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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE ANTHONY SIMMONS,

Defendant and Appellant.

D059180

(Super. Ct. No. RIF146865)

APPEAL from a judgment of the Superior Court of Riverside County, Jean Pfeiffer Leonard, Judge. Affirmed.

INTRODUCTION

A jury acquitted Andre Anthony Simmons of first and second degree murder (Pen. Code, § 187),¹ but convicted him of the lesser included offense of voluntary manslaughter (§ 192). The jury also convicted him of shooting at an inhabited motor vehicle (§ 246). As to both crimes, the jury found true allegations Simmons personally

¹ Further statutory references are also to the Penal Code unless otherwise stated.

used a firearm in the commission of them (§ 12022.5, subd. (a)). Conversely, as to both crimes, the jury found false allegations Simmons committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)). The jury similarly acquitted Simmons of active gang participation (§ 186.22, subd. (a)). The trial court sentenced Simmons to 15 years in prison.

Simmons appeals, arguing the trial court violated his constitutional rights by allowing the prosecution to use statements in its case-in-chief obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We conclude no *Miranda* violation occurred and affirm the judgment.

BACKGROUND

Prosecution Case

While conducting unrelated video surveillance, Riverside County sheriff's deputies saw Simmons and Russell Burns standing in front of a barber shop by a white car. Tyrek Lara, Daunte Gross, and Jeffrey Sherman came out of an adjacent liquor store and walked to the car. Simmons and Lara got into a verbal altercation, followed by a physical altercation. Simmons's wife walked in between them, pushed them apart, and told them to stop fighting. Lara, Gross, and Sherman then got into the white car and started to leave. Lara got into the driver's seat, Sherman got into the front passenger seat and Gross got into the back passenger seat.

Simmons and Burns walked past the liquor store toward a parking lot. Simmons took off his sweater and handed it to Burns. Simmons then pulled out a handgun and started pacing. Lara drove toward Simmons and tried to hit him. Simmons stepped aside

as the car passed and he ran toward the driver's side. Lara stopped the car because there was another vehicle in its path. Simmons ran up to Lara's car, exchanged words with him, pointed a handgun at the driver's side window and fired three shots.

Sherman got out of the car and ran away. Lara tried to get in the backseat to get away. Gross also tried to get away. Simmons immediately ran toward the rear passenger side door and pointed the handgun at Gross and Lara. Simmons then ran to his own car, got into the driver's seat and sped away.

Meanwhile, Gross got out of the rear passenger side of the car, ran to the driver's side, pushed Lara's legs into the backseat, got in, and drove toward a hospital. Lara died within minutes from multiple gunshot wounds. The incident was captured on a videotape viewed by the jury.

Police detectives subsequently arrested and interviewed Simmons.² He told them that he, his wife, and his sister-in-law went to the barber shop in his wife's car. While Simmons was having his hair cut, he saw a man in a hoodie walk out of the barber shop.

After Simmons's barber finished his haircut, the two went outside and talked. As they were talking, the man in the hoodie drove up in a white car. There were two other people in the car. Simmons did not know the men. He heard them cussing, but did not pay attention to them. As he was fiddling with his cell phone, the man in the hoodie grabbed him and punched him in the eye.

² The information Simmons provided in the interview was inconsistent with the events depicted on the videotape and tended to show Simmons intentionally lied to the detectives, indicating consciousness of guilt.

Simmons and the man started fighting. Then, one of the man's companions hit Simmons and Simmons started fighting with both of them. Neither man indicated why he was fighting with Simmons.

The man in the hoodie started to pull Simmons toward the white car. Simmons wrestled free and attempted to leave, but the man in the hoodie swung at him again and their fight continued. At some point, the fight stopped and the man and his companions ran and got into the white car. As Simmons started walking away, the white car followed him in reverse and intercepted him. The man in the hoodie, who was the driver, pointed a gun out of the window. Simmons ran into the man's arm, knocked the gun out of the man's hand, and picked up the gun. Simmons then saw the back passenger retrieve another gun. He thought the back passenger was going to shoot him. He tensed up and turned his head and the passenger's gun went off two or three times before jamming.

Simmons ran to his wife's car, got in and took off. Simmons said he did not remember what he did with the gun he picked up, but denied ever firing it. He subsequently denied ever touching it despite previously stating he picked it up.

Defense Case

Simmons testified³ that several months before the shooting, he encountered Lara in a store and Lara called him a derogatory name. After the two men exchanged insults for a few minutes, Lara pulled out a gun from his waistband and pointed it first at

³ Simmons's trial testimony contradicted his earlier statements to the detectives in all material respects. His trial testimony more closely matched the videotape evidence and, based on the jury's verdict, it appears the jury believed his trial testimony.

Simmons and then at Simmons's infant daughter, who was in a stroller. Simmons then stepped in front of the stroller. Lara placed the gun back into his waistband, backed out of the store, and said he would catch Simmons when he came out of the store. Although Simmons did not know it at the time, a few months earlier Lara had reportedly shot up a house where the father of Simmons's sister's baby was staying.

On the day of the shooting, Simmons went to the barber shop with his wife and her sister to pay for a haircut he got the day before. He was standing outside with his barber when Lara, Sherman and Gross drove up. The three men got out of the car and started insulting Simmons. Simmons responded in kind.

The three men then went into the liquor store. When they came out, they started insulting Simmons again and Simmons again responded in kind. As they started walking back to their car, Sherman commanded Lara to fight Simmons and the two men started fighting.

After Simmons's wife broke up the fight, the men continued to exchange insults. Someone suggested the men take the fight somewhere else and someone responded, "All right." Then, as Simmons started walking to the parking lot, his barber walked with him and said he thought the men had a gun. Simmons also thought the men had a gun.

Expecting the fight to continue, Simmons took off his sweater and handed it to the barber. He then walked with his wife to their car. He was afraid his wife or her sister would be hurt if the men shot at him. So, he took out his gun from his front pocket, put it in his back pocket and started walking back to the barber. As he did, Lara drove toward him, called him a name, and tried to hit him with the car. He jumped out of the way, and

thinking Lara and his companions had a gun and were going to kill him, he pulled the gun from his pocket, went up to Lara's car and started firing.

He then noticed Gross getting out of the car. He thought Gross was going to come towards him, so he ran over to Gross and pointed his gun at him. He did not fire the gun because Gross got back into the car and he saw that Gross did not have a gun. After that, Simmons ran toward his car, jumped in and drove off.

He admitted he lied to the police detectives when they interviewed him after his arrest. He denied shooting Lara for revenge or for any reason other than self-protection.

The parties stipulated that, when Lara was a juvenile, he admitted committing spousal abuse after he was accused of hitting his girlfriend several times while she was holding their 11-month old daughter. His girlfriend had a scratch on her right cheek, a quarter inch laceration on the right side of her face, and other lacerations inside her upper and lower lip.

The parties further stipulated Simmons was previously arrested for possessing a loaded firearm in a vehicle. He subsequently pleaded guilty to a misdemeanor violation of carrying a loaded firearm in a public place.

DISCUSSION

I

Before Simmons provided the police detectives with his statement, one of the detectives started to give Simmons *Miranda* advisements. He told Simmons, "[Y]ou have the right to remain silent. Anything you say can and will be used against you in a court of law." He asked Simmons if he understood and Simmons said, "Not really."

Simmons clarified, " 'Cause I don't understand what's this about. So, it's like, how could I really understand it."

The detective pointed out that understanding the purpose of the interview and understanding *Miranda* rights were two different things and Simmons needed to understand his *Miranda* rights before the interview could begin. The detective then repeated, "[Y]ou have the right to remain silent. Anything you say can and will be used against you in a court of law. Do you understand that?" Simmons responded, "I can't really say that I do." The detective asked him what he did not understand and Simmons replied, "Just basically, everything about it 'cause um, you know, I understand what you're saying, but it, it don't make sense to me."

The detective decided to give the next advisement and then return to the first one. He informed Simmons, "[Y]ou have the right to talk to a lawyer . . . and have him present with you while you are being questioned. Do you understand that?" Simmons responded, "I do, but I don't." Simmons continued, "So, it's like, what would I be questioned for? Why would I need a lawyer?" The detective started to explain that the *Miranda* advisements were a procedural requirement. Simmons interjected, "No, I understand, that's what I'm saying" and told the detective he was missing his point.

The detective again tried to explain, "I have to tell you this." Simmons responded, "Yeah, you know what I'm saying? But I'm not understanding. Don't misunderstand. I'm understanding what you're telling me, but I'm not understanding that. You know what I'm saying? It's just like you says, it's a procedure."

The detective restarted the *Miranda* advisements for a third time. "Okay, you have the right to remain silent . . . do you understand that you have that right as a person to remain silent? That's what that says." Simmons responded, "Basically, like, if I don't want to talk, I don't have to talk."

Notwithstanding this clear demonstration of understanding, Simmons continued to equivocate and the detective continued to attempt to determine precisely what Simmons did not understand so the detective could provide clarification. Simmons eventually acknowledged he understood what the detective was reading to him, but stated he did not understand the purpose for doing it.

Around this point, a second detective joined the interview and took over the task of providing Simmons with *Miranda* advisements. He first told Simmons they wanted to talk to him about the shooting at the barber shop. He then informed Simmons, "[Y]ou have the right to remain silent. Do you understand that?" Simmons equivocated once more, saying "I do, but I don't."

The detective asked Simmons what he meant by that and Simmons replied, "Like I understand what, what you're saying, but I don't understand the purpose of it." The detective reiterated that Simmons was under arrest for the shooting at the barber shop and they wanted to talk to him about the shooting.

The detective again advised Simmons of his right to remain silent and asked him if he understood that right. Simmons again equivocated. The detective then explained, "It's pretty, pretty simple, you have the right, you don't have to talk to us today unless you want If you want to tell us your side of the story, we're [going to] listen to it, okay?"

And, and it does mean something to us, but that's up to you. Anything you say [may be] used in court. Do you understand that?"

Simmons replied, "I'm not understanding." The detective asked him what about the advisement he did not understand. Simmons said, "What's the purpose of it? What's, I don't, I'm not understanding."

The detective then continued with the *Miranda* advisements informing Simmons, "[A]nything you say [may be] used against you in court. Do you understand that?" Simmons responded, "I understand it, but I don't" The detective clarified, "If you decide to tell me your side of the story, okay, because we already talked to the other people out there, okay? Whatever you say [may be] used against you, okay?" Simmons said, "I know this" The detective continued, "It [may be] used to help you. It depends on what you tell us, okay? Do you understand that?"

Simmons once again stated, "I understand it, but I said I don't understand the purpose." The detective responded, "Well, the purpose is because we're doing an investigation. You have a right to the presence of an attorney before and during any questioning. Do you understand that?"

Simmons asked, "What's that stand for?" The detective answered, "It's pretty easy. That means that you can have an attorney before or during any questioning and that's your right. You understand that, right? If you cannot afford an attorney, one will be appointed free of charge before any questioning if you want. Do you understand that?" Simmons responded, "I do understand."

The detective then asked Simmons whether, keeping his rights in mind, he wanted to talk to them about the shooting. Simmons stated the detectives could ask him questions.

The second detective asked Simmons what prompted the fight and Simmons denied being in a fight with anyone. The detective expressed frustration at Simmons's denial, informed him the incident had been recorded, and told Simmons he just wanted to know what led to the fight and what happened afterwards. Simmons responded, "Ah, probably just have to come back, talk to me a different day. If not, then I don't know what else to say." The detective said, "Okay, well, this is your opportunity." Simmons replied, "I'm not, I'm not comprehending anything right. So,"

The detective told Simmons that they just wanted to hear the truth about what happened. Simmons responded, "Ah, you'll get the truth. I'm saying, I can't, I can't tell you nothing if I can't comprehend right now. That's what I'm saying." The interview then continued with Simmons providing the version of events related in the prosecution's case.

II

A

Simmons moved in limine to exclude his statements to the detectives because they were not knowingly, intelligently, and voluntarily made as he did not understand the *Miranda* advisements and asked to conduct the interview on a different day. After reading the transcript and listening to a recording of the interview, the trial court denied

the motion, finding the defendant had understood the advisements and impliedly waived them.

Simmons contends the trial court's failure to exclude the statement violated his federal constitutional rights and requires reversal of his conviction. We disagree.

B

"[T]o counteract the coercive pressure inherent in custodial surroundings, *Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. [Citation.] After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. [Citation.] Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. [Citation.] Critically, however, a suspect can waive these rights. [Citation.] To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst* [1983] 304 U.S. 458" [Citation.] [¶] "The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence.' [Citations.] In addition, '[a]lthough there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was [voluntary,] knowing [,] and intelligent under the totality of the circumstances surrounding the interrogation.' [Citation.] On appeal, we conduct an independent review of the trial court's legal determination and rely upon the trial court's

findings on disputed facts if supported by substantial evidence." (*People v. Williams* (2010) 49 Cal.4th 405, 425.)

"The totality of the circumstances approach 'permits—indeed, it mandates— inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the [defendant's] age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.' " (*People v. Johnson* (2010) 183 Cal.App.4th 253, 293.)

Here, the totality of the circumstances surrounding the detectives' interview with Simmons fully supports the trial court's determination Simmons understood his *Miranda* rights. At the outset of the interview, Simmons stated he had graduated from high school and was taking college courses in the administration of justice field. He also acknowledged he had experience with the criminal justice system and had previously received *Miranda* advisements.

Although there is some indication in the record Simmons had not slept much the day and evening before the interview, the record does not show the absence of sleep affected Simmons's comprehension. Simmons never indicated lack of sleep was muddling his thoughts and none of his remarks to the detectives during the interview suggested he lacked the intellectual capacity to understand the *Miranda* advisements. To the contrary, the detailed, self-serving lies he told the detectives about the incident indicate he was well able to comprehend the advisements.

In addition, after receiving clarification of his right of silence, he demonstrated his understanding of the right by accurately restating it in his own words and, after receiving clarification of his right to counsel, he unequivocally stated he understood this right. His continual claims of lack of understanding, considered in their entirety, did not relate to the content of the advisements. Rather, they related to the purpose of the advisements and, more particularly, why the detectives were giving them to him.

The totality of the circumstances also fully supports the trial court's determination Simmons impliedly waived his *Miranda* rights. Once the detectives completed giving the *Miranda* advisements and specifically informed him he was under arrest for a shooting, Simmons told them they could ask him questions. After they challenged his initial claim that he had not been in a fight, he suggested they talk to him on a different day because he could not comprehend anything correctly; however, he did not ask to end the interview, ask for counsel, or stop talking. Instead, he continued answering their questions, intentionally portraying himself as an unsuspecting victim of a random attack by unknown assailants.

As the trial court correctly determined Simmons understood and impliedly waived his *Miranda* rights, we conclude the trial court did not err in refusing to exclude Simmons' statements to the detectives. (*People v. Johnson, supra*, 183 Cal.App.4th at pp. 293-295.) Given our conclusion, we need not address Simmons's arguments regarding prejudice or the application of the defensive acts doctrine.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.