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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.

GABRIEL TRAMMEL RODRIGUEZ,

Defendant and Appellant.

E052896

(Super.Ct.No. RIF131993)

OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge.

Affirmed as modified.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Gabriel Trammel Rodriguez appeals from his conviction of second degree murder through the use of a deadly weapon (Pen. Code,¹ §§ 187, subd. (a), 12022, subd. (b)(1)) and petty theft (§ 484), with enhancements for a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)) and a serious prior felony conviction (§ 667, subd. (a)). Defendant contends (1) he was deprived of his constitutional rights by the admission of his extrajudicial statement, and (2) the trial court erred in imposing and staying an enhancement for a prior serious felony rather than striking the enhancement. The People correctly concede error in sentencing, and we will order the sentence modified accordingly. We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

In 2006, John Blanco lived in an apartment on 11th Street in Riverside. Blanco suffered from severe arthritis, among numerous other physical ailments; he was in constant and severe pain, and he used a cane. Richard and Anna Paulino lived in the upstairs apartment, and their son, Jesse Paulino,² lived in a converted garage next to Blanco's apartment. Richard testified that Blanco made a lot of noise in the evenings by coughing, hollering, and pounding on the walls; they believed it was his way of dealing with the pain.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Because these witnesses share a last name, we will refer to them herein by their first names for convenience and clarity, and not intending any disrespect.

Most mornings, Richard had coffee with Blanco; however, Richard did not see Blanco after the first week of August 2006. A day or so after last seeing Blanco, Richard saw defendant in Blanco's apartment for the first time. Defendant told Richard that he lived there with Blanco and that Blanco was in a mental hospital and had asked defendant to watch the apartment.

The Paulinos began to notice a bad odor emanating from Blanco's apartment. Defendant told the Paulinos and others that he had been spraying for roaches. Richard began to see other people, including a man named John Moody, in Blanco's apartment. He saw defendant and others removing things from Blanco's apartment and garage and loading them into Blanco's van.

Maria Elias, who worked for a home support service for elderly and disabled persons, cleaned Blanco's apartment every Tuesday and Friday. She did not clean his bedroom when he was feeling weak and was lying down. On August 11, 2006, she did not see Blanco when she cleaned. A young man who was there took her time sheet into Blanco's bedroom and returned it to her signed. On August 15, a young man let her into the apartment, and again, she did not see Blanco. She went to the Laundromat, and when she returned, her signed time sheet was on the kitchen table. On August 18, she found a note taped to Blanco's front door telling her she was not needed that day.

The Paulinos and another friend of Blanco called the police several times to report that he was missing, that strangers were present in his apartment, and that a bad smell was emanating from the apartment. Each time, when the police responded, they found

nothing suspicious. Finally, when the police responded to another report on August 18, 2006, they detained six people, including defendant and John Moody, who were at the scene. The officers patted defendant down and found a key to Blanco's van and Blanco's identification card. Defendant told the officers he lived there with Blanco and John Moody, and defendant gave the officers permission to search the apartment. He said he had Blanco's permission to drive the van and that Blanco was in the hospital. The officers also searched Moody and found a key to Blanco's apartment.

Inside the apartment, the officers found a bedroom door secured with a padlock and sealed shut with tape and towels. Fire department personnel entered the apartment and located Blanco's body under the bed surrounded by foam padding.

In early August 2006, defendant was a transient, living in downtown Riverside. Defendant told Donna Moss, a homeless woman who had befriended him, that he was the caretaker for an elderly man. Defendant asked Moss for help in pawning some of the man's possessions because defendant did not have a driver's license. They went together to pawn some DVDs and tools on August 11, 2006, and defendant gave Moss \$20 for her help. On August 14 and 15, 2006, the same pawnbroker purchased some tools and a television set from Moody for a total of \$450. Moody gave the 11th Street address as his address. Defendant told a friend that the man who lived in the apartment had gone to Hawaii and had given defendant permission to write checks from his account. A briefcase found in a field contained Blanco's checkbook with carbon copies of written checks, including five checks made out to Moss in amounts ranging from \$75 to \$150.

Bank surveillance videotapes showed Moss in the bank. Defendant's clothing, a briefcase containing paperwork bearing defendant's name, and a bag bearing defendant's name were found in Blanco's garage. Defendant said he got the van from his mother and that his lover and employer let him use the van while the man was in a psychiatric hospital for evaluation.

The pathologist who performed the autopsy testified that Blanco had died from blunt impact and cranial cerebral trauma, anywhere from several days to several weeks before the body was discovered. His body was so decomposed it had to be identified through comparison with previous X-rays. Blanco had at least three skull fractures and a facial bone fracture. The injuries were consistent with having been inflicted by a cane. There was no trauma anywhere other than the head, and there was no indication Blanco had been stabbed. An entomologist testified that the stages of development of flies and maggots found on Blanco's body were consistent with his death occurring within a 24-hour period around August 10, 2006.

A woman who had spent time with defendant while they were homeless testified that he or another acquaintance had given her a cane on August 17, 2006. She had earlier told police officers that defendant gave her the cane. She had never seen him driving a vehicle before, but that day he was driving a white van. At trial, she testified that defendant had told her he got the van from his roommate. She had earlier told a police officer defendant said he got the van from his mother.

Detectives Greg Rowe and David Smith interviewed defendant on August 19, 2006; most of the interview³ was recorded on a DVD, which was played for the jury.

Defendant told the officers he and Moody had gone to visit Jesse in his garage apartment on August 8, 2006. They heard Blanco making noises and beating himself in some kind of religious ritual; Blanco was naked, and his blinds were up. Blanco asked who they were, invited them in, and said they could spend the night. He asked if they wanted to be his roommates for \$300 each. Defendant spent that night with Jesse.

Defendant said he was going to spend the night of August 9, 2006, with Jesse in the garage, but he could not sleep because Blanco was making so much noise. He went to Blanco's apartment about 2:00 a.m. on August 10 and knocked on the door; Blanco asked who he was and what he wanted. Blanco gave him a pill, and he fell asleep on Blanco's living room floor. Defendant stated there had been no violence between him, Moody, or Blanco. After the detectives suggested Blanco might have tried to hurt him, defendant claimed he had been raped. Defendant appeared to be crying, but Detective Rowe saw no tears. Defendant later claimed Blanco gave him something that made him sleepy; he went crazy and beat Blanco, but he did not remember what he beat Blanco with because he blacked out. He was coming down from drugs, and he asked Blanco for something to help him sleep. Blanco gave him something that made him "incapacitated to a certain degree for [a] second." When he awoke, his pants were down, and Blanco

³ Because of an equipment malfunction, the DVD cut off before the interview was finished.

was engaged in anal intercourse with him while whispering satanic curses in his ear. At first, defendant was too sleepy to care about what was happening, and he did nothing. Defendant then grabbed a cane from the couch and beat Blanco with it all over his body. Blanco was bleeding from the mouth and nose. Defendant kicked him in the testicles. Defendant then took a shower and left. He knew Blanco was alive because Blanco had made it to his room, had kicked the door closed, and was yelling for help. Defendant claimed he had been bleeding from his anus after the rape.

Defendant later told the detectives he had broken Blanco's arm with the cane. He then masturbated on top of Blanco, ejaculated into his hand, threw the semen in Blanco's face, and kicked him in the testicles after taking a shower. Defendant cleaned the cane and gave it to a homeless person. Blanco was bleeding a lot, but defendant said he did not kill Blanco; he claimed Moody had stabbed Blanco, and he said he found the knife Moody had used with drops of blood on it. He saw stab wounds on Blanco's body after Moody left, and Moody admitted stabbing Blanco. Defendant and Moody pawned Blanco's property and split the money.

Detective Rowe wrote a report of what defendant said during the unrecorded portion of the interview. Defendant said he wrapped Blanco's body in blankets and put it in the closet. When the body started to smell, he and Charles Sanders, whose nickname was Wolf, put the body under the bed. They cut foam from the mattress, put the foam and a piece of plywood over the body, put the mattress on top of that, and sealed the

room with plastic and tape and put a lock on the door. Defendant and Moody pawned some of Blanco's property and split the proceeds.

The jury found defendant guilty of second degree murder and petty theft. In bifurcated proceedings, defendant admitted the prior conviction allegations. The trial court granted the prosecutor's motion to dismiss an allegation under section 666 based on a recent amendment of the statute.

For the murder conviction, the trial court sentenced defendant to 15 years to life and doubled the term because of the prior strike. The trial court imposed a consecutive one-year term for the weapon use enhancement as to the murder count, a consecutive term of four years for the petty theft, and a five-year consecutive term for the serious prior felony enhancement as to that count.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Admissibility of Defendant's Extrajudicial Statement

1. Additional Background

Before trial, defendant moved to suppress his statement to the detectives on the ground that he had not understood or expressly and intelligently waived his *Miranda*⁴ rights. The trial court reviewed the relevant portion of the videotape of the interview and found that defendant had understood his rights and had knowingly and voluntarily waived them.

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436, 479 (*Miranda*).

Before the interview, Detective Rowe told defendant to wake up and sit up and offered him some water. Detective Rowe said he and Detective Smith needed to talk to defendant and stated: “We’re just as tired as you.” Defendant said: “Instead of asking me questions, why don’t I just tell you what I think happened, what I” Detective Smith responded they would let him do that after Detective Rowe, who had apparently left the room, came back. Detective Rowe returned and told defendant they wanted to talk to him about what had happened at Blanco’s house over the past week or so. Defendant replied: “Hey, like I, I told him, the best way for, just like you know, is for me to just tell you what I can tell you [¶] . . . [¶] . . . instead of the questions.”

Detective Rowe obtained personal information from defendant and then said: “Okay, um, what I’m gonna do since you have been detained so long, um, is I’m gonna read you your *Miranda* [r]ights. Oh, have you ever been arrested before? Okay, so you know what those are, and then we’ll basically talk about what uh, what it is that you wanna talk about oh, at, at the house, okay?” Defendant responded, “Okay,” and the detective read him his rights and asked if he understood. Defendant responded in the affirmative.

The following colloquy then took place:

“ROWE: Okay. Um, just start about how it is that you came about at that house. How? When did you start living at the house and just, you, you tell, you said you wanted to just tell me the story. You tell me the story, and then we’ll go from there, and we’ll, I’ll have some questions for you.

“[DEFENDANT]: Um . . . the . . . fact that you read me my *Miranda* [r]ights changes some things that I would of said.

“ROWE: Okay. What

“[DEFENDANT]: Which means, let me tell, because like uh, um, . . . I’m not gonna perjure myself or it’s not [¶] . . . [¶] . . . perjury. You know what I mean, but

“ROWE: I, I don’t want

“[DEFENDANT]: . . . no, no, no what it is called, uh

“ROWE: I don’t want you to perjure yourself

“[DEFENDANT]: Not perjure myself uh

“ROWE: . . . because I don’t, you

“[DEFENDANT]: . . . not perjury, oh, based on what, but it is called, um, what it is when you like put yourself in a situation where you can get yourself in trouble?

“ROWE: Okay. Well, the, the thing, the thing is, [defendant], is um, I think you know pretty much what’s going on at that house.

“[DEFENDANT]: Um hmm.

“ROWE: And, and what it was that we found at the house, and there’s got to be some explanation for the house.

“[DEFENDANT]: Yeah.

“ROWE: And you’re the one that’s staying at the house, and if we don’t get an explanation from you, then it doesn’t look good for you. Okay, so, and if, we need to

find out what your side of the story is because right now, you know all we've got to go on is we have a, a dead person at your house. You know, so I mean I'm not telling you anything that you, I'm sure you don't already know. Um, so that's the way you got[t]a look at it. We want to, I mean if, if you're not the one that did it, then, then we need, we need . . . an explanation. Or, if you are the one that did it, we need an explanation of, of why, why it was that you did it. Because, otherwise, what we see is

“[DEFENDANT]: Did it like one out of respect. . . .”

Thereafter, defendant gave his account of the events to the detectives as recounted above.

In ruling on defendant's motion to exclude his statements, counsel for the parties and the trial court agreed that when defendant said he did not want to perjure himself, he meant to say he did not want to incriminate himself. Defendant's counsel argued that the officers should have clarified defendant's intent to determine whether he waived his rights.

2. *Forfeiture*

The People contend that defendant has forfeited most of his challenges to the admission of his confession, specifically, his contention that the waiver of his constitutional rights was involuntary because of police trickery and his prior drug use, tiredness, and psychiatric problems, because he did not raise those grounds in the trial court. The sole basis for defendant's pretrial motion was that the prosecution failed to prove defendant expressly and intelligently waived his *Miranda* rights. To preserve a

challenge to the admission of evidence, a party must make a timely objection or motion to exclude or strike ““so stated to make clear the specific ground of the objection or motion.”” (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171; see also Evid. Code, § 353, subd. (a).)

In *People v. Michaels* (2002) 28 Cal.4th 486 (*Michaels*), the defendant raised on appeal the issues of the voluntariness of his confession based on the alleged police tactic of softening him up through ingratiating conversation and of his incapacity to waive his rights based on his having been under the influence of methamphetamine. (*Id.* at p. 511.) With respect to the capacity argument, our Supreme Court merely stated that the “defendant’s failure to raise this issue in the trial court bars him from asserting it on appeal.” (*Ibid.*) With respect to his voluntariness argument, the court stated: “In the trial court, defendant unsuccessfully argued that his confession was inadmissible because he did not waive his *Miranda* rights to counsel and to remain silent. The issue he now raises is different—he claims that even if he did waive his *Miranda* rights, that waiver was involuntary. The determination whether a waiver is voluntary is one entrusted to the trial judge, based on the totality of the facts and circumstances, including the background, experience and conduct of the accused. [Citation.] [¶] Because defendant failed to raise the voluntariness issue at trial, he cannot raise it now. [Citation.] Defendant contends here that the issue is preserved for appeal by his trial court objection to the admissibility of the confession on the ground that he did not waive his *Miranda* rights. Because such an objection does not ordinarily lead to the presentation of evidence of defendant’s

background, experience, and conduct—evidence essential to determining whether a waiver was voluntary—we reject that contention.” (*Id.* at pp. 511-512.)

The circumstances of the present case are indistinguishable from those in *Michaels*. Defendant’s sole contention in the trial court was that the prosecutor did not prove an explicit waiver of his *Miranda* rights. The issues he attempts to raise on appeal are different, and evidence relevant to those issues was not before the trial court. Our review of the trial court’s ruling “of course, is limited to the evidence before the court when it heard the motion. [Citations.]” (*People v. Hartsch* (2010) 49 Cal.4th 472, 491.) We conclude defendant has forfeited the issue of the voluntariness of his confession by failing to raise the issue in the trial court. (*Michaels, supra*, 28 Cal.4th at pp. 511-512; see also *People v. Scott* (2011) 52 Cal.4th 452, 482 [because the trial court had no “opportunity to resolve material factual disputes and make necessary factual findings,” the defendant’s arguments raised for the first time on appeal were forfeited].)

In his reply brief, however, defendant argues unpersuasively that he did not forfeit his right to argue all the relevant circumstances concerning the voluntariness of his statements. He argues that those circumstances include his preexisting psychiatric issues, and he asserts he had been diagnosed with bipolar disorder in 1999, and he receives SSI (supplemental security income) benefits. That information, which appears only in the probation report prepared after defendant’s conviction, was not before the trial court at the time it ruled on his motion. Other information had in fact previously been before the court concerning defendant’s mental health issues, but that information is hardly helpful

to defendant's argument on appeal. Defendant underwent an evaluation under section 1368 to determine his competency, during which all three medical evaluators concluded he was competent and probably malingering. Dr. Harvey Oshrin stated his opinion that "this man is malingering mental illness in the effort to obstruct the legal process and avoid prosecution. He presented with a conglomeration of symptoms and quasi symptoms which do not constitute any recognized psychiatric entity." Dr. Oshrin further elaborated: "Indeed his performance was reflective of a lay man[']s impression of how mentally ill persons behave." Dr. Patricia Kirkish stated her opinion that "[a]lthough the defendant attempted to present himself as significantly disabled, there were no objective data to support the presence of an acute psychiatric condition. His presentation of psychiatric symptoms was considered to be feigned and consisted solely of his refusal to participate legitimately in the interview and his insistence he is a prophet. It was therefore opined that his presentation was not legitimate and represented an effort to secure alternative placement in a hospital. It was therefore this evaluator's opinion that no objective evidence of a psychiatric disability that would impair his judicial competence was found." Dr. Craig Rath stated that "the defendant was essentially uncooperative and . . . there is insufficient information to overcome the presumption of competency. The defendant didn't demonstrate any symptoms apart from anger, although paranoia cannot be ruled out." Thus, the evidence of defendant's mental condition that was before the trial court decidedly did not weigh in favor of a finding of involuntary waiver.

Defendant next argues that he was under the influence of drugs when he made his statement, because the day he was detained he had been in Blanco's garage getting high on methamphetamine. At the hearing on his motion to suppress, however, defendant did not present any evidence of his drug use; the evidence to which he now refers was later elicited at trial. We do not consider subsequent testimony in reviewing the propriety of the trial court's ruling on the motion to suppress. (*People v. Hartsch, supra*, 49 Cal.4th at p. 491.)

The remaining factors on which defendant relies—the circumstances of his possible fatigue and his prior experience with having been read his *Miranda* rights—were before the trial court when it ruled on defendant's motion to exclude. The transcript of the police interview shows that defendant had previously received *Miranda* warnings, not when that had occurred. Defendant's reliance on the dates of his arrest set forth in the probation report is therefore misplaced. With respect to defendant's fatigue, Detective Rowe asked defendant, before the interview began, to sit up so he would not fall asleep and stated that the detectives were "just as tired as you." However, defendant responded readily to Detective Rowe's questions and even attempted to gain control of the situation by volunteering to tell the story in his own words. Nothing about his responses indicates he was too sleepy to give a voluntary waiver of his rights. We presume the trial court properly took the factors before it into consideration under the totality of the circumstances. We agree with the trial court that those factors do not indicate that defendant's implied waiver of his *Miranda* rights was involuntary.

3. *Necessity for Clarifying Questions*

Defendant argues that once he made an ambiguous statement invoking his right to silence, the officers could continue questioning him only for the limited purpose of clarifying whether he was invoking his right. However, our Supreme Court has held that “the ‘stop and clarify’ rule does not apply to ambiguous assertions of the right to silence. ‘Faced with an ambiguous or equivocal statement, law enforcement officers are not required . . . either to ask clarifying questions or to cease questioning altogether.’”

(*People v. Martinez* (2010) 47 Cal.4th 911, 948.)

In *People v. Peracchi* (2001) 86 Cal.App.4th 353, on which defendant relies, the court held that the defendant explicitly invoked his right to remain silent when he repeatedly stated that he did not want to talk and said: “I don’t want to discuss it right now.” Thus, the court found error in admitting into evidence the statements that ensued when the officer continued questioning him. (*Id.* at pp. 358-359.) Here, defendant made no similarly unambiguous and unequivocal statement invoking his rights. Moreover, even before Detective Rowe read defendant his rights, defendant showed an eagerness to talk to the detectives: “Instead of asking me questions, why don’t I just tell you what I think happened,” and “Hey, like I, I told him, the best way for, just like you know, is for me to just tell you what I can tell you . . . [¶] . . . [¶] . . . instead of the questions.” We find no error in the admission of defendant’s statements.

B. Sentencing Error

Defendant contends the trial court erred in imposing and staying a five-year enhancement under section 667, subdivision (a) as to the petty theft count, because that crime was not a qualifying felony. (§§ 667, 1192.7.) The information alleged petty theft with a prior conviction under sections 484 and 666. After the jury found defendant guilty of petty theft, defendant admitted the prior conviction allegation in bifurcated proceedings. However, the trial court then granted the prosecutor's motion to dismiss the section 666 allegation, so the crime became a misdemeanor petty theft conviction. (§§ 484, 490, 666.) The People therefore properly concede error in the imposition of the enhancement.

The People also observe that because the underlying crime was a misdemeanor, the four-year prison sentence the trial court imposed for that count was unauthorized and must be corrected. (See, e.g., *People v. Smith* (2001) 24 Cal.4th 849, 854.) We agree, and we will order the judgment modified to reflect a misdemeanor sentence for the petty theft count. We will also order the abstract of judgment corrected accordingly.

IV. DISPOSITION

The trial court is directed to modify the abstract of judgment to delete reference to the petty theft count and to forward the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

CODRINGTON

J.