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

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS KUSALICH,

Defendant and Appellant.

H041457

(Santa Cruz County

Super. Ct. No. F19851)

A jury found defendant Nicholas Kusalich guilty of first degree murder for killing his roommate Robert Burr by striking him in the head with a small sledgehammer while Burr was lying on a couch. In the week following the killing, Kusalich made numerous statements to the police about the circumstances of Burr's death. With Kusalich's help, the police found Burr's body buried in a shallow grave in a rural part of Soquel. Kusalich eventually confessed to the murder while sitting in a tree and threatening suicide.

Asserting various violations of his Fifth Amendment rights, Kusalich moved pretrial to suppress his statements and the evidentiary fruits of them. The trial court denied the motion to suppress and admitted all the challenged statements and evidence. After the jury found Kusalich guilty, the court imposed a total term of 31 years to life.

Kusalich appeals from the denial of his motion to suppress. We conclude the trial court properly denied the motion. Finding no error, we will affirm the judgment.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Facts of the Offense*

#### 1. *Overview*

Kusalich killed his roommate Robert Burr by striking his head with a small sledgehammer and tying a zip tie tightly around his neck in the early morning hours of September 26, 2010.<sup>1</sup> Kusalich enlisted his friend, Gerald Bosinger, to help him bury Burr's body in a wooded part of Soquel.

After the Capitola police arrested Bosinger for drunk driving in Burr's truck on September 27, the police contacted Kusalich. Kusalich made numerous statements to the police over the course of the next week. He initially claimed Burr had gone to the airport to fly to Michigan. Kusalich then claimed Bosinger had killed Burr, and that he (Kusalich) had assisted Bosinger in disposing of the body. Kusalich led police to the location of the body and told them where to find the hammer. Eventually, Kusalich confessed to killing Burr himself. He confessed to the police on his cell phone while sitting in a tree with a rope around his neck. After Kusalich fell from the tree and nearly hanged himself, police cut him down and took him to the hospital. Kusalich confessed to the murder again at the hospital.

#### 2. *Circumstances of the Killing*

Burr, a retired cabinetmaker, lived in a three-bedroom house on Koopmans Avenue in the Live Oak neighborhood of Santa Cruz. Kusalich, a 49-year-old contractor, moved into the house with his girlfriend Christina Delucchi in August 2010. Burr's ex-wife Monica Burr lived elsewhere, but she remained good friends with Kusalich.<sup>2</sup>

In September, Burr made plans to fly to Michigan to meet two of his brothers. The three brothers were planning to drive back to Santa Cruz together in a recreational vehicle. Burr purchased a ticket for a flight to Michigan departing Sunday, September

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<sup>1</sup>All events in the statement of facts occurred in 2010.

<sup>2</sup>We will refer to Monica Burr by her first name to avoid confusion.

26. He planned to have Kusalich drive him to the airport on the morning of the flight. But Burr never arrived in Michigan.

Burr was last seen in public on Saturday night, September 25. A surveillance camera at an ATM showed Kusalich and Burr together outside a bank in Capitola at 7:55 p.m. Burr withdrew \$300 in cash from the ATM, and the two men drove away in Kusalich's truck.

Cell phone records from later in the evening placed the location of Kusalich's cell phone in the general vicinity of the Koopmans Avenue residence. At 9:53 p.m., Kusalich called his friend Gerald Bosinger. Kusalich had been allowing Bosinger to camp in a tent on a rural five-acre property on Glen Haven Road in Soquel which was owned by Kusalich's father. At the time of the phone call, Bosinger was at Sir Froggy's Pub, a bar in Soquel where the two men often met.

Around midnight that evening, a neighbor who lived across the street from the Koopmans Avenue residence heard Burr yelling, "Get out of my fucking yard. I'm going to kill you." The neighbor looked out his window, but his view was blocked by a hedge.

The prosecution claimed Burr was killed shortly after midnight. Physical evidence showed Burr was lying on a couch in the living room at the time. Police found a substantial amount of blood on the armrest of the couch and underneath the cushions. An oval-shaped indentation in Burr's skull was consistent with his head being struck by a hammer while he lay on the couch with his face pointed outward. A heavy gauge plastic zip tie was tightened around Burr's neck with so much force that it fractured a small bone above his Adam's apple.

At both 12:12 a.m. and 12:50 a.m. on Sunday morning, Kusalich placed cell phone calls to Bosinger. Location data from the cell phone towers that transmitted the calls were consistent with Kusalich being at Koopmans Avenue while Bosinger was at Sir Froggy's Pub. At 1:56 a.m., Kusalich called Monica and told her Burr and his truck were gone.

Christina Delucchi had gone to sleep in a bedroom at the Koopmans Avenue residence at 8 p.m. Saturday evening, and she awoke at 3:00 a.m. Sunday morning. When she got up, both Kusalich and Burr were gone. Delucchi called Kusalich's cell phone, but he did not answer. She went back to sleep and awoke again at 6 a.m., but Kusalich was still gone. He finally returned around 9 a.m. When Delucchi asked him about the plan to take Burr to the airport, Kusalich said Burr had gotten angry at him for talking to Monica, so Kusalich "left him somewhere." Kusalich said Burr would probably drive himself to the airport. The couple then went for a ride on Burr's Harley Davidson motorcycle. Later that day, Delucchi called the Capitola Police Department and the local hospital inquiring about the whereabouts of Burr, but nobody knew where he was.

Shortly before noon on Sunday, Kusalich met Bosinger at Sir Froggy's Pub. Video cameras at the bar captured the two men meeting briefly before walking out. The cameras captured them meeting at the bar again later that evening.

Around 2:30 a.m. Monday morning, Capitola police stopped Bosinger for speeding and driving recklessly. He was driving Burr's truck, and he appeared intoxicated. When police questioned Bosinger about Burr, Bosinger responded, "Good luck finding Bob. He's having a lot of problems with his ex-wife." The police arrested Bosinger and impounded the truck. Later that morning, Kusalich went to the tow yard where Burr's truck was impounded. Video cameras captured Kusalich approaching the truck and inspecting it without the yard manager's permission.

At some point on Monday, Kusalich told Delucchi that Burr was dead. Kusalich told her the "Mexican mafia" had "popped Bob off" around 3 a.m. Sunday morning, and he claimed he got rid of the body for them. Delucchi testified that Kusalich was acting "very hyper . . . like a bee in a jar." Later, she saw Kusalich lying on his bed with a rifle in his mouth. Delucchi became upset and began vomiting uncontrollably. Kusalich arranged for her to fly to Southern California to stay with her longtime friend, Constance

Fitzmaurice. Delucchi flew to Ontario that afternoon and stayed with Fitzmaurice at her home in Big Bear.

### 3. *Defendant's Interactions with the Police*

After arresting Bosinger early on Monday morning, September 27, the police went to the Koopmans Avenue residence in search of Burr. They arrived around 3 a.m.

Kusalich answered the door and told the police Burr had left for Michigan. Kusalich said Burr had driven his truck to the airport and would not return until October 12.

Later that morning, police called Kusalich and left him a voice mail asking him to call them back. Kusalich called them back and told them Burr had printed out a boarding pass for his flight to Michigan. The officer who spoke with Kusalich felt he was being vague and evasive in his answers, so the officer asked if Kusalich would be willing to come to the Capitola Police Department to speak with police in person. He agreed to do so.

#### a. *September 27 Interview at the Capitola Police Department*

At 3:30 p.m. on Monday, September 27, Kusalich voluntarily went to the Capitola Police Department. Monica went with him. The police met them in the lobby and took Kusalich to an interview room while Monica remained in the lobby. A single officer interviewed Kusalich for about an hour and a half. The interview was recorded on video with audio. At no point was Kusalich handcuffed.

At the start of the interview, the officer confirmed that Kusalich was there voluntarily. The officer told Kusalich he was not under arrest and he was free to leave at any time. The officer stated he was “merely trying to figure out what’s going on.” Kusalich verbally acknowledged these statements. The officer did not advise Kusalich of his rights under *Miranda*.<sup>3</sup>

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<sup>3</sup>*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Kusalich set forth the following narrative of his whereabouts on the evening of September 25. He said he took Burr to the bank to withdraw \$300 from an ATM at some time before midnight. Afterward, he and Burr drove to a liquor store where they bought beer and rum. They then drove down Seventh Avenue to an area by the beach to drink beer for an hour or two. At that point, Burr wanted to drive to a bar, but Kusalich told Burr he was too drunk to drive. The two got into an argument, and Burr dropped Kusalich off on a frontage road by Highway 1. Kusalich called Monica to tell her Burr was “MIA” and “wound up.” Kusalich then called Bosinger, who had borrowed Kusalich’s car. Kusalich became vague about his whereabouts at that point in the interview, but he stated he never saw Burr again. Kusalich insisted he did not know where Burr was.

About an hour into the interview, the officer left the room and Kusalich exchanged phone calls with his father. Kusalich asked his father to look for a hole in the ground that Kusalich had dug on the Glen Haven property to bury deer carcasses. Kusalich told his father that if the hole had been covered up it might indicate Burr’s body had been buried there.

The police, who overheard the phone conversations, told Kusalich they wanted to examine the Glen Haven property. Kusalich offered to go with them to “show you where everything’s at.” At that point, the interview ended.

b. *Statements to Police at the Glen Haven Property on September 27*

After completing the interview at the Capitola Police Department, the police drove to the Glen Haven property. Monica drove Kusalich to the property in her car. The parties arrived around 6:00 p.m. The police saw Kusalich’s automobile parked on the property, whereupon they obtained his consent to search the car. At that point, Kusalich appeared nervous and uncomfortable. He began sweating and taking deep breaths. When the police began to open the trunk of the car, his eyes widened and he sighed loudly. In the trunk, the police found a bloody plastic bag containing an animal heart.

The police then went to the hole in the ground and discovered it to be empty. The hole was covered with cobwebs and “appeared to have been there for a while.”

Kusalich and the police then entered the main house on the property to speak with Kusalich’s father. While one officer spoke with the father, Detective Sarah Ryan remained with defendant by the stairwell. Kusalich was sweating, pacing around, and appeared increasingly upset. Detective Ryan asked if Kusalich wanted to sit down, so he sat on the steps of the stairwell. As he leaned back, Detective Ryan noticed tears welling up in his eyes. She told Kusalich they would continue their search for Burr until they found him. Kusalich put his head back and began taking deep breaths. After a long moment of silence, he said, “[T]here was a fight and I know what happened to Bob.” Kusalich said this was “new information” he had not yet revealed to the police. At that point, another detective approached and asked if Kusalich was providing new information. Detective Ryan relayed Kusalich’s statement, and the other detective confirmed it was the first time he had heard this information. Kusalich then said he wanted to tell the truth and that he could not take it any longer. Detective Ryan asked him to step outside and tell her what happened.

Once they were outside, Kusalich paced around and bent over with his hands on his knees as if he were going to vomit. Detective Ryan then told him it appeared his lies were “catching up with him” and that he would be unable to keep track of what he had said. Kusalich agreed and said he wanted to tell the truth but that he did not want to get in trouble. Detective Ryan told him he would not get in trouble if he did nothing wrong.

Kusalich then said he had gotten a phone call from Bosinger at some point in the early morning hours. Bosinger said Burr had attacked him and they got into a fight in which Burr had been hit on the head and “hurt real bad.” Kusalich did not know what time Bosinger called him. Kusalich said he went to the Koopmans Avenue residence after the phone call and saw Burr lying on the ground with his head bleeding. Kusalich claimed Bosinger told him, “You need to help me move Mr. Burr because he’s in your

house, and you're going to go down for it." Without giving further details, Kusalich said he "helped" Bosinger. Kusalich did not tell Detective Ryan where Burr was.

At the end of their conversation, he turned around, put his hands behind his back, and told Detective Ryan, "Just arrest me." Kusalich said he wanted to talk to the district attorney and make a deal. Detective Ryan told Kusalich she was not arresting him and asked if he would be willing to go to the Sheriff's Office to make a statement. Kusalich agreed to do so.

Detective Ryan then asked Kusalich to sit in the back of her patrol car. She did not handcuff him. She conducted a patsearch before he got in her car, but he had no weapons and she did not take any property from him. After some time, she drove Kusalich to the Santa Cruz County Sheriff's Office.

*c. Interview at the Sheriff's Office on the Night of September 27*

When they arrived at the Sheriff's Office, Kusalich told Detective Ryan he had not eaten or slept much in the previous three days. She escorted him into the office without handcuffing him. They proceeded to an interview room where two detectives from the Sheriff's Office questioned him. The interview began around 10:15 p.m. and ended around 11:57 p.m. At several points in the interview, the detectives left Kusalich in the room alone for periods of around ten minutes. They provided him with coffee on request. The interview was recorded on video with audio.

The detectives began the interview by advising Kusalich to "just be honest" and telling him, "[W]e'll investigate it, we'll figure out the truth and, we'll do you as good as we can do you while you're telling us the truth." Kusalich responded, "I'm telling the truth and I didn't do anything. What's, what's good? What's the goodest [*sic*] you can do me?" At that point, the detectives fully advised Kusalich of his *Miranda* rights and he verbally acknowledged that he understood the advisements.

When asked to explain what happened, Kusalich said he felt bad because "I screwed up and I got scared and I was drunk." He asked if, hypothetically, he had been

blackmailed, “[W]hat am I looking at?” He added, “Say, say hypothetically, I mean, I, don’t, I don’t, I want this over with but not, I don’t want to spend the rest of, you know, ten, five years in prison for, being drunk and scared.” The detectives asked him to explain further, and Kusalich responded, “I’m concerned. I’m concerned my best friend died . . . dead. And I helped cover it up.” This prompted the following exchange:

“[Detective:] And how is that. Can you take me back to when it all happened?”

“[Kusalich:] Well I can, what are we talking about really? *Do I need to get an attorney*, I want, I want to settle this, I really do. But what am I looking at for like, being an accessory, after the fact?”

“[Detective:] Well, you know what, I can’t . . . I don’t know. It’s something we’d have to talk to the DA’s office about.

“[Kusalich:] I thought you were the DA?”

“[Detective:] No, I’m actually a detective here at the Sheriff[’]s Office.

“[Kusalich:] Well, that’s why the DA was here to cut, to make a deal out of this.

“[Detective:] Well no, you know, well Nick, the DA works Monday through Friday, 8-5. Obviously the DA, the District Attorney’s Office . . .

“[Kusalich:] I thought this guy’s [*sic*] was a DA Investigator.

“[Detective:] No, we’re investigators, we’re detectives here at the Sheriff[’]s Office.

“[Kusalich:] Okay. So you can’t cut a deal?”

“[Detective:] Nick, I’m not saying that. What I’m saying is, there’s some things that you know, obviously we have to, we have to offer, so we have to explain some things to the DA’s office. Right? They work Monday through Friday, 8-5.

“[Kusalich:] Okay.” (*Italics added.*)

Kusalich continued to answer the detectives’ questions and repeatedly denied killing Burr. When the detectives asked if Kusalich knew what kind of weapon was used and if it would have fingerprints on it, he responded, “Yeah, but mine.” He then gestured

with his arm, mimicking the act of throwing away some object. He lamented that “I’m screwed” because Bosinger would accuse him of the murder. Kusalich claimed he was in his truck when Bosinger called him. Kusalich said he had allowed Bosinger into the Koopmans Avenue residence to shower while Burr was passed out. Kusalich said, “He hit him with it,” and that Burr was “bleeding a lot. A lot.”

When Kusalich again asked if he could speak with a district attorney, the detectives told him there was no district attorney at the office. Kusalich responded, “I want to get this out of the way, but, *I really think I should, at least have an attorney here.*” (Italics added.)

The detectives continued to question Kusalich. They told him he was helping them out by “telling us about a crime that we don’t know anything about yet.” They added, “Now, is there perhaps going to be some culpability for helping out afterwards? Maybe, maybe not.” They continued, “But if you did not kill this person, it’s a completely different charge. But if we don’t find out tonight, what happened and, and that’s from you, then neither Chris or I are going to be able to stop working until we find this person and then it’s gonna look like you may have been more culpable for what happened than actually did, because you’re not helping us out 100%.” Kusalich responded, “Okay, forget the deal, I can’t, I couldn’t keep this, I couldn’t keep this, this; I’ll tell you what, I told my girlfriend today.”

Kusalich again told the detectives that Bosinger killed Burr at the Koopmans Avenue residence while Kusalich was out, and that Burr was dead when Kusalich returned to the residence. Kusalich claimed Bosinger had hit Burr with a hammer. Kusalich said he and Bosinger discussed what to do next, whereupon Bosinger threatened to leave him with the evidence, including the hammer. Kusalich said Bosinger rolled Burr’s body up in a carpet and proposed to put the body in the back of Kusalich’s automobile. In a rambling, disjointed fashion, Kusalich described the two men taking

Burr's body up to the Glen Haven property, where Kusalich threw the hammer into the bushes.

Kusalich subsequently stated that he "should have just found an attorney and cut a deal for the testimony . . . ." He added, "This is costing me, I know that. By not having an attorney."

Kusalich later stated that they unloaded Burr's body by the tent where Bosinger was staying on the Glen Haven property. Kusalich said they put Burr's body in the trunk of an abandoned Jaguar. Kusalich then claimed he did not remember where Burr's body was, and he said it would be hard to find the body. Kusalich made numerous confusing statements along these lines, but he generally indicated they ultimately buried Burr's body in "half a grave" somewhere in a rural area of Soquel. Toward the end of the interview, the detectives suggested going to look for the body. Kusalich agreed to do so and stated, "I want to get Bob out of that hole. Let's go get it."

d. *Discovery of Burr's Body*

After concluding the interview, the detectives drove Kusalich in their vehicle to a rural area of Soquel to search for Burr's body. Kusalich sat in the front passenger's seat while giving directions to the detectives. While in the car, Kusalich made further statements blaming Bosinger for the killing. Around 1:00 a.m. on September 28, after about an hour of driving around, the parties arrived at a property on Nicasio Way. The police found a shovel and a rake on the property. A sample of DNA taken from the shovel was subsequently matched to Kusalich's DNA. The police found Burr's body down a steep embankment on the side of a dirt road. They also found a beer can near Burr's body. A sample of DNA taken from the beer can was subsequently matched to Kusalich's DNA.

e. *Interview at Sheriff's Office on the Morning of September 28*

After police found Burr's body, they escorted Kusalich back to the Sheriff's Office. They gave him some food from a fast food restaurant and took him to an

interview room for further questioning. The interview began around 3 a.m. on September 28 and lasted approximately 80 minutes. The interview was recorded on video with audio. Kusalich was not handcuffed at any point in the interview.

The police once again asked Kusalich to describe his whereabouts on the night of the killing. Kusalich continued to maintain that Bosinger called him from the Koopmans Avenue residence while Kusalich was elsewhere, and that he returned to the residence to find Bosinger there with Burr's dead body. Kusalich again asserted that Bosinger blackmailed him into helping Bosinger dispose of Burr's body. Kusalich stated that they took Burr's body to the Glen Haven property in the back of Burr's truck and put the body in the trunk of an abandoned Jaguar. Kusalich also described throwing the hammer into the bushes at the Glen Haven property. He met Bosinger at Sir Froggy's Pub the next day, and they moved Burr's body to the Nicasio Way property on Sunday night. Kusalich described in detail their efforts to bury Burr's body.

Toward the end of the interview, Kusalich signed a consent form allowing the police to search his cell phone. After the interview, the police took Kusalich to the Glen Haven property to search for the hammer. The police conducted a cursory search in the area of Bosinger's campsite, but they could not locate the hammer at that time. The parties returned to Santa Cruz, and the police booked Kusalich into the Santa Cruz County Jail.

The police subsequently found a double-headed hammer with a yellow handle at the Glen Haven property. A sample of DNA taken from the head of the hammer matched Burr's DNA. A fingerprint on the handle of the hammer matched the middle finger of Kusalich's right hand.

f. *September 29 Interview Outside the Jail and at the Koopmans Avenue Residence*

At 5:15 p.m. on September 29, the police released Kusalich from the Santa Cruz County Jail. Two detectives from the Sheriff's Office met him outside the jail. They

interviewed him for several minutes outside the jail, whereupon he agreed to go with them to the Koopmans Avenue residence. The police recorded audio of their interactions. The interview lasted about five hours.

As soon as the police approached Kusalich outside the jail, the following exchange occurred:

“[Kusalich:] I’m, and *I can’t say anything more without my attorney all over it.*

“[Detective:] What’s that?

“[Kusalich:] *My, my attorney’s probably all over it by now.*

“[Detective:] Have you talked to an attorney?

“[Kusalich:] No. But I know she is, cause she saw the paper.

“[Detective:] Is that right?

“[Detective:] Well that’s what, that’s what we were wondering. You do, *you don’t have to talk to us anymore you can tell us to go pound sand.*” (Italics added.)

The detectives continued to question Kusalich and expressed a desire to look for a .22-caliber rifle at the Koopmans Avenue residence. Kusalich told them where the rifle was located in the house and added, “I made a few things that I think may have been wrong but, *my attorney won’t let me talk about them, you know now, and . . .*” (Italics added.) The detectives continued to question Kusalich and pointed out that he had been released from jail. The detectives told him, “You’re more than free to leave. [¶] You’re free to leave whenever you want. It’s, you’re not in custody. You’re not under arrest. The door[?]s not locked.” Kusalich then offered to go with the detectives to the Koopmans Avenue residence to get the rifle.

The detectives drove Kusalich home while questioning him further during the drive. Kusalich was not handcuffed at any time. In the course of the interview, the detectives confronted Kusalich with the fact that his cell phone records showed he called Bosinger shortly after midnight. They also told him the records showed Bosinger’s phone was not located at Koopmans Avenue at the time of the calls. Kusalich responded

by asserting that the killing happened at some other time of day. He claimed he was at the Koopmans Avenue residence around the time of the killing, but that he had gone for a walk around the block while Bosinger was in the shower. Kusalich claimed he then returned from his walk to find Bosinger had killed Burr. When the detectives confronted Kusalich with inconsistencies in his narrative, he then stated that he was in another room at the Koopmans Avenue residence when Bosinger killed Burr. Kusalich admitted he had lied about “the phone call thing.” He claimed Bosinger and Burr had gotten into a fight after Burr caught Bosinger trying to steal Burr’s marijuana, whereupon Bosinger killed Burr. Kusalich also stated that he helped tighten the zip tie around Burr’s neck, but that Burr was already dead and the zip tie was intended to stem the flow of blood. Kusalich also made statements suggesting he actually saw Bosinger strike Burr.

Toward the end of the interview, the detectives asked Kusalich if he would be willing to answer more questions the next day. Kusalich answered affirmatively and added that he would be willing to testify for them. The detectives departed and left Kusalich at the residence.

*g. Phone Calls with Christina Delucchi and Constance Fitzmaurice*

On September 28, police traveled to Big Bear to meet with Delucchi and Fitzmaurice. The police arranged for Delucchi and Fitzmaurice to place several recorded pretext calls to Kusalich. Delucchi and Fitzmaurice each spoke with Kusalich once on the evening of September 29. Delucchi spoke with Kusalich once on the morning of September 30, and Fitzmaurice spoke with him twice in the afternoon. Kusalich maintained that Bosinger had killed Burr. Kusalich made several references to his attorney during the calls. In one call, Kusalich told Fitzmaurice he was at his attorney’s office and offered to call Fitzmaurice back in the morning.

In the last call, at 3:25 p.m. on September 30, Fitzmaurice falsely told Kusalich the police were coming “to take [Delucchi] with them.” Fitzmaurice added that the experience would cause Delucchi to “fold mentally.” Kusalich lamented Delucchi’s

involvement and blamed himself: “I just really ruined her too. I mean I have really ruined her whole progress. I just mean I feel like such a piece of shit. I swear to God, I’m going to fuck, I don’t know. I don’t know. I’m just ready to fuck end it. I mean, I just feel like such a piece of shit and I have always thought of myself as a good person.” Toward the end of the call, Kusalich stated, “I can’t talk about this anymore. I talked to my attorney and she said don’t talk to anybody about it.”

*h. October 1 Interactions with the Police*

At 8:16 a.m. on October 1, Kusalich called the Santa Cruz County Sheriff’s Office and left a voice mail stating, “Will you please call me right away? I got to make sure, uh, I get, uh, Christina cleared on this thing. I’ve got some information for you that should clear the whole thing up. Would you please call me as quickly as possible?” At 8:51 a.m., Kusalich called again and left another voice mail asking police to call him back. Detective Jalon Harris returned Kusalich’s call a short while later and recorded the audio. The conversation lasted for about 100 minutes over six calls. About halfway through the conversation, Kusalich revealed he was sitting in a tree.

Kusalich began the call by angrily berating the police for picking up Delucchi. Detective Harris insisted Delucchi had not been taken into custody, but Kusalich insisted he knew she had been “picked up.” Kusalich then said he wanted “to clear Christina.” He then stated that he had “made a mistake” and explained, “I killed fucken [*sic*] Bob okay?” Kusalich stated that he had killed Burr because Burr was “in pain” and wanted Kusalich to kill him. Kusalich stated, “This was premeditated,” and asserted that Bosinger was hired to kill Burr. Kusalich claimed that Burr wanted to commit suicide but that Burr asked Kusalich to kill him instead so that Burr’s children would get the money from his life insurance policy. Kusalich stated that he hired Bosinger to kill Burr but Bosinger failed to do so because the rifle jammed.

Kusalich stated that he killed Burr by hitting him with the hammer because Burr told him to do so and Kusalich was “blacked out drunk.” Kusalich also admitted that he

put the zip tie on Burr's neck. He later stated Bosinger was not at the Koopmans Avenue residence that evening, but that Bosinger later helped him put Burr's body in the abandoned Jaguar at the Glen Haven property.

Kusalich then told Detective Harris, "I want you to come and get me," and "I'm just sitting in a tree fucken hanging out bro." Kusalich stated he was at the Glen Haven property and told the detective he would send a picture on his cell phone. He subsequently revealed he had "two ropes and a bunch of zip ties" around his neck and stated, "[Y]ou're not putting me in prison." Detective Harris then arranged for Fitzmaurice and Delucchi to speak with Kusalich on the phone. The two women pleaded with him not to commit suicide. Kusalich told Detective Harris he wanted to plead guilty and receive the death penalty. While Kusalich was on the phone with Detective Harris, several police officers went to the Glen Haven property where they found Kusalich sitting in a tree. He had a rope around his neck with a series of zip ties in a daisy chain fixed to a branch. Kusalich had a case of beer in the tree with him, and a tequila bottle was sitting at the foot of the tree. Police spoke with Kusalich for about 50 minutes. They recorded the audio of the interaction.

At the start of the conversation, the police advised Kusalich of his *Miranda* rights. Kusalich again told police Burr wanted to kill himself and begged Kusalich to kill him. Kusalich said Burr was a sad man who could not live without his ex-wife, and that Burr "just wanted to leave something for his kids."

At that point, it appeared to police that Kusalich was starting to fall out of the tree. One of the officers climbed up the tree and cut Kusalich free as the rope and zip ties went taut. Kusalich fell out of the tree, and police took him to the hospital.

i. *October 2 Interview at the Hospital*

Police interviewed Kusalich again at 10:39 a.m. on October 2 while Kusalich was hospitalized at Dominican Hospital. The police recorded the audio of the interview. Soon after start of the interview, the police fully advised Kusalich of his *Miranda* rights.

Kusalich set forth facts similar to the statement he gave while sitting in the tree the day before. He stated that Bosinger became involved when Burr asked Kusalich to find a hit man to shoot him. Kusalich claimed Bosinger attempted to shoot Burr, but the rifle jammed. Kusalich confessed to killing Burr himself by striking him on the head with the hammer. Kusalich then took Burr's body to the Glen Haven property in Burr's truck. Bosinger met him at the property to help him dispose of Burr's body.

### *B. Procedural Background*

The first amended information (the operative charging document) charged Kusalich with one count of murder. (Pen. Code, § 187, subd. (a).)<sup>4</sup> The information alleged Kusalich personally used a deadly and dangerous weapon—a hammer—in the commission of the offense. (§ 12022, subd. (b)(1).) The information further alleged he had suffered a prior “strike” and a serious felony conviction. (§ 667, subds. (a)(1), (b)-(i).)

The case proceeded to jury trial on the murder count and the weapon allegation. The trial court tried the prior strike allegation in a bifurcated proceeding. The jury found Kusalich guilty of first degree murder and found true the weapon allegation. The court found true the prior strike conviction but subsequently granted Kusalich's motion to strike it under *Romero*.<sup>5</sup> The court imposed a total term of 31 years to life in state prison, composed of 25 years to life on the murder count consecutive to five years for the serious felony conviction and one year for the weapon enhancement.

## **II. DISCUSSION**

Kusalich moved pretrial to suppress his statements to police and the evidentiary fruits of them based on his federal constitutional rights under *Miranda* and *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*). The trial court denied the motion in its entirety

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<sup>4</sup> Subsequent undesignated statutory references are to the Penal Code.

<sup>5</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

and admitted all the challenged statements and evidence. Kusalich now appeals from the denial of his motion to suppress.

Kusalich contends the police failed to advise him of his *Miranda* rights during custodial interrogations and failed to stop questioning him after he invoked his right to counsel. He further contends his statements were the product of deceptive and improper police tactics. The Attorney General argues that Kusalich was not in custody when he made his statements and his invocation of counsel was ambiguous. She contends Kusalich voluntarily reinitiated contact with the police when he ultimately confessed, and she disputes his characterization of the police tactics as improper.

We conclude the trial court properly denied the motion to suppress because Kusalich voluntarily made his statements during noncustodial interviews and voluntarily reinitiated contact with the police before ultimately confessing.

#### A. *Legal Principles*

The Fifth Amendment’s self-incrimination clause provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” (U.S. Const., 5th Amend.) “To safeguard a suspect’s Fifth Amendment privilege against self-incrimination from the ‘inherently compelling pressures’ of custodial interrogation [citation], the high court adopted a set of prophylactic measures requiring law enforcement officers to advise an accused of his right to remain silent and to have counsel present prior to any custodial interrogation. [Citation.]” (*People v. Jackson* (2016) 1 Cal.5th 269, 338-339 (*Jackson*)). “‘[T]he prosecution bears the burden of establishing by a preponderance of the evidence that a *Miranda* waiver was knowing, intelligent, and voluntary under the totality of the circumstances of the interrogation.’ [Citation.]” (*Id.* at p. 339.)

“A statement obtained in violation of a suspect’s *Miranda* rights may not be admitted to establish guilt in a criminal case. [Citation.]” (*Jackson, supra*, 1 Cal.5th at p. 339.) “But in order to invoke [*Miranda*’s] protections, a suspect must be subjected to

*custodial interrogation*, i.e., he must be ‘taken into custody or otherwise deprived of his freedom in any significant way.’ [Citation.] ‘The ultimate inquiry is whether there is ‘a formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.’ [Citation.]” (*People v. Morris* (1991) 53 Cal.3d 152, 197, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824.) Based on the circumstances of the interrogation, we ask whether “a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 402 (*Ochoa*)). The factors relevant to this analysis include “whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person’s conduct indicated an awareness of such freedom; whether there were restrictions on the person’s freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation.” (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162 (*Aguilera*)). The prosecution bears the burden of showing the defendant was not in custody. (*People v. Davis* (1967) 66 Cal.2d 175, 180-181; *People v. Ceccone* (1968) 260 Cal.App.2d 886, 893.)

“[I]f at any point in the interview [a defendant] invokes the right to remain silent or the right to counsel, ‘the interrogation must cease.’ ” (*People v. Martinez* (2010) 47 Cal.4th 911, 947, quoting *Miranda, supra*, 384 U.S. at p. 474.) “[A]n accused . . .

having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” (*Edwards, supra*, 451 U.S. at pp. 484-485.) “The applicability of the ‘“rigid” prophylactic rule’ of *Edwards* requires courts to ‘determine whether the accused *actually invoked* his right to counsel.’ ” (*Davis v. U.S.* (1994) 512 U.S. 452, 458.) “[T]his is an objective inquiry. [Citation.] Invocation of the *Miranda* right to counsel ‘requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.’ ” (*Ibid.*, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 (*McNeil*).)

“In reviewing the trial court’s denial of a suppression motion on *Miranda* and involuntariness grounds, ‘ “ ‘we accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.’ ” ’ [Citations.] Where, as was the case here, an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review.” (*People v. Duff* (2014) 58 Cal.4th 527, 551.) “[I]ssues relating to the suppression of statements made during a custodial interrogation must be reviewed under federal constitutional standards.” (*People v. Nelson* (2012) 53 Cal.4th 367, 374.) If a trial court erroneously admits statements in violation of the federal Constitution, we must reverse the judgment unless the state proves the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained]; *People v. Neal* (2003) 31 Cal.4th 63, 86.)

## B. *The Trial Court Properly Denied the Motion to Suppress*

### 1. *September 27 Statements to the Police*

As set forth above in Section I.A.3., Kusalich made four sets of statements to the police on September 27. First, when the police went to the Koopmans Avenue residence at 3:30 a.m. after arresting Bosinger, Kusalich answered the door and told them Burr had left for Michigan. Second, Kusalich went voluntarily to the Capitola Police Department to speak with police the following afternoon at 3:30 p.m. The officers told Kusalich he was not under arrest and that he was free to leave at any time. At no point was he handcuffed. After about one and a half hours of questioning, Kusalich offered to go with the police to the Glen Haven property to “show you where everything’s at.” Kusalich does not challenge the admissibility of the statements he made up to that point.<sup>6</sup>

#### a. *September 27 Statements at the Glen Haven Property*

Kusalich challenges the admissibility of certain inculpatory statements he made at the Glen Haven property on the ground that he was in custody at the time and the police failed to *Mirandize* him. Kusalich made these statements after the police went into the house to question his father. Kusalich was sitting on a stairwell inside the house when Officer Ryan noticed he was in distress. Kusalich then stated, “[T]here was a fight and I know what happened to Bob.” He added that he wanted to tell the truth and that he “could not take it any longer.” At that point, Detective Ryan asked him to step outside and tell her what happened. Once outside the house, Kusalich claimed Bosinger had called to say he and Burr had gotten in a fight in which Burr had been hit on the head and

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<sup>6</sup> Although his opening brief purports to challenge the admission of “each and everyone [*sic*] of the interrogations and/or interviews done with defendant from September 27, 2010, to, and including, October 2, 2010,” Kusalich makes no arguments with respect to the admissibility of the first two sets of statements. Nor did he offer any such arguments below. In any event, the record shows the statements were voluntary and Kusalich was not in custody when he made them. Moreover, he said nothing directly inculpatory in these statements. Even assuming it was error to admit them, any such error would have been harmless beyond a reasonable doubt.

badly hurt. Kusalich then said he went to the Koopmans Avenue residence where he saw Burr dead on the ground with his head bleeding. Kusalich claimed Bosinger blackmailed him into helping dispose of Burr's body.

Kusalich then told Detective Ryan to arrest him, but she refused to do so and told him he was not under arrest. She asked him if he would be willing to go to the Sheriff's Office to make further statements, and he agreed to do so, whereupon she asked him to sit in her patrol car. Kusalich had not yet been *Mirandized*. At no point did she handcuff him.

The trial court found Kusalich was not in custody at any time during this exchange. The court found it was "a consensual voluntary encounter and exchange of information between Mr. Kusalich and Detective Ryan, and any statements Mr. Kusalich made to Detective Ryan were not made in connection with any custodial interrogation."

Kusalich contends the trial court erred because he was in custody around the time when Detective Ryan asked him to step outside the house. He notes that Detective Ryan was suspicious of him at the time. He points out that he was incriminating himself by making false statements and obstructing a law enforcement officer. He further argues that Detective Ryan was directing him what to do and isolating him from the house and his own father by asking him to step outside. And he asserts that once outside the house, her questioning became accusatory in nature. He contends a reasonable person would believe Detective Ryan was depriving him of his freedom of action in this course of events.

We find no merit in these contentions. We note first that the exchange took place at the home of Kusalich's father, not at a police station. (Cf. *Miranda*, *supra*, 384 U.S. at p. 461 [describing the compulsory nature of the "isolated setting of the police station"].) Kusalich, riding in Monica's car, voluntarily accompanied the police to the property. At no point was Kusalich handcuffed, physically restrained, or told he was not free to leave. While one other officer briefly appeared during the interaction, most of the exchange

took place between Kusalich and only one officer. With little or no prompting, Kusalich began to make incriminating statements before Detective Ryan asked him to go outside. The degree of restraint on Kusalich's freedom of movement as a result of her asking him to go outside was minor and nonintrusive. Nothing in Detective Ryan's subsequent questions to Kusalich suggested any substantial degree of aggression or confrontation. To the contrary, Kusalich appeared quite willing to "unburden" himself, likely because he believed he could avoid responsibility for the murder by blaming Bosinger. The entire exchange took place over a fairly brief period of time.

Based on the totality of the circumstances, and given the factors set forth in *Aguilera, supra*, 51 Cal.App.4th at page 1162, we conclude Kusalich was not in custody when he made the statements at the Glen Haven property. Accordingly, the police had no obligation to advise him of his rights under *Miranda*, and the omission of the advisements violated no constitutional right. (*People v. Storm* (2002) 28 Cal.4th 1007, 1027 [*Miranda* and *Edwards* apply only to custodial interrogation]; *People v. Mickey* (1991) 54 Cal.3d 612, 648 ["Absent 'custodial interrogation,' *Miranda* simply does not come into play."]) We conclude the trial court properly denied the motion to suppress the pertinent statements and any evidence obtained because of them.

b. *Statements at the Santa Cruz County Sheriff's Office on the Night of September 27 and the Morning of September 28*

At the conclusion of his exchange with Detective Ryan at the Glen Haven property, Kusalich voluntarily agreed to go to the Santa Cruz County Sheriff's Office for further questioning. Detective Ryan drove him there in the back of her patrol car. Upon arrival, they proceeded to an interview room where two detectives questioned him for about an hour and 40 minutes. The detectives gave Kusalich coffee on request. Kusalich was left alone in the room several times. At no point was he handcuffed.

The detectives *Mirandized* Kusalich at the start of the interview, and he acknowledged the advisements. He continued to speak with the detectives, implicitly

waiving his *Miranda* rights. (*People v. Whitson* (1998) 17 Cal.4th 229, 247-248 [waiver may be inferred when a defendant continues to talk willingly after being *Mirandized*].) He told police he “screwed up,” “got scared,” and was drunk. He then repeatedly inquired about making a deal with the district attorney and asked what kind of sentence he could receive. In the course of these requests, he asked, “Do I need to get an attorney[?]” He explained, “I’m concerned my best friend died,” and added, “I helped cover it up.” The detectives told Kusalich the district attorney only worked during business hours and continued to question him. He repeated the claims he made to Detective Ryan, asserting Bosinger called him from the Koopmans Avenue residence to inform him of the killing.

After Kusalich asked again to speak with the district attorney, the officers again told him there was no prosecutor at the office. Kusalich then stated, “I want to get this out of the way, *but, I really think I should, at least have an attorney here.*” (Italics added.) The detectives continued to question Kusalich, whereupon he gave a more detailed narrative concerning his interactions with Bosinger and their efforts to dispose of Burr’s body.

In his motion to suppress, Kusalich argued that he invoked his right to counsel under *Miranda* and *Edwards, supra*, such that the officers should have ceased their questioning. The trial court rejected the argument on the ground that Kusalich was not in custody at the time. The court set forth several factual findings in its ruling. As relevant here, the court found Kusalich had not been arrested; he was told he was not under arrest; he voluntarily went with Detective Ryan to the Sheriff’s Office; he told her he wanted to negotiate a deal with the district attorney; and he had implicated himself as an accessory. The court then examined the circumstances of the interview with the detectives. The court found Kusalich was not “deprived of freedom of action in any significant way.” The court found Kusalich was “engaged in the free flow of information in a voluntary way to put forth his best efforts to extract some kind of deal with law enforcement.” The

court noted the non-accusatory nature of the detectives' statements, in which they thanked Kusalich for "coming to us" and "helping us out." The court made clear it was looking at the objectively observable facts of the interview—e.g., the statements made by Kusalich and the detectives—as a basis for its findings.

The trial court's factual findings are supported by substantial evidence. The record is clear that Kusalich went voluntarily to the Sheriff's Office, and he repeatedly expressed his desire to make a deal with a prosecutor. The statements he made were objectively oriented toward that goal, supporting a finding that he made them voluntarily. At no point did the detectives physically restrain him from leaving or instruct him not to leave. The duration of the interview was not excessive. The detectives were polite and respectful throughout the interview; at no point did their questioning become aggressive, accusatory, or confrontational. They did not "manifest[] a belief that [Kusalich] was culpable and they had the evidence to prove it." (*Aguilera, supra*, 51 Cal.App.4th at p. 1162.) The detectives did not arrest Kusalich at the end of the interview; to the contrary, he readily agreed to accompany the detectives to search for Burr's body, stating, "I want to get Bob out of that hole. Let's go get it."

Some of the circumstances of the interview weigh in favor of a finding that Kusalich was in custody. First, the interview took place in a closed interrogation room at the Sheriff's Office. As noted above, an interview conducted at a police station is inherently more compulsory. (*Miranda, supra*, 384 U.S. at p. 461.) But this factor is not dispositive. (See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [*Miranda* warnings not required simply because the questioning takes place in a police station].) Second, Kusalich was outnumbered, with two detectives questioning him throughout the interview. Kusalich notes that the detectives positioned themselves between him and the door of the interview room, but it appears they did so to sit at a table for their notetaking. On balance, we think these factors were outweighed by the numerous facts showing Kusalich engaged in the interview voluntarily and that he was free to leave at any time.

Given the totality of the circumstances, we conclude a reasonable person in his circumstances would have felt “at liberty to terminate the [investigation] and leave.” (*People v. Ochoa*, *supra*, 19 Cal.4th at pp. 401-402.)

Kusalich contends the trial court erred by considering his stated intention to strike a deal with the district attorney. He contends this constituted an improper reliance on his subjective state of mind, contravening the rule set forth in *Stansbury v. California* (1994) 511 U.S. 318, 323 [the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned].) But the trial court made clear it was relying on objectively observable facts to make a finding about the *express* purpose of the interview. (See *Aguilera*, *supra*, 51 Cal.App.4th at p. 1162 [express purpose of the interview is one factor in assessing its custodial nature].) Subjective beliefs may be relevant to the extent they are made manifest to the parties involved. (See *People v. Stansbury*, *supra*, 9 Cal.4th at p. 830.)

With respect to the invocation of counsel, the Attorney General contends it was worded too ambiguously to be legally effective. As to the initial mention of an attorney, we agree. In the course of inquiring about his legal liability, Kusalich asked, “Do I need to get an attorney, I want, I want to settle this, I really do. But what am I looking at for like, being an accessory, after the fact?” Viewing these statements objectively, Kusalich was simply expressing his own uncertainty about whether he needed an attorney. The reference to counsel was too equivocal to have any legal force. (*People v. Cunningham* (2015) 61 Cal.4th 609, 645 [defendant’s question, “Should I have somebody here talking for me, is this the way it’s supposed to be?” was not an invocation of counsel]; *People v. Michaels* (2002) 28 Cal.4th 486, 510 [defendant’s statement, “I don’t know if I should [talk] without a lawyer,” was too equivocal]; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153 [no invocation of counsel when defendant asked, “There wouldn’t be [an attorney] running around here now, would there?”].)

A bit later, after being told again that no district attorney was available, Kusalich responded, “I want to get this out of the way, but, I really think I should, at least have an attorney here.” The trial court tentatively ruled that Kusalich unambiguously invoked his *Miranda* rights, but the court ultimately ruled that he was not in custody at the time, so the court never made a final ruling on this issue. The Attorney General contends this statement is equivalent to that cited above in *People v. Michaels, supra*, 28 Cal.4th at page 510 (“I don’t know if I should [talk] without a lawyer.” (See also *People v. Sapp* (2003) 31 Cal.4th 240, 268 [defendant’s comment, “maybe I should have an attorney” was equivocal].) Those examples are somewhat less assertive than Kusalich’s statement, which was coupled with an expressed desire to speak with a district attorney. When Kusalich added, “*but*, I really think I should, at least have an attorney here,” this implied some desire to wait for his own attorney, at least temporarily. Arguably, Kusalich’s statement was sufficiently unambiguous that a reasonable police officer would construe it to be an expression of desire for the assistance of counsel.

But we need not decide whether Kusalich unambiguously invoked his right to counsel. Even assuming he did so, he was not in custody at the time for the reasons set forth above. (See *People v. Mickey, supra*, 54 Cal.3d at p. 648 [“Absent ‘custodial interrogation,’ *Miranda* simply does not come into play.”].) Thus, the invocation of counsel was purely anticipatory, having no legal effect. As the United States Supreme Court has observed, “We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’ . . . .” (*McNeil, supra*, 501 U.S. at p. 182, fn. 3.) California courts have ruled in accord with this principle. “[T]he prophylactic ‘right to counsel’ stemming from the Fifth Amendment can be validly invoked by the suspect only when he is both in custody and under either the threat or influence of interrogation.” (*People v. Avila* (1999) 75 Cal.App.4th 416, 418.) At no point was Kusalich in custody during the interviews on the night of September 27 or the following morning. Kusalich was eventually booked into jail later

that morning, but the record contains no statements made by him during his time in custody. For these reasons, the trial court properly admitted the statements in accord with *Miranda* and *Edwards*.

Kusalich further contends the police improperly used deceptive tactics to encourage him to keep talking by falsely telling him no district attorney was available. At the preliminary hearing, one of the detectives testified that a prosecutor was in fact available. But the use of deceptive tactics by the police does not by itself render a defendant's statements involuntary. "Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is ' " ' of a type reasonably likely to procure an untrue statement.' " ' [Citations.] ' " "The 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." ' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 443 (*Williams*)). The fundamental test for voluntariness is whether the "defendant's will was overborne" by the circumstances surrounding the taking of the statement. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. McWhorter* (2009) 47 Cal.4th 318, 346.) We consider the totality of the circumstances surrounding the interrogation in deciding whether the defendant's will was overborne. (*Dickerson v. U. S.* (2000) 530 U.S. 428, 434.) These circumstances include pertinent characteristics of the defendant, including the level of his or her sophistication and prior experience with the criminal justice system. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.)

Kusalich does not explain how the detectives' tactics could have coerced him into making any involuntary or unreliable statements. To the contrary, if Kusalich had genuinely held a strong desire to speak with a prosecutor, the natural effect of the detectives' response would have been for him to *stop talking* until one appeared. The fact that he continued to speak suggests he did so voluntarily out of a desire to get his false narrative before the police. And Kusalich points to no other factors that might have

rendered his statements involuntary. As explained above, the officers were neither confrontational nor accusatory; they remained calm and polite throughout their questioning of Kusalich. Under the totality of the circumstances, we conclude his statements were voluntary.

For these reasons, the trial court properly denied the motion to suppress the statements made on the night of September 27 and the morning of September 28, as well as the evidence discovered because of them.

*c. Statements Following Kusalich's Release from Jail on September 29*

After Kusalich was released from the county jail on the afternoon of September 29, two detectives approached him outside the jail and began questioning him again. Almost immediately, Kusalich invoked his right to counsel, stating, "I can't say anything more without my attorney all over it." The detectives told Kusalich, "[Y]ou don't have to talk to us anymore you can tell us to go pound sand." After another minute or so, the detectives stated, "You're more than free to leave. [¶] You're free to leave whenever you want. It's, you're not in custody. You're not under arrest. The door[']s not locked." Kusalich then offered to go with the detectives to the Koopmans Avenue residence to retrieve a rifle. The detectives drove Kusalich home while questioning him further during the drive. They questioned him further once they reached the residence. Kusalich was not handcuffed at any time during this interaction.

The trial court ruled that Kusalich was not in custody at the time, such that his invocation of counsel was purely anticipatory. Kusalich does not dispute the finding that he was not in custody once released from jail. Rather, he contends the police were prohibited from questioning him again under *Maryland v. Shatzer* (2010) 559 U.S. 98 (*Shatzer*). In *Shatzer*, a police officer questioned the defendant in custody and he invoked his right to counsel, whereupon the officer terminated the interview. Three years later, after a break in custody, another officer approached the defendant and questioned him again about the same offense. This time, the defendant waived his *Miranda* rights

and made inculpatory statements. The high court held that once a defendant, after having invoked *Miranda* in a custodial setting, is then released from custody for at least 14 days, the police are not prohibited from reinitiating their questioning.

Kusalich argues that the police violated *Shatzer* because they approached Kusalich within minutes of his release from custody, well short of the 14-day waiting period. But a necessary premise of *Shatzer* is that a defendant must first invoke *Miranda* in a custodial setting. As explained above, Kusalich was never in custody when he arguably invoked his *Miranda* rights. *Shatzer* is therefore inapposite. (See also *People v. Storm*, *supra*, 28 Cal.4th at p. 1024 [if defendant, *during custodial interrogation*, invokes his or her *Miranda* right to counsel, but the police then release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, there is no reason under *Edwards* to forbid subsequent police contact], citing *Dunkins v. Thigpen* (1988) 854 F.2d 394, 397.)

We conclude the trial court properly denied the motion to suppress as to the statements Kusalich made on September 29 following his release from jail.

d. *Statements Made in the Phone Calls with Christina Delucchi and Constance Fitzmaurice*

On September 29 and 30, the police arranged for Delucchi and Fitzmaurice to make five pretext phone calls with Kusalich. The trial court ruled that the statements Kusalich made during these calls were admissible because he was not in custody and had not previously invoked his *Miranda* rights while in custody.

Kusalich argues the police violated the 14-day rule of *Shatzer*, *supra*, by using Delucchi and Fitzmaurice as their agents to reinitiate contact with him. As explained above, the *Shatzer* rule assumes the defendant initially invoked *Miranda* in a custodial setting. For the reasons above, Kusalich never invoked *Miranda* while he was in custody, so *Shatzer* is inapposite. Kusalich relies on language in *Arizona v. Mauro* (1987) 481 U.S. 520, for the proposition that police may not use a defendant's statements

to a third party, but that case also concerned a defendant who invoked his *Miranda* rights while in custody. *Arizona v. Mauro* is likewise inapposite.

We conclude the trial court properly denied the motion to suppress with respect to statements Kusalich made in the phone calls with Delucchi and Fitzmaurice. In any event, during those calls, Kusalich maintained his position that Bosinger killed Burr; he said nothing significant about the killing he had not already told police. Thus, even assuming the statements should have been excluded, their admission was harmless beyond a reasonable doubt.

e. *October 1 Confession While Sitting in the Tree*

Kusalich, while sitting in a tree and talking to the police on his cell phone, ultimately confessed to killing Burr himself. Kusalich initiated those calls by calling the Sheriff's Office early that morning. He does not contend he was in custody at the time. The trial court found the police did not violate *Miranda* in the calls because no custodial interrogation had occurred. For the reasons above, the trial court properly found Kusalich had not been interrogated in custody. Admission of the October 1 phone calls was therefore proper.

Even assuming Kusalich had previously invoked his *Miranda* rights in a custodial interrogation, admission of the October 1 phone calls was proper because Kusalich voluntarily reinitiated contact with the police. “[A]n accused, [. . .] having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*” (*Edwards, supra*, 451 U.S. at pp. 484-485, italics added.) “ ‘An accused “initiates” ’ further communication, exchanges, or conversations of the requisite nature ‘when he speaks words or engages in conduct that can be “fairly said to represent a desire” on his part “to open up a more generalized discussion relating directly or indirectly to the investigation.” ’ ” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 642.)

Kusalich contends he did not “initiate” contact within the meaning of this rule because his phone calls to the police were the product of deceptive tactics—i.e., the pretext phone call made by Fitzmaurice the previous afternoon. In that call, Fitzmaurice falsely told Kusalich the police were coming to take Delucchi with them. In response, Kusalich expressed his consternation and concern for Delucchi’s mental health. In the voice mails he left for the police on the morning of October 1, he expressed his desire to clear Delucchi. And at the start of his conversation with the police, he angrily attacked them for taking Delucchi into custody. He now argues this evidence shows he did not voluntarily reinitiate contact with the police.

As noted above, the use of deceptive tactics by police does not necessarily render a statement involuntary. (*Williams, supra*, 49 Cal.4th at p. 443 [courts prohibit 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].) Given the totality of the circumstances surrounding the phone calls, the record shows Kusalich voluntarily initiated contact with the police on October 1. First, Kusalich was not in a custodial environment at the time. He initiated the calls while located on private property, with no law enforcement personnel nearby. He continued speaking with the detective even after the detective informed him repeatedly that Delucchi had not in fact been taken in custody. Furthermore, Kusalich, who had multiple prior experiences with the criminal justice system, was well aware of the likelihood the police would use deceptive tactics. (See *In re Shawn D., supra*, 20 Cal.App.4th at p. 209 [defendant’s sophistication and prior experience with criminal justice system are relevant to the voluntariness determination].) For example, in one of the phone calls with Fitzmaurice, Kusalich told her the police would lie to Delucchi: “They do that, they lie Connie. They lie. They lie and try to twist everybody up. Uh. See they are going to bullshit her and she’s going to be [] honest because she has nothing to hide. [ . . . ] They can lie about this shit all they

want . . . .” Given the totality of the circumstances, we think the tactics used by the police here were not so coercive as to produce an involuntary and unreliable statement.

f. *October 2 Statements at the Hospital*

Police contacted Kusalich again at the hospital on October 2. The detective fully *Mirandized* Kusalich at the start of the interview. Kusalich continued to speak with police and gave a confession substantially similar in substance to the statements he made the day before while sitting in the tree. As with the October 1 statement, the trial court ruled the statement was admissible because Kusalich had not previously invoked his *Miranda* rights in a custodial interrogation. For the reasons above, the trial court properly found Kusalich had not previously been interrogated in custody. While he was indisputably in custody at the hospital on October 2, he implicitly waived his *Miranda* rights by willfully continuing to speak with police. (*People v. Whitson, supra*, 17 Cal.4th at pp. 247-248.) Admission of the October 2 phone calls was therefore proper.

Kusalich argues police violated the 14-day rule of *Shatzer, supra*, when they reinitiated contact with him at the hospital. For the reasons above, *Shatzer* is inapposite since Kusalich had not previously invoked his *Miranda* rights in a custodial interrogation.

2. *“Fruit of the Poisonous Tree” Doctrine*

Kusalich contends the trial court should have suppressed the physical evidence police discovered as the result of statements he made to them—e.g., Burr’s body and the hammer—under the “fruit of the poisonous tree” doctrine. As set forth above, the police did not violate Kusalich’s constitutional rights at any point in the investigation. For this reason alone, Kusalich was not entitled to suppression of the physical evidence.

But even assuming any of Kusalich’s statements were obtained in violation of *Miranda/Edwards*, the fruit of the poisonous tree doctrine does not apply to evidence discovered as the result of a noncoercive violation. (*U.S. v. Patane* (2004) 542 U.S. 630, 637 [Fifth Amendment cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements] (plur. opn. of Thomas, J.); *Id.* at p. 645

[admission of nontestimonial physical fruits does not run the risk of admitting into trial an accused's coerced incriminating statements against himself] (conc. opn. of Kennedy, J.); *People v. Davis* (2009) 46 Cal.4th 539, 598 [fruit of the poisonous tree doctrine does not apply to physical evidence seized as a result of a noncoercive *Miranda* violation, and a violation of *Miranda/Edwards* does not automatically mean that any ensuing confession was coerced].) For the reasons set forth above, all Kusalich's statements to the police were noncoercive, even assuming he invoked his *Miranda/Edwards* rights in a custodial interrogation. Therefore, the fruit of the poisonous tree doctrine does not apply.

Citing language in *Nix v. Williams* (1984) 467 U.S. 431, Kusalich contends the fruit of the poisonous tree doctrine applies because “[t]his case involves a true violation of defendant’s Fifth Amendment federal constitutional right to counsel at a police interrogation.” This conflates a defendant’s *Miranda/Edwards* rights with the right to counsel under the Sixth Amendment. Kusalich is correct that the United States Supreme Court has excluded tainted fruits as a result of violations of the right to counsel under the Sixth Amendment. (See *Nix v. Williams, supra*, 467 U.S. at p. 442.) But the Sixth Amendment right to counsel generally does not attach until a prosecution is commenced—e.g., through the filing of formal charges or at an arraignment. (*McNeil, supra*, 501 U.S. at p. 175.) The right under *Edwards* not to be questioned until counsel is present—which some courts have called a “Fifth Amendment right to counsel”—is an extension of the prophylactic protection judicially created by *Miranda*. As the California Supreme Court recognized in *People v. Davis, supra*, 46 Cal.4th at page 598, the fruit of the poisonous tree doctrine does not apply to noncoercive violations of that right.

We conclude the trial court properly denied the motion to suppress with respect to all the challenged statements as well as the evidentiary fruits thereof. Accordingly, Kusalich's claims are without merit.

### III. DISPOSITION

The judgment is affirmed.

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WALSH, J.\*

WE CONCUR:

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RUSHING, P.J.

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PREMO, J.

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