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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY LEE POWELL,

Defendant and Appellant.

A131100

(Alameda County
Super. Ct. No. H46994)

Troy Powell, convicted of first degree murder, contends that his confession was coerced and his *Miranda*¹ and confrontation rights were violated. We find no merit in his arguments and affirm the judgment.

BACKGROUND

Powell was a suspect in the August 2005 murder of Daniel Shopshire in Vallejo and the January 2006 murder of Ronald Morris in Fremont. This appeal is from Powell's conviction for shooting Morris to death during a robbery of his pawn shop.

In June 2006, Powell was arrested on a warrant and questioned by Vallejo and Fremont police. Vallejo Police Officer Raul Munoz and Detective Joe McCarthy began interviewing him, starting at approximately 11:35 p.m. The interview was recorded and portions of the DVD were played at the suppression hearing.² Officer Munoz read Powell his *Miranda* rights at the beginning of the interview. Powell nodded affirmatively

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

² We have reviewed the recordings of the interviews.

when asked if he understood those rights. Officer Munoz believed he had obtained a valid implied *Miranda* waiver, and proceeded to question Powell. For the next ten minutes or so Powell was questioned about and tried to explain away evidence that implicated him in the Vallejo murder, including cell phone records that placed him in the area and the recovery of his dental grill from the murder scene.

For approximately the first half hour of the interview, Powell admitted he was with two other suspects, but not at the time of the robbery. Then, the following dialogue took place shortly after midnight. “[Detective McCarthy]: I’m not gonna even tell you about your cousin OK? You got two people that told us the truth that got consistent stories, OK? Consistent stories. [Officer Munoz]: It sounds like your story up until certain parts. And then there’s some involvement with these guys then you go down by yourself. And if you feel some sort of loyalty to these people, I’m telling, I’m telling you Troy, with the stuff we have right now, think about this. You’re here arrested for this. You don’t just get arrested, a Judge doesn’t just sign the arrest warrant if he doesn’t feel there’s enough to arrest you for. You’re here arrested on this warrant so you know we’re doing our work. So now, how this ends is on you. Do you want to sit here and play up I don’t know, I wasn’t there and let all that evidence come forward and all these people coming forward against you and get up in front of a jury and I don’t know I wasn’t there or do you want to tell us what happened? [Detective McCarthy]: Cuz right now is the time to get ahead of this. [Officer Munoz]: What happened? [Detective McCarthy]: It really is. You need to get ahead of it.”

At this point Powell said “I ain’t got nothing else to say about it. Put it like that, take me to jail and stuff. I already told y’all. You already believe them? You believe him?” The conversation continued: “[Detective McCarthy]: Well, let me ask you this. [Powell]: I ain’t never killed nobody in my life. [Detective McCarthy]: Troy. [Powell]: I ain’t never shot at anybody. [Detective McCarthy]: Troy, let me ask you something. [Powell]: Talking about, y’all fucking with niggers that’s killing niggers and shit.”

Officer Munoz did not think Powell was invoking his right to remain silent. Rather, he thought Powell was expressing anger and frustration because the officers

disbelieved him, and that he did not want to answer the question being asked. During an interrogation some nine months earlier, Powell had clearly told Munoz he wanted to stop the interview. This time, he did not.³

The Vallejo officers terminated the interview after about 45 minutes and left the interrogation room. About eight minutes later, Fremont Police Sergeant Robert Alexander and Detective Michael Tegner entered and began their interview. They had been watching the Vallejo interview on a video monitor. They were satisfied that Powell had given the Vallejo officers a valid *Miranda* waiver and did not invoke his rights, so they did not provide a new *Miranda* warning before they took his statement. Neither Alexander nor Tegner thought Powell was invoking his right to silence when he told McCarthy he had nothing to say and then kept on speaking. Rather, they considered his comments just part of a heated conversation. As Detective Tegner described it, “Mr. Powell continued to talk, never stopped talking, and even when the detective was trying to ask him something, Mr. Powell spoke over the top of the detective. So I believe he didn’t want to stop the interview. He continued to speak, answer questions.”

Sergeant Alexander did most of the questioning. Alexander testified that he sometimes uses gentle, reassuring physical contact as a way of building rapport with a suspect. During the course of the interview he put his hand on Powell’s shoulder and touched his knee and chest lightly; he also held Powell’s hand and massaged his left shoulder. Powell never indicated that he did not want to be touched.

Powell initially denied any knowledge of the robbery and murder. Then he admitted knowing about it, but denied that he was present. Then he admitted that he cased the scene the day before, but said he was not there during the robbery and killing. Ultimately, he admitted that he was present when Morris was killed and identified the shooter, the driver, and a fourth participant.

³ About 20 minutes later, when Officer Munoz was asking more questions about Powell’s cell phone records, he replied “I ain’t got nothing to say man period.” Although defendant argued at the suppression hearing that this comment, too, was an invocation of his right to remain silent, he does not so claim on appeal.

At the end of the interview, Sergeant Alexander asked “closing questions” designed “to completely get it on the record that the person I was speaking with did believe that I treated them fairly and professionally, did believe that I didn’t make them any threats or promises, and I’m just trying to put everything on the record.” He asked Powell whether he remembered his *Miranda* rights, and Powell nodded his head in the affirmative. The Fremont officers’ interview lasted about 80 minutes in total.

Over a defense objection, the court admitted and reviewed police reports that showed Powell had been read his *Miranda* rights on five prior occasions and had either invoked or agreed to waive them. Powell moved to suppress his confession. He did not contest that the Vallejo officers properly advised him of his rights, but he argued that he subsequently invoked his right to silence during their questioning when he said “I ain’t got nothing to say. Take me to jail and stuff.” The court found that Powell was properly advised of his rights, that he waived them, and that he did not subsequently invoke his right to remain silent.

The court also rejected Powell’s claims that his confession was coerced. It explained: “[T]he question is whether or not is it free and voluntarily? Gentlemen, I saw the interview. There’s nothing in my mind that shows that this officer coerced this interview. He was very gentle, quite frankly, with Mr. Powell and very accommodating, requesting. Do you need some water? You know, he’s rubbing on his shoulder. He’s talking about things, talking about you don’t want to go down for other people. He doesn’t raise his voice. He’s not at his throat. . . .” The court found under the totality of circumstances that Powell’s statement was freely and voluntarily given.

A jury convicted Powell of one count of murder and three counts of second degree robbery. This appeal timely followed.

DISCUSSION

I. *Miranda*

Under *Miranda*, if a suspect indicates in any manner during a custodial interrogation that he wishes to remain silent, the interrogation must cease. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 473–474; *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

Whether a defendant has invoked his right to remain silent is a question of fact that is determined in light of all the circumstances. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) But, to invoke the Fifth Amendment privilege to remain silent after it has been waived, the suspect must unambiguously and unequivocally assert his right to silence or counsel. (*Stitely, supra*, 35 Cal.4th at p. 535; *Berghuis v. Thompkins* (2010) ___ U.S. ___, 130 S.Ct. 2250, 2259–2260.) “Of course, such an approach may disadvantage suspects who, for emotional or intellectual reasons, have difficulty expressing themselves. [Citation.] However, a rule requiring a clear invocation of rights from someone who has already received and waived them ‘avoid[s] difficulties of proof’ [citation], and promotes ‘effective law enforcement.’ ” (*Stitely, supra*, at p. 535.)

The scope of appellate review on this point is well established. We accept the trial court’s credibility assessments and resolution of disputed facts and inferences, if they are supported by substantial evidence, but we independently review, based on the undisputed facts and those properly found by the trial court, whether the challenged statement was obtained in violation of the defendant’s *Miranda* rights. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128.)

Powell asserts that he unambiguously invoked his right to terminate questioning when he said, “I ain’t got nothing else to say about that. Put it like that, take me to jail and stuff. I already told y’all. You already believe them? Y’all believe him.” He did not. We have carefully reviewed the taped interview and are confident, as was the trial court, that Powell’s comment reflected his frustration with the officers’ questions and his attempt to avoid answering a particular question, not an unambiguous and unequivocal attempt to end the interview. (See *People v. Wash* (2000) 6 Cal.4th 215, 236 [reviewing court gives great weight to the trial court’s considered conclusion when it has viewed the same evidence]; see also *People v. Silva* (1988) 45 Cal.3d 604, 628–630 [suspect’s statement that “ ‘I really don’t want to talk about that’ ” was not an invocation of *Miranda* rights]; *People v. Williams* (2010) 49 Cal.4th 405, 433–434 [same, “I don’t want to talk about it”]; *People v. Ashmus* (1991) 54 Cal.3d 932, 968, 970 [“now I ain’t saying

no more” was not an invocation of the right to remain silent].) Powell places great significance on his view that Detective McCarthy either interrupted or followed his alleged invocation with the statement, “Well, let me ask you this.” But we do not. Viewed objectively (see *Berghuis v. Thompkins*, *supra*, 130 S.Ct. at pp. 2259–2260), Powell’s statement was by no means an unambiguous invocation of his right to terminate the interview. The taped interview shows that Powell simply continued talking after his “take me to jail and stuff” statement, and nothing in his demeanor or the context of the statements indicates he was calling a halt to the interrogation session.

B. Voluntariness

Powell also contends his confession was involuntary because it was induced by implied promises of leniency, coupled, apparently, with Sergeant Alexander’s empathetic and caring demeanor during the interview. We disagree.

A confession is involuntary, and therefore subject to exclusion at trial, when it is the product of coercive police activity. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) We consider whether, based on the totality of the circumstances, the facts show the defendant made the statement as a result of a free and unconstrained choice or “because his will was overborne.” (*People v. Memro* (1995) 11 Cal.4th 786, 827.) “Details of the interrogation may prove significant in deciding whether a defendant’s will was overborne. For example, courts may consider whether the police lied to the defendant. ‘While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness.’ ” (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.)

“ ‘It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, “[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest

course of conduct,” the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, ‘if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. . . .’ ” [Citation.] [¶] . . . ‘[The police] are authorized to interview suspects who have been advised of their rights, but they must conduct the interview without the undue pressure that amounts to coercion and without the dishonesty and trickery that amounts to false promise.’ ” (*People v. Holloway* (2004) 33 Cal.4th 96, 115 (*Holloway*)).

The burden is on the prosecution to prove by a preponderance of the evidence that the confession was voluntary. (*People v. Markham* (1989) 49 Cal.3d 63, 71.) We independently review the trial court’s determination that it did so in light of the record in its entirety, but “accept the trial court’s factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence.” (*People v. Richardson* (2008) 43 Cal.4th 959, 992–993, internal quotation marks omitted.)

There was no improper coercion here. It is no exaggeration to say that Sergeant Alexander came across more like a mentor than a police officer during the interview. He spoke about family, character, overcoming problems, accepting responsibility for wrongdoing, and becoming a better man. He urged Powell to “walk the righteous path,” to “do the right thing,” to “tak[e] control of your life.” He touched Powell gently on the leg and shoulder and said he was a good person who never intended for someone to die. “[O]n that day you made a bad decision. But . . . your decision was not as bad as the outcome. You’re not a killer.” He told Powell that he cared about him and his mother, and that he believed Powell was “put on this earth to excel and succeed in life. And, unfortunately, you’re not, you are making decisions that aren’t good up ‘til this point. This could be a turning point.” He urged Powell to help himself and “do what’s best for

you right now.” He invited Powell to think about a future life, family and career “when this is all said and done. . . .”

But, at no point during the interview did either officer expressly or impliedly promise Powell that he might not be charged with, prosecuted for, or convicted of the murder if he cooperated. They did not suggest that Powell could influence the decisions of the court or district attorney, but simply suggested that his truthfulness would be beneficial in an unspecified way. Indeed, Sergeant Alexander said he did not know what kind of charges would be brought and that those decisions were made by other people. Under the circumstances, the officer’s suggestion that it would be better for Powell to tell the truth and promptings to consider his future did not amount to a promise of leniency. (See *People v. Carrington* (2009) 47 Cal.4th 145, 174; *Holloway*, *supra*, 33 Cal.4th at pp. 115–116.)

Powell’s contention that the police officers improperly implied he was not fully responsible for the murder because he was a “victim of the circumstances” and did not intend for someone to get killed must also be rejected. It is entirely permissible for police to suggest possible explanations of the events and offer the suspect an opportunity to provide the details of the crime. (*Holloway*, *supra*, 33 Cal.4th at p. 115.) Moreover, any benefit to Powell that could be reasonably inferred from the substance of Alexander’s remarks was “merely that which flows naturally from a truthful and honest course of conduct, because the particular circumstances of a homicide can reduce the degree of culpability, and thus minimize the gravity of the homicide or constitute mitigating factors in the ultimate decision as to the appropriate penalty.” (*People v. Carrington*, *supra*, 47 Cal.4th at p. 174, internal quotation marks omitted.) Powell’s confession was not coerced by lies or false promises, but was free and voluntary.

Finally, Powell contends the trial court violated the hearsay rule and his rights under the confrontation clause when it considered prior police reports in evaluating his familiarity with *Miranda* advisements. We need not address the legal merits of this contention because, independent of the reports, the DVD of the interview establishes beyond any doubt that Powell’s confession was voluntary and that that he did not invoke

his right to remain silent. As Powell concedes, the question of the reports' admissibility is thus irrelevant.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.