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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.

EDGAR GARCIA,

Defendant and Appellant.

E054104

(Super.Ct.No. FVA900137)

OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

Stephen M. Lathrop, 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 Peter Quon, Jr., and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Edgar Garcia appeals from his conviction of first degree murder (Pen. Code,¹ § 187, subd. (a), count 1) and second degree robbery (§ 211, count 2), with associated enhancements for use of a deadly weapon (§ 12022, subd. (b)(1)). Defendant contends the trial court erred in admitting his confession, because it was the involuntary product of an intentional, two-step interrogation in violation of *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*). We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

Willie Bryant received a telephone call from his 20-year-old son, D'Eric Bryant,² at 1:30 a.m. on January 10, 2009. "Caller ID" on Willie's phone showed that the call was placed from telephone number 909-609-7388. D'Eric sounded like he might have been drinking, and Willie could hear a male voice in the background giving D'Eric the location of Sierra and 12th Streets. Willie's conversation with D'Eric was interrupted, and a man asked, "Who are you?" Willie said he was "D'Eric's dad," and the phone went dead. Willie tried to call the number back several times and left messages but got no response. He never again spoke to his son.

Adrian Gonzalez, a coworker of D'Eric, testified that they had gone to a liquor store in the evening of January 9, 2009, to get beer. They then went to the home of a

¹ All further statutory references are to the Penal Code.

² Because Willie and D'Eric share a last name, we will refer to them hereafter by their first names for clarity and convenience, and not intending any disrespect.

friend, Gabriel Hernandez, where they were “[j]ust drinking.” Gonzalez left before midnight, and D’Eric remained at the house. Hernandez testified that D’Eric was intoxicated and Hernandez did not want him to leave. Gonzalez said D’Eric was “[a] little stumbling, but he wasn’t falling, just stumbling.” D’Eric used Hernandez’s phone to call someone for a ride. He then said he was going to the front of the house, and he left at about 1:20 a.m.

Detective Scott Landen testified that he had been dispatched to the area of Cedar and 12th Streets in Bloomington on January 11, 2009, to investigate a report of “a body dump.” He saw D’Eric’s body in a field; there were several wounds in his chest area and on his neck and hands, and his pants had been removed and were lying on the ground. The detective found a knife blade that was broken in half lying near the body.

Willie gave Detective Landen the telephone number that D’Eric had called from, and the detective traced the number to defendant. Defendant agreed to be interviewed at the sheriff’s headquarters. The interview was videotaped; a compact disc (CD) of the interview was played for the jury, and the jury was provided with a transcript.³ In the portion of interview that was introduced into evidence, defendant said the victim had asked to use defendant’s cell phone and then started walking away with it. Defendant followed him to the dirt field and demanded his phone back. The victim, who was talking to his father, gave the phone to defendant. The father asked where they were, and defendant gave him an incorrect location and hung up. The victim started chasing

³ The CD and transcript were redacted to exclude statements the trial court ruled were inadmissible, as discussed at more length below.

defendant; they both tripped and got up, and defendant got out his knife. When the victim started coming toward him, defendant stabbed the victim. The victim started running away, and defendant ran after him and “just blanked out.” Defendant stabbed the victim again two or three times. Defendant threw away the clothes he had been wearing that night because they had “[a] lot” of blood on them. He took the victim’s wallet and threw it in the trash without looking inside because he was angry. He said he had demanded the wallet when the victim was on the ground. After the victim gave defendant the wallet, defendant stabbed him again. The only thing the victim had said was “Stop, please.” Defendant told the victim to take off his pants, “Cause I was angry, cause he tried to come at me,” and he wanted to humiliate the victim.

A pathologist testified that D’Eric had died from two stab wounds to the chest. One had punctured a lung and perforated the pericardial sac. The second had gone into the heart itself. Death had ensued within minutes from massive blood loss. D’Eric’s body also had blunt force injuries and scrapes on his hands and back of the neck, which appeared to have been received at about the same time as the stab wounds, and he had incised wounds at the base of his neck and on his shoulder. Finally, he had a stab wound in the middle of his back. In all, there were at least nine “contacts with [D’Eric’s] body by the sharp object.” The wounds to D’Eric’s hands were consistent with defense wounds.

B. Defense Evidence

D’Eric’s blood alcohol level tested at .24 and .29 percent. Gunshot residue was detected on D’Eric’s right hand. A criminalist testified the residue “indicate[d] that an

individual either fired a firearm, handled a firearm, was in close proximity to a discharging firearm, or in contact with a surface containing gunshot residue.”

C. Jury Verdicts and Sentence

The jury found defendant guilty of first degree murder (§ 187, subd. (a), count 1) and second degree robbery (§ 211, count 2) and found true as to each count that defendant used a deadly weapon (§ 12022, subd. (b)(1)). The trial court sentenced him to 25 years to life for count 1, with a consecutive one-year enhancement for the weapon use. The court imposed the aggravated term of five years for count 2 with a one-year enhancement for the weapon use as to that count but stayed the sentence under section 654.

III. DISCUSSION

Defendant contends the trial court erred in admitting his confession because it was the involuntary product of an intentional, two-step interrogation in violation of *Seibert*.

A. Additional Background

Defendant moved before trial to suppress his confessions to detectives on the grounds they were taken involuntarily and in violation of *Miranda*⁴ and *Seibert*.

The trial court reviewed the video recordings of the two interrogation sessions with Detectives Landen and Rodriguez. When the first interrogation session began, defendant was offered water, soda, “anything you want, a candy bar,” and Detective Rodriguez said to let him know if he had to use the restroom. Defendant spoke to his

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

sister on his cell phone and gave her directions to the police station. Detective Landen informed defendant he was not under arrest and could leave at any time, and the detective gave directions on how to leave the room in case of an emergency.

Detective Landen asked defendant about his activities on Friday evening two weeks earlier. Defendant replied that he had been walking to his cousin's house when a drunk man asked to borrow his cell phone. Defendant lent the man the phone; the man made a call and then returned the phone to defendant. Defendant continued to a friend's house after finding his cousin was not home, spent some time there drinking, and then his friend gave him a ride home around midnight. Defendant said the man may have been with "two other bald guys" who were at the corner about 10 feet away.

Detective Rodriguez asked defendant if he would take a polygraph test "just to make sure what you're telling[] us is the truth." Defendant said he would not do so unless he "ha[d] like a lawyer right next to me or something." The detectives said they knew what time the victim had used defendant's phone. They told him the man to whom he had lent his cell phone was dead, defendant was the last person to see him alive, and they needed to know what happened. Detective Landen said he knew defendant was not telling the truth because defendant's version of when the victim had used his cell phone was off by five or six hours. Detective Landen asked whether defendant was responsible for the man's death, and defendant said he was not. Detective Landen suggested that maybe there had been a fight, and "everybody has a right to defend themselves" After further conversation, Detective Rodriguez stated, "I wanna believe your story, but usually if someone's telling the truth, they got no problem taking a test to prove they're

telling the truth.” He again asked if defendant had been involved, and defendant again denied it.

Detective Rodriguez stated they had “a lot of evidence that shows, other than what you’re telling us here,” such as DNA on the victim’s clothing. He stated this was defendant’s chance to tell them what happened and asked if defendant wanted to live the rest of his life wondering when “this is gonna catch up to you? Or you wanna just get it behind you, and tell us what happened, so you can move on.” The detectives stated they were willing to “sit her[e] for three hours if you want, and you can do it too. Or you can just tell me what happened and we could be done with this.” Detective Rodriguez told defendant there had been a camera where they found the victim. He continued to tell defendant they knew he was lying. He said DNA evidence could be found on the victim’s body, “not to mention everything else okay, swabs, blood, uh footprints, um, hair, stuff you don’t even think about. Spit, just by talking to somebody, there’s evidence everywhere.” He again asked if the victim had attacked defendant or had been “pissed off at you, cause you hung up the phone?”

Detective Landen said he could tell defendant was lying from defendant’s body language, and defendant was “just digging a hole, deeper, and deeper, and deeper,” and the only way defendant could get out of the hole was “to start being honest.” He continued, “I don’t think you meant for this to happen, I don’t, I’m looking at you right now and I don’[t] think you meant for this to happen, but it happened, and now we need to know why.” Defendant then responded, “INAUDIBLE, I did it.” He continued, “He

was chasing me.” Defendant did not know why the victim was chasing him, but he “got scared.”

Detective Landen asked, “Okay, now can you take me back to that night and tell me what happened, from the time you left your house . . . how did . . . he start chasing you[?]” Defendant replied, “Cause I was, I was, I was telling him, like give me my phone, and he didn’t wanna, just kept talking, so I got it from his hand and I told em, I was like, ‘yeah you guys can pick em up right here.’ And I just hung up, so like I started walking away, started walking away, when he just started chasing me, so I just ran, but I had a kitchen knife on me, and I, and he just started like you know, he, he was trying to like beat me up, so I didn’t know what to do, so I just got it and [sentence ends].”

Defendant said the victim had been walking away toward a dirt field with defendant’s phone, and defendant “just got the phone from him, and just started chasing me.”

Defendant took a kitchen knife from his pocket while trying to get away, and they both fell to the ground. They got up, and the victim saw the knife in defendant’s hand and started coming toward defendant. “[T]hat’s when I, just stabbed him, and that’s when he ran away, and that got me mad, cause he was trying to like, tackle me and beat me up.”

Defendant said he had stabbed the victim four or five times. Defendant also suffered an injury that started bleeding, and he “blanked out.” The victim was on the ground. The only thing the victim said during the incident was “Stop.”

Detective Landen testified that they then took a 10-minute break, during which they and defendant stepped outside to smoke cigarettes and engage in small talk. After the break, a second interrogation session began, before which Detective Landen gave

defendant his *Miranda* admonishments and asked if defendant understood his rights and wanted to continue talking “[w]ith those rights in mind.” Defendant responded, “INAUDIBLE, whatever you guys think is best.” Defendant then made a confession as recounted above in the statement of facts.

Detective Landen testified that before the interview, the detectives had picked up defendant at his home and had driven him to the station. Defendant was not handcuffed, and the door to the interview room was not locked.

The trial court ruled that the confession made in the first interrogation session was obtained in violation of *Miranda*, because *Miranda* warnings were not given, and the setting became custodial when the detectives discussed “sit[ting] there for three hours” until defendant told them what happened. The trial court thus excluded the confession made in the first interrogation session. The trial court ruled, however, that the confession made in the second interrogation session, following *Miranda* warnings and waivers, was voluntarily made and was not the product of a deliberate two-step interrogation in violation of *Seibert*. The court held that the 10-minute break, followed by the *Miranda* warnings before the second session began, cured any defect. The trial court therefore permitted introduction into evidence of a redacted videotape and transcript of the first interrogation session, excluding defendant’s first confession, and a videotape and transcript of the second interrogation session which contained the second confession.

B. Standard of Review

In considering a claim that a statement or confession is inadmissible under *Miranda*, we “accept the trial court’s resolution of disputed facts and inferences, and its

evaluation of credibility, if supported by substantial evidence.’ [Citation.]” (*People v. Haley* (2004) 34 Cal.4th 283, 299.) “We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained. [Citations.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

C. Analysis

Before law enforcement officers may interrogate a suspect who is in custody, they must clearly inform the suspect of his right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. (*Miranda, supra*, 384 U.S. at pp. 473-474.) Here, the trial court determined that defendant’s confession in his first interrogation session was obtained in violation of *Miranda* and was inadmissible. The specific issue before us is whether the statements defendant made *after* receiving the *Miranda* advisements should have been suppressed.

“Even when a first statement is taken in the absence of proper advisements and is *incriminating*, so long as the first statement was voluntary a subsequent voluntary confession ordinarily is not tainted simply because it was procured after a *Miranda* violation. Absent “any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will,” a *Miranda* violation—even one resulting in the defendant’s letting “the cat out of the bag”—does not “so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.”” (*People v. Scott* (2011) 52 Cal.4th 452, 477, citing *Oregon v. Elstad* (1985) 470 U.S. 298, 309, 311 (*Elstad*) among other authorities.) The relevant

inquiry is “whether, in fact, the second statement was also voluntarily made.” (*Elstad*, *supra*, at p. 318, fn. omitted.)

In *Elstad*, a teenage suspect made incriminating statements in response to questions asked by an officer during a “brief stop” in the boy’s living room while another officer was explaining the charges to the boy’s mother in another room. (*Elstad, supra*, 470 U.S. at p. 315.) The suspect later was systematically interrogated at the police station after *Miranda* warnings were given (*Elstad, supra*, at pp. 314-316), and the court held that the post*Miranda* statement was admissible.

In *Seibert*, the court reached the opposite result. Police officers questioned the defendant, who was under arrest, for 30 to 40 minutes before she confessed; the officers did not give *Miranda* warnings before the questioning. After a 20-minute break, the officers finally gave the *Miranda* warnings, and the defendant signed a waiver of rights. The officers then confronted her with her prewarning statements, and she confessed again. (*Seibert, supra*, 542 U.S. at p. 605.) The officer who had conducted the questioning testified during the suppression hearing that he had made a “‘conscious decision’ to withhold *Miranda* warnings” pursuant to an interrogation technique he had been taught, to “question first, then give the warnings, and then repeat the question” until the defendant provided the answer he or she had “‘already provided once.’” (*Seibert, supra*, at pp. 605-606.) A plurality of the Supreme Court determined that the “repeated statement” obtained immediately after the police had first obtained an incriminating statement without giving *Miranda* warnings was inadmissible “[b]ecause this midstream recitation of warnings after interrogation and unwarned confession could not effectively

comply with *Miranda*'s constitutional requirement" (*Seibert, supra*, at p. 604.) The plurality reasoned that "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." (*Id.* at p. 611.) Under the plurality approach, circumstances to be considered include "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." (*Id.* at p. 615.)

In a concurring opinion, Justice Kennedy set forth a narrower test: "If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." (*Seibert, supra*, 542 U.S. at p. 622 (conc. opn. of Kennedy, J.)) Such curative measures might include "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning," and "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." (*Ibid.*) "Because Justice Kennedy 'concurred in the judgment [] on the narrowest grounds' [citation], his concurring opinion represents the *Seibert* holding." (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1370, fn. omitted.)

The *Seibert* plurality distinguished *Elstad*, observing that in *Elstad*, "the pause in the living room 'was not to interrogate the suspect but to notify his mother of the reason for his arrest,' [citation]" (*Seibert, supra*, 542 U.S. at p. 614), and the incident had "none

of the earmarks of coercion,’ [citation].” Moreover, the officer’s initial failure to warn in *Elstad* was an “‘oversight’ that ‘may have been the result of confusion as to whether the brief exchange qualified as “custodial interrogation” or . . . may simply have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent’s mother.’ [Citation.]” (*Seibert, supra*, at p. 614.) At “a later and systematic station house interrogation going well beyond the scope of the laconic prior admission, the suspect was given *Miranda* warnings and made a full confession.” (*Ibid.*) Thus, “[i]n *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect’s shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.” (*Id.* at pp. 615-616.)

The *Seibert* plurality further noted, “The [*Elstad*] Court thought any causal connection between the first and second responses to the police was ‘speculative and attenuated,’ [citation]. Although the *Elstad* Court expressed no explicit conclusion about either officer’s state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally. [Citation.]” (*Seibert, supra*, 542 U.S. at p. 615.)

The People argue persuasively that the detectives did not purposely attempt to circumvent *Miranda* as the officers did in *Seibert*, and this case is more like *Elstad*. The

trial court explicitly found that the detectives did not intentionally use a two-step interrogation process. We give great weight to that factual finding. (*People v. Camino*, *supra*, 188 Cal.App.4th at pp. 1371-1372.)

Unlike in *Seibert*, defendant was not under arrest when the first interrogation session began. The record does not indicate that the detectives suspected defendant of murder when they brought him to the sheriff's station for an interview. Rather, it appears that all the detectives knew when they invited him for an interview was that the victim had used defendant's cell phone to call his father that night. As the trial court observed, defendant's demeanor was relaxed, and he even used his cell phone in the interview room.

Before any questioning began in the first session, Detective Landen repeated that defendant was "free to go at any time, but like I told you we've been talking to a lot of people, in a case that we're investigating and your name came up and so we just wanna talk to you." The record indicates the detectives' focus shifted to defendant as a suspect rather than a witness because of the obvious discrepancy between defendant's account of when his encounter with the victim occurred and the evidence of when the telephone call was actually made. Although, as the trial court held, *Miranda* warnings should have been given when the interrogation became custodial, nothing indicates the detectives had a predetermined strategy to withhold warnings for their tactical advantage. Thus, we agree from our review of the record, including inferences reasonably drawn from the evidence, that substantial evidence supports the trial court's factual finding that the detectives did not purposely attempt to circumvent *Miranda*. While this is indeed a close case, and

other evidence, as defendant details in his opening brief at pages 39 and 40, could have supported a contrary finding, the deferential standard we apply on appeal requires that we accept the trial court's resolution of the factual issue. We therefore find no error in the admission of defendant's confession from the second interrogation session.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

J.

I concur:

RAMIREZ

P.J.

King, J., Concurring.

I concur with the majority's conclusion that there was no error in admitting into evidence defendant's second statement following the giving of the *Miranda*¹ warnings. I disagree with the analysis.

While indicating that "[t]he relevant inquiry is 'whether, in fact, the second statement was . . . voluntary[ily] made'" (maj. opn. *ante*, at pp. 10-11), the majority resolves the case on whether the detectives "purposely attempt[ed] to circumvent *Miranda*." (Maj. opn. *ante*, at p. 14.) In concluding that there is substantial evidence to support the trial court's finding that the detectives did not intentionally attempt an end run around *Miranda*, the majority finds that the second statement was admissible.

Initially, if the detectives' intent is the crucial inquiry, I would hold that the second statement is inadmissible. Our record does not contain substantial evidence to support a factual finding that the detectives did not deliberately circumvent *Miranda* by use of the two-step interrogation method. To the contrary, all of the inferences taken from the available evidence support the conclusion that the detectives' interrogation approach was indeed deliberate.

I do not believe, however, that the detectives' intent should be the focus of the inquiry. As to the second statement, the issue is, after being informed of his *Miranda* rights, whether defendant's waiver thereof and the subsequent statement were voluntary.

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

If so, the statement should be admitted. (See *Missouri v. Seibert* (2004) 542 U.S. 600, 628 (dis. opn. of O'Connor, J.).)

Miranda and the Two-step Approach to Interrogation

“The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*.” (*Oregon v. Elstad* (1985) 470 U.S. 298, 306-307.) However, “[i]t is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.” (*Id.* at p. 309.)

As discussed *infra*, the present record supports the conclusion that defendant’s second statement, which followed an advisal of *Miranda* warnings, was knowingly and voluntarily made.

Deliberate Use of the Two-step Process

In resolving this matter, the majority appears to hinge its result on the concurring opinion of Justice Kennedy in *Siebert*, wherein he indicates: “The *Miranda* rule would

be frustrated were we to allow police to undermine its meaning and effect [by use of the two-step questioning approach]. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of ‘knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.’ [Citation.] When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps.” (*Missouri v. Seibert, supra*, 542 U.S. at p. 621 (conc. opn. of Kennedy, J.).)²

In our matter, to support the notion that the two-step approach was not deliberate, the majority states: “The trial court explicitly found that the detectives did not intentionally use a two-step interrogation process. We give great weight to that factual finding.” (Maj. opn. *ante*, at pp. 13-14.)

There is no substantial evidence to support the trial court’s finding; as such, I believe the majority opinion to be flawed.

At the Evidence Code section 402 hearing relative to the admissibility of the first and second statements given by defendant, Detective Scott Landen was the only witness

² Relying on *People v. Camino* (2010) 188 Cal.App.4th 1359, 1370, the majority indicates: “Because Justice Kennedy ‘concurred in the judgment[] on the narrowest grounds’ [citation], his concurring opinion represents the *Seibert* holding.” (Fn. omitted.) While I believe the plurality’s rationale would include Justice Kennedy’s more limited view, nonetheless eight Justices expressly rejected Justice Kennedy’s focus on the intent of the interrogating officer.

called to testify. He stated that he and his partner transported defendant from his residence to the station for the interviews; he conducted the interviews of defendant; 10 minutes elapsed between the first and second interviews; and, during this 10-minute break, defendant smoked a cigarette outside in a parking lot not accessible to the general public. In addition to this evidence, the court indicated that it viewed both videotapes dealing with the respective statements of defendant. While the trial court's findings stretch over six pages of transcript, its findings, with supporting evidence, dealt with the issue of when during the interrogation it became custodial. As to the issue of whether the two-part interview was intentional, the court stated: "In contrasting this case and the *Seibert* case and *Leonard* . . . cases, which *Seibert* addresses, I don't think there was any intentional two-part interview, one without *Miranda* in violation of his *Miranda* rights, softening him up, getting from him a confession and going back with a consensual *Mirandized* interview instead of—I think this case is probably a case where the detective crossed the line perhaps and most likely, and the Court will find, that it was inadvertently transforming that non-custodial interview into a custodial interview requiring the requisite *Miranda*."

This is nothing more than a conclusory statement dealing with the perceived ultimate issue. There is no reference to any evidence presented at the Evidence Code section 402 hearing nor any aspect of the videotapes which support this conclusion.

The first non-*Mirandized* portion of the interrogation lasted 46 minutes. It was conducted in a small room by two detectives. The door was closed and both detectives

were between defendant, who had his back to a corner of the room, and the doorway. Going into the interview, it is evident that the detectives knew the victim had placed a call to his father on defendant's cell phone, near the time of the victim's death. The detectives further knew that the victim's mother, a day or two following the murder, had called defendant's cell phone and someone answered. Shortly after the non-*Mirandized* interview started, the detectives begin inquiring about the activities of defendant in the eight hours preceding the murder. About five minutes into the interview defendant, in describing his activities, indicated that about 6:00 p.m., as he was walking to his cousin's house, "some guy . . . asked me to use my phone"—"I did, and then from there he calls, I dunno who he calls" Clearly, based on this statement and the knowledge of the detectives that the phone call actually occurred after midnight, the detectives knew that defendant was being less than forthright. Further discussion occurred relative to defendant's activities and the timeline within which all of this was occurring. Throughout this time, the detectives continually attempted to solidify defendant's story as to when the victim used defendant's cell phone. Approximately 23 minutes into the interview, the detectives asked defendant to take a polygraph test. Following defendant's refusal, the tenor of the interrogation dramatically changed; the questions became accusatory and defendant was accused of lying.

Whether the interrogation turned custodial at this point or at the later time as identified by the trial court is not that important. It is clear from both the videotapes, as well as the transcript, that within the first 24 minutes the interrogation turned custodial,

yet the detectives continued to question defendant for another 22 minutes without *Mirandizing* him.

In viewing the interaction between the detectives and defendant it is quite evident that both detectives knew full well how to work an interrogation. In attempting to elicit from defendant a story that it was possibly self-defense, Detective Landen stated: “*We’ve investigated hundreds of these.*” (Italics added.) And later, Detective Landen indicated: “We can’t work with lies, we can’t. Okay [defendant], and if you wanna throw your life away for lies, if you wanna throw your son’s life away, for lies, then that’s on you man. It’s, its’s no[t] on us, we’re trying to give you a chance, to tell us what happened that night, we’re not giving you a chance to tell us lies okay. I’ll, I’ll tell you right now, I have sat in this exact room, and I’ve sat in here for three, four hours with somebody and they told me, the same story for three hours okay, and finally when they decided to tell [the] truth, we were done in ten minutes, okay. *So trust me, I’ve been through this whole thing, probably a hundred times.* [¶] . . . [¶] And I’m going through it right now, with you, and, and I’ll sit her[e] for three hours if you want, and you can do it too. Or you can just tell me what happened and we could be done with this.” (Italics added.)

In looking at these statements and the videotaped confessions as a whole, it is evident that the detectives had significant experience in questioning suspects. It can be reasonably inferred that they knew that their questioning had become a custodial interrogation and that *Miranda* warnings were needed. In spite of this, they deliberately continued with the non-*Mirandized* portion of the interview until a confession was

exacted. Immediately following a full confession, a cigarette was offered to defendant and a short break was taken. Upon returning from the break, *Miranda* warnings were given and defendant again confessed to the murder.

The detective's deliberate use of the two-step approach is patent. I find no evidence which contraindicates this conclusion.

The Evidence Supports a Finding That as to the Second Statement Defendant Knowingly and Voluntarily Waived His Rights and Gave the Statement

While deterrence of coercive police conduct in exacting an admission is one of the objectives of the *Miranda* advisals, the touchstone is nonetheless whether the defendant's waiver of rights and ultimate admission are voluntarily and knowingly made. (*Oregon v. Elstad, supra*, 470 U.S. at pp. 308-309.) The admission must be the product of a free and deliberate choice with an awareness of the nature of what it is being done. In viewing this, the courts look to the "totality of the circumstances." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.)

Here, the detectives picked defendant up at home. While they indicated to defendant that he was not under arrest "now" and was free to leave, defendant was nonetheless in a custodial setting. (It was a small room and the door was closed. Defendant was seated with his back to a corner of the room with both deputies between him and the door.) While the questioning during the non-*Mirandized* portion of the encounter became very accusatory, there were no deceptive tactics used, other than telling defendant there was a video camera in the area where the crime was committed.

In viewing the videotapes of the interviews, it appears that defendant eventually admitted the crime because it was evident that his initial version of the events was simply not credible. (The time of day the victim used his cell phone was a fact defendant simply could not talk around.) While non-*Mirandized*, his initial confession appears to have been totally voluntary and made in a knowing manner.

Turning now to the second statement—it was made within minutes of the non-*Mirandized* statement in which defendant incriminated himself. This clearly cuts against the statement being voluntary. (The psychological effect of just having admitted the crime.) The second confession was obtained by the same detectives in the same setting. These circumstances point in the direction that the second statement was not voluntarily given. All other factors, however, appear to move in the direction of the second statement being voluntary following the detectives' giving of *Miranda*: (1) nothing unduly coercive occurred during the first statement; (2) other than Detective Landen stating at the beginning of the second statement, “[y]ou told me some things . . . I kinda thought you were involved in this but you told me a little more . . . now I know that you were involved in it,” the detectives did not refer back to or reference things that were said by defendant in the first statement; (3) during the first statement defendant made two comments which clearly reflect that he understood the precariousness of speaking with the detectives and that he had the right not to. When asked at one point whether defendant’s friend could verify his “story,” defendant responded by indicating, “[y]eah, we’re friends but, he probably won’t tell you guys nothing.” And, after being asked if he

would take a polygraph, the following colloquy occurred: “[Defendant]: No, I wouldn’t take it. [¶] Det. Rodriguez: You wouldn’t take it. [¶] [Defendant]: Unless I have like a lawyer right next to me or something”; and (4) after being read his *Miranda* rights immediately before the second statement, 10 seconds passed in total silence after which defendant responded, “whatever you guys think is best.” In giving this response, while defendant deferred to the detectives, it nonetheless communicates that he understood that he had a choice and was not compelled to speak with them.

While I in no way wish to condone the two-step process, reviewing the videotapes of defendant’s interaction with the detectives convinces me that he knowingly and voluntarily waived his *Miranda* rights and that the subsequent statement was voluntarily given.

In sum, while the present facts are closer to *Seibert* than to *Elstad*, I do not believe that the first non-*Mirandized* statement infected the second statement to the extent that defendant’s waiver of his rights and subsequent confession can be deemed to have not been voluntary and knowing.

KING

J.