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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MANUEL DE JESUS VALENCIA, Defendant and Appellant.	B283588 (Los Angeles County Super. Ct. No. YA091677)

APPEAL from a judgment of the Superior Court of Los Angeles County, LaRonda J. McCoy, Judge. Affirmed in part and remanded with directions.

Stephen Michael Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

Gustavo Jaimes spoke disrespectfully to Manuel de Jesus Valencia, so Valencia shot him to death. In jail, Valencia described the murder to an undercover deputy. We affirm the admission of this confession and a gang sentencing enhancement. We remand for resentencing under Senate Bill No. 620 (2017–2018 Reg. Sess.), which we abbreviate as SB 620, and direct the trial court to credit Valencia with an additional day of presentence custody. All code references are to the Penal Code.

I

We recount facts favorably to the side that won at trial.

Valencia is in a gang called Evil Klan. Evil Klan's territory is in Los Angeles County. Its southern border is Century Boulevard.

The morning of the murder, Valencia was on Century Boulevard with fellow Evil Klan member Little Looney. Jaimes was standing at a bus stop on Century Boulevard. Little Looney told Valencia to check out Jaimes. Valencia walked over to Jaimes, who began "talking shit" to Valencia. Valencia felt he had no choice but to shoot Jaimes. Valencia fired seven times, killing Jaimes.

Police arrested Valencia, read Valencia his *Miranda* rights, and interrogated him. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444 (*Miranda*).) After answering some questions, Valencia requested a lawyer. The detectives left.

The next day, police put Valencia in a holding cell with an undercover sheriff's deputy dressed like an inmate and wearing a recording device. The deputy and Valencia spoke for nearly 40 minutes.

Police removed Valencia from the cell and put him in a line-up. Police planned to tell Valencia the witness identified him,

whether or not the witness did. The witness did not identify Valencia.

After police returned Valencia to the cell with the undercover deputy, Valencia asked a uniformed deputy, "Are you gonna let me know if I got picked?" The uniformed deputy responded, "I'm running, running solo right now, so give me a couple seconds." A few minutes later, the following dialogue was recorded:

> Uniformed deputy: Uh, you did get picked. And, uh, [the detectives] gonna talk to you. [unintelligible]
> Undercover deputy: Who's gonna talk to me?
> Uniformed deputy: Detectives.
> Undercover deputy: Detectives?
> Uniformed deputy: Yeah.
> Undercover deputy: Alright.
> Uniformed deputy: As a matter of fact, probably pretty quick. Not sure how long it's gonna take for you. You already have a house?
> Valencia: Nah. [unintelligible]
> Undercover deputy: Sit there and just no matter what they tell you, you don't have to open your mouth. Just sit there [unintelligible]
> Valencia: What if they ask questions?
> Undercover deputy: Just because they ask a question don't mean you gotta answer it right?
> Valencia: Yeah. I have the right to remain silent.
> Undercover deputy: You just sit there and you just let them talk. Let them feed you what they have, so you know. You're playing chess now homie. You need to know what their game [unintelligible] I'm

> almost positive they have [unintelligible] They probably have more, something else [unintelligible] So you really need to start playing back everything now. [unintelligible] It's gonna be a rough ride for you, you know.
>
> Valencia: [unintelligible]
>
> Undercover deputy: You gotta start [. . .] They got you? Straight up, they got you?
>
> Valencia: They got me.

Then Valencia told the undercover deputy he murdered Jaimes and described the details. No one appears to dispute that the uniformed deputy left the cell before Valencia told the undercover deputy, "They got me," and described the details of the crimes.

At trial, the prosecution introduced evidence about Valencia's gang, Evil Klan. That evidence included Evil Klan member Elvin Mundo's conviction for grand theft from the person. Detective Albert Arevalo was the prosecution's gang expert. Arevalo said he was familiar with Mundo, Mundo's membership in Evil Klan, and Mundo's conviction.

Arevalo testified the "primary criminal activity of Evil Klan range from vandalism, felony vandalism, narcotic possession, narcotic possession for sale, illegal firearm possession, robbery, theft and assaults." Arevalo also testified the gang's primary activity include "assaults with firearms or deadly weapons."

The jury convicted Valencia of murder. It found true a firearm enhancement under section 12022.53, subdivision (d) and a gang enhancement under section 186.22, subdivision (b)(1)(C).

The trial court sentenced Valencia to 50 years to life: 25 years to life for murder and 25 years to life for the firearm enhancement. The trial court did not impose any time under the

gang enhancement. However, the enhancement made Valencia ineligible for parole for 15 years.

II

The trial court did not violate Valencia's Fifth Amendment rights by allowing the jury to hear his confession to the undercover deputy.

We defer to factual findings that are supported by substantial evidence. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 642.) We independently review legal determinations. (*Ibid.*)

Valencia's confession was voluntary and was not the result of coercion. There was no *Miranda* problem. (*Miranda*, *supra*, 384 U.S. at p. 478 [statements given freely and voluntarily without any compelling influences are admissible].)

Miranda forbids coercion, not strategic deception that tricks suspects into trusting someone they see as a fellow prisoner. (*Illinois v. Perkins* (1990) 496 U.S. 292, 297.) The atmosphere is not coercive when a suspect considers himself in the company of cellmates and not law enforcement. (*Id.* at pp. 296–297.) Because Valencia confessed to a man he believed was not with the government, there is no reason to assume coercion. (*Id.* at pp. 297–298.) Ploys to mislead suspects or to lull them into a false sense of security are not within *Miranda*'s concerns. (*Ibid.*)

Miranda is inapplicable because Valencia did not know he was speaking to a sheriff's deputy. Police did not dominate the cell's atmosphere. The element of government coercion was missing. (See *People v. Davis* (2005) 36 Cal.4th 510, 554.)

Under these principles, the trial court was right to overrule Valencia's objection to admitting his confession. Voluntary confessions are a proper element in law enforcement and an

unmitigated good. They are essential to society's compelling interest in finding, convicting, and punishing criminals. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 108 (*Shatzer*).)

Valencia objects a uniformed deputy subjected him to a custodial interrogation by lying to him that the lineup witness had picked him. We assume this lie was a custodial interrogation for purposes of argument. Valencia, however, said nothing to this deputy, who departed before Valencia spoke. The deputy was playing a role in a planned ruse to prompt Valencia to speak to someone Valencia did *not* believe was an officer. Valencia fell for the ploy. When the uniformed deputy left, Valencia thought he was alone with his trusted confidant, not in a police-dominated environment. Valencia spoke freely and voluntarily and not in response to his perception of official coercion. His confession was admissible.

Relying on *Shatzer*, Valencia incorrectly argues a coercive effect lingered after the uniformed deputy left Valencia. *Shatzer* does not help Valencia. Justice Scalia's opinion in *Shatzer* concerned statements to people the defendant knew were police. (*Shatzer*, *supra*, 559 U.S. at pp. 101–102.) Valencia's statements were not to people Valencia thought were police.

Valencia also invokes *Edwards v. Arizona*, but it, like *Shatzer*, involved statements to people the defendant knew were from the government. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 479 (*Edwards*) [after Edwards asked for a lawyer and officers left, other officers returned to cell and identified themselves].)

The same holds for Valencia's reliance on *Missouri v. Seibert* (2004) 542 U.S. 600, 604–605, which again concerned statements by a defendant to people she knew were police.

There was coercion in *Shatzer*, *Edwards* and *Missouri v. Seibert* because those defendants knew they were confronting the inquisitorial might of the government. The coercion in those cases triggered *Miranda*. Valencia was free of this intimidating power, so the opposite holds for him: no coercion, no *Miranda*. (Accord, *People v. Orozco* (2019) 32 Cal.App.5th 802, 811-818.)

In sum, Valencia confessed to satisfy his own desire to tell the truth, not to satisfy the will of a person Valencia thought was from the government. Because Valencia spoke only to an undercover officer, *Miranda* and the Fifth Amendment do not apply. His voluntary confession was admissible.

III

The jury had enough evidence to find true the gang sentencing enhancement provided by section 186.22, subdivision (b)(1)(C).

We review the record in the light most favorable to the prosecution to determine whether a reasonable jury could find the facts required for the enhancement. (*People v. Garcia* (2014) 224 Cal.App.4th 519, 522-523.)

Section 186.22, subdivision (b)(1)(c) increases the sentences of defendants who commit a violent felony for the benefit of a gang. (§ 186.22, subd. (f).) The increase does not apply unless the gang's primary activities include at least one of 28 enumerated crimes. (§ 186.22, subd. (f).)

Here, the trial court did not identify each of those 28 enumerated crimes for the jury. Instead, it gave an instruction identifying just three: murder, burglary and grand theft. When reviewing for sufficiency of the evidence, we assess the evidence against the theory presented to the jury. (*People v. Garcia*, *supra*, 224 Cal.App.4th at p. 525.) Thus, we must determine

whether sufficient evidence showed Evil Klan's primary activities include murder, burglary, or grand theft.

The prosecution concedes the jury had insufficient evidence to find Evil Klan's primary activities include murder or burglary, but argues the jury had sufficient evidence to find the gang's primary activities include grand theft.

Only some types of grand theft are among the 28 enumerated crimes that count as a primary activity for the purposes of the enhancement. The enumerated crimes do not include grand theft as defined in section 487, subdivision (b), or felony theft of an access card, which can be grand theft. (§§ 186.22, subds. (e) & (f); 484e, subd. (d).) The enumerated crimes do include grand theft from the person. (§ 186.22, subds. (e)(9) & (f).)

There was enough evidence for the jury to find Evil Klan's primary activities include grand theft from the person. The prosecution's gang expert testified Evil Klan's primary activities include "theft." The jury could infer the sort of "theft" referred to by the expert included "grand theft from the person" because (1) the prosecution introduced Evil Klan member Elvin Mundo's conviction for grand theft from the person, and (2) the gang expert testified he was familiar with Mundo's conviction.

Valencia argues the expert's testimony was "insolubly ambiguous" because "theft" encompasses grand theft and petty theft, so the jury could not find Evil Klan's primary activities include grand theft much less a type of grand theft that counts for section 186.22. (See § 486 [delineating grand and petty theft]). Valencia's argument fails because we review the evidence in the light most favorable to the prosecution. (See *People v. Garcia* (2014) 224 Cal.App.4th 519, 522–523.) Any ambiguity in

the expert's testimony did not preclude this jury's finding because the jury could use Mundo's conviction to make sense of the expert's testimony.

When the expert discussed the Evil Klan member's conviction, he noted the gang member "took a deal for theft. 487 theft." This testimony appears to refer to section 487, which defines grand theft, including grand theft from the person. Valencia argues this testimony shows the expert knew how to specify types of thefts, and "when the expert meant to specify a certain type of theft, he did so." But the testimony could also show that when the gang expert used the word "theft," he meant the term to include grand theft and specifically grand theft from the person. We again favor the inference that supports the prosecution.

Even if we assume the jury was unable to infer Evil Klan's primary activities include "grand theft from the person," we would affirm because the jury would find the sentencing enhancement true if the trial court gave a more complete jury instruction. A complete instruction would have informed the jury that a gang qualifies for the sentencing enhancement if its primary activities include assault with a deadly weapon, robbery, felony vandalism, or illegal firearm possession. (§ 186.22, subds. (f), (e)(1), (e)(2), (e)(20, (e)(31)).) The prosecution's expert testified Evil Klan's primary activities include each of these crimes. Sufficient evidence supported the jury finding true the gang sentencing enhancement provided by section 186.22, subdivision (b)(1)(C).

IV

The trial court properly found no police personnel records were discoverable under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

We review for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

Valencia moved the trial court for disclosure of the personnel records of two sheriff's deputies. On appeal, Valencia requests we review the trial court's in camera proceedings to determine whether it abused its discretion in finding no discoverable documents. The prosecution does not object.

We have reviewed the transcript of the proceedings as well as the trial court's notes and findings. The trial court placed the custodian of records under oath, a court reporter transcribed the proceedings, and the court made a record of the material it reviewed. This procedure was proper. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1229 [holding the trial court should make a record of the documents it examined before ruling on a *Pitchess* motion, and can do so by describing the documents on the record].) The court did not abuse its discretion in holding there was no evidence to be disclosed.

V

Valencia's case must be remanded so the trial court can exercise the sentencing discretion created by SB 620.

SB 620 gives a court discretion to strike or dismiss a firearm enhancement imposed under section 12022.53. Although SB 620 did not take effect until after Valencia was sentenced, it applies retroactively to convictions that are not final. (*People v. K.P.* (2018) 30 Cal.App.5th 331, 339.)

Valencia and the government agree the case should be remanded so the trial court can exercise the discretion created by SB 620. Remand is required unless the trial court clearly shows it would not not have stricken the firearm enhancement if it did have discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, the trial court did not clearly show it would not have stricken the firearm enhancement. It implied the opposite, saying it imposed the sentence it did "because the court has no discretion."

On remand, the trial court may determine whether to admit evidence that could be relevant to Valencia's future youth offender parole hearing. The government's arguments to the contrary are not on point because they address whether a remand is *required* under *People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*). *Franklin* remanded a case because it was unclear whether the defendant had a sufficient opportunity to present evidence for his future parole hearing. (*Ibid.*) Valencia does not dispute he had a sufficient opportunity, so *Franklin* is inapposite.

This case is like *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091, fn. 3, where a defendant already had the "opportunity and incentive" to put forth information related to a future youth offender parole hearing. (*Id.* at pp. 1088–1089.) The *Woods* court nonetheless allowed the trial court to determine how the record could be supplemented on remand. (*Id.* at p. 1091, fn. 3.) We follow suit.

VI

We direct the trial court to amend the abstract of judgment to credit Valencia with an additional day of presentence custody. The trial court awarded Valencia 883 days of presentence custody

credits, but all parties agree Valencia should have been awarded 884 days.

DISPOSITION

We remand so the trial court can exercise the sentencing discretion created by SB 620. We direct the trial court to credit Valencia with an additional day of presentence custody. The judgment is otherwise affirmed.

WILEY, J.

We concur:

BIGELOW, P. J.

GRIMES, J.