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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUIS BONER,

Defendant and Appellant.

C064254

(Super. Ct. No.
SF108698A)

On June 21, 2008, defendant Marquis Boner--an 18 year old with no record of violence--shot Rigoberto Galaviz dead, as Galaviz was trying to stop defendant from fleeing from a robbery. Defendant was quickly captured, and confessed to the robbery and to shooting Galaviz. In securing defendant's confession, the interviewing detectives did not tell defendant that Galaviz was dead.

The jury found defendant guilty of murder, robbery, and discharging a firearm from a motor vehicle, and found true a robbery-murder special circumstance and firearm allegations.

(Pen. Code, §§ 187, 211, 12034, subd. (d), 190.2, subds. (a)(17) & (a)(22), 12022.53, subds. (b) & (e)(1).) The jury acquitted defendant of a second robbery, as well as allegations that he was a member of a criminal street gang and committed the crimes for the benefit of a gang, and rejected other firearms allegations. With the concurrence of the People, in light of the not-true findings on the gang charges, the trial court struck the firearm enhancements found true by the jury, and sentenced defendant to prison for life without possibility of parole for murder with special circumstances, and stayed determinate terms for the robbery and vehicle discharge counts (see Pen. Code, § 654). Defendant timely appealed.¹

On appeal, defendant contends his confession should not have been introduced as evidence because it was involuntary from its inception or, alternatively, became involuntary after the detectives lied to him about Galaviz's physical condition. As we will explain, our independent review of the record, including a DVD of the interrogation, shows defendant's confession was voluntary.

Defendant also contends the trial court improperly overruled foundational objections to gang-related material that had been downloaded from social networking websites. We conclude the trial court did not abuse its discretion in overruling the defense objections; further, in light of the acquittal on all gang-related charges, any error was harmless.

¹ The People had not sought the death penalty.

Accordingly, we shall affirm the judgment.

FACTS

The evidence showed defendant, his brother Antwaine Boner (Antwaine), and their companion, Anthony Moody (Moody), robbed a group of young women outside a bar on the night of June 20-21, 2008, and Galaviz was fatally shot trying to stop the robbers from fleeing the scene. All three robbers were apprehended nearby, with the murder weapon.²

The robbery of the women took place at a club in an unincorporated area of San Joaquin County, east of Stockton.³ Several women left the club after midnight, when a "tall African-American male" wearing a red jersey and displaying a revolver, accompanied by two other African-American men, robbed them of gold chains, money, and a cell phone, then fled. Galaviz tried to stop the robbers, and was fatally shot. One of the women identified defendant at trial as one of the robbers, and another woman had identified defendant in a field showup as "the one that took her necklace."

² Partial severance was granted for *Aranda-Bruton* reasons (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476]), and because the trial court did not want a two-jury trial, the prosecutor elected to try defendant first, separately. The charges against the codefendants had not been resolved by the time of defendant's sentencing, and are not revealed by the record.

³ We discuss selected details about an earlier robbery the same day, of which defendant was acquitted, *post*.

Soon after the shooting, not far from the club, peace officers stopped a car driven by defendant, whereupon defendant and Antwaine fled, leaving Moody to be arrested with the murder weapon, and leaving some loot in the car. Both defendant and Antwaine were soon captured. Later, defendant gave a detailed confession to the robbery and the shooting, a DVD of which was played for the jury, and which we discuss in detail in Part I of the Discussion, *post*.⁴

The defense argument at trial emphasized the burden of proof, and suggested defendant confessed while exhausted in order to protect his brother or Moody, and that the investigators had quickly and unreasonably made up their minds that defendant was guilty.

DISCUSSION

I

Confession

A. Standard of Review

The evidence about defendant's confession consists of the DVD of the interrogation and limited, undisputed, testimony by the lead investigator. Because there are no material factual disputes, we must review the denial of defendant's motion de novo. (See *People v. Maury* (2003) 30 Cal.4th 342, 404 (*Maury*).)

⁴ Efforts by the prosecution to convince the jury the robbery was gang related were unsuccessful, as the jury acquitted defendant of all gang-related charges. However, we discuss some of this evidence in Part II, *post*.

The People must demonstrate by a preponderance of the evidence that defendant's confession was voluntary. (*Maury, supra*, 30 Cal.4th at p. 404.) The California Supreme Court has summarized the relevant test in part as follows:

"A statement is involuntary if it is not the product of 'a rational intellect and free will.'" [Citation.] The test for determining whether a confession is voluntary is whether the defendant's 'will was overborne at the time he confessed.' [Citation.] "The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' [Citation.]" [Citation.] In determining whether or not an accused's will was overborne, "an examination must be made of 'all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.' [Citation.]" [Citation.]" [Citation.]

"A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence." (*Maury, supra*, 30 Cal.4th at pp. 404-405.)

B. The Interrogation

Detective Chanda Bassett testified she knew defendant had not slept in more than a day, and had been drinking. He had been given food at about 9:30 a.m. on June 21, 2008, his interrogation began at 1:50 p.m., and he was provided more food near the end of the interrogation, which ended about 4:00 p.m. that day. Defendant appeared tired, but did not appear to be under the influence, and he appeared to understand the questions posed, and stated he was not under the influence. He did rub

his wrists, perhaps because handcuffs (which were taken off before the interrogation began) can be uncomfortable. Bassett knew defendant was only 18 years old, and that his only criminal record was a misdemeanor hit and run.

The principal evidence at the hearing was the DVD of the interrogation itself. Without giving a line-by-line account, we provide sufficient detail to fully address defendant's claims.⁵

When Detectives Bassett and Hood entered the interrogation room, a well-lit room with a table and chairs, defendant smiled and answered questions about his name, address, age and other preliminaries. When asked about tattoos, he displayed his arm without hesitation and discussed the number "209" tattooed there, then described the numbers on his red jersey as signifying notable San Francisco 49er football players. He denied being under the influence and agreed, laughing, when one detective said, "You've been here for too long, unless . . . you smuggled some in[,]'" but defendant did say he had not slept since "Thursday night" and woke up around 10:00 a.m. the day before. He nodded when asked if he had graduated from high school.

Bassett read defendant his rights. (See *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].) She asked if he

⁵ The transcript used at the suppression motion was not the same transcript used at trial, because parts were redacted at trial for reasons unrelated to voluntariness. The parties quote from the transcript used at trial, and we do as well.

understood each right, and he nodded or said he did, before she asked him about the next right.

Defendant explained that the trio (himself, Moody and Antwaine) saw the keys in a car belonging to "Junior" and took the car, but then said they had dropped Junior off. When asked whether he had beaten Junior up and taken the keys, defendant laughed, stretched, and said, "No." The trio split a pint bottle of "Amsterdam" liquor, which made defendant "a little bit tipsy, but I wasn't drunk."⁶

When defendant said he did not hang out much with his brother, he stretched back in his chair and smiled again. Bassett teased defendant about Antwaine being better at a "Madden" video game, and defendant grinned. He seemed completely at ease.

When asked what happened when the car was pulled over, the following took place: [A., by defendant]: We ran. [Q., by Basset]: Who ran? [A.] I ran. My brother. Well, I ain't even going to beat around the bush. We were going to like rob some people or whatever. I just snatched the [inaudible] chain and then took some money and then just jumped in the car." When asked to explain, defendant said he walked up to a car, some women had money, and he snatched the money and some gold chains. Defendant gave more details, speaking softly, but clearly and directly.

⁶ Although defendant rested his chin on his hand at this point, he was paying attention and answering questions coherently.

The men had been drinking some more from the pint bottle in the parking lot, but had not finished it by the time they were pulled over. Defendant said he had "had a cool buzz" but was not falling-down drunk, and he chuckled. He first said Moody came out of the car, but Antwaine did not. When Bassett asked if Moody was the lookout, defendant said, "If that's what you want to call it" and laughed and shrugged when she said she was not trying to put words in his mouth.

When the police pulled the car over, defendant ran from the car, breaking away from an officer. Defendant laughed as he explained how a different officer "swooped" him up on a different street.

Defendant said the robbery was his idea. When Bassett thanked him for saving time by admitting the robbery, defendant chuckled. He initially denied committing an earlier robbery that night.

Defendant at first denied he had a gun or had seen a gun, even after Bassett told him that Moody had been captured with a gun in his waistband--a gun already identified by the robbery victims. But when she explained that Moody "failed big time with his task" and got caught with the gun, defendant admitted he had seen the gun before, and later said he had *held* the gun a couple of days before. When defendant told Bassett that Moody is "mental," he again chuckled and stretched.

When Detective Hood displayed a gun in a box, defendant identified it as a gun he had *shot* a couple of days before, in the air at a creek, but not *at* anybody. Then Hood told

defendant "both parties" had already been interviewed, and had been "very forthcoming." Further, he stated a gunshot residue test that had been given to defendant earlier (which purportedly would only detect powder for 24 hours) had come back "positive," showing defendant was the shooter, whereupon defendant expressed disbelief.

Hood said the victim had been grazed on the shoulder, "So no one's hurt. He's got a band-aid on his shoulder." Hood then said the detectives knew what happened, that Moody and Antwaine had talked, and he urged defendant to "Cut to the chase." Defendant immediately said: "Man, dude ran up to the car. He started, started swinging on me or whatever man" and when asked if he had fired only one time, defendant said he shot the man "Like once or twice probably."

After Hood said the robbery victims had described the robber with the gun as wearing a red jersey, and defendant laughed and said, "Wow[,] " Detective Bassett said, "You already admitted to doing the robbery," that it did not matter whether or not he had the gun and that "there's a point at which you can dig yourself into so big of a hole that we can't help you get out. Ok?" She praised him for having been "almost honest" and urged him to be fully truthful. Defendant then said, "Man, I asked for their money. And then, I guess they didn't want to put out, so I just, I put it in the girl's face" and he clarified that "it" meant the gun Hood had showed him. Defendant had known the gun was loaded.

Defendant explained that as he and Moody got into the car, "this guy runs up swinging on me" and speaking Spanish, so defendant shot him once or twice. He demonstrated how he used the gun with his right hand (despite being left-handed) and twisted around to shoot the man.⁷

When Bassett told defendant the detectives knew "a lot more" than he thought, defendant smiled. She asked him again about the earlier robbery, and as she and Hood provided more details about that incident, he smiled with dawning understanding and admitted there was a "Mexican guy" whose pockets he and Antwaine reached into, while defendant had the gun, and defendant said they got change and cigarettes from that man.

After a while, defendant admitted it was his gun and that he loaded it, and he had bought it for \$100 but it was probably worth more.

Later, defendant said he needed money for his son, and when asked what he thought would happen to him, defendant said he would "Just go to court and just let them know" and "do what I got to do and get out." Bassett suggested defendant write an apology letter. When defendant asked if his victim would be

⁷ Defendant expressed no hesitation in giving the detectives details, explaining that the man fell, that Moody gave him the gun before the robbery, and that he gave the gun back to Moody after the shooting. When defendant said the man he shot had struck him in the jaw, he said he was not hurt, chuckled, and rubbed his jaw.

"ok[,]” she said, “I’m going to go check on that right now. And then I will let you know. I’ll be right back.”

When defendant was alone, he began to write on the paper Bassett left him. Hood came in and asked if defendant wanted more food, and defendant said they were “some of the nicest cops I’ve ever seen.” He said he was hungry, did not need a “break of any type” and said, “I’m cool” and “Yeah, I got this to write. I just got to think for a minute.” Defendant was smiling and calm, and thanked the detectives for going to get more food.

For another half-hour, defendant was alone, writing diligently, before Hood brought food, for which defendant gave thanks. After Hood left, defendant ate and continued to write for a while, got up and stretched, ate some more, then continued to write.

At about 3:55 p.m., Bassett came in and Hood offered defendant more food, which defendant declined, and they laughed about onions. Defendant had written one letter to his “baby’s momma” and another to the shooting victim.⁸ Bassett read aloud defendant’s letter to the victim, as follows:

“You know I’m really sorry about what I did. When you’re under the influence and you need money and something to do to keep your family fed, you go all out and do whatever you can to make sure you see that that happens. I know you probably have a family of your own to take care of. And if they need to eat, you would make sure that they

⁸ Both of the apologies were introduced at trial. The reverse side of the letter to the victim states “I’m so sorry” in large block letters.

meet their needs. Everybody takes care of business in different ways because [people are] all not the same. The way I tried to take of mine was wrong, but I tried to find a wrong way out, but at the time, I felt it was right. But what I did could have made me never see my family again. And if I would have hit you in the wrong spot, both our families would have been missing us. But that's not what it's about. It's about me telling you that what I did was wrong and I'm really sorry. I know me telling you this probably won't mean shit to you, but the officer suggested it and I thought it would be a good idea. I know because I'm saying sorry won't make it right."

Bassett also read aloud defendant's letter to his son's mother, in part as follows: "I fucked up big time babe. I'm so sorry, but all I was doing was trying to make sure he get what he needs. But I guess I wasn't looking at the right picture. You're probably mad at me but it's ok. I [would] be mad if a nigga left me as young a parent,^[9] but you could handle it babe, and I know you could. I'm hoping to be out soon, but only the judge would say that. . . . I know your mom's going to be shocked to hear some shit like this happened to me. You better come visit me punk."^[10]

After clarifying a few more facts, and handcuffing him, the detectives told defendant the victim had died.

C. Trial Court's Ruling

The trial court ruled the confession was voluntary, because defendant was not intoxicated, there was no physical coercion or threats, and the fact defendant was tired did not prevent him

⁹ Here, Bassett and defendant laugh.

¹⁰ Here, Bassett asked if defendant called his son's mother a punk, he said yes, and both laughed.

from understanding and answering questions freely. As for the statement by Detective Bassett that "we can't help" if defendant dug himself into too big a hole, the trial court found the statement was not "a promise of any kind or a promise of leniency, nor do I find it to be a motivating factor in his confession. In fact, before that was said, he had already admitted to being the shooter."

The trial court also found the *Miranda* waiver was effective and that defendant had not been "softened up" in order to waive his rights, because the information elicited before the *Miranda* warnings were given "was mostly routine booking and statistical information. I don't find it to be a method of softening up.

[¶] The officer didn't trick or cajole him to give up his rights, there was no contact with him before the interview, and no one talked to him extensively in order to soften him up before the interview." The trial court found the use of deception was lawful because the lies were not the sort that would cause an innocent person to confess, and found that the suggestion to write an apology letter to the victim was not coercive.

D. Contentions on Appeal

Defendant raises three somewhat interrelated contentions about his confession. As we will explain, none persuades.

1. Defendant contends the detectives "softened him up" before obtaining *Miranda* waivers, thereby rendering those waivers ineffectual. We disagree.

In *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), after Honeycutt was arrested an officer spoke with him for a half-hour, denigrating the victim and trying to get Honeycutt to talk about the crime. *Miranda* warnings were not given until after Honeycutt agreed to waive his rights. (*Honeycutt, supra*, 20 Cal.3d at pp. 158-159.) The California Supreme Court in part found "the conversation-warning-interrogation sequence was intended to elicit a confession from the inception of the conversation." (*Honeycutt, supra*, at p. 159.) "When the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive . . . must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Id.* at pp. 160-161; see *Missouri v. Seibert* (2004) 542 U.S. 600, 611 [159 L.Ed.2d 643, 654] (plur. opn.) [reiterating *Miranda's* condemnation of practices likely to undermine free choice].)

Here, before the *Miranda* warnings were given, the detectives asked defendant questions about his age, address, family status, education, tattoos, and the numbers on his jersey. They also asked whether he was under the influence and when he last slept. Most of these questions were "routine booking questions and responses" that did "not render involuntary a later waiver of constitutional rights." (*Honeycutt, supra*, 20 Cal.3d at p. 159.) Others, like questions about defendant's education and jersey were innocuous.

Defendant characterizes them as insidious “‘rapport building’ questions[.]” It is true that Detective Bassett quickly established a friendly rapport with defendant, as they chatted freely and laughed or smiled together thereafter. But there was nothing incriminating about these preliminary questions, and they were not the sort of questions that would likely undermine a person’s free will.

Bassett then said she wanted to talk to defendant about the charges “but before I do that, I need to read you your rights. You probably heard them before, but we have to do them every time, ok?” Contrary to defendant’s suggestion, this statement did not undermine the subsequent warnings by lulling defendant into thinking they were unimportant. The DVD shows that defendant paid attention when Bassett read each warning and asked if defendant understood, and waited for defendant to nod or say he understood before proceeding to the next warning. Accordingly, we conclude the record does not support the claim that defendant did not understand and freely waive his *Miranda* rights.¹¹

2. Defendant contends the “array” of lies told during the interrogation rendered his confession involuntary. We disagree.

“[T]elling a suspect falsehoods regarding the status of the case against him is widely accepted.” (3 Ringel, Searches &

¹¹ Defendant cites law review articles criticizing techniques pertaining to *Miranda* warnings and waivers, but we apply the law as set forth by the Supreme Courts of the United States and California.

Seizures, Arrests and Confessions (2d ed. 2011) Voluntariness of Confessions and Admissions, § 25:8, pp. 25-38; see 2 LaFave, et al., Criminal Procedure (3d ed. 2007) Interrogation and Confessions, § 6.2(c), pp. 629-633.) "Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted." (*People v. Farnam* (2002) 28 Cal.4th 107, 182 (*Farnam*); see 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 69, p. 760.)

We agree with the trial court that the methods used by the detectives in *this* case were not of the sort that would force or induce someone to confess *falsely*, such as where officers threaten to hold a loved one unless the suspect talks. (See *People v. Steger* (1976) 16 Cal.3d 539, 550.)

The detectives said the gunshot residue test and eyewitness statements showed defendant was the shooter, and both Antwaine and Moody had told the detectives everything. Although apparently these statements were not true, we do not find that any of these statements, nor all of them together, would tend to cause an *innocent* person to confess.

Defendant contends that minimizing the victim's injury, as well as the statements that defendant "can help [himself] out" and "can dig . . . so big of a hole that we can't help you out," amounted to an improper offer of lenity if defendant confessed. We are not persuaded by this argument.

"In general, "any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession

and to make it involuntary and inadmissible as a matter of law.” [Citations.] In identifying the circumstances under which this rule applies, we have made clear that investigating officers are not precluded from discussing any ‘advantage’ or other consequence that will ‘naturally accrue’ in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.”

(*People v. Ray* (1996) 13 Cal.4th 313, 339-340; see *People v. Seaton* (1983) 146 Cal.App.3d 67, 74 (*Seaton*).)

Exhortations to tell the truth are not impermissible.

(*People v. Holloway* (2004) 33 Cal.4th 96, 115.) Nor is it improper for the police to emphasize the realities of a defendant’s plight. (See *Seaton, supra*, 146 Cal.App.3d at p. 74 [mention of parole hold simply a comment “on the realities of defendant’s position”]; *People v. Flores* (1983) 144 Cal.App.3d 459, 469 [“truthful and ‘commonplace’ statements of possible legal consequences, if unaccompanied by threat or promise, are permissible police practices”].) In this case, the various exhortations to defendant to confess were not inherently coercive, and there were no bargains. (See *Seaton, supra*, 146 Cal.App.3d at p. 74 [no implied promise of lenity where officer “told defendant the district attorney would make no deals unless all of the information defendant claimed to have was first on the table”]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203-1204; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28.)

Defendant cites two sister-state cases to support his claim that the detectives’ statement that the victim merely needed a band-aid was an implied offer of lenity. These cases are distinguishable.

In *State v. Ritter* (1997) 268 Ga. 108 [485 S.E.2d 492] (*Ritter*), an officer falsely told Ritter the victim was not seriously hurt by a blow to the head the day before, but just had a bad headache. (*Ritter, supra*, 268 Ga. 108-109 [485 S.E.2d at pp. 493-494].) The Georgia Supreme Court upheld the exclusion of the ensuing confession, *not because the lie was likely to cause an innocent person to confess*, but because of a state statute that provided a higher bar to the admissibility of a pretrial confession, specifically, a statute requiring that the prosecution show the statement was not “induced by another by the slightest hope of benefit or remotest fear of injury.” (*Ritter, supra*, at pp. 109-110 [485 S.E.2d at pp. 494-495].) In other words, the court looked at Ritter’s likely *subjective* understanding, and concluded he may have interpreted the “headache” lie as “an implied promise” that he would be charged, at most, with aggravated assault. (*Id.* at pp. 110-111 [485 S.E.2d at p. 495].) That is not the substantive standard we apply. We look at police deception *objectively*, to determine if it was of the sort likely to cause a false confession. (See *Farnam, supra*, 28 Cal.4th at p. 182.) Accordingly, *Ritter* is unpersuasive.¹²

¹² We note the Georgia Supreme Court also applied a different *procedural* standard, stating it would uphold the decision suppressing the confession unless “clearly erroneous.” (*Ritter, supra*, 268 Ga. at p. 109.) As stated, *ante*, we independently review the record in this case. (See *Maurry, supra*, 20 Cal.4th at p. 404.) We also note that the Georgia Supreme Court had previously *upheld* the admission of a confession after a defendant was falsely led to believe the victim was not dead,

Similarly, in *Mitchell v. State* (Ala. Crim. App. 1986) 508 So. 2d 1196 (*Mitchell*), after the police told Mitchell the victim had died of a heart attack, Mitchell said he entered the victim's residence to steal, had sexual intercourse with her, and when he left, she was alive, "sitting on her bed." (*Mitchell, supra*, 508 So. 2d at pp. 1197-1198.) The Court of Criminal Appeals of Alabama interpreted the police deception as an implied promise that Mitchell would not be charged with murder, and found the confession involuntary. (*Mitchell, supra*, at pp. 1199-1200.) As defendant himself notes, Alabama courts also suppress statements if the officers suggest "any hope" of favorable treatment. (See *Wallace v. State* (1973) 290 Ala. 201, 204 [275 So.2d 634, 636].)

Here, the detectives did not state or imply that if defendant admitted he shot the victim he would get lenient treatment because the victim had not been badly hurt. Instead, they employed a technique of minimizing the consequences of defendant's actions. We do not see that such conduct is likely to make an *innocent* person *falsely* confess.

Several cases have found that minimizing a victim's injuries is not of itself likely to undermine a person's free will and cause a false confession. (See *Eliacin v. State* (1978) 269 Ind. 305, 308 [380 N.E.2d 548, 550] [Eliacin "'knew or should have known that the nature of the gun wound was such that

under that same "clearly erroneous" standard of review. (*Cooper v. State* (1986) 256 Ga. 234, 235-236 [347 S.E.2d 553, 554-555].)

there was a very high probability that the victim would die'"]; *People v. Prude* (1977) 66 Ill. 2d 470, 477 [363 N.E.2d 371, 373-374] [two 16-year-old defendants not told victim died, but knew "they were being interrogated regarding an armed robbery in which [the victim] had been shot three times. It was clear a grave crime and not some minor violation was involved"]; accord *Commonwealth v. Friedman* (1992) 411 Pa. Super. 628, 639-640 [602 A.2d 371, 377] [the fact officers told Friedman the victim was merely in "grave condition" was not likely to cause an involuntary waiver of her *Miranda* rights, because she knew she had shot the victim in the neck].)

In this case defendant knew he had shot someone during an armed robbery, and knew he was being questioned about that incident. The fact he was told the victim only needed a band-aid was not the sort of deception that would tend to cause an innocent person to admit to the shooting. (See *Farnam, supra*, 28 Cal.4th at p. 182.)

3. Defendant contends the totality of the circumstances of the interrogation show his statements were involuntary. He reargues the facts and construes them in his favor, emphasizing his youth, lack of sleep, prior consumption of alcohol, use of deception by the detectives, and discomfort caused by hunger and the use of handcuffs. He concludes by saying he "will not belabor this issue further. This court knows an involuntary statement when it sees it."

We have watched and listened to the confession and we see and hear no involuntary statements. Although defendant was

fairly young and most likely tired, he spoke freely and easily with the detectives. Near the end of the interview, *after* his confession to having committed the robberies and having shot a man who tried to stop him, defendant was able to write two coherent apology letters, showing he was more than alert enough to understand what was happening. The gist of the letters did not contradict what he had told the detectives about his role in the offenses. He had eaten earlier, was provided with more food during the interview, and was not handcuffed during the interview. He laughed and agreed when Detective Bassett pointed out he could not be under the influence unless he had smuggled something into the jail.

Our independent review of the evidence confirms the trial court's conclusion that defendant voluntarily confessed.

II

Internet Materials

Defendant contends the trial court should have sustained his objections to material downloaded from the Internet that was introduced to show his connection to a gang. Anticipating the rejoinder that these materials will be deemed harmless because the jury acquitted defendant of gang-related charges, defendant asserts they were nonetheless prejudicial to him. We find no error, and conclude any error would be harmless.

A. Background

Defendant moved in limine to exclude any references to or documents from the Internet, on the grounds of hearsay, lack of

foundation, and undue prejudice (Evid. Code, § 352). These documents had been introduced at the preliminary hearing. At the in limine hearing, the prosecutor argued the foundation was that the documents had been downloaded from specified Internet websites, and "the defense can always make a weight versus admissibility argument." The defense objected that anyone could have authored the documents and posted them on the websites, thus they were "unduly prejudicial and unreliable." The trial court reviewed the transcript from the preliminary hearing (at which the trial court judge had presided, sitting as a magistrate), and overruled the defense objections, which were renewed at trial and again overruled.

At the preliminary hearing, Detective Bassett had testified she searched for "mainly" the names of the defendants to find their MySpace or MocoSpace profiles. She did not know who created those profiles or who could have modified the captions under the photographs she found. She did not need passwords to access the web pages. When Bassett's Internet-search techniques were being explored by the defense, the magistrate pointed out that "the only thing that came off those web pages were the photographs and the photographs are picture[s] of him. [¶] So I don't see the technique so much as relevant . . . the photographs are what they are. It doesn't matter really who put them up there, it's him, at least that's what the evidence shows."

The defense replied that the *captions* under some photographs may have been posted by somebody else. Some

photographs from Antwaine's MocoSpace page show him hooded or with a bandanna over his face, with the captions "tyme to get paid!" and "Give me the loot!," others make reference to the "Crip" gang, and one photograph shows him holding what looks like a revolver. But defendant does not describe any purportedly incriminating or inflammatory captions pertaining to *his* photographs.

At trial, Bassett testified along the same lines as her preliminary hearing testimony, stating she checked social networking sites on the Internet for sites associated with defendant, his brother Antwaine, and Moody. She found a "MocoSpace" site, similar to a "MySpace" site, for defendant, and other sites associated with Antwaine and Moody, containing gang references. During extensive cross-examination, the defense established she had not documented her methods, she could not show who created those web pages, and that she was aware of cases of fraudulent social networking.

At trial, the People's gang expert in part relied on the Internet photographs to support his opinion that defendant, Antwaine, and Moody were gang members, although there was other evidence on the point as to each. The gang expert described *non-Internet* photographs of defendant wearing a red bandanna and flashing the Blood gang hand sign by making the letter "B." Similarly, in some Internet photographs, defendant can be seen wearing red and flashing the letter "B," and the captions

included "my little bra,"¹³ "dauntouchable" (in red letters) and "holla if u real i dont fuck wit fake mothafuckaz."

The jury rejected *all* gang-related charges.

B. Analysis

Defendant contends the photographs from the Internet lacked foundation, and he also contends the captions associated with the photographs were hearsay.

A photograph is a "writing" that may be authenticated by "the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is[.]" (Evid. Code, §§ 240, 1400.) Generally, a photograph may be "authenticated by testimony or other evidence 'that it accurately depicts what it purports to show.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 747 [videotape case].) "Circumstantial evidence, content and location are all valid means of authentication." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383; see *People v. Smith* (2009) 179 Cal.App.4th 986, 1001-1002; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372-1373.) After the trial court makes a preliminary finding that sufficient facts exist to authenticate a document, "the authenticity of the document becomes a question of fact for the trier of fact." (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262; see *People v. Garcia* (1988) 201 Cal.App.3d 324, 328-329.)

¹³ "Bra" is a synonym for "bro" in this context.

A trial court's ruling on authentication is reviewed for an abuse of discretion. (*People v. Tafoya* (2007) 42 Cal.4th 147, 165; *People v. Daugherty* (2011) 199 Cal.App.4th Supp. 1, 5-6.)

Relying largely on *People v. Beckley* (2010) 185 Cal.App.4th 509 (*Beckley*), defendant contends no adequate foundation was shown in this case. Beckley's girlfriend, Fulmore, had provided alibi testimony on his behalf, and had denied she associated with a gang. To impeach her, the People introduced "a photograph purportedly showing Fulmore flashing" a gang sign, along with testimony that the photograph had been downloaded "from Beckley's home page on the Internet Web site MySpace." (*Beckley, supra*, 185 Cal.App.4th at pp. 513-514.) Acknowledging it was undisputed that the "face" in the photograph was Fulmore's, the court held that, absent testimony the photograph *had not been doctored*, and absent testimony precluding the possibility that Beckley's page had been hacked, the trial court erred in admitting the photograph. (*Beckley, supra*, at pp. 515-516.)

As we now explain, we do not fully embrace the reasoning of the *Beckley* court. Credible testimony that a photograph accurately depicts a person is substantial evidence the photograph is what it purports to be. The proponent of a writing is not required to disprove all possibility of alteration and forgery, but need only make a preliminary showing the writing is what it purports to be. "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn

regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.)

In *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437 (*Valdez*), the court upheld the admission of MySpace documents, finding an adequate foundation for admissibility was established by Valdez's photograph, greetings addressed to him, and by the apparent relationship to others in a comments section. (*Valdez, supra*, 201 Cal.App.4th at pp. 1434-1435.)

"[T]he trial court could conclude that particular items on the page, including a photograph of Valdez forming a gang signal with his right hand, met the threshold required for the jury to determine their authenticity. The contents of a document may authenticate it. [Citation.] Valdez does not dispute he is the person depicted in the gang signal photograph. Other 'content' in the photograph, specifically, the deliberately posed position of Valdez's hands, was precise and definite to suggest an intentional rather than inadvertent or accidental hand gesture. Nothing on the rest of the page undermined an initial impression the photograph accurately depicted Valdez making a gang hand sign instead of some other signal or motion. Rather, the writings on the page and the photograph corroborated each other by showing a pervading interest in gang matters, rather than an anomalous gesture. Importantly, this consistent, mutually reinforcing content on the page helped authenticate the photograph and writings, with no evidence of incongruous elements to suggest planted or false material." (*Valdez, supra*, 201 Cal.App.4th at p. 1436.)

The *Valdez* court distinguished *Beckley*, noting the "pervasive consistency of the content of the [web]page" present in Valdez's case. (*Valdez, supra*, 201 Cal.App.4th at p. 1436.)

The fact pattern of *Valdez* is similar to this case, as is the "pervasive consistency," where the challenged photographs

are many, include the codefendants, and show defendant wearing red clothing and making a deliberate gang sign. Although in *Valdez* the MySpace page was password-protected for posting and deleting content (see *Valdez, supra*, 201 Cal.App.4th at p. 1436), here Detective Bassett also testified that she did not need a password to *look* at the pages, but did not testify as to whether a password was needed to post and delete content. But this point is not dispositive; rather, it goes to the *weight* of the evidence. The proponent need not conclusively negate the possibility of alteration.¹⁴

"[T]he proponent's threshold authentication burden for admissibility is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic." (*Valdez, supra*, 201 Cal.App.4th at p. 1437.) To the extent that the court in *Beckley* held otherwise, we disagree. Here, the People met this burden.

Defendant also contends the *captions* were hearsay. But he does not describe any captions associated with *his* photographs that were admitted "to prove the truth of the matter stated." (See Evid. Code, § 1200.)

¹⁴ Defendant emphasizes that "Anyone can put anything on the Internet." (*St. Clair v. Johnny's Oyster & Shrimp, Inc.* (S.D. Tex. 1999) 76 F.Supp.2d 773, 775; see *Beckley, supra*, 185 Cal.App.4th at pp. 515-516.) But here, the photographs were authenticated by the testimony identifying the men depicted therein. Identifying who *posted* them was not essential.

In any event, even if all the captions could be deemed inadmissible hearsay, and all of the Internet photographs should have been excluded, any error was harmless.

Defendant admitted his intent to rob the women at the club, and admitted he personally fired a gun at a man who was trying to stop the robbers. The challenged evidence was unimportant in relation to the charges of which defendant stands convicted.

Further, this was no runaway jury. A qualified gang expert opined that Moody and defendant were Blood gang members, and that Antwaine was a Crip gang member, and that in San Joaquin County, the two gangs "get along and coexist[.]" Yet the jury rejected all gang charges. The other charged robbery was at the same bar earlier that same night. Defendant confessed to that robbery, and that victim's testimony and pretrial statements corroborated that confession. Yet the jury acquitted on this robbery count. The rejection of all the gang charges and one robbery charge in the face of strong evidence shows that this jury took its job seriously, and was not inflamed by any of the gang evidence, including the Internet evidence.¹⁵

¹⁵ Defendant asserts the acquittals show the jury must have found he "was taking onto himself acts committed by" others. (AOB 5) To the contrary, it is well-settled that an acquittal on one charge does not change the strength of the evidence on another, which might have been due to lenity or other reasons. (See *People v. Lewis* (2001) 25 Cal.4th 610, 655-656; *People v. Brown* (1985) 174 Cal.App.3d 762, 769; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657.) More likely the jury concluded the men were not acting for the benefit of either gang, but rather for personal reasons. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Therefore, any error was harmless because it is not reasonably probable the exclusion of this evidence would have made a difference. (*People v. Lucas* (1995) 12 Cal.4th 415, 468; *Beckley, supra*, 185 Cal.App.4th at p. 517.)

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

HOCH, J.