

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES GARCIA,

Defendant and Appellant.

G057601

(Super. Ct. No. 16CF1135)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Johanna Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Paige B. Hazard and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted appellant Andres Garcia of robbery, attempted robbery, assault with a firearm, and street terrorism. The jury also found to be true the allegation he committed these crimes for the benefit of a gang. Garcia contends the trial court erred

in denying his pretrial motion to suppress the statements he made during an interview with an investigating officer. Garcia argues the officer used improper “softening up” tactics rendering involuntary the waiver of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We find the contention unpersuasive and therefore affirm the judgment.

I

FACTS AND PROCEDURAL HISTORY

On March 23, 2016, a car pulled up next to two high school students walking home from school. Two passengers emerged from the car and approached the boys. One of the men displayed a handgun and threatened to shoot them if they did not hand over their valuables. One victim complied, but when the other victim hesitated, the assailant struck him in the face with the gun. Both men returned to their car and yelled out their gang’s name as the car fled the scene.

About an hour after the robbery a Santa Ana police officer initiated a traffic stop of a car driven by Garcia. The officer suspected Garcia participated in the robbery based on a description of the car and the robbers. The officer had spotted Garcia driving his car with three other individuals earlier that afternoon, but temporarily lost track of Garcia’s car. When spotted again Garcia was the lone occupant. The officer released Garcia when the victims failed to identify him.

One month later, Santa Ana School Police Detective Anne Pliska interviewed Garcia at his high school’s resource office. Another school police officer also was present. It was the first time Pliska had met Garcia, who was not restrained. Though Pliska had her “regular duty gear” with her, at no point did either officer threaten to use a weapon against Garcia.

Pliska asked in a “soft” voice if Garcia had driven a white Toyota, bearing a specific license plate number, on the dates the robbery and shooting occurred.¹ Garcia responded he had access to a Toyota belonging to his brother’s girlfriend. Pliska asked Garcia if he had received permission to drive the vehicle on the date of the robbery and Garcia responded he did. Pliska asked if Garcia had received permission to drive the vehicle, whenever he wanted and Garcia responded affirmatively. Pliska told Garcia the vehicle had been involved in a shooting and showed Garcia two pictures of the Toyota Tercel driving through the park where the robbery occurred on March 22 and told Garcia it appeared he was the driver. Pliska then asked Garcia if he wanted to tell the truth about what happened and Garcia agreed.

At this point Pliska advised Garcia of his *Miranda* rights from a department-issued preprinted card. Garcia acknowledged his rights, waived them, and proceeded to speak further with Pliska, who tape recorded their conversation. Garcia admitted driving the subject Toyota on relevant dates and transporting gang members when the robbery was committed. Shortly after Pliska ended Garcia’s interview, Sergeant Silva of the Santa Ana Police Department, who had arrived at the high school resource office, also secured a separate *Miranda* waiver from Garcia and recorded another interview with Garcia, who again made self-incriminating statements.

At trial, the prosecution played audio recordings of Garcia’s postwarning discussions with Pliska and Silva. The jury convicted Garcia of four crimes arising from the robbery: second degree robbery (§§ 211, 212.5, subd. (c)), attempted second degree robbery (§§ 664 subd. (a), 211, 212.5, subd. (c)), assault with a firearm (§ 245, subd. (a)(2)), and street terrorism (§ 186.22, subd. (a)). The jury also found Garcia committed his crimes in counts 9 through 11 to benefit a criminal street gang (§ 186.22, subd. (b))

¹ The shooting incident mentioned in this interview referred to a robbery on March 22 involving the same suspects. Police suspected Garcia was the driver. The jury did not reach a verdict on the charges arising out of this incident.

and a principal of the gang personally had used a firearm when committing the robbery and attempted robbery. (§ 12022.53, subd. (b) & (e)(1).) The court sentenced Garcia to a total term of 12 years, comprised of a two-year low term and a ten year enhancement for one of the firearm findings.

II

DISCUSSION

A. Procedural Background

As noted, Garcia asked the trial court to exclude his postwarning statements to Pliska and Silva. At the pretrial suppression hearing, Pliska testified the failure to record her prewarning discussion with Garcia was not based on any explicit decision to do so.

After hearing Pliska's testimony and argument from counsel, the trial court denied Garcia's motions. The court disapproved of Pliska's failure to record her prewarning exchange with Garcia, but found Pliska's hearing testimony credible and corroborated that *Miranda* advisements had been properly given and waived. The court concluded Garcia's prewarning statements—including his admission he had driven the subject vehicle on the day the robbery occurred—were “not incriminating statements.”

The trial court explained that even if prewarning incriminating statements were made, that fact would not necessarily preclude a suspect from later making a voluntary *Miranda* waiver, which would make the postwarning statement admissible at trial. The court found Garcia's admissions were voluntary and not the product of any police coercion. Similarly, on its denial of Garcia's motion to exclude his statements to Silva, the court found there was “no evidence of any coercion, threats, . . . weapons drawn, aggressive tone, or anything that would create a voluntariness issue.”

B. Standard of Review and Miranda Case Law Principles

In reviewing the voluntariness of a *Miranda* waiver, “[w]e accept [the trial] court's factual findings, provided they are supported by substantial evidence, but we

independently review the ultimate legal question[s].” (*People v. Scott* (2011) 52 Cal.4th 452, 480 (*Scott*)). Garcia as the appellant bears the burden of demonstrating error. (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 694.)

The prosecution has the burden to demonstrate a defendant’s *Miranda* waiver was made “voluntarily, knowingly and intelligently.” (*People v. Combs* (2004) 34 Cal.4th 821, 845 (*Combs*), quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421; *People v. Nelson* (2012) 53 Cal.4th 367, 374-375 [preponderance of the evidence burden].) “The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the ‘totality of the circumstances surrounding the interrogation’ reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” (*Combs, supra*, 34 Cal.4th at p. 845.)

It is often the case an investigating officer will speak with a subject before *Miranda* warnings are required. Doing so does not necessarily render a suspect’s prewarning statements involuntary, even if the interviewing officer did this “to establish[] rapport” with the suspect. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1088.) Indeed, “[i]n midstream *Miranda* cases (where a defendant is interviewed before and after the giving of *Miranda* warnings), a defendant’s postwarning inculpatory statements are generally admissible if the prewarning statements *and* the postwarning statements were voluntarily made.” (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1363-1364 (*Camino*)). This is true even if the suspect’s prewarning statements are incriminatory. As the California Supreme Court has explained: “Even when a first statement is taken in the absence of proper advisements and is *incriminating*, so long as the first statement was voluntary a subsequent voluntary confession ordinarily is not tainted simply because it

was procured after a *Miranda* violation. Absent “any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will,” a *Miranda* violation—even one resulting in the defendant’s letting “the cat out of the bag”—does not “so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.” [Citations.] . . . “The relevant inquiry is whether, in fact, the second statement was also voluntarily made.” [Citations.]” (*Scott, supra*, 52 Cal.4th at p. 477.)

“In evaluating the voluntariness of a statement, no single factor is dispositive. (*People v. Williams* (1997) 16 Cal.4th 635, 661 [rejecting the view that an offer of leniency necessarily renders a statement involuntary].) The question is whether the statement is the product of an “essentially free and unconstrained choice” or whether the defendant’s “will has been overborne and his capacity for self-determination critically impaired” by coercion. [Citation.] Relevant considerations are “the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity” as well as “the defendant’s maturity [citation]; education [citation]; physical condition [citation]; and mental health.”” (*People v. Williams* (2010) 49 Cal.4th 405, 436 (*Williams*).)

C. The Trial Court Did Not Err in Finding Garcia Voluntarily Waived His Miranda Rights

Garcia contends the trial court erred in not excluding his postwarning statements to Pliska and Silva. Garcia relies on *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), which held that a defendant’s *Miranda* waiver will be deemed involuntary when it “results from a clever softening-up of a defendant through disparagement of [a] victim and ingratiating conversation.” (*Id.* at pp. 160-161.)

Honeycutt, which our Supreme Court has “limited to its facts” (*People v. Krebs* (2019) 8 Cal.5th 265, 306 (*Krebs*)), is inapt here. In *Honeycutt*, the interrogating officers deliberately plotted to induce the defendant to waive his *Miranda* rights by

engaging in “ploys” that included a “bad cop/good cop” or “Mutt and Jeff” routine. (*Honeycutt*, supra, 20 Cal.3d at pp. 159, 160, fn. 5.) As the high court recently explained, “two salient features of *Honeycutt*” were that “an interrogating officer who had a prior relationship with the defendant . . . sought to ‘ingratiate’ himself ‘by discussing ‘unrelated past events and former acquaintances’” and . . . the officer disparag[ed] the victim.” (*Krebs*, supra, 8 Cal.5th at p. 306, quoting *Scott*, supra, 52 Cal.4th at pp. 477-478.) No violation of *Honeycutt* occurs in the absence of evidence the officer’s preliminary comments “overbore defendant’s free will.” (*People v. Gurule* (2002) 28 Cal.4th 557, 602.)

Here, substantial evidence supports the trial court’s conclusion Garcia’s prewarning and postwarning statements were voluntary. There is no evidence Pliska had a prior relationship with Garcia, no evidence Pliska disparaged the victims, and no evidence of a prewarning ingratiating conversation like the one that occurred in *Honeycutt*. Nor is there any evidence Pliska threatened Garcia or promised him leniency, or otherwise used any aggressive or coercive tactics in her interview.

Garcia correctly notes the trial court erred in concluding his prewarning statement—that he drove the subject vehicle on the day of the shooting—was not incriminating (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn. 5 [“By ‘incriminating response’ we refer to any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial”]), but this does not aid him because we conclude the statement was voluntarily given. (*Scott*, supra, 52 Cal.4th at p. 477; *People v. Zapien* (1993) 4 Cal.4th 929, 976 [a court’s ruling is reviewed for its correctness and not necessarily its reasoning].) Although Garcia was young (see *Williams*, supra, 49 Cal.4th at p. 436 [maturity is relevant consideration]), there is no sufficient ground to conclude his ““will ha[d] been overborne and his capacity for self-determination critically impaired”” by coercion.” (*Ibid*, quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225.) Garcia does not claim he was confused or given false information.

(See *Krebs, supra*, 8 Cal.5th at p. 303.) He also does not claim he was intimidated, threatened, or promised any leniency for speaking. (*Williams, supra*, 49 Cal.4th at p. 436 [police coercion is ““the crucial element””].)

After independently reviewing the circumstances surrounding Garcia’s prewarning statements to Pliska, Garcia’s *Miranda* waiver to both Pliska and Silva, and his postwarning statements, we conclude no basis exists to reverse the trial court’s rulings. (*Combs, supra*, 34 Cal.4th at p. 845.) Garcia voluntarily responded to Pliska’s prewarning questions and then voluntarily, knowingly, and intelligently waived his *Miranda* rights before voluntarily making the postwarning statements admitted at his trial. (*Camino, supra*, 188 Cal.App.4th at pp. 1363-1364.)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.