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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER CORTEZ,

Defendant and Appellant.

G049151

(Super. Ct. No. 10CF3258)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor, Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Christopher Cortez of willful, deliberate, and premeditated attempted murder of Alfonzo Perez Behena (Pen. Code, §§ 664, 187, subd. (1); count 1; all further statutory references are to this code), shooting at an occupied motor vehicle (§ 246; count 2), and street terrorism (§ 186.22 subd. (a); count 3). The jury found defendant committed counts 1 and 2 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subds. (b)(1) & (b)(4)(B)), and also found he personally and intentionally discharged a firearm causing great bodily injury to Bahena (§ 12022.53, subd. (d)). The trial court dismissed count 2 because only the special findings relating to the count had been read in open court; the underlying verdict was not read in open court and the jury had not been polled on it.

The trial court sentenced defendant to 32 years to life in prison, consisting of seven years to life for the attempted murder and a consecutive term of 25 years to life for discharge of a firearm causing great bodily injury, with a concurrent 10-year sentence for the gang enhancement, and a stay on the street terrorism count.

Defendant challenges the trial court's pretrial ruling denying his motion to suppress his statements to the police, alleging the officers used improper "softening up" tactics and trivialized his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also challenges the sufficiency of the evidence to support the gang enhancement. We affirm the judgment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Around 7:00 p.m. in early December 2010, as Bahena sat in the driver's seat of his car at a red light in Santa Ana, a male figure approached on the passenger side and fired three shots into his vehicle, striking Bahena on his right elbow, right thigh, and left calf. Bahena exited his car and sought help at a nearby bus stop, where someone called 911.

Approximately two minutes later, a police officer responded to a gas station at the McFadden and Bristol intersection, where Bahena yelled out to him that he had been shot. Bahena described his assailant as a Hispanic male between 18 and 20 years old who wore a gray hooded sweatshirt and had been riding a beach cruiser bicycle. Paramedics arrived at the scene and rushed Bahena to the hospital.

Around 9:00 p.m. that same night, Santa Ana Police Officers Frank Gutierrez and his partner were patrolling an area in Santa Ana claimed by the Orange County Kings (OCK) criminal street gang. Gutierrez noticed a Lincoln Navigator stopped in the middle of the road, impeding traffic, and he also noticed individuals he recognized as OCK members conversing with the vehicle occupants. As the officers made a U-turn to conduct a traffic stop, the Navigator accelerated to evade the police and made a series of turns before coming to a stop, and both the driver and his passenger jumped out of the vehicle and fled. Before fleeing, the driver threw a shiny object back into the car; the police apprehended him, but the passenger, an OCK member known by the gang moniker, Demo, escaped. Demo and defendant were friends.

The officers retrieved from the vehicle a chrome .38-caliber revolver loaded with two live rounds. Gutierrez investigated whether the vehicle or gun was connected to the earlier shooting. The next day at the hospital, Gutierrez showed Bahena a photographic lineup that included OCK gang members. Bahena identified defendant as the person who shot him, and told Gutierrez he knew defendant and that they had “gotten down once or twice,” meaning they had fistfights. Bahena explained they fought because he was affiliated with a rival gang, No Fucking Respect (NFR), but also said the fights occurred for “personal reasons.”

After defendant was arrested on December 5, 2010, Gutierrez and a Detective Wilson interviewed him at the police station. Gutierrez began the interview with a brief conversation lasting “35 seconds to a minute” to establish a rapport with defendant. Wilson then asked defendant some identifying questions and read him his

*Miranda* rights. After reciting each of the different rights, Wilson asked defendant, “Do you understand,” and defendant responded, “Yes.” In the ensuing interview, defendant admitted to “kicking it” with OCK for the past three years and identified the group as having at least 15 members. He admitted to purchasing a chrome .38-caliber gun with money raised by OCK members, and he identified the weapon as an OCK or gang gun.

Defendant also stated Bahena had “disrespected” his girlfriend, the mother of his children, a couple months earlier. Defendant’s girlfriend told him Bahena had called defendant a “pussy” and boasted he was going to kill him. Defendant admitted he knew he was a suspect in the recent shooting, stating, “[L]ike alright if he is going to kill me then why should I just wait you know?”

Gutierrez testified defendant told him in an unrecorded portion of the interview that in a separate incident, Bahena pushed defendant’s girlfriend in the stomach while she was pregnant. Defendant told Gutierrez he felt Bahena had disrespected him and he needed to retaliate.

Defendant explained that on the day of the shooting, he had been “kicking it” at an OCK hangout in the “back of Highland” with Demo, another OCK gang member known as Plets, and “like three other guys.” Demo pointed out Bahena passing by in his vehicle, and defendant explained his “crew” knew he “had a beef” with Bahena and would “do something.” They had a .38-caliber at their disposal. Defendant admitted he grabbed his bicycle, chased down Bahena’s car, and shot him three times. According to defendant, Plets knew he had the gun, and followed him to Bahena’s car. After the shooting, defendant gave the gun to Demo and went home.

At trial, Bahena testified he heard someone say “OCK” just before the shooting, but he claimed he was no longer sure defendant was the shooter. He denied having any altercation with defendant’s girlfriend or threatening defendant.

The jury convicted Cortez as noted above, and he now appeals.

## II

### DISCUSSION

#### A. *Voluntariness of Defendant's Statements*

Defendant contends the trial court erred in denying his pretrial motion to suppress his statements to investigators because the officers used coercive interrogation tactics to “soften[] him up” with small talk and trivialize his *Miranda* rights, rendering his admissions involuntary. We are not persuaded. “In determining whether a confession was voluntary, ‘[t]he question is whether [the] defendant’s choice to confess was not “essentially free” because his will was overborne.’” (*People v. Massie* (1998) 19 Cal.4th 550, 576 (*Massie*); see *Moran v. Burbine* (1986) 475 U.S. 412, 421 (*Moran*) [a defendant’s decision to speak with police “must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception”].) On appeal, we defer to the trial court’s factual findings concerning the circumstances surrounding the interrogation, but we independently review the voluntariness of the defendant’s statements under the totality of the circumstances. (*Massie*, at p. 576.) In making this determination, we give great weight to the trier of fact’s “considered conclusions” in examining the same evidence, but reserve final judgment for ourselves. (*People v. Wash* (1993) 6 Cal.4th 215, 236.)

Defendant argues his statements were involuntary because one of the detectives engaged in small talk with him before providing *Miranda* warnings at the outset of his interview, which lasted between 75 and 90 minutes. The detective’s introductory statements, however, were brief and innocuous. Detective Gutierrez simply told defendant, who was 18 years old, that his girlfriend, mother, and his children were all worried about him and said, “Hi,” and that he could give them a call soon. The detective had conversed with the family members in serving a search warrant at defendant’s home.

Unlike in *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), on which defendant relies, the detective's pre-*Miranda* conversation here lasted "maybe 35 seconds to a minute" and was not coercive. In *Honeycutt*, the Supreme Court found the officers deliberately plotted "from the inception of the conversation" to induce the defendant to waive his *Miranda* rights, engaging in false ploys that included a "bad cop/good cop" or "Mutt and Jeff" routine and remarks to discredit the victim. (*Honeycutt*, at pp. 159, 160, fn. 5.) Specifically, the *Honeycutt* detectives drew the defendant into a hostile confrontation with the first officer, whom the defendant spat at and called racial epithets, then that officer left and the second officer, who knew the defendant well, engaged him in conversation about unrelated matters and former acquaintances for a half hour, while also disparaging the murder victim as a suspect in a homicide and a person of "homosexual tendencies." (*Id.* at p. 158.)

The court in *Honeycutt* found these coercive stratagems before advising defendant of his *Miranda* rights rendered the defendant's ensuing *Miranda* waiver and confession involuntary, explaining, "when the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Honeycutt*, *supra*, 20 Cal.3d at pp. 160-161.) The court found that "Detective Williams had, prior to explaining the *Miranda* rights, already succeeded in persuading defendant to waive such rights." (*Id.* at p. 159.)

There were no similar softening-up tactics, nor any coercion here. The trial court in reviewing the tape recorded portions of the interview found defendant "does not sound like he's being coerced," but to the contrary, had "no reservations about speaking to the officers." (Accord, *People v. Whitson* (1998) 17 Cal.4th 229, 249 [suspect's "willingness to speak with the officers is readily apparent from his responses"].) Unlike

the detectives in *Honeycutt*, Gutierrez in his brief introductory comments did not talk about shared experiences or mutual acquaintances, did not disparage the victim, and did not attempt to trick defendant into talking. Nor did Gutierrez induce defendant to confess with promises of leniency. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 214-216.) Nothing in the record suggests defendant's waiver of his *Miranda* rights was involuntary or the result of impermissible conduct. (See *People v. Gurule* (2002) 28 Cal.4th 557, 602 [finding no *Honeycutt* violation in absence of evidence that the "small talk" before the *Miranda* warnings "overbore defendant's free will"].) Defendant's challenge is without merit.

The trial court expressed some concern regarding defendant's other contention that the officers downplayed the *Miranda* warnings as "something real quick" among "a couple of things" they needed to get to before questioning defendant, but the court ultimately found the officers' conduct did not render defendant's statements involuntary, or unknowing, uninformed, or unintelligent. We agree.

As the high court explained in *Moran*, a suspect's *Miranda* waiver must be voluntary, but also knowing, informed, and intelligent in the sense that it is made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Moran, supra*, 475 U.S. at p. 421.) In *People v. Musselwhite* (1998) 17 Cal.4th 1216, our Supreme Court considered the defendant's claim his *Miranda* waiver was invalid because investigators minimized the rights conferred by *Miranda*, thereby suggesting in the defendant's characterization that they were an "unimportant 'technicality.'" (*Id.* at p. 1237.) The court agreed with "the proposition that evidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision—by 'playing down,' for example, or minimizing their legal significance—may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and

intelligent.” (*Ibid.*) The court concluded however, the record failed to support the defendant’s claim of being tricked into waiving his *Miranda* rights. (*Id.* at p. 1238.)

The *Musselwhite* court observed: “Given the brevity, as well as the accuracy, of Detective Bell’s statement, the fact that the officers never described the *Miranda* warning as a ‘technicality’ or used similar words, the absence of similar comments during the course of the questioning, defendant’s record of police encounters as evidenced by two prior felony convictions, the likelihood he was aware he was a suspect in a murder investigation . . . , we conclude the record fails to support defendant’s claim that the importance of his *Miranda* rights was misrepresented by the detectives and that he was thereby ‘tricked’ into waiving them.” (*Musselwhite, supra*, 17 Cal.4th at p. 1238.)

Detective Gutierrez stated at the beginning of the interview in reference to the *Miranda* warning that “[m]y partner just has to read you something real quick” and Detective Wilson then proceeded to the terms of the warning by stating, “I’m, uh, [going to] read you a couple of things.” But as in *Musselwhite*, the officers did not refer to the *Miranda* warning as a mere technicality, nor did they conduct a campaign throughout the course of the interview to downplay defendant’s rights, nor was he a neophyte in police custody, having been arrested twice, and his ready admissions indicated he knew he was a suspect in the shooting. We give great weight to the trial court’s assessment that defendant spoke without reservation. In the overall context of the interview in which the officers treated defendant with courtesy and respect, we do not believe their brief comments about *Miranda* overbore his ability to understand or assert those rights, or led him to believe they were a fiction or would be ignored. In the totality of the circumstances surrounding the interview, the evidence does not suggest his *Miranda* waiver was anything but voluntary, knowing, informed, and intelligent. The trial court therefore did not err in denying defendant’s suppression motion.

## B. *Gang Enhancement*

Defendant challenges the sufficiency of the evidence to support the jury's conclusion he committed the attempted murder for the benefit of a criminal street gang (§ 186.22, subd. (b)). Defendant relies on his assertion his antagonism toward Bahena was personal, based on a perceived slight to his girlfriend, rather than gang related. But it is enough that defendant committed the offense "in association with" (*ibid.*) his fellow gang members, Plets and Demo. (*People v. Albillar* (2010) 51 Cal.4th 47, 60, 62 (*Albillar*)). Demo pointed out Bahena as a potential target when Bahena drove by, Plets knew defendant had a gun and followed when defendant pursued Bahena, thus acting in gang culture as "back up" to provide support for defendant, and after the shooting defendant gave the gun to Demo, illustrating a close connection in criminal activity that the jury could infer was cemented by the trio's gang ties. (See, e.g., *id.* at pp. 61-62 ["their common gang membership ensured that they could rely on each other's cooperation" in committing offense and hiding their involvement].)

Thus, the prosecution need not establish that the underlying felony benefits the gang, but only that the defendant harbored the requisite specific intent and committed the offense in association with fellow gang members. (*Albillar, supra*, 51 Cal.4th at p. 60; see, e.g., *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, fn. 7 [evidence sufficient for gang enhancement when defendant commits offense in association with fellow gang member].) Nor must the prosecution prove the defendant intended to promote, further, or assist in criminal conduct by gang members apart from his or her conviction offense. (*Albillar*, at p. 66; *People v. Leon* (2008) 161 Cal.App.4th 149, 162-163.)

In any event, it was the jury's province to weigh the evidence, and the jury reasonably could determine defendant not only relied on his cohort as gang members, but also intended the shooting to benefit his gang. According to the trial testimony, he yelled out his gang's name just before pulling the trigger. He also acknowledged his differences

with Bahena were not merely personal, but stemmed from belonging to rival gangs. As the trial court observed, “Often people act for a variety of reasons and have multiple motivations,” and the jury reasonably could find mixed motives for the shooting that included garnering respect for defendant’s gang by committing extreme violence. We must view the record in the light most favorable to the judgment below (*People v. Elliot* (2005) 37 Cal.4th 453, 466), and the fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment (*People v. Bean* (1988) 46 Cal.3d 919, 932-933). An appellant “bears an enormous burden” in challenging the sufficiency of the evidence (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330), and defendant has not met that burden here. Ample evidence supports the jury’s true finding on the gang enhancement.

### III

#### DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.