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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL TODD JONES,

Defendant and Appellant.

F063909

(Super. Ct. No. 1236539)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie Sovey Silveira, Judge.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Russell Todd Jones was charged with murder (Pen. Code,¹ § 187, subd. (a)) in association with the death of the victim Dena Raley, also known as Dena Raley

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

McCluskey. A jury convicted defendant of the lesser included offense of voluntary manslaughter (§ 192, subd. (b)). The trial court sentenced defendant to the upper term of 11 years for the offense.

On appeal, defendant contends his statements indicating his involvement in the victim's killing were coerced by the police and, therefore, should have been excluded by the trial court. He further contends the trial court improperly instructed the jury regarding the elements of the lesser included offense of involuntary manslaughter. We affirm the judgment.

FACTS

On October 13, 1999, Mark Keough reported his girlfriend Dena Raley missing. Kara Davis was in charge of the missing persons unit at the time, and during her investigation she spoke to defendant regarding the disappearance. Defendant indicated Keough and the victim had been living with him from February to May of that year, but he had evicted them after a disturbance. The victim moved back into the home in September of 1999. Defendant told the investigator he had not seen the victim since October 10, 1999, but assumed she had been at the home the following day because he noticed something of hers missing from the refrigerator. Davis did not notice any injuries to defendant's face at the time.

Through the investigation, officers learned the victim was an alcoholic and in poor health. At the time of her disappearance she was five feet six inches tall and "very thin." No progress was made on the victim's disappearance until October of 2007² when Modesto Police Officer Scott Heller, sergeant of the homicide unit at the time, was contacted regarding a media request on the case. As a result of the media inquiry, Heller reviewed the case file regarding the victim's disappearance. As he was doing so, Officer Craig Plante of the economic crimes division expressed some interest in the case and joined him in reviewing the files.

²All further references to dates will be to 2007 unless otherwise indicated.

During the officers' review, it appeared Keough had been a suspect in the victim's disappearance. The police were aware Keough had a history of assault or domestic violence against the victim. In reviewing the case file, Plante became interested in defendant. Plante located defendant and spoke to him briefly at his home on October 23. After the conversation, Plante felt defendant was being deceptive. As a result, Plante returned to defendant's home on October 25 and asked defendant if he would be willing to be interviewed at the police department. Defendant agreed.

The interview took place in a locked interview room and was quite lengthy, spanning several hours. The officers employed a strategy of "good cop/bad cop." At times during the interview defendant became very upset with Heller when Heller questioned defendant's involvement in the victim's disappearance. Heller was at times accusatory with defendant. However, Heller noted defendant had a bond with Plante. Heller excused himself from the interview to allow Plante to continue to get information from defendant. Plante conducted the great majority of the interview without Heller. The interview was approximately six and one-half to seven hours long. During the interview, defendant suggested Keough killed the victim in a jealous fit. Defendant made no admissions during this interview.

A few days later, Plante along with Officer Matt Medina, recontacted defendant at his home and discussed the possibility that defendant had information about the crime. After a conversation that included several hypothetical scenarios, the officers stated they would contact the district attorney's office to see what promises, if any, could be made to defendant if he provided information regarding the location of the victim's body. At that time, Plante viewed defendant as a witness.

The officers returned later that day with a letter from the district attorney stating defendant was viewed as a cooperative witness. Upon receiving the letter, defendant told the officers the location of the victim's body. Defendant explained he had found the victim dead on the bathroom floor one morning. He noted her face had been beaten. Because he was on parole, and feared no one would believe he just found the victim dead,

he panicked and decided to hide the body. He was afraid he would be blamed for her death. Defendant waited until the early morning hours to move the body. He wrapped the victim in a blanket and put her in the bed of his truck, but subsequently moved the body to the toolbox of his truck and made the drive to Groveland to his parent's property to bury the body.

Once at the property, he selected a site, dug a hole, wrapped the victim's body in plastic, poured diesel fuel over the body to cover the scent, and buried her. When he returned home, he cleaned the blood from the bathroom with bleach and water. He noted a blood trail from the front door to the bathroom that he also cleaned. Defendant did not want anything relating to the victim's death pointing to him, so he moved the victim's car from his home to another area in town to deflect any suspicion. Defendant opined Keough had killed the victim.

Subsequently, officers began looking for the victim's body, which was eventually discovered in the location pointed out by defendant. A forensic anthropologist examined the victim's body, finding no evidence of trauma to the teeth or the orbital or nasal areas. However, he found multiple rib fractures and injury to her breastbone. He could not determine whether the injuries were sustained prior to or just after her death.

Defendant was interviewed again on October 31 by Detective Craig Grogan of the homicide unit. During this interview, defendant further detailed how he found the victim in his home and described his actions in moving and burying the body. He added that he had also rented a carpet cleaner and cleaned the carpets to remove any evidence the victim had died in his home. He continued to deny being involved in her death. After that interview was terminated, Plante and Medina drove defendant home. They spoke to defendant and inquired as to whether he could have had played a role in the victim's death. During the conversation with Plante and Medina, which took place in defendant's home, defendant eventually confessed he had caused the victim's death.

Defendant stated he and the victim had spent the evening drinking at a bar. When they returned home, the victim became upset because she had spent her last \$20 at the

bar. Defendant put \$20 on the counter and told the victim she could have it. As defendant turned to leave, the victim came at him and scratched him under his eye. Because defendant was sensitive about his eyes, he punched the victim one time in a reflex action. The victim fell to the ground and was cut but was still conscious. Defendant helped her to the bathroom to clean up. Once in the bathroom, the victim collapsed and died. Defendant explained the rest of what he had told the officers was true with the exception of how badly she was beaten. Defendant was drunk at the time but knew he could not do anything for the victim as he could tell she was already dead.

The following day, defendant was again interviewed by the police and further detailed his involvement in her death. Defendant added that after the victim collapsed in the bathroom, he believed she had passed out, so he placed a blanket over her and went to bed. When he checked on her the next morning, she was deceased. He added that when he put the victim in the toolbox of his truck, she was stiff and would not fit. He forced her body into the toolbox with his body weight, using his knee. He opined he likely broke some of her ribs in the process.

In addition to defendant's confession, the prosecution presented evidence from two women suggesting defendant had been controlling, threatening, and on one occasion used violence against his ex-girlfriend. This evidence was disputed by the defense. Additionally, defendant's father testified he had never seen him controlling or violent with women. Instead, he noted defendant had cared for his terminally ill girlfriend until her death.

Defense

Richard Ofshe, Ph.D., testified regarding false confessions. He reviewed the transcripts of defendant's taped interviews and opined the officers engaged in psychological coercion. He explained false confessions arise when a person is subjected to psychological coercion and made to feel hopeless. In Dr. Ofshe's opinion, defendant's interrogation was "worthless" because it was driven by psychological coercion resulting from threats and promises. Because there were no objectively verifiable details within

defendant's confession, there is no way to determine whether the confession itself was actually false.

Dr. Robert Lawrence, a forensic pathologist, reviewed the victim's medical records as well as witness statements related to the case. According to her medical records, the victim was anorexic. In his experience, anorexics can die suddenly. In addition, the victim exhibited some symptoms of possible gastrointestinal bleeding as evidenced by reports that she looked unwell shortly before her death, there was evidence of rectal bleeding, and she was seen drinking heavily and passing out multiple times in a day. Such conditions could also have contributed to her death. When asked to assume defendant did not strike the victim and he simply found her dead, Dr. Lawrence opined the most likely causes of death were alcohol or drug overdose, death related to anorexia, or another natural or accidental cause.

DISCUSSION

I. The Admission of Defendant's Statements

As noted above, a significant portion of the case against defendant related to his statements made over the course of several days in a series of interviews. Defendant contends his statements informing the police where the victim's body was buried and his subsequent statement explaining his role in her death were coerced. Specifically, he claims his initial statements regarding the location of the victim's body was induced by a promise of immunity, and his subsequent statements regarding how she died were coerced by a combination of threats and promises. After a careful review of the record, including the audio- and video-taped statements, we reject defendant's claims.

Background

The police conducted a total of six interviews with defendant over the course of a 10-day period. The first occurred on October 23 at defendant's home. This was a very brief interview by Plante where Plante felt defendant was being deceptive with him. The second interview occurred on October 25 when Plante arrived at defendant's home and asked him to come to the police department to answer some questions. Defendant

agreed. Once defendant arrived, he was interviewed by Plante and Heller for a number of hours. The interview was aggressive at times and defendant asked to leave on more than one occasion. Defendant made no admissions during this interview and was subsequently returned home by Plante.

Four days later, on October 29, Plante returned to defendant's home and asked to speak with him about the victim's disappearance. Medina accompanied Plante to defendant's home. During this interview, Plante discussed the possibility that defendant knew the whereabouts of the victim's body. The men began to speak hypothetically, and ultimately Plante and Medina left to speak with a representative of the district attorney's office regarding any possible assurances it was willing to extend to defendant for his cooperation. Plante and Medina returned later that same day with a letter from the district attorney's office advising defendant he was currently viewed as a cooperative witness, however that status would change upon learning defendant was involved in the victim's death. At that point, defendant informed the officers of the location of the victim's body. He further disclosed he had found her in his home, dead, and he subsequently concealed her body and buried her at his parent's property in Groveland. Defendant directed the officers to the location of the victim's grave, and the police began searching for her body. Defendant was once again returned to his home at the end of the day.

On October 31st, defendant was interviewed by Grogan at the police department. This interview lasted four and one-half hours and ended when defendant asked to leave. Plante and Medina again drove defendant home from the interview. Upon arriving at defendant's home, Plante continued to speak with defendant, and defendant eventually invited Plante and Medina into his home. After speaking with defendant for awhile, he admitted he struck the victim causing her death. Medina and Plante left defendant at his home.

The following day, on November 1st, he was again interviewed, this time at the police department, and he again admitted striking the victim causing her death. A final

interview was conducted on November 3d where defendant confirmed the details of the incident.

Prior to trial, defendant moved to exclude the statements he made to officers implicating himself in the victim's death, claiming his statements were coerced. At the hearing, defendant testified he had felt intimidated during the interview with Heller, and his repeated requests to end the interview were ignored. And when he later spoke to Plante at his home, he felt he had to cooperate. He understood the conversation about speaking with the district attorney as a discussion about immunity, and once he received and read the letter, he believed it granted him immunity. He testified he would not have informed the officers of the location of the victim's body without immunity. Regarding the conversation with Plante and Medina where defendant indicated he was involved in the victim's death, defendant testified Plante's representations that he would be his advocate left him with the impression that Plante would help him. However, he admitted Plante never explained what he meant by being his advocate. Defendant claimed he would not have made the incriminating statements without the promises.

Regarding the statement itself, defendant testified it was the officers who brought up the idea the killing could have been accidental or unintentional, and they suggested the scenario where the victim could have clawed at him. Because he felt no one would believe him, defendant gave a false confession based upon what the officers told him.

After hearing testimony and reviewing the recordings of the interviews, the trial court found defendant's statements were voluntarily made. Defendant renewed his motion twice during the trial, and the trial court denied each motion.

Defendant challenges the police conduct during the interviews occurring on October 29 and 31. Therefore we will recount the content of those interviews in more detail.

October 29, 2007, interviews

On October 29, Plante and Medina arrived at defendant's home at approximately 8:35 in the morning. Defendant spoke with the officers outside of his home for

approximately one and one-half hours. Initially, defendant expressed some anger toward Plante because in the previous interview, Heller had been aggressive with defendant and the interview itself was quite lengthy. Plante apologized, noting he did not know the previous interview was going to be that long and explaining that Heller does things differently. The first half of the interview was composed of small talk between Plante, defendant, and Medina. Approximately halfway through the conversation, the subject turned to defendant's possible knowledge regarding the victim's disappearance.

During the interview, Medina told defendant, "[W]e know you know something." Plante explained defendant had indicated at the last interview that he wanted some time to think about the situation and get some advice, and the officers had honored that request. They told defendant they wanted to bring closure to the victim's family. Medina asked defendant what he would fear if he told the officers what he knew about the victim's disappearance or whereabouts. Defendant stated his concern that he would be put in jail, and his number one fear was that he would be made a scapegoat and put in jail. At that point, the officers began speaking in hypothetical scenarios, asking what would ease his concerns. However, prior to the hypothetical discussion, defendant acknowledged the officers had told him initially they could not make him any guarantees.

During the discussion, the officers explained they could go to the district attorney and ask, hypothetically, what the district attorney would be willing to offer in exchange for the information. Specifically, Medina hypothesized the district attorney would say, "[T]his case has been open for seven years. If we could get somebody tell us where the—where the body is, we might be willing to—we might be willing to, you know, just make him a witness." Plante then stated, "Grant immunity."

Plante and Medina explained the district attorney would want to know about the history of the person with the information, and specifically would want to know he was not the actual killer. Defendant voiced a concern he would be made a "scapegoat" and Plante stated, "You can't be made something that you aren't."

The topic returned to providing closure for the victim's family. The officers questioned whether they might be able to find the victim that day, and defendant said he did not know. Medina suggested, in a hypothetical, that they needed to contact the district attorney, explain the case, and ask, "[W]hat if somebody is willing to tell us?" Plante then asked defendant, "[W]hat would be a guarantee in your mind that you aren't going to be double-crossed or made a scapegoat? What—what would be the guarantee I could give you? There's got to be something that you would believe." Defendant reiterated he did not "want to be the fall guy." Medina then asked, "Well, hypothetically if you could tell us where she is, wherever that may be, and hypothetically the DA's office would be willing to somehow grant you some kind of immunity and make you a witness, would that be a good deal hypothetically speaking?" Defendant replied "[y]es."

Medina explained his "belief is she was—she was hurt, murdered probably, violently assaulted or something, but you were not involved in that. That's just my belief. But somehow—but you know where she is." The topic returned to whether the victim could be found that day, and defendant agreed it was possible the victim was within 100 miles. Medina stated they had some "work to do, and I think we probably have to sit down with one of the DAs and say, 'We—we may know somebody that knows something, and they may be—they may be willing to help us out, but, you know, they may also want, you know, some guarantees of being a witness and only a witness,' and that's something we have to run by him."

The officers explained they would go to the district attorney's office and talk to someone and return later after the discussion. After discussing the matter with the district attorney's office, the officers returned to defendant's home with a letter authored by Chief Deputy District Attorney Gerald Begen stating:

"[T]he status of [defendant] in the disappearance of Dena Raley ... is that of a cooperative witness. This status will not change until such time as the Modesto Police Department or this office develop evidence that [defendant] was the killer of Mrs. Raley."

The officers provided defendant with the letter and he read it. Defendant did not have any questions about the letter and subsequently informed the officers he had found the victim, beaten and bloody, in the bathroom at his home. He explained she was already dead, and fearing he would be blamed for her death, he decided to transport her to his parent's property in Groveland where he buried her. Defendant stated he believed the victim's boyfriend was to blame for her death. Defendant stated he felt relieved he had finally told someone what happened because it had been "haunting [him] for a long time."

October 31, 2007, interview

On October 31, defendant agreed to speak with Grogan at the police station. He was interviewed in a locked interview room, although it was made clear he was there voluntarily and he could end the interview at any time. The interview lasted approximately four and one-half hours, although there was a break during the interview, and defendant was provided food, drink, and restroom breaks.

The interview began with defendant's personal history, including questions about his prior criminal history and the facts underlying his prior conviction, as well as questions regarding where he had lived over the past 10 years, the various jobs he had held, and his various relationships with women. They discussed how he had met the victim, as well as her boyfriend, and the issues defendant had encountered with the victim's boyfriend. Grogan asked defendant about the victim, her personality, and eventually began talking about the details regarding how defendant had found the victim in his home, and the details of how he moved and buried her. It was not until the final minutes of the interview that Grogan broached the subject of defendant possibly being responsible for the victim's death. Defendant denied having anything to do with her death and, shortly thereafter, terminated the interview. In accordance with defendant's wishes, Grogan stopped the interview and allowed defendant to leave.

At the very end of the interview, Grogan asked defendant if he needed a ride home. Plante then offered defendant a ride home. Medina accompanied them in the

vehicle. Plante told defendant that he had briefly spoken with Grogan and Grogan felt that if the victim's boyfriend had actually killed her, there was no reason for defendant to go to the lengths he did to conceal her death and bury the body. Defendant questioned why he ever said anything in the first place. Plante explained he believed defendant got scared, but told him he needed to evaluate his situation. He noted that people understand accidents, and the detectives were going to continue investigating and if he was not truthful they would catch him in inconsistencies.

Plante and Medina continued to ask defendant if it was possible something happened with the victim, perhaps an accident. They explained the truth would help him, but inconsistencies would look bad. The discussion continued along this line, again noting the detectives investigating the case were going to build a strong case. At one point, Plante stated:

“I’m willin’ to be your advocate. I’m willing to go to bat for you. So is [Medina], ... I mean if you say something, and I don’t want you to make up things, but if you say something that’s an excuse or understandable or, or a reason how things happened...we, we will go to bat for you. I mean, I don’t think you’re a bad guy, but I think somehow you got caught up in something that’s nasty and, and, and don’t know a way out. And I-I-I-I think that if Grogan and the other guys, and Heller’s one of his crew. He works for Heller. Those guys are tenacious. They will find facts from way back when, they will do things and, and track things down and bottle, bottle up this case and they can paint a bad picture of you, okay.” (Second ellipsis in original.)

Plante reiterated the lengths defendant went to cover up the crime: cleaning up the area, putting the victim in a blanket, transporting her in the toolbox of his truck, taking care not to be seen, and burying her. He explained it did not make sense for defendant to go to these great lengths to cover up a death for which he was not responsible. Plante explained he “can’t make any promises, I can’t make any, any guarantees” but noted that people understand explanations, but do not understand lies or inconsistencies. Furthermore, Plante told defendant “if you’re involved in this you can’t get out of doing some time, okay. I don’t think you can get out of that.”

The officers continued the discussion, outlining the difference between an accident and an intentional act. Plante told defendant he would testify for him when the case went to trial, and again made it clear the case would not go away. Defendant indicated he needed a cigarette and Plante offered to get him some. Defendant noted Plante and Medina were the only ones treating him “halfway decent.”

The trio went to a store where defendant purchased some cigarettes. Then the officers drove defendant to his home. The conversation returned to the topic of whether there was some kind of accident or explanation for the victim’s death. The officers continued to talk about the difference between someone making a mistake doing something accidentally and someone who does something intentionally and how people can understand mistakes. Defendant noted that if he had planned something out, he had access to heavy equipment that could ensure the victim’s body would never be found. While asking defendant if there could have been an accident or some explanation for the victim’s death, defendant questioned why they thought he caused her death when he told them about the location of her body and continued to consent to questioning. The officer replied because defendant was a good person who wanted to do the right thing in this situation.

Plante and Medina continued to tell defendant that people were going to want to know what happened to the victim when the case went to court. Without an explanation, people would make assumptions regarding what happened. They continued talking about different scenarios where an action was unintentional. The officers also inquired as to whether what happened could have been a nonintentional reaction to something the victim had done.

At this point, defendant decided to smoke a cigarette and allowed Plante and Medina to join him. The men engaged in some small talk, and defendant invited the officers into his home. Medina made it clear to defendant they would leave anytime he wanted, and he was not obligated to continue talking to them.

The officers again broached the subject of whether the victim's death could have been accidental. Defendant said people weren't likely to believe someone recently out of prison or with a criminal record. After being asked whether he thought the officers would believe him, defendant said "maybe." While discussing whether defendant thought the officers would believe him, Plante told defendant:

"I'm very persuasive when I talk to other people and when I go back and talk to the detectives and when I go to talk to the DAs, I get things done. Like I said, we go talk to the DA we get things done, when we go talk to the other detectives we get things done. I can get things done for you, but I—to be your advocate I hafta have an explanation, you know. I can't be your advocate if...." (Ellipsis in original.)

After defendant offered the officers a seat, the following exchange took place:

"PLANTE: But, but you understand I am a persuasive salesman. If I believe in what I'm selling, and what I'm selling is that [defendant]'s a good guy and this was a mistake, or an accident, or a goof I can sell that to who I need to sell it, because it's the truth and it's an easy sale. You understand?"

"[DEFENDANT]: Yeah but it's still, you know, accident or not then um it would still fry my ass.

"PLANTE: I don't think so. I, I have told you and I've been honest about this. This is going to court, okay. I personally don't think that you're gonna be able to avoid some jail time. But, and this—it—wh-when, when jails and district attorneys and everyone else looks at things they say okay did he lie up front, or what was goin' on. Was he cooperative, did he help out, hell yes he was cooperative, hell yes he helped out. He took us to her body.

"[DEFENDANT]: Well why, yeah but why didn't he cooperate ah...

"PLANTE: Because he was panicked.

"[DEFENDANT]: ...10 years ago.

"MEDINA: He was scared is all.

"PLANTE: And now I become the voice for [defendant]. I become the explanation for [defendant], okay. I become your advocate because now I understand what happened. But I can't become that advocate if I don't understand, if I don't have a reason. Okay?"

“MEDINA: Could it just, could there be an accident [defendant]?”

“PLANTE: Could this of been a terrible mistake?”

“[DEFENDANT]: Yeah.” (Ellipses in original.)

At this point, defendant admitted he had struck the victim as a reflex after she attempted to scratch his face. He then detailed his interaction with the victim, stating that after he struck the victim, she fell, and he assisted her to the bathroom. While helping her in the bathroom, the victim collapsed and died.

Legal Standards

A confession which is the product of coercive police activity is involuntary and therefore inadmissible at trial as violative of federal and state due process requirements. (*Colorado v. Connelly* (1986) 479 U.S. 157, 163-167; *People v. Benson* (1990) 52 Cal.3d 754, 778.) When a defendant claims his or her confession was involuntary, the People bear the burden to demonstrate the statements were voluntary by a preponderance of the evidence. (*People v. Jones* (1998) 17 Cal.4th 279, 296.)

In deciding whether a statement is voluntary, the court considers the totality of the circumstances, including factors relating to the interrogation itself as well as the personal characteristics of the accused. Relevant factors include: “[T]he crucial element of police coercion, [citation]; the length of the interrogation, [citation]; its location, [citation]; its continuity, [citation]; the defendant’s maturity, [citation]; education, [citation]; physical condition, [citation]; and mental health, [citation].” (*Withrow v. Williams* (1993) 507 U.S. 680, 693.) A statement is considered involuntary “if it is not the product of “a rational intellect and free will.”” The test for determining whether a confession is voluntary is whether the [witness’s] ‘will was overborne at the time he confessed.’” (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

A statement may be coerced by either physical intimidation or psychological pressure. In cases of psychological coercion, the question is ““whether the influences brought to bear upon the accused were ‘such as to overbear [the accused]’s will to resist and bring about confessions not freely self-determined.’””” (*People v. Maury, supra*, 30

Cal.4th at p. 404.) “““[T]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.”” (*People v. Williams* (2010) 49 Cal.4th 405, 436; see *People v. Ray* (1996) 13 Cal.4th 313, 340; *People v. Thompson* (1990) 50 Cal.3d 134, 166-167.)

It is well established that “mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. [Citation.]” (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509–510, fn. 17.) The police “are not precluded from discussing any ‘advantage’ or other consequence that will ‘naturally accrue’ in the event the accused speaks truthfully about the crime.” (*People v. Ray, supra*, 13 Cal.4th at p. 340.) However, the “line between a threat (or a promise) and a statement of fact or intention can be a fine one.” (*People v. Thompson, supra*, 50 Cal.3d at p. 169.) When evaluating a claim of psychological coercion, “we must exercise great care not to become confused: intellectual persuasion is not the equivalent of coercion.” (*People v. Ditson* (1962) 57 Cal.2d 415, 433.)

In reviewing the trial court’s ruling regarding whether a statement was coerced, we examine the entire record, deferring to the trial court’s credibility determinations and findings of fact where supported by substantial evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 444.) We may independently review the trial court’s determination where, as here, the interview was recorded. (*People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)

A. Defendant’s Statements Revealing the Location of the Victim’s Body Were Voluntary

Defendant first attacks his statements revealing the location of the body. He claims his statement was induced by a promise that he would have immunity for divulging whatever information he had regarding the victim’s whereabouts. We disagree.

Initially, we note the conversation at issue took place with the officers just outside of defendant's home. Defendant was not under arrest, and the conversation was conducted in a casual tone. The officers engaged in small talk with defendant for a significant period of time, discussing various topics. The officers were never threatening toward defendant and did not appear to consider defendant a suspect in a murder investigation. Early in the conversation, defendant acknowledged the officers had made it clear to him from the beginning that they could not make him any guarantees.

While speaking with defendant, the officers asked him, “[H]ypothetically if you could tell us where she is, wherever that may be, and hypothetically the DA’s office would be willing to somehow grant you some kind of immunity and make you a witness, would that be a good deal hypothetically speaking?” Defendant argues this statement, along with other similar statements, implied defendant would have immunity for whatever he told the officers. When considering whether an officer’s statement conveys a promise of leniency, we “do not consider the words spoken in a vacuum but in the context of the conversation.” (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203.) After considering the entire conversation, we conclude no such implied promise was conveyed.

Neither Plante nor Medina made any promise of leniency or immunity to defendant. Rather, all discussions about possible immunity, or being treated as a witness, were premised upon approval by the district attorney’s office. From the overall discussion, it was clear the officers were not extending any promises on their own.

In this respect the case is not unlike that of *People v. Ramos, supra*, 121 Cal.App.4th 1194. There the officer explained to the defendant that his cooperation would be beneficial in the judicial process because the officer would take the defendant’s statement to the district attorney’s office for consideration. (*Id.* at p. 1200.) In determining the defendant’s statement was voluntary, the court found any statement the defendant would benefit in the judicial process from making a statement was qualified by the fact that it would be the district attorney who would determine what consideration to

give the defendant for his statement. (*Id.* at p. 1203.) Thus, the officer never implied any promise of leniency, he simply informed the defendant the district attorney would decide what, if any, consideration he would receive for his cooperation. (*Ibid.*) Likewise here, each of the hypothetical scenarios proffered to defendant were all clearly based upon approval by the district attorney's office. Thus, defendant could not have reasonably interpreted anything the officers stated as a promise of immunity without approval by the district attorney's office.

Furthermore, it was apparent from the conversation as a whole that any discussion of "immunity" did not extend to the situation where the defendant was responsible for the victim's death. Indeed, the officers explained the district attorney would want to be assured defendant had nothing to do with the victim's murder. For example, Plante told defendant the district attorney would "need to know if he was the bad guy." He went on, "[I]t would be likely that the DA would go, 'Okay. How do we know that this guy just didn't put a gun to her head and kill her and then now is trying to blame the other guy?'" Defendant clearly understood this, as his concern was that he would be made a "scapegoat." Plante responded, "You can't be made something that you aren't." When defendant began to compare the situation to his prior conviction for possessing firearms, Plante clarified defendant had not been made a scapegoat in that instance because he in fact had possessed the guns. Rather, defendant interpreted the law incorrectly in that situation.

The entire conversation regarding defendant being a witness was premised upon defendant simply having knowledge regarding the victim's whereabouts without being involved in her murder. At one point, Medina made this clear, telling defendant his "belief is she was—she was hurt, murdered probably, violently assaulted or something, but you were not involved in that. That's just my belief. But somehow—but you know where she is."

Thus, it is clear from the overall conversation that defendant understood any promises made would have to come from the district attorney and defendant was a

witness, not the actual killer. This understanding was summarized in the letter from the district attorney which stated:

“[T]he status of [defendant] in the disappearance of Dena Raley ... is that of a cooperative witness. This status will not change until such time as the Modesto Police Department or this office develop evidence that [defendant] was the killer of Mrs. Raley.”

Defendant could not reasonably understand this letter as a grant of immunity. Even if defendant understood the term “cooperative witness” as synonymous with immunity, the letter clearly states that status would change if the police department or district attorney’s office developed evidence that defendant killed the victim. Defendant admitted to reading the letter twice after the officers picked him up. He had no questions about the letter. As the letter very plainly did not promise defendant any leniency or grant him any sort of immunity, his claim that his subsequent statement was coerced must fail.

Defendant analogizes his case to that of *In re Shawn D.* (1993) 20 Cal.App.4th 200 where a minor was charged with burglary. We find the analogy misplaced. The police there promised the minor’s honesty would be noted in the police report, and if the minor talked he would not go to jail but could see his pregnant girlfriend. Additionally, the police explained they just wanted to get the stolen property back and if the minor helped, his cooperation would be noted. The officer further expressed that if the minor “explained” himself, he would be treated more leniently; in exchange for a confession, the officer would speak to the district attorney and, by clear implication, make sure the minor was tried as a juvenile rather than as an adult. Considering the totality of the circumstances and that a “promise of leniency in exchange for a confession permeated the entire interrogation,” the court found the statement involuntary. (*Id.* at pp. 215-216.)

Unlike the situation in *Shawn D.*, Plante and Medina never made any promise of leniency in exchange for information. Rather, it was clear throughout the conversation that the only one who could make any promises was the district attorney, not the officers themselves. The officers spoke in hypothetical scenarios to determine why defendant

was hesitant about divulging the knowledge he had. The entire conversation was premised upon the fact defendant was not responsible for the victim's death. Medina expressly said as much, explaining it was his belief defendant had somehow learned where the victim was buried but he had not killed her. Indeed, defendant lamented the reason he did not want to say anything was because he was afraid of being made a scapegoat. He did not want to be put in jail simply because he had information about the victim's whereabouts. Given the entire context of the conversation, defendant could not have understood the officers' references to immunity to mean he would not be charged if he divulged he was in fact the killer. The letter plainly informed defendant he would not be considered a witness if the authorities received information he was responsible for the victim's death.

Likewise, defendant's reliance on *People v. Hogan* (1982) 31 Cal.3d 815 (*Hogan*), disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836, is misplaced. *Hogan* is factually distinguishable. It involved false statements that made the defendant doubt his own sanity, thus making an offer for mental help in that situation an impermissible offer of leniency. (*Hogan, supra*, at pp. 836, 840–841 [defendant legitimately believed “if I pleaded like I'm nuts they'd get me off”].) No promises were made to defendant here and, unlike *Hogan*, the police did not use any deceptive practices in their discussion with him.

That the officers framed the discussion in hypothetical situations further supports our finding no promise was made. The officers never stated they could provide any promises or that the district attorney would in fact provide any consideration for a statement. Once the officers returned with the letter from the district attorney, it was manifest that no promises were being extended. It stated quite clearly that defendant was viewed as a cooperative witness, however, that status would change if the police or the district attorney discovered evidence that defendant was responsible for the killing. Such a statement does not offer any explicit or implied promise of leniency. Defendant admitted to reading this letter twice and stated he did not have any questions regarding

the letter. As nothing in the conversation or the letter implied a promise of immunity, defendant's subsequent statement regarding the location of the victim's body and his actions in finding and moving her were not coerced.

B. Defendant's Admission Regarding Killing the Victim Was Voluntary

Defendant argues Plante and Medina used alternating promises and threats to induce his confession. He claims the officers' warnings that the other detectives, such as Heller and Grogan, "don't fool around" and they could "bottle up this case and they can paint a bad picture of you" were impermissible threats followed by promises that Plante and Medina would "go to bat" or "advocate" for defendant. He also argues the officers suggestion that the killing was an accident and that an accident would be viewed differently from an intentional killing amounted to a promise of leniency. We disagree.

We begin by considering the conversation in its totality and evaluating what defendant reasonably understood from statements. (*People v. Ramos, supra*, 121 Cal.App.4th at p. 1203.) Considering the conversation as a whole, there were no threats from Plante regarding the other officers. Plante made it clear the other officers could not make up facts and merely pointed out they were good at their jobs and rarely made mistakes. Further, they would document any inconsistencies and, without a statement from defendant, they could speculate as to the motivation behind the killing. Plante made it clear the detectives had a statement from defendant placing himself at the crime scene, and the facts that defendant went to great lengths to conceal the death and hide the body. Plante did not deceive defendant as to the information the police possessed but simply pointed out the facts apparent. Nothing he said in this regard could have been considered a threat; rather, he very truthfully explained defendant's situation. As one court has explained, "Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect. [G]ood faith confrontation is an interrogation technique possessing no apparent constitutional vice." (*People v. Nicholas* (1980) 112 Cal.App.3d 249, 264.)

Much of the officers' conversation focused on whether defendant had an explanation for the victim's death. In this respect, the facts are quite similar to those found in *People v. Holloway* (2004) 33 Cal.4th 96. The defendant there was suspected in a double homicide. During the booking process, the detectives explained the crime could result in the death penalty. Further, they told the defendant "[t]he truth cannot hurt you, if it's known. The longer you sit there and not say anything and you just ride with it, and you're just, you're gone." (*Id.* at p. 113, italics omitted.) The defendant continued to deny his involvement, and the detectives persisted, asking the defendant to tell them if he blacked out or lost his temper. The defendant inquired as to what "difference would that make," and the detective explained: "It makes a lot of difference. Makes a lot of difference. Difference between someone gone, going over to do something intentionally before you can get that, I'll go over and do this crime. There's a hell of a difference." (*Ibid.*, italics omitted.)

The Supreme Court addressed whether "suggestions that defendant would benefit from giving a truthful, mitigated version of the crimes ... constituted implied threats and promises of leniency sufficient to render the subsequent admissions involuntary." (*People v. Holloway, supra*, 33 Cal.4th at p. 115.) In finding the defendant's statements were voluntary, the court explained that suggesting the killing could have resulted from an accident or an uncontrollable fit of rage fell "far short of being promises of lenient treatment in exchange for cooperation." Rather, the remarks simply indicated that such circumstances could act as mitigation as to the degree of homicide and merely explained a benefit that might naturally flow from a truthful statement. (*Id.* at p. 116.)

Likewise here, Plante's statements to defendant on the subject of whether the victim's death was the result of an accident rather than an intentional killing and that such circumstance could make a big difference were not promises of leniency. Plante never offered any specific benefit for a statement. Indeed, Plante repeatedly told defendant he could not make any guarantees, the case would go to trial, and defendant would not avoid doing some jail time. The statements simply reflected homicide is divided into different

degrees, and the circumstances surrounding the killing could support mitigation. (*People v. Holloway, supra*, 33 Cal.4th at p. 116; *People v. Carrington* (2009) 47 Cal.4th 145, 171 [suggesting homicide may have been result of accident, self-defense, or fear was not coercive because it merely pointed out “the particular circumstances of a homicide can reduce the degree of culpability”]; cf. *People v. Williams* (2010) 49 Cal.4th 405, 444 [suggestions by police that defendant may not have been the killer or he did not intend to kill the victim not coercive because they “merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime”].)

Defendant further claims Plante’s comments stating he would “go to bat” for him amounted to a promise that “linked confession to the compelling benefit of having two officers take his side and be his advocates.” However, defendant never delineates exactly what benefit he expected. Although he repeatedly argues the officers promised to “advocate” for him, he does not explain how that resulted in a promise of leniency. “The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police.” (*People v. Hill* (1967) 66 Cal.2d 536, 549.) Defendant asserts that Plante “implied he would recommend a shorter sentence if [defendant] agreed to talk,” but never explains how he would have understood that implication. Plante never asserted he had any control whatsoever over the outcome of the case. He repeatedly reminded defendant the case would go to trial, defendant would serve jail time, and he could not make any promises or guarantees. Indeed, he referred to the jury as the ultimate arbiter of fact in the case. While Plante did inform defendant that juries understood mistakes and accidents, the statement did not amount to a promise of leniency, it simply explained an advantage that might naturally follow from a truthful statement. (*People v. Carrington, supra*, 47 Cal.4th at p. 171; *People v. Holloway, supra*, 33 Cal.4th at p. 116; *People v. Ray, supra*, 13 Cal.4th at p. 340.) In essence, Plante

related that if there were some mitigating circumstance, it would benefit defendant to relay that to the trier of fact.

The present case is distinguishable from cases on which defendant relies, all of which involve repeated and obvious promises of lenient treatment should the defendant make a statement. For example, in *In re Shawn D.*, *supra*, 20 Cal.App.4th at pages 214-216, the police repeatedly lied to the 16-year-old suspect regarding the evidence against him. The officers further stated the minor would be tried as an adult, which was “plainly misleading” under the circumstances of the case. (*Id.* at p. 213.) Additionally, the police implied the minor’s girlfriend would get into “trouble” unless he confessed. The court explained that even in combination, these circumstances may not have been sufficient to render the minor’s statement involuntary. However, the repeated suggestions that the minor would be treated more leniently if he confessed rendered his statement involuntary. The officers told the minor if he “told the truth his honesty would be noted” in the police report, whereas if he lied, his “deception would also be documented,” which implied the minor would benefit from having the police note his honesty. Furthermore, the officer stated he just wanted to get the property back and if the minor were to help to that end, his cooperation would be noted. (*Id.* at p. 214.)

Additionally, the officer misled the minor regarding the law of aiding and abetting, suggesting an aider and abettor could be less culpable than the principal and that providing an explanation for his actions would benefit him. (*In re Shawn D.*, *supra*, 20 Cal.App.4th at p. 215.) Finally, the officer told the minor that if he disclosed the location of the stolen property, he would “personally talk to the D.A. or persons who do the juvenile.” (*Id.* at p. 215, italics omitted.) This statement implied that if the minor confessed, he would not be tried as an adult. Considering the totality of the circumstances and that the “promise of leniency in exchange for a confession permeated the entire interrogation” the court found the statement was involuntary. (*Id.* at pp. 215-216.)

Likewise in *In re Roger G.* (1975) 53 Cal.App.3d 198, 200-204, the officer's alternating threats that the minor might be tried as an adult if he did not confess and promises of help to secure him parole if he did confess amounted to impermissible coercion. In *People v. Neal* (2003) 31 Cal.4th 63, 82-85 the defendant's young age, inexperience with the criminal justice system, and the officer's refusal to honor the defendant's assertion to his right to counsel and silence all played a part in the court's determination the defendant's statement was involuntary. Furthermore, the officer's metaphor that he was a bus driver and the defendant was a passenger and it was up to the driver whether to let the defendant off the bus closer to home or all the way to Timbuktu amounted to an implied promise that if the defendant made a statement, the officer would make things easier for him. The court found the totality of circumstances created a coercive situation rendering the defendant's statement involuntary. In *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 883, an agent's statement that unless the defendant cooperated with police he would be forced to recommend maximum in custody time implied a promise that if the defendant cooperated, his parole agent would recommend a shorter sentence.

Unlike the situations presented above, Plante's statement he would advocate for defendant carried no implied promise. Rather, Plante's offers to advocate on defendant's behalf are similar to the situations presented in *People v. Ramos, supra*, 121 Cal.App.4th 1194, *People v. Higareda* (1994) 24 Cal.App.4th 1399, and *People v. Wischemann* (1979) 94 Cal.App.3d 162. In *People v. Ramos*, the officer explained to the defendant that his cooperation would be beneficial in the judicial process because the officer would take the defendant's statement to the district attorney's office for consideration. (*People v. Ramos, supra*, at p. 1200.) The court concluded the officer's "'offers of intercession with the district attorney amounted to truthful implications that [the defendant's] cooperation might be useful in later plea bargain negotiations.'" (*Id.* at p. 1203, quoting *People v. Jones, supra*, 17 Cal.4th at p. 298.) In *People v. Higareda*, the court held a confession was not rendered involuntary simply because police said they would talk to

the district attorney if the defendant told the truth. (*People v. Higareda, supra*, at p. 1409.) In *People v. Wischemann*, the defendant asked another officer what the interviewing officer was like after he left the room. The officer told the defendant the interviewer was a fair man and it would be advantageous for the defendant to talk to him. The court found the statement was not coercive as it simply was an expression of the officer's opinion of the interviewing officer. The decision of whether or not to make a statement was left with the defendant. (*People v. Wischemann, supra*, at p. 172.) Similarly, Plante's offers to advocate for defendant if he provided an honest and believable statement was a truthful implication that the officer would relay the statement to the district attorney, the other detectives, and the jury.

While the officers could not falsely promise defendant leniency, the officers could express a sympathetic personal view of defendant's crimes, real or feigned, to encourage a confession without rendering it involuntary. (See *People v. Holloway, supra*, 33 Cal.4th at p. 116 [officer's suggestion killings might have been accidental or product of drunken rage did not invalidate confession]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1043 [officer's effort to establish rapport with defendant did not constitute coercion]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1212 [no "implied promise of leniency" in "statement that '[w]e are here to listen and then to help you out'"].) The officers' sympathetic statements here "fall far short of being promises of lenient treatment in exchange for cooperation. [They] did not represent that they, the prosecutor or the court would grant defendant any particular benefit" (*People v. Holloway, supra*, at p. 116.)

Importantly, Plante neither expressly nor impliedly asserted defendant would get any benefit from a statement other than that which would naturally flow from a truthful statement. Plante's statements about testifying for defendant did not provide promises of leniency. They did no more than explain that, as an officer, Plante would be called upon to testify as to what defendant told him. His statement simply acknowledged that by giving a statement, the officer could recount it to the jury. He stated he would believe his statement and he could "sell" it because it was the truth. Plante never implied he would

do anything other than give a truthful testimony regarding defendant's statements. Though defendant characterizes the officers' words as amounting to an express or implied promise of leniency, on this record they are at most the aggressive suggestion of a benefit that "flows naturally from a truthful and honest course of conduct." (*People v. Hill, supra*, 66 Cal.2d at p. 549.)

In *People v. Jones*, the court found an officer's statement to the defendant that he would tell the district attorney the defendant had been honest was not an implied promise of leniency. (*People v. Jones, supra*, 17 Cal.4th at p. 298.) Considering the totality of the circumstances of the interview, the court found the officer's statements "amounted to truthful implications that [the defendant's] cooperation might be useful in later plea bargain negotiations." (*Ibid.*)

Nor is this case similar to *People v. Jimenez, supra*, 21 Cal.3d 595. There, according to the defendant's uncontradicted testimony, the officer told the defendant that if he cooperated, the officer would tell the jury "and the jury would go lighter on him" in connection with the death penalty. (*Id.* at p. 611.) No such promise was made here. Plante's statements that he would advocate for defendant, or be his voice, or testify for him never implied defendant would received a lesser sentence as a result.

Here the benefits indicated by Plante and Medina were those associated with truthful conduct. The officers pointed out that if there were some explanation for the victim's death, such as an accident or some other unintentional act, it could be viewed as a mitigating circumstance. If there were a mitigating circumstance, it could in fact affect the degree of homicide. Plante never promised any specific benefit from defendant's statement or implied defendant would receive a benefit from making a statement. He just emphasized the consequences of a dishonest course of conduct.

Further, it is important to note the officers never deceived defendant or misrepresented the law. The fact defendant was convicted of voluntary manslaughter, rather than murder, demonstrates the varying degrees of homicide. Likewise, Plante's statements as being defendant's voice merely pointed out he could testify as to what

defendant told him. Of course, his statement that he believed defendant did not offer a benefit, nor did his statement that he could be persuasive. It could hardly be beyond defendant's comprehension that an officer could—and likely would—be called to testify regarding defendant's statements, and he would have to testify truthfully. Plante never insinuated he would be responsible for the ultimate decision at trial, and stated repeatedly throughout the conversation that the case would go to a jury for a decision. There was nothing in the conversation implying they would have any say over what charges would be brought or the outcome of the proceeding.

The officers repeatedly stated they did not want defendant to make up anything, but based upon their discussions with him, they did not believe he intentionally killed the victim. Plante's comments about being persuasive or "selling" a statement merely expressed his belief that a truthful explanation would be believed. Specifically, Plante's comments read in context said nothing more than if there was an explanation regarding the victim's death, providing that explanation could make a difference to the trier of fact. Importantly, Plante offered nothing in exchange for the defendant's statement. The only promise one could imply is that he promised he would testify truthfully. He repeatedly stated he could not make the defendant any promises or guarantees. Instead, he told defendant he believed he was a good person and that defendant would unburden himself by explaining what had happened.

In this respect the case is not unlike *People v. Vance, supra*, 188 Cal.App.4th 182 where an officer told the defendant he was there to "listen and then to help you out." (*Id.* at p. 1210.) The defendant was interviewed after being arrested for murder and the officers suggested the killing could have been accidental. (*Id.* at pp. 1208-1209.) The defendant ultimately admitted the killing was an accident. (*Id.* at p. 1210.) In rejecting the defendant's claim of an implied promise of leniency in the officers' statements that they were there "to listen and then to help you out," and that the court wanted "to know ... the real story ... and [the defendant was] the only one that can provide that," the court explained, the only benefit "promised by the officers was the peace of mind defendant

and others would have after he did the right thing and gave his side of the story.” (*Id.* at p. 1212.) The brief references did not imply a promise of leniency. (*Ibid.*)

Similarly, in *People v. Carrington*, *supra*, 47 Cal.4th 145, the defendant was arrested on a burglary warrant from another county. While in custody, officers questioned the defendant regarding a homicide in their county. During the interrogation, an officer stated they ““would try to explain this whole thing”” to the other agency ““as [best] we can”” if the defendant cooperated in the interview. However, he also noted he had no control over the other agency. The court found the statement was not an express or implied promise of leniency. (*Id.* at pp. 169-170.) Instead, the court found the statements, taken in context, only relayed that the officer would try to get more information about the out-of-county burglary to assist the defendant regarding her status for that crime. (*Id.* at p. 170.)

Even if we were to view Plante’s statements to advocate or testify for defendant as conferring some benefit upon defendant, we would still find his confession was voluntary. In *People v. Williams* (1997) 16 Cal.4th 635, our Supreme Court noted no one factor, including a promise of leniency, is dispositive in evaluating the voluntariness of a confession. (*Id.* at pp. 660-661.) The court explained:

“In *People v. Boyde* (1988) 46 Cal.3d 212, 238, this court said that ‘where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law.’ Similarly, the United States Supreme Court stated in *Bram v. United States* (1897) 168 U.S. 532, 542–543, that a confession is not voluntary if obtained by ““any direct or implied promises, however slight, [or] by the exertion of any improper influence.”” But in *Arizona v. Fulminante* (1991) 499 U.S. 279, 285, the high court described *Bram* as inconsistent with current precedent, and explained it does not reflect ‘the standard for determining the voluntariness of a confession.’ We echoed that view in *People v. Cahill*[, *supra*,] 5 Cal.4th 478, 513, footnote 2. Thus, under current law, no single factor is dispositive in determining voluntariness, but rather courts consider the totality of circumstances. (*Withrow v. Williams*, *supra*, 507 U.S. at pp. 693–694; *Arizona v. Fulminante*, *supra*, at pp. 285–286.)” (*People v. Williams*, *supra*, at pp. 660-661.)

The court reiterated this proposition in *People v. Neal, supra*, 31 Cal.4th 63. Indeed, in that case, the court found the officer's threats and promises to the defendant, when considered in combination with other factors weighing against the voluntariness of the confession, rendered the statement coerced. (*Id.* at pp. 84-85.)

In the context of the entire conversation, we conclude any promise of an implied benefit arising from Plante's statement that he would advocate or testify for defendant were insufficient to overcome defendant's will to resist. Defendant was 47 years old at the time of the interview, appeared to be of normal intelligence, had obtained a GED and admitted to completing some college courses. He was no stranger to the criminal justice system, stating in prior interviews that he had been "threatened by the police before" and had served time in prison. (See *People v. Vasila, supra*, 38 Cal.App.4th at p. 876 [defendant's "age, sophistication, prior experience with the criminal justice system and emotional state" are relevant factors to consider in determining voluntariness of confession].) The trial court noted defendant was "as streetwise on the subject of promises and negotiations as you might find in a person." The tone of the interview was friendly and took place at defendant's home where he had invited the officers inside. The officers made it abundantly clear defendant could ask them to leave at any point and they would comply with his request. While defendant expressed frustration during the interview at the continued inquiry into his role in the killing, he did not display any sign that he was vulnerable or under any emotional distress. To the extent he displayed any emotional struggle, it appeared he was wrestling with his conscience, which was weighing heavily on him.

The interview with Plante and Medina lasted approximately one and one-half hours in total. Although it occurred immediately after the lengthy interview with Grogan, we note that interview was nonaccusatory in tone. Defendant was given food and water and restroom breaks. Additionally, the interview consisted primarily of gathering background information on defendant, his prior relationships with other women and the victim, and gathering additional details regarding defendant's actions in discovering and

concealing the victim's body. It was not until the final minutes of that interview that Grogan suggested defendant could be involved in the victim's death. At that point, defendant terminated the interview and was allowed to leave the police station.

But most telling is the fact no promises to advocate or testify for defendant appeared to induce his confession. Prior to disclosing his role in her death, defendant repeatedly stated his concern he would be "fried" for any involvement in the victim's death, and no one would believe his statements. After defendant confessed his role in the victim's death, he still expressed the same belief that his "life is over." When Plante reiterated he would be his advocate after defendant confessed, defendant replied, "Yeah but you know it's not gonna matter." Defendant later reiterated this feeling after Plante again said he was going to testify; defendant stated no one is going to "believe it." A short time later, defendant once again expressed his feeling that his explanation the killing was accidental was "not gonna change anything." When the officers asked defendant to put his statement on tape, defendant stated, "the DA's ah gonna fry me." He continued, "Ah, nobody would believe me then and nobody is gonna believe me now that it was an accident." Defendant continued to express his feeling he was "gonna be fried" throughout the remainder of the conversation. When Plante responded it was not true, defendant stated, "you can't guarantee that." Thus, even to the extent Plante's statements could be interpreted as some kind of implied promise that a confession would lead to a lesser sentence, it does not appear to have induced defendant's confession. These statements demonstrate his confession was not based upon any promise of advocacy on the officer's part. If defendant himself did not believe his statement would result in reward or advantage—something he expressed repeatedly after making the statement—then the inducement implied by Plante's offers to advocate for defendant could not have been the primary motivating cause of the admission that followed. (See *People v. Rundle* (2008) 43 Cal.4th 76, 119 [defendant's belief he would be sent to prison and forgotten and not receive any help, expressed before and after confession, demonstrated his belief

he would not receive benefits discussed by officers], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Considering the totality of the circumstances surrounding defendant's statement, we conclude defendant's statement was the product of his own free will and was not motivated by any express or implied promises or threats. As such, the trial court's ruling admitting the defendant's statements was proper.

II. Any Instructional Error Was Necessarily Harmless

The trial court instructed the jury regarding the elements of murder, as well as the lesser included offenses of voluntary manslaughter and involuntary manslaughter. As to the lesser included offense of involuntary manslaughter, the court instructed the jury the crime was committed if:

“1. The defendant assaulted Dena Raley McCluskey;

“AND

“2. The defendant's acts unlawfully caused the death of another person.”

Defendant argues this instruction was erroneous as it neglected to inform the jury that defendant's act must have been committed with criminal negligence. (*People v. Cox* (2000) 23 Cal.4th 665, 675 [involuntary manslaughter based upon misdemeanor conduct requires a showing the misdemeanor was dangerous to life under circumstances of its commission]; *People v. Butler* (2010) 187 Cal.App.4th 998, 1008 [conviction of involuntary manslaughter based upon an act amounting to a misdemeanor resulting in another's death requires a finding of criminal negligence].) We need not determine whether the instruction omitted a necessary element because assuming error, it was necessarily harmless.

In *People v. Breverman* (1998) 19 Cal.4th 142, 165-176, our Supreme Court addressed the proper standard of review for a trial court's failure to fully instruct with a lesser included offense. In explaining the court's duty to instruct sua sponte on all lesser included offenses, the court noted the rule avoids an unwarranted all or nothing choice

for the jury and ensures a verdict no harsher or more lenient than the evidence merits. (*Id.* at p. 155.) The court analyzed the proper standard of review when a trial court failed to instruct, or to instruct fully, on a lesser included offense in noncapital cases and found the error is “at most, an error of California law alone” and subject to the *People v. Watson* (1946) 46 Cal.2d 818 standard of reversibility. (*People v. Breverman, supra*, at p. 165.)

Defendant argues prejudice must be assessed under the *Chapman v. California* (1967) 386 U.S. 18, 24 standard of review as this case involves failure to instruct on all elements of the lesser included offense, rather than the failure to instruct on the lesser included offense in its entirety. In support of his argument, he relies upon *United States v. Gaudin* (1995) 515 U.S. 506. We find this reliance misplaced. In *Gaudin*, the defendant was charged with making false statements on federal loan documents. One of the elements of the crime required a finding that the false statement was material. The trial court instructed the jury this element was a “matter for the decision of the court” and further instructed the jury the statements were in fact material, thus removing an element from the jury’s consideration. (*Id.* at p. 508.) Because the “Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged,” the removal of that element from the jury constituted federal constitutional error. (*Id.* at pp. 522-523.) Thus, *Gaudin* applies where an element of the charge for which the defendant was convicted is omitted from the jury’s consideration. Unlike the situation in *Gaudin*, defendant’s jury was fully and properly instructed upon all elements of voluntary manslaughter. As the jury in fact considered all elements of the offense for which defendant was convicted, *Gaudin* is inapplicable.

Indeed, *People v. Breverman* addressed, and rejected, a similar argument. As the court explained:

“Defendant was not convicted of manslaughter on the basis of incomplete instructions, but of murder, an offense supported by the evidence as to which defendant claims no misinstruction. His complaint, as we read it, is

not that an element of the charged offense of murder was removed from the jury's consideration, but simply that the omission of an 'element' of voluntary manslaughter denied him full jury consideration of that *lesser alternative* to murder. As explained above, the United States Supreme Court has acknowledged the value of lesser included offense instructions as a safeguard against overconviction in lieu of an equally unwarranted acquittal. However, the high court has explicitly refrained from according these interests federal constitutional stature in noncapital cases. It thus appears likely the United States Supreme Court would deem a state conviction for a charged noncapital offense to be untainted by federal constitutional error *in the complete absence* of unrequested instructions on lesser included offenses. Under these circumstances, defendant's conviction cannot acquire such a taint simply because instructions on a lesser included offense were given but, as provided in the absence of a defense request, were incomplete." (*People v. Breverman, supra*, 19 Cal.4th at pp. 169-170.)

Likewise here, the claim of error is that the jury was not fully instructed on all of the elements of the lesser included offense, not that the jury was not fully instructed on all elements of the offense for which defendant was convicted. Thus, the *Watson* standard applies. (*People v. Breverman, supra*, 19 Cal.4th at p. 176.)

In assessing prejudice, defendant argues this court cannot consider the fact the jury chose to convict him of the greater offense or that substantial evidence supported the greater offense. (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.) While it is true that when there is a complete failure to instruct on a lesser included offense the jury's finding as to the greater offense does not resolve the issue of prejudice, such a situation is not present here. The reason for such a rule is simple: we cannot assume the jury rejected a theory it was never asked to consider. As the court explained in *Breverman*, the "purpose of the rule is to allow the jurors to convict of *either* the greater or the lesser offense where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears reasonably probable the jury would

nonetheless have elected the lesser if given that choice.” (*People v. Breverman, supra*, 19 Cal.4th at p. 178, fn. 25.)

Defendant’s jury was fully instructed on all theories of murder, voluntary manslaughter, and involuntary manslaughter as well as excusable homicide. It is well settled that “[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.”” (*People v. Beames* (2007) 40 Cal.4th 907, 928.) The jurors were instructed that if they found the victim’s death was solely the result of defendant’s assault, the crime was deemed involuntary manslaughter. However, the jury rejected that theory, finding instead defendant acted in the heat of passion in killing the victim and deeming his actions voluntary manslaughter. Any failure to instruct the jury that it must find an *additional* element, namely criminal negligence, before it could find defendant committed the crime of involuntary manslaughter could not have affected the verdict where the jury had already rejected such a theory on lesser elements. Thus, defendant did not suffer any prejudice.

DISPOSITION

The judgment is affirmed.

PEÑA, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

SARKISIAN, J.*

*Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.