. Thomas testified it accurately reflected her location, the layout of the neighborhood, the lighting conditions at the time of the shooting, and the view she had of the shooter.

Thomas did not contact the police because she was afraid of getting involved. Much later, the police came to her home and her niece let them in. Thomas inadvertently said something about what she saw. The police then repeatedly tried to contact her. She initially lied to the police because she did not want to be involved. She met with the detectives on January 28, 1999 and selected appellant's photo from an array of six photos as that of the gunman. At trial, she was still certain the person in the photo was the killer. At the preliminary hearing, appellant stood and Thomas viewed his build, which was consistent with that of the gunman. Prior to the day of the shooting, she had never seen appellant. After the shooting, she did not see him again until she saw the photographs the

police showed her. At trial, she denied seeing any news reports about this case, but at the preliminary hearing she testified she had seen news reports about the shooting the day after it occurred.

Francisco Castillo was a guest at the wedding reception. After he heard the gunshots, he saw 12 or 13 young men who appeared to be gang members running on Westhaven from Cochran toward Redondo. A group of about four gang members, including one who limped, ran to a house on Cochran. About 35 seconds after he heard the shots, he saw three young Latino men who looked like gang members running around the corner from Cochran, turning eastbound on Westhaven. They came up to the gate and fence of the yard where the wedding reception was held, and one of them grabbed the gate. One of the other two told him not to go in, and said that they should cross the street instead. They were six to seven feet from Castillo. They then ran across Westhaven and went toward a house on the corner. At that point, Castillo lost sight of them. He recognized one of the three men as a person he had previously seen in the neighborhood. On Oct. 12, 1999, Officer Michael Cardenas showed Castillo a six-pack of photographs and he selected a photograph of appellant as the man who had said not to go into the party, but instead to go across the street. Castillo told Cardenas that he saw the man in the photo run from the area where the gunshots came from, which he thought was Carlin. At trial, he testified the man in the photo was wearing dark clothing, but the pants were darker than the shirt. However, Castillo did not recognize appellant in the photographs in People's Exhibit 24, which were photographs of appellant at the wedding reception. He was not asked to identify appellant at trial, and did not do so.

On August 15, 1998, after they obtained photographs and a videotape showing appellant at the wedding reception, the police executed a second search warrant at the Lozas' house. At that time, they recovered from a closet in the family room clothing that appeared to match clothing appellant was wearing in the wedding reception photographs and videotape. Previously, an identification card and papers bearing appellant's name were recovered from the same family room. Detective Henry discussed the clothing with Joel Loza, who said the clothes belonged to appellant. The police looked through the

whole house, but found no other clothing that matched clothing seen on the videotape of the wedding. A police criminalist testified that on the pants recovered from the closet (People's Exhibit 80) he found nine particles consistent with gunshot residue and one particle "highly specific" to gunshot residue. On the shirt recovered from the closet (People's Exhibit 81), he found eight particles consistent with gunshot residue.

Detective Henry admitted he handled the clothing with his bare hands while seizing it from the Lozas' closet. The prosecution's criminalist testified if a police officer with gunshot residue on his hands from a prior use of his own gun handled the clothing with his bare hands, he might transfer gunshot residue from his hands to the clothing.

Joel Loza denied telling the police that the clothes belonged to appellant. He simply said they were not his because they were light gray and he did not own any pants of that color at that time. Loza usually left his work clothes in the same closet from which police recovered the clothing (People's Exhibits 80 and 81), and at the time of Cuesta's murder, he used a powder actuated gun at his work that shot metal pins into concrete. A firearms expert called by the defense testified that operating a gunpowder actuated tool could deposit gunshot residue on the user's clothing. No evidence of the type of powder used in Loza's tools was offered.

Appellant testified he did not wear either article of clothing in People's Exhibits 80 and 81 to the wedding reception. His clothing was "Dickies" brand and the shirt had a "Dickies" label on the outside. Appellant pointed to a "Dickies" label on his shirt that was visible in the wedding reception videotape, but was absent from the shirt in People's Exhibit 81. He denied that either the shirt or the pants belonged to him.

The prosecution also relied upon gang and graffiti evidence to establish motive, identity and premeditation. The prosecution's theory was that appellant bore a grudge against the police in general, and Cuesta in particular, based upon prior arrests and detentions. Toward that end, Cuesta's former partner, Gary Copeland, testified he and Cuesta arrested appellant on April 1, 1998 for possessing rock cocaine for sale. Appellant was convicted and sentenced to probation on conditions, including service of a jail term. When appellant was released from jail, Copeland noticed appellant had a

"harder" attitude toward police and was more confrontational with them. However, Copeland admitted his opinion was based solely upon one encounter with appellant on August 3, 1998. Negron also testified at the preliminary hearing that when appellant was released from jail after the drug conviction, he was "harder and much bigger." This statement was introduced at trial as a prior inconsistent statement.

Appellant was an admitted member of the 18th Street Gang, and he and Negron were both members of the Smiley-Hauser clique of the 18th Street Gang. Negron and several police officers testified appellant's moniker was Termite, and other 18th Street Gang members called him Termite. Appellant testified he used several monikers, including Termite. A field identification card prepared by Officers Cuesta and Jones listed appellant's moniker as "Gimbo." Another 18th Street Gang member, Troy Shaw, also used Termite as one of his monikers. Appellant testified he knew Shaw, had a good business relationship with him, and saw him write a lot of graffiti.

On August 3, 1998, Copeland arrested appellant for drinking in public and transported him to the Southwest Station, where he wrote appellant a ticket for drinking in public, and then released him. Copeland testified appellant was extremely angry both at the time of his arrest and while being transported to the police station. He cursed at Copeland and his partner and called them names. Appellant testified Copeland refused to drive appellant back to his neighborhood or let him use a police department phone to arrange a ride home. The station was a long way from appellant's home and in between lay territory claimed by gangs hostile to his own. Appellant used a payphone to call for a ride.

Later in the day on August 3, 1998, Copeland noticed new graffiti on a wall in 18th Street Gang territory at the corner of Hauser and Homeside. It said "T•Mite," "18th Street T.M.L.S." and had the word police had crossed out. Based on Copeland's experience with gangs, he believed the graffiti writer planned to retaliate against the police, possibly by killing an officer. The graffiti had not been on the wall when Copeland passed the location the night before.

Copeland told Cuesta about the graffiti and said Termite wrote it. Cuesta told his wife about it and said he was going to look for Termite that evening, that is, the night of the crime. Copeland testified that both he and Cuesta knew appellant was Termite, and Cuesta asked if appellant was still on probation. Copeland said, as far as he knew, appellant was still on probation. Cuesta said he would look for appellant when he went on patrol that night because writing the graffiti would constitute a probation violation.

Negron testified he once saw appellant write graffiti and he signed it "T•Mite," as in the photograph of the graffiti Copeland noticed on August 3, 1998 (People's Exhibit 9).

Appellant testified he did not write the graffiti in People's Exhibit 9. The defense introduced photographs of other graffiti that included the names "T•MYTE" and "T-MITE." Appellant denied writing those as well.

Appellant further testified he was not angry at the police following his arrest in April 1998 or service of his short sentence at Wayside. He liked Cuesta and had many friendly encounters with him, including one around July 4, 1998. Cuesta had a good reputation in the neighborhood and tried to help people leave gangs. Appellant's sister and his sister's fiancé also testified that appellant had an apparently friendly conversation with Cuesta when he and other officers visited a party the family held on July 4, 1998. Appellant also testified that he had a friendly encounter with Cuesta sometime between August 3 and August 8, 1998, when Cuesta stopped and searched him. Then Cuesta asked appellant about his pregnant girlfriend and told appellant he had a new baby. Cuesta urged appellant to think about his baby and stop hanging around.

Defense gang expert Malcolm Klein testified that crossing out "police" in the graffiti depicted in People's Exhibit 9 suggested the writer was unhappy with the police, but it could not be determined that it was a threat, as there are no strict rules or norms with graffiti. Klein also testified that killing a police officer might earn a gang member either elevated status or great opprobrium.

Monica Alvarado testified she met appellant for the first time at the wedding reception. He told her people called him Termite. She danced with him that night. After

the police came into the party looking for a missing girl, appellant asked her to leave with him and go to his house so they could be alone. He also said "some shit might go down" or "there is going to be some shit happening," and he did not want her to be involved. She asked him what he meant, and he there could be fights or shootings. Alvarado refused to leave with appellant. He asked her again, and she still declined. Appellant testified that he was just trying to convince Alvarado to leave and go to his sister's house with him so they could be alone.

Appellant testified he did not take a gun to the wedding party. He claimed he did not possess a gun at that time. Alvarado testified that when she danced with appellant at the party, she touched his body and held him around the waist and hips and felt the small of his back, but did not feel a gun.

Appellant testified he did not shoot Cuesta. He was at the party, near the cake and disk jockey, when the shots were fired. When appellant heard the shots, he ran to the back, went through a gate and over a fence, and then ran on Westhaven and Dunsmuir to his sister Araceli Loza's house on Dunsmuir. Because his sister was not home, he entered the house through a window.

Joel Loza's sister, Yni Loza, also attended the wedding reception. When the shots started, and while the shooting still was in progress, appellant ran up to her and asked where Beto was. When she told appellant Beto jumped the fence, appellant ran and jumped the fence as well. In a prior statement, however, Loza said appellant was sitting across from her when the shooting started. Confronted with this statement at trial, she said she was not really sure where appellant was.

Cindy Salas, a friend who had known appellant for a long time, also was at the wedding reception and saw him less than a minute before the shooting began. He was near the disk jockey, rapping. Mayra Salas saw appellant seconds or a minute before she heard the shots. She also testified appellant was near the disk jockey, rapping in a crowd of his friends.

Lorena Martinez, whose younger sister was a friend of appellant, also was at the reception. Appellant was dancing at the reception and, when the shots were fired, ran toward the back, along with about 40 other people.

Jose Villasenor testified he knew appellant and the Lozas. After Villasenor heard the shots, he looked out his front door and saw appellant walking quickly in a group of men and women toward the Loza's home on Dunsmuir.

In addition to establishing an alibi, appellant presented a type of impossibility defense, that is, his hand was too disabled to fire so many shots at the officers. He testified he was shot in the back and upper arm in June 1997. As a result, he could not use his right hand well for about a year. Initially he could only use his thumb and index finger, although his hand gradually improved. In January 1998, he purchased a Glock .45 caliber gun. He had no trouble holding the gun and, on three or four occasions, using his right hand, he fired it into the air or at a light post. However, his hand could only fire one or two shots. When appellant got out of jail in June 1998, his gun was missing from the location he hid it outside his parents' house. He did not know what happened to it.

Dr. Stuart Kuschner, an orthopedic surgeon specializing in hands and upper extremities, examined appellant and reviewed his medical records. He opined that the 1997 gunshot wounds injured appellant's ulnar nerve and left it significantly impaired, so that nerve impulses did not reach appellant's hand correctly. Some muscles in appellant's right hand also were atrophied as a result of the absence of nerve impulses. He further opined it would have been difficult for an individual with injuries such as appellant's to fire a handgun in the manner depicted in the prosecution's videotaped demonstration. Moreover, the ring and little fingers on appellant's right hand were weak and he could not move his middle finger from side to side. Appellant also suffered a diminished grip strength, which derived primarily from the ring and little fingers.

The murder weapon was never recovered. However, the firearms examiner determined that the cartridges found at the northwest corner of Cochran and Carlin were fired from a single weapon, and were consistent with casings fired from a Glock 9 millimeter gun.

Had the jury not heard any part of the statements appellant made to Youngblood and Aldahl in the course of the second and third interrogations, it is possible that they would have reached the same verdicts. However, the admission of those statements cannot be deemed harmless beyond a reasonable doubt. There was reason to doubt each of the eyewitness identifications. Negron had several grounds for bias against appellant. Appellant came to the assistance of Ernest Standifer, who broke Negron's jaw and, hours before Cuesta's murder, Negron discovered his girlfriend in appellant's company. Furthermore, Negron contradicted himself at trial regarding the gunman's identity and gave other testimony that differed from or contradicted his prior statements to the police. Thomas did not come forward at the time of the shooting and therefore did not view a photograph of appellant until nearly six months after the crime. In addition, Thomas may have mistakenly assumed the gunman was the same person she saw earlier that night. Castillo did not see the shooting, but simply saw people leaving the vicinity of the shooting. Moreover, he first identified appellant more than one year and two months after the crime and, although he identified appellant's photograph from a six-pack, he could not identify appellant in photographs of the wedding party. The prosecutor's failure to ask Castillo to identify appellant at trial strongly suggested he would have been unable to do so.

Although the gunshot residue on the clothing found in Loza's closet was highly incriminating, there was no proof appellant wore the clothing the night of the crime. Indeed, appellant pointed out differences between the shirt with the gunshot residue and the one the wedding party videotape showed him wearing at the party. At least two alternative explanations were offered for the presence of gunshot residue on the clothing: contamination by Aldahl or the powder-actuated tools Loza used in his work. Although neither alternative was conclusively proved, they at least provided plausible explanations for the presence of the gunshot residue. Appellant's explanation for his suggestion to Alvarado that she should leave with him because something might happen at the party was highly plausible. In any event, because nothing happened at the party or among people attending the party, the statements had little or no tendency to establish identity,

premeditation or motive. Alvarado's testimony that she did not feel a gun on appellant cast doubt upon Negron's testimony that he saw appellant carrying his gun in his pocket at the wedding reception and added reasons to doubt Negron's credibility. Appellant's flight after the crime was not strong evidence of consciousness of guilt because numerous witnesses testified that dozens of people, especially young men, fled when the shooting began.

Appellant's alibi evidence and evidence of his disabled hand did not, of course, conclusively establish that he was not the person who shot Cuesta. However, it must be deemed additional grounds upon which the jury could reasonably doubt appellant's guilt.

In light of the totality of the evidence and the significant reasons to doubt or discount the incriminating evidence, we cannot conclude that the erroneous introduction of appellant's admissions that he killed Cuesta did not contribute to the jury's verdict. Appellant's admissions were the most persuasive evidence of his guilt and likely caused the jury to completely disregard or greatly discount all of the evidence tending to establish appellant's innocence or otherwise cast doubt upon the prosecution's evidence. Why should a jury doubt the credibility of the prosecution's eyewitnesses, for example, when appellant admitted shooting at the officers? Accordingly, the court's error in admitting appellant's statements cannot possibly have failed to contribute to the verdict. We therefore reverse the judgment and remand for a new trial. Because a few of the remaining issues raised by appellant in this appeal are likely to retain significance upon retrial, this opinion addresses several of those issues.

c. Appellant's statements were not involuntary under the due process clause.

If the totality of the circumstances show that the police obtained a statement by applying physical or psychological influences that overcame a defendant's free will, the statement is inadmissible for any purpose. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) Relevant factors include police coercion; the length of the interrogation, along with its location and continuity; and the defendant's maturity, education, physical condition, and mental health. (*Ibid*.) No single factor is dispositive. (*People v. Neal* (2003) 31

Cal.4th 63, 79.) The police are prohibited from using only those psychological ploys that, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. (*People v. Jones* (1998) 17 Cal.4th 279, 297-298.) Confessions prompted by deceptive police statements or tactics are admissible as long as the deception is not of a type reasonably likely to produce a false confession. (*Id*. at p. 299.) In particular, deception regarding the evidence or degree of knowledge possessed by the police is acceptable. (*Ibid*.) Although threats or promises of leniency or advantage for the accused may be considered in determining voluntariness, neither truthful statements that the accused's cooperation might be useful in later plea negotiations nor advice or exhortation that it would be better to tell the truth, when unaccompanied by either a threat or a promise, will render a statement involuntary. (*Id.* at p. 298; *People v. Williams* (1997) 16 Cal.4th 635, 660-661 (*Williams*); *People v. Boyde* (1988) 46 Cal.3d 212, 238, overruled on another point *sub nom*. *Boyde v. California* (1990) 494 U.S. 370.) When the police merely point out a benefit that flows naturally from truthful and honest conduct, a subsequent statement will not be considered involuntary. (*People v. Thompson* (1990) 50 Cal.3d 134, 170 (*Thompson*).)

If a statement is challenged as coerced, the prosecution must prove by a preponderance of the evidence that it was voluntarily made. (*People v. Markham* (1989) 49 Cal.3d 63, 71.) On appeal, we independently review the trial court's determination of voluntariness. However, we accept the trial court's factual findings regarding the circumstances surrounding an admission or confession if they are supported by substantial evidence. (*Williams*, *supra*, 16 Cal.4th at pp. 659-660.) With respect to conflicting testimony, we must accept the version of events most favorable to the People, to the extent it is supported by the record. (*Thompson*, *supra*, 50 Cal.3d at p. 166.)

Appellant premises his coercion claim on Henry's references to a dimmer, his weakened physical state during the second and third interrogations, Youngblood's use of the Reid interrogation techniques and his statements regarding the polygraph test and its results, and everyone's disregard of his attempts to obtain counsel.

As previously discussed, appellant's first references to a public defender was a

sufficient invocation of his right to counsel, and should have been honored by the police. The police, however, ignored his first request for counsel and effectively disregarded his subsequent references to counsel. Accordingly, there is merit to appellant's contention that police disregard of his requests for counsel contributed to a coercive atmosphere. This factor alone, however, is not determinative of coerciveness.

Henry's references to using a dimmer are troubling. The trial court found the testimony on that point confusing and made no express findings regarding the nature or effect of the dimmer references. Despite Henry's denial, the language and context strongly suggest the dimmer references were threats, if only to visibly signal the detectives' belief that appellant was lying. However, even assuming the dimmer references were threats, nothing indicates they were threats of physical harm. Appellant never suggested the dimmer references were a veiled threat to shock him with electricity. Moreover, appellant does not suggest the detectives threatened to turn down or off the lights and use physical force upon him while the room was dark. In this regard, it is highly significant that the police had taken Polaroid photographs of appellant when he first arrived at the police station and given them to Loza for safekeeping. Had the detectives or any other officers beat appellant, it could readily have been established through "before and after" photographs. Accordingly, the threat was merely as reflected on the face of the statement: the detectives would turn the lights down when they believed appellant was lying to them. The threat was, at worst, a strange psychological ploy. The record does not indicate appellant was afraid of the dark or otherwise unusually susceptible to a threat to dim or extinguish the lights. Despite Dr. Leo's opinion that a threat to turn off the lights in an interrogation room is coercive, such a threat, when made to an adult not shown to be unusually susceptible to a threat, is not so coercive as to tend to produce a statement that is both involuntary and unreliable.

The only evidence of appellant's allegedly poor physical condition was his statement to Youngblood regarding his lack of sleep, toothache, weakness, and reaction to the mustard on his sandwich. In contrast, Youngblood testified appellant appeared to be rested and alert and did not appear to be in pain. Aldahl also testified appellant

seemed fine and alert after his session with Youngblood. Appellant's responses to Youngblood's questions reveal no physical or mental infirmity. The trial court made no express findings regarding appellant's condition. Because the record supports the prosecution's position about appellant's condition, any flaws in appellant's physical condition were insufficient to render his statement involuntary or even contribute to involuntariness. (*Thompson*, *supra*, 50 Cal.3d at p. 166.)

The use of the Reid interrogation techniques by the detectives and Youngblood undoubtedly pressured appellant to admit his involvement and suggested more appealing scenarios to which he would have less difficulty admitting, that is, he only intended to scare the officers and/or he did not think they were in the car when he fired at it. They also may have resorted to deceptive exaggeration in telling appellant about the strength of their case against him and the accuracy of the polygraph machine. However, they did not make any threats or promises, express or implied. They essentially advised him it would be better to tell the truth and accurately represented that appellant should reveal any mitigating facts at that time, rather than later, to enhance his credibility regarding such mitigation and permit the police to act accordingly. These were merely benefits that flow naturally and logically from a truthful and honest course of conduct. The police neither promised appellant leniency if he admitted the crime nor threatened to charge him or treat him more severely if he did not. (Cf. *People v. Neal*, *supra*, 31 Cal.4th at pp. 72-74.) The tactics and statements used by the police were not inherently likely to induce appellant to falsely confess or admit involvement.

Despite the somewhat coercive effect of the police repeatedly ignoring appellant's attempt to consult with counsel, the totality of the circumstances does not show that the police obtained appellant's admissions by applying physical or psychological influences that overcame his free will.

2. The trial court did not violate appellant's confrontation rights and the prosecution did not engage in misconduct.

The prosecution prepared two demonstrative videotapes to play at trial. One videotape showed Officer Scott Reitz firing a gun of the type believed to have been used

in Cuesta's killing. The final portion of the videotape was intended to demonstrate recoil. In the tape, Reitz was shown, first in regular speed, then in slow motion, firing the gun while moving, and then while standing still. Although Reitz held the gun in his right hand, with his arm extended, he testified that the recoil effect would be identical if the gun were fired with the left hand, with the left arm extended. He further testified the recoil would still be evident if the gun were fired while the shooter placed his free hand against the wrist of the arm holding the gun. On cross-examination, defense counsel referred to the prosecutor's questions about using the left hand or bracing one arm with the other, and asked, "None of those scenarios were depicted on the video, were they?" Reitz agreed they were not. Defense counsel then asked whether "they" provided Reitz with "the information that that was the way they believed the shooting occurred; is that why you did it that way?" The court sustained the prosecutor's relevance objection. Defense counsel asked essentially the same question twice more, and relevance objections were sustained each time.

Appellant contends the trial court violated his confrontation rights by preventing him from exploring "the basis for the facts illustrated by the re-enactment video."

The state and federal constitutions guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) However, the constitutional provisions simply guarantee an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense wishes. (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.) Judges retain wide latitude to impose reasonable limits on cross-examination. (*People v. Frye* (1998) 18 Cal.4th 894, 946 (*Frye*).) Confrontation rights are not violated unless a defendant shows that the prohibited cross-examination would have produced a significantly different impression of the witness's credibility. (*Ibid.*)

Appellant expressly directed questions to the portion of the videotape in which Reitz was demonstrating the recoil effect created by firing a loaded gun. He expressly testified on direct to the difference, or lack thereof, in recoil if the gun were fired with the left hand or with the free hand bracing the firing hand. Nothing suggested that portion of

the videotape was intended to re-enact the crime. Accordingly, it was irrelevant why Reitz chose to fire with his right hand, with his arm extended. If the question had been allowed, and Reitz answered the question by saying he chose his shooting hand and stance to mimic what investigators told him about the shooting in this case, the testimony would not have any tendency in reason to prove or disprove that appellant was the shooter or to establish his mental state. The trial court's application of the established rule that only relevant evidence is admissible did not violate appellant's right to confront witnesses.

The second videotape was a computer animation intended to depict eyewitness Thomas's view of the shooting from the balcony of her second-floor apartment across the street from the gunman's location. At the preliminary hearing, Thomas testified she saw the gunman "lift his hands up" and demonstrated his stance. The court described Thomas "bringing her right hand up pointing a finger forward and holding her right arm with her left hand at about the wrist area. So it would be about even with her waist if she were standing."

Before trial, appellant objected that the animation was inaccurate, because it depicted the gunman holding out using just one arm to shoot, while Thomas's preliminary hearing testimony was that the gunman used two hands. The prosecutor responded that Thomas would not testify that appellant fired with his right hand while using his left hand to support his right wrist.

At trial, Thomas identified appellant as the gunman and testified she saw him "lift his hands up" before shooting. She did not, however, see his gun and did not know whether he used his left, right, or both hands to fire it. Detective Elehue Bauchman, who created the animation, testified he had read the transcript of Thomas's preliminary hearing testimony, but when he met with her, she demonstrated the gunman's firing stance by raising one arm and pointing. In the animation, therefore, he depicted the gunman holding out using just one arm to shoot.

Appellant moved for a mistrial, and renewed the motion several times, on the ground of prosecutorial misconduct. Appellant argued the prosecution had initially

represented that there was no evidence Thomas ever said the gunman held and fired the gun with one hand, but had subsequently elicited contradictory evidence. Appellant argued the prosecution changed its theory after receiving appellant's medical reports showing he was unable to use his right hand due to pre-existing injuries. He claimed the court had prevented him from eliciting from Reitz the basis for depicting the gunman using only his right arm, and argued that the court's rulings deprived the jury of "critical evidence that the story is now changing." The prosecutor told the court the videos depicted the use of one arm because he had overlooked the judge's description of Thomas's demonstration during the preliminary hearing until defense counsel brought it to his attention before trial. The trial court denied appellant's motions for mistrial. Appellant contends the denial was an abuse of discretion.

Conduct by a prosecutor that does not violate a ruling by the trial court is misconduct only if it amounts to the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury or is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Silva* (2001) 25 Cal.4th 345, 373.)

The prosecution did not change its theory of the gunman's stance to avoid appellant's defense of an unusable right hand. The only evidence of a two-handed firing stance was presented at the start of proceedings in this case, when Thomas demonstrated a two-handed firing posture at the preliminary hearing. Whether the prosecutor overlooked this evidence or disregarded it, the two-handed theory was present from the outset. The defense was well-aware of it, as illustrated by its reference to that testimony in a pre-trial hearing. Thomas, not the prosecutor, later contradicted her preliminary hearing demonstration by showing Bauchman that the gunman held just one arm out to fire. The prosecution's preparation of an animation based upon Thomas's descriptions to Bauchman was not a deceptive or reprehensible method of persuasion or so egregious as to infect the trial with unfairness.

Moreover, appellant has not shown he was prejudiced by the "inaccurate" animation. Whether the gunman used one or two hands was an unresolved factual issue,

as illustrated by Thomas's admission at trial that she could not see the gun and did not know how he held it. The prosecution's animation presented one possibility. Absent evidence that use of the left hand or both hands would have tended to show that appellant was not guilty, appellant cannot show prejudice from the purported inaccuracy. If anything, the prosecution's depiction of the gunman using his right hand played into appellant's defense that he could not possibly have been the shooter due to his disability. The trial court did not err in denying appellant's motions for mistrial.

3. The trial court properly excluded Guzman's testimony about an overheard phone call.

On the eve of trial, the prosecution moved to exclude appellant's third party culpability evidence, which suggested Juan Barragan, an 18th Street Gang member known as Babyface, shot Cuesta. At an evidentiary hearing on the motion, Maria Guzman[4] testified that on the day of her wedding, she saw Babyface drive by her home on two occasions. The first occurred in the early afternoon as Guzman got into a limousine to go to the wedding. The second occasion occurred between 7:00 and 8:00 p.m. while the reception was occurring. As far as Guzman knew, Babyface did not attend the reception.

About a year later, in the summer of 1999, a man Guzman knew as Little Boy, telephoned her from the state prison in Tehachapi. He asked her to make a three-way call for him and put the phone down after the call connected. Guzman placed the call and recognized Babyface's voice on the line. Little Boy told Babyface that a woman from Baldwin Park, which was not where Guzman lived, placed the call for him. Guzman put the receiver down, but picked it back up again after about ten minutes. She heard Babyface say that he had killed a "hura," meaning police officer. He made a noise that seemed to imitate rapid gunfire. She put the phone down and checked back later, at which time only Little Boy remained on the phone. He asked her if she had listened to any of the conversation, saying he did not want her to know about the things they

discussed. Guzman denied listening. Guzman was nervous, but believed the information was important. She called Steven Gibbs, a defense investigator with whom Guzman had spoken about this case on 10 to 20 prior occasions. They met at a restaurant, and she told him about Babyface's statement.

For purposes of the motion, the trial court accepted counsel's representations that Babyface was Barragan and was a member of the 18th Street Gang and that he had told investigators he was in Big Bear the day of the wedding and shooting and would be unavailable as a witness because he would exercise his privilege against self-incrimination. The court found that even if appellant could overcome the hearsay problem presented by the statement, the link between the statement and Cuesta's shooting was too speculative. Appellant contends exclusion of the statement was error and violated due process.

Evidence tending to show that a person other than appellant committed the charged offense is admissible if it could raise a reasonable doubt about appellant's guilt. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017.) However, evidence that a third person merely had a motive or opportunity to commit the crime is insufficient to raise a doubt. (*Ibid.*) There must be direct or circumstantial evidence linking the third person to the actual perpetration of the charged crime. (*Ibid.*) Evidence Code section 352 and all other requirements for admissibility are fully applicable to third party culpability evidence. (*People v. Davis* (1995) 10 Cal.4th 463, 501.)

Assuming appellant's ability to overcome the hearsay problem presented by Guzman testifying to Barragan's statement, the evidence was nonetheless inadmissible because it failed to link Barragan to Cuesta's killing. Barragan did not refer to Cuesta by name or state any facts, such as the date, place or name of the person charged with the crime that would tend to show he was referring to the killing of Cuesta. The telephone conversation occurred ten months to one year after Cuesta's death. Although appellant argued no other officers had been killed in the same neighborhood since Cuesta, no

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4 By the time of the hearing, Maria Guzman was using the surname Marquez. To

evidence was introduced to establish that fact. Moreover, Barragan could have been referring to killing a police officer in a different neighborhood, city or state, before or after Cuesta's death. No other evidence linked Barragan to Cuesta's killing. Guzman testified she did not see him at the wedding reception, and she saw him in the neighborhood no later than 8:00 p.m. The shooting occurred at about 12:30 a.m. Given the vagueness of the statement and the absence of evidence linking Barragan to Cuesta's killing, Guzman's proffered testimony was insufficient to raise a reasonable doubt regarding appellant's guilt.

Appellant's constitutional claim also has no merit. Enforcing the ordinary rules of evidence does not violate a defendant's due process rights. (*Frye*, *supra*, 18 Cal.4th at p. 948.)

4. The trial court's refusal to modify CALJIC No. 2.92 was not error.

The trial court instructed the jury with CALJIC No. 2.92, which sets forth a number of factors for consideration in evaluating the believability of eyewitness identification testimony.[5] Appellant requested the court to add the following factor:

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avoid confusion, we refer to her as Guzman.

[5] As read to the jury, CALJIC No. 2.92 provided as follows:

"Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witnesss' identification of the defendant, including, but not limited to, any of the following:

"The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

"The stress, if any, to which the witness was subjected at the time of the observation;

"The witness's ability, following the observation, to provide a description of the perpetrator of the act;

"The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

"The cross-racial or ethnic nature of the identification;

"The witness's capacity to make an identification;

"Whether on any occasion before trial the witness failed to identify the defendant or identified someone else as the offender." The court declined to modify the standard instruction on the ground that points in the proposed addition were addressed in the standard instruction, including the catch-all "[a]ny other evidence relating to the witness' ability to make an identification."

Appellant contends the court erred in refusing his requested modification. He refers to identification witnesses Thomas and Castillo, and notes that at trial, Castillo could not identify appellant from a photograph taken at Guzman's wedding reception.

The modification proposed by appellant was largely addressed by the combined effect of the catch-all provision cited by the court and a factor already included in CALJIC No. 2.92: "Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup." This factor is stated in a neutral fashion, but logically includes the circumstances of misidentification or inability to identify stated in appellant's proposed addition. The court is not required to give a requested instruction that is covered by other properly given instructions. (*Mayfield*, *supra*, 14 Cal.4th at pp. 780-781.)

Moreover, the proposed modification was not supported by any evidence, as neither Thomas nor Castillo ever identified someone else or failed to identify appellant before trial. While Castillo was unable to identify appellant from a wedding reception

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"Evidence relating to the witness's ability to identify other alleged perpetrators of the criminal act;

"Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;

"The period of time between the alleged criminal act and the witness's identification;

"Whether the witness had prior contacts with the alleged perpetrator;

"The extent to which the witness is either certain or uncertain of the identification;

"Whether the witness's identification is in fact the product of his or her own recollection; and

"Any other evidence relating to the witness's ability to make an identification."

photograph, the inability occurred only at trial, and was therefore outside the scope of appellant's proposed modification, which expressly referred to events "on any occasion before trial." Appellant argues the time lapse between the crime and the identifications by Thomas and Castillo supported the proposed modification. However, the plain language of the paragraph appellant sought to add undermines this theory. A witness's delay in coming forward or the investigator's delay in finding a witness cannot be deemed an "occasion" on which "the witness failed to identify the defendant." Accordingly, the instruction was not supported by the evidence, and no reasonable possibility has been shown that the trial court's failure to modify CALJIC No. 2.92 contributed to the verdict.

DISPOSITION

The judgment is reversed and the cause is remanded for further proceedings.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.