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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ADAM LEE LOPEZ, Defendant and Appellant.	E052294 (Super.Ct.No. FMB008569) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Ronald A. Jakob and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Adam Lee Lopez appeals from his conviction of attempted murder of a police officer (Pen. Code,[1] §§ 664, 187, subd. (a)) with related enhancements. He contends the trial court erred in (1) denying his motion to exclude evidence of his pretrial statement to the police, (2) refusing to instruct the jury on the lesser included offense of attempted voluntary manslaughter, and (3) giving a flight instruction to the jury. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

In October 2006, defendant lived at a compound in Joshua Tree with his mother, his half brothers, James and Johnny Van Doiron, Rick "Rocco" Kennedy, and Dawna King. On the afternoon of October 26, defendant got into an argument with James. Defendant accused Johnny of impersonating him and cashing his unemployment or disability check without his permission. In an unrelated incident a few months earlier, defendant had shot out the windows of James's car, and in retaliation, James had broken defendant's window. There was ill will between defendant and James, but they had never had any physical altercation in the past.

Eventually, defendant left the compound with his girlfriend, Tonya Campbell. James parked his car inside the fence at the house and locked a chain around the gate. Defendant's mother called the police because defendant had broken the front window of the house. The police took the mother's statement and left.

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

After the police left, James was sitting talking to his mother when he saw car lights approaching. A car stopped at the locked gate, and James asked who was there. Campbell identified herself, and defendant began yelling at James and calling him names. James threatened to "kick [defendant's] ass." Defendant had broken his ankle and was wearing a cast. He did not make any threat toward James, but he said something like, "'What, are you going to beat up on a handicap?'"

James left and eventually drove into a neighbor's driveway to wait for his girlfriend. While he was waiting, he heard a car approaching and could see that it was a sheriff's patrol car driving with its headlights off. James tried unsuccessfully to flag down the car.

The patrol car had six-foot-long reflective decals on its sides and a light bar on the roof. Deputy Adrian Garcia testified that he had his headlights on. The patrol car was equipped with a computer screen and dashboard illumination, which provided sufficient light to the interior of the vehicle that a person could identify the occupant as an officer.

Deputy Garcia did not see anyone trying to flag him down. He saw a car in front of him with its brake lights on, and he saw someone get out of the passenger side. He heard a shot, his passenger side window shattered, and he hit the gas. He heard a second shot and saw defendant holding a shotgun. He was struck in the hand and leg by shotgun pellets and glass fragments. His vehicle was hit in the front bumper, passenger side window, and back window. Birdshot can kill a person.

King testified that Campbell had oiled a shotgun that evening. Earlier that day, Campbell had asked King to watch Campbell's child, saying "[j]ust that it was no place

for a kid, whatever they were going to do." King had driven up to the locked gate at the compound when she saw defendant, who said, "Now's not a good time." She did not see where defendant went after that. Campbell drove up and stopped behind King's car. The passenger door of Campbell's car opened, and King heard popping sounds. A police car flew up, and Campbell took off. King testified that the headlights of the patrol car were on.

Detective[2] James Porter interviewed defendant after his arrest. The interview was videotaped and played for the jury. Defendant told Sergeant Porter that he had argued with his brother that night. His brother threatened him, so he and Campbell left the house. He went back to get some clothes, but the gate was locked, so they left again. He told Campbell he was going to get his keys to open the gate.

Defendant walked to the back of the compound and saw Campbell driving with another car following her. He thought it was James chasing her, and he shot at the front of the car. He was not trying to hurt or kill anyone; he just wanted to scare his brother. He did not know until his third shot that he was firing at a police officer. He has poor eyesight, and he was not wearing his glasses.

An optometrist testified that defendant's eyeglasses indicated defendant's uncorrected vision was 20/200, which qualifies as legally blind in California, and that defendant would have had great difficulty seeing at night without his glasses.

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[2] Porter was a sergeant at time of trial.

The jury found defendant guilty of attempted murder of a police officer (§§ 664, 187, subd. (a)) and found true the allegations that defendant personally used a shotgun (former § 12022.53, subds. (b), (c)) and that a principal was armed with a firearm (former § 12022, subd. (a)(1)). Defendant pleaded guilty to an additional charge of being a felon in possession of a firearm (former § 12021, subd. (a)(1) and the jury found him not guilty of a charge of conspiracy to commit murder (§ 182, subd. (a)(1).) The trial court found true the allegations that defendant had sustained three prior felony convictions. (§ 667.5, subd. (b).) The trial court sentenced defendant to a total term of 33 years to life in prison.

III. DISCUSSION

A. Admission of Pretrial Statement

Defendant contends the trial court erred in denying his motion to exclude evidence of his pretrial statement to the police. He argues the police improperly continued questioning him after he invoked his right to an attorney.

1. Additional Background

Defendant moved before trial to exclude evidence of his extrajudicial statement. At the hearing, Detective Porter testified, and the trial court stated it had reviewed the DVD of his interview.

When defendant's police interview began, Detective Porter read defendant his *Miranda*[3] rights. Defendant said he understood his rights. Detective Porter asked defendant if he was willing to talk, and the following colloquy occurred:

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

"[Detective Porter] Q[:] Okay cool. With these rights in mind are you willing to talk to me?

"[Defendant] A[:] About what?

"[Detective Porter] Q[:] Well about the shooting that happened last night. We can stop whenever you want.

"[Defendant] A[:] I don't know even know what you're talking about but [unintelligible][4] wait until an attorney's present or something.

"[Detective Porter] Q[:] Well that's up to you. I mean that's a decision you've got to make.

"[Defendant] A[:] Yea. Yea cause I don't know what you're talking about a shooting.

"[Detective Porter] Q[:] Well like I said it's your call you've got to be clear about this. You have the absolute right to talk to us or not talk to us.

"[Defendant] A[:] Yea.

"[Detective Porter] Q[:] Um but, but we're legally required to make sure we have absolute clarification. Do you want to talk with us? Do you not want to talk with us? Do you want to wait for an attorney? The decision falls on you. We obviously want to hear your side of the story. I mean I know you're in a bad position and everything but you know it is what it is now.

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[4] Detective Porter testified that defendant had said, "I guess I'll wait until an attorney is present or something." The trial court found that was what defendant had said.

"[Defendant] A[:] Yea.

"[Detective Porter] Q[:] So.

"[Defendant] A[:] Well is my girlfriend being charged for anything?

"[Detective Porter] Q[:] Right now she is. Because right now we're in a position where we only have that one side of the story so far. I'm in no, I'm definitely not, I don't want you to feel like we're putting any pressure on you. I mean the decision is yours to talk to us or not. Obviously an incident happened last night with one of our deput[ies]. That's serious stuff. I mean like I said it is what it is. The drama's over. What happened happened and now it's time for us to, to clean it up so to speak. Knowing what I know right now I don't think . . . you thought you we[re] shooting at the cops. Now I know you're in a position where you feel like, you're probably feeling like man I'm screwed no matter what happens right now but there's not much you can do to make this worse for yourself. Now that being said again that you, you have to make the decision whether or not you want to talk to us. Right now both you and your girlfriend are both charged with attempted murder. We've heard what she has to say. And you know we've heard what the deputy has to say.

"[Unidentified officer] Q[:] It's attempted murder of a police officer too. Which is an additional [unintelligible].

"[Detective Porter] Q[:] We'll leave it up to you. Obviously I don't think[—]

"[Defendant] A[:] She didn't do nothing[.]

"[Detective Porter] Q[:] Well hold on nobody's putting any pressure on you. Haven't the cops been decent with you up here so far?

"[Defendant] A[:] Yea. Yea.

"[Detective Porter] Q[:] And we're going to continue to be. I mean but again if you're going to talk to us the law requires that we protect your rights. Right? The law requires that if you want to talk to us it's something that you want to do freely, voluntarily and I'm not going to[,] you know[,] if you feel like you said you think you want to wait for an attorney or whatever the case is[,] that's up to you. Now all I can do is encourage you that we obviously want to hear the other half of this. But that's a decision that you've got to make, not us. So what do you think?

"[Defendant] A[:] Can I take a couple of minutes to think about it?

"[Detective Porter] Q[:] Sure, absolutely. Just remember that we'll never know your side of this unless, unless you're the one to tell us. Right? We'll step out and let you think about it. What do you think?"

The deputies left for two or three minutes. When they returned, defendant said, "Yea I'll talk to you."

"[Detective Porter] Q[:] Huh?

"[Defendant] A[:] Yea I'll talk to you.

"[Detective Porter] Q[:] You'll talk to me? All right."

Defendant moved before trial to suppress his statement to the police. The trial court reviewed the videotape of the interview, and Detective Porter testified at the hearing on the motion. The trial court ruled that defendant had not unambiguously requested an attorney and noted that Detective Porter had not been pushy or coercive. The trial court found that after defendant had said, "I don't even know what you're

talking about, but I guess I'll wait until an attorney is present or something," Detective Porter sought to clarify defendant's statement, and defendant eventually agreed to talk. The trial court denied the motion, explaining, "In view of the detective's statements, mannerisms, and admonishments, coupled with the defendant's responses, it is clear to this court that the defendant effectively, freely, voluntarily, and knowingly waived his constitutional rights to an attorney and did not invoke *Miranda* protections.

2. Standard of Review

In reviewing the trial court's ruling on a motion to suppress a defendant's extrajudicial statement, we accept the trial court's resolution of disputed facts and inferences and its evaluation of credibility if they are supported by substantial evidence. We independently assess from the facts properly found whether the defendant's statement was illegally obtained. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.) We apply federal constitutional standards in reviewing a defendant's claim that his statements were elicited in violation of *Miranda.* (*People v. Crittenden* (1994) 9 Cal.4th 83, 129-131 (*Crittenden*).)

3. Analysis

a. General principles

If a suspect indicates in any manner, at any time before or during questioning, that he wishes to remain silent, interrogation must cease. (*Miranda*, *supra*, 384 U.S. at pp. 473-474. Once a suspect invokes his rights, that decision must be "'scrupulously honored.'" (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 360 (*Peracchi*).)

"[N]o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. [Citation.]" (*Crittenden, supra,* 9 Cal.4th at p. 129.) However, if the suspect's invocation of his rights is ambiguous, "the police may continue questioning for the limited purpose of clarifying whether he or she is waiving or invoking those rights." (*Peracchi, supra,* 86 Cal.App.4th at p. 360, fn. omitted; see also *People v. Williams* (2010) 49 Cal.4th 405, 427-428 [citing with approval *United States v. Rodriguez* (9th Cir.2008) 518 F.3d 1072, 1080, which held that with respect to waivers at the commencement of interrogation, officers should clarify a defendant's ambiguous statements].) We evaluate objectively, from the point of view of the interrogating officer, whether a suspect's response to an admonition was ambiguous. (*People v. Williams, supra,* at p. 428.)

b. Defendant's statement was ambiguous

Defendant contends the trial court erred in concluding that his statement was ambiguous. We disagree. In a number of cases in California and other jurisdictions, courts have found conditional statements to be ambiguous. (See, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 264, 268 [the defendant did not invoke his right to counsel when he stated he understood his *Miranda* advisements but added, "'maybe I should have an attorney'"]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526-527 ["'I just thinkin', maybe I shouldn't say anything without a lawyer . . . .'" was ambiguous]; *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070-1072, "'I think I would like to talk to a

lawyer,'" was ambiguous]; *U.S. v. Clark* (D. Me. 2010) 746 F.Supp.2d 176, 179-180 ["'I guess this is where I have to stop and ask for a lawyer, I guess,'" was ambiguous]; *Burket v. Angelone* (4th Cir. 2000), 208 F.3d 172, 198 ["'I think I need a lawyer'" was ambiguous]; *Tucker v. State* (1997) 228 Ga.App. 321 [491 S.E.2d 420, 421-422] ["'I guess I need a lawyer because I wasn't even there when that happened,'" was ambiguous]; *Taylor v. State* (Ind. 1997) 689 N.E.2d 699, 703 ["'I guess I really want a lawyer, but, I mean, I've never done this before so I don't know,'" was ambiguous]; *Henness v. Bagley* (6th Cir. 2011) 644 F.3d 308, 320 ["'I think I need a lawyer'" was ambiguous].)

Here, defendant used similar conditional language: "I *guess* I'll wait until an attorney is present *or something*." (Italics added.) We conclude the trial court did not err in determining that defendant's statement was ambiguous.

c. The officers did not continue interrogating defendant

Defendant contends that the detective's questions after he made his statement amounted to impermissible interrogation. More specifically, he asserts the detective "used a coercive questioning technique to compel a *Miranda* waiver."

Although officers may ask clarifying questions in response to a defendant's ambiguous statement, "they may not persist 'in repeated efforts to wear down his resistance and make him change his mind.'" (*Peracchi*, *supra*, 86 Cal.App.4th at p. 360, fn. omitted.) Here, the record, set forth above, speaks for itself. After defendant made an ambiguous statement, Detective Porter did nothing more than seek to clarify whether defendant indeed wished to invoke his right to counsel. Defendant, not the detective,

initiated the discussion about whether defendant's girlfriend would be charged, and the detective's response to that issue was appropriate. We conclude the detective did not coerce defendant to waive his rights, and the trial court did not err in admitting his statement into evidence.

B. Refusal to Instruct on Lesser Included Offense

Defendant contends the trial court erred in refusing to instruct the jury on the lesser included offense of attempted voluntary manslaughter.

1. Additional Background

Defense counsel requested the trial court to instruct the jury on the lesser included offense of attempted voluntary manslaughter. Defense counsel argued that sufficient evidence supported the instruction, specifically, defendant's statement that he believed James was driving the car behind Campbell's car, and James had threatened to "kick his ass" earlier that day. The trial court stated it did not believe the evidence supported the instruction and refused the defense request. The trial court did instruct on the lesser offenses of assault with a firearm on a police officer and assault with a firearm and on lawful defense of another.

2. Analysis

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Avila* (2009) 46 Cal.4th 680, 704.) The trial court must instruct the jury on a lesser included offense "if there is substantial evidence that only the lesser crime was committed." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) """'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence

that a reasonable jury could find persuasive.’”’” (*People v. Benavides* (2005) 35 Cal.4th 69, 102.)

Voluntary manslaughter is a homicide “upon a sudden quarrel or heat of passion.” (§ 192, subd. (a).) The heat of passion must be preceded by adequate provocation. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) “‘The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively.’” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) Whether the provocation was adequate under that objective test is ordinarily a question of fact for the jury. (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705.) “However, where the provocation is so slight or so severe that reasonable jurors could not differ on the issue of inadequacy, then the court may resolve the question. [Citations.]” (*Ibid.*) In *Fenenbock*, the court listed examples of legally adequate provocation, including murder of a family member, a sudden and violent quarrel, or infidelity of a spouse, and examples of legally inadequate provocation, including simple trespass and simple assault. (*Ibid.*)

Defendant contends the following evidence of provocation was sufficient to support an instruction on voluntary manslaughter. He had argued with James in the late afternoon of October 26, 2006. James had threatened physical violence against him, and defendant had called James names. Defendant had an injured ankle and wore a cast, meaning he could not defend himself in a physical altercation. That evening, defendant drove back to the compound and angrily yelled at James to open the locked gate.

Defendant told the police that later, after dark, he saw another car following Campbell's car, and he believed his brother was chasing Campbell. He shot at the front of the second car to scare his brother and rapidly fired two more shots. Defendant argues, "[T]he jury could have concluded that [he] was out of his mind with rage at this brother. His state of rage increased when he thought his brother was chasing Ms. Campbell. This provoked [him] to react rashly and without reason in starting to shoot. [Citations.]"

Defendant relies on *People v. Breverman* (1998) 19 Cal.4th 142, in which the court held that the evidence was sufficient to support an instruction on voluntary manslaughter. In that case, a group of young men, who had earlier fought with others in front of defendant's house, returned to seek revenge. The group taunted defendant and hit his car with bats and clubs, and the defendant first fired shots at the men from his living room window and then walked outside and fired a second round of shots as the men were fleeing. (*Id.* at pp. 163-164.) In our view, the present case is nothing like *Breverman*, where the court held the jury could reasonably infer that the defendant feared a mob of armed men would force their way into his house after battering his car in the driveway within feet of the entrance to the house.

In contrast to *Breverman*, in *People v. Moye* (2009) 47 Cal.4th 537, the court held that a Saturday evening fight between the defendant and the victim, even when combined with the victim's act of kicking the defendant's car on Sunday morning, would not create heat of passion in an ordinarily reasonable person, causing him to kill the victim. (*Id.* at p. 551.) The court further held there was no substantial evidence that the defendant

subjectively killed under the heat of passion when the defendant testified he had acted in self-defense by swinging a baseball bat to fend off the victim's advances. (*Id.* at p. 554.)

This case is far more similar to *Moye* than to *Breverman.* Here, as in *Moye*, there was no evidence sufficient to support a finding that any conduct of James would create heat of passion in an ordinarily reasonable person, and no evidence to support a finding of subjective heat of passion. We conclude the trial court did not err in refusing to instruct on voluntary manslaughter as a lesser included offense.

C. Flight Instruction

Defendant contends the trial court erred in giving a flight instruction. He contends the instruction permitted the jury to draw an irrational inference of guilt.

1. Additional Background

The trial court instructed the jury with CALCRIM No. 372, as follows: "If the defendant fled immediately after the crime was committed, that conduct may show he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." Defendant did not object to that instruction.

2. Forfeiture

The People contend that defendant has forfeited his challenge to the flight instruction because he did not make a timely and specific objection in the trial court. (*People v. Bolin* (1998) 18 Cal.4th 297, 326.) The People have nonetheless addressed the merits of defendant's challenge, and to forestall any claim of ineffective assistance of

counsel, we will also address the merits. (See *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151.)

3. Standard of Review

"On review, we examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden of defendant's guilt beyond a reasonable doubt." (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.)

4. Analysis

The giving of a flight instruction in an appropriate case is statutorily required: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given." (§ 1127c.)

In *People v. Paysinger*, *supra*, 174 Cal.App.4th at pp. 30-32, the court held that the language of CALCRIM 372 complies with that statutory mandate and rejected the defendant's argument that the instruction deprived the defendant of the presumption of innocence and the requirement of proof beyond a reasonable doubt. Similarly, the court

in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1159, rejected a due process challenge to CALCRIM No. 372 identical to defendant's challenge.

Although defendant contends *People v. Hernandez Rios*, *supra*, was wrongly decided, we find his argument unpersuasive. Our Supreme Court repeatedly rejected challenges to a substantially similar version of the flight instruction in CALJIC No. 2.52. (See, e.g., *People v. Lynch* (2010) 50 Cal.4th 693, 761, overruled on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610, 636-643; *People v. Brady* (2010) 50 Cal.4th 547, 567, and cases collected; *People v. Kelly* (2007) 42 Cal.4th 763, 792 [finding that the flight instruction did not impermissibly dilute the requirement of proof beyond a reasonable doubt]. We agree with the reasoning and conclusion of those courts and hold that CALCRIM No. 372 is constitutionally valid.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.