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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER GRIMES,

Defendant and Appellant.

B290711

(Los Angeles County
Super. Ct. No. BA421625)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Mark F. Feeser, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Senior Assistant
Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy
Attorneys General, for Plaintiff and Respondent.

A jury convicted Christopher Grimes of second degree murder and found true specially alleged firearm-use enhancements. On appeal Grimes primarily contends the court erred by refusing to instruct the jury on voluntary manslaughter/heat of passion and denying his motion to suppress his statements to police on the ground they were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Grimes's First Trial

An amended information filed July 28, 2016 charged Grimes with one count of murder (Pen. Code, § 187, subd. (a))¹ and two counts of attempted premeditated murder (§§ 187, subd. (a), 664). The amended information specially alleged Grimes had personally used and intentionally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)). Grimes pleaded not guilty to all charges and denied the special allegations.

On October 5, 2016 Grimes went to trial on the allegations in the amended information. Grimes testified in his own defense; and the court instructed the jury on first and second degree murder and voluntary manslaughter based on heat of passion. On October 26, 2016 the court declared a mistrial after the jury failed to reach a verdict.

2. Grimes's Second Trial

On January 10, 2018 the information was amended a second time after the People dismissed both attempted murder

¹ Statutory references are to this code unless otherwise stated.

counts. Grimes pleaded not guilty to the single remaining count of murder and denied the special allegations he had personally used and intentionally discharged a firearm causing death.

a. *The People's case*

On February 12, 2014 at 10:31 a.m. Adrian Dawson and his fiancée, Marrisha Robinson, parked their car, a green Mitsubishi, in the parking lot of a Los Angeles strip mall near the intersection of Figueroa and 54th Streets. Dawson went into a store while Robinson and the couple's infant daughter waited in the car. At 10:32 a.m. Grimes drove his gold Mercedes four-door sedan into the same parking lot and double parked behind the Mitsubishi. Grimes got out of his car without putting it in gear or setting the brake, and it rolled forward and hit the rear bumper of the Mitsubishi. Robinson immediately checked on her daughter, who was in the back seat, then got out of her car. Grimes hurried back to his car, put it in gear, then got out and calmly told Robinson not to worry, "I'll take care of it." Suddenly, Dawson, a much larger man than Grimes, ran out of the store and "sucker punched" Grimes two or three times in the face yelling, "My baby's in the car." Grimes told Dawson he did not want to fight and quickly got back in his car. At 10:33 a.m. Grimes moved his car to the far end of the parking lot, stopped for a moment, then drove away. Surveillance footage of the incident was admitted into evidence.

Dawson and Robinson returned to their car, and Robinson drove the family out of the lot. When she did not see Grimes or his car after leaving the lot, Robinson concluded she and Dawson had been the victims of a hit and run, but told Dawson to forget about it. Robinson began driving to their destination, Dawson's father's house. Less than two minutes later, while driving north

on Hoover Street near the intersection of Hoover Street and 57th Street, Dawson told Robinson the Mercedes that had hit their car was behind them. Robinson looked behind her and slowed her car, believing she and the driver of the Mercedes might exchange insurance information. Suddenly, the driver of the Mercedes sped up and fired four gunshots from the driver's side window toward the front passenger side of the Mitsubishi, where Dawson was sitting. Surveillance footage from a nearby business, which was admitted into evidence without objection, showed Robinson's car travelling on Hoover Street followed closely by a Mercedes sedan, less than two minutes after the incident in the parking lot. Prosecutors argued the car following Robinson was Grimes's gold Mercedes; Grimes insisted the car that was recorded following Robinson's was white or silver and was not his.

Following the shooting, Robinson immediately drove toward the nearby University of Southern California. At 10:37 a.m. she called the 911 emergency number to get help for Dawson. Dawson was taken by ambulance to the hospital. He told first responders the shooter was the driver of the gold Mercedes four-door sedan. Dawson died later that day from a gunshot wound to his abdomen.

Grimes was arrested two days after the incident. During a search police officers found live ammunition in the home he shared with his parents and siblings and two spent firearm casings in his Mercedes. A firearms analyst testified a bullet found in Dawson's clothing and one found in the console of the Mitsubishi were fired from the same nine-millimeter gun. Two cartridge casings were found in Grimes's car, one underneath the driver's seat and one on the floorboard of the driver's seat. Although manufactured by different companies,

both cartridge casings could be used in nine-millimeter guns. Because the gun used in the shooting was never recovered, the firearms analyst explained, he could not conclusively match either of the casings in Grimes's car to the bullets recovered from Dawson's car and clothes.

Photographs recovered from Grimes's cell phone showed Grimes posing with several different firearms. One of the firearms contained a serial number that matched a registered nine-millimeter gun.

Grimes's cell phone records revealed he had made 11 phone calls to friends and acquaintances immediately after the shooting, between 10:37 a.m. and 11:00 a.m., and sent and received several text messages. A friend of Grimes's with the nickname "Blaze" sent Grimes a text at 11:03 a.m. to tell him he was "doing his homework now"; Grimes responded by describing Dawson's appearance. In a text message Grimes told Blaze he had decided not to fight Dawson because he (Grimes) lived in the neighborhood. Instead, "I left the area and did my shit. It's kill or be killed. Not fight for no reason." The next day Grimes texted an unknown number stating, "Don't play games with me I stay with heat," a possible reference to having a gun.

During a custodial interview the day after his arrest, introduced into evidence over objection, Grimes admitted to police officers that he had been involved in the altercation with Dawson at the strip mall but denied any involvement in the shooting. Grimes claimed he had left the strip mall because Dawson had told him he was "set trip," which Grimes understood to mean Dawson was a violent gang member. Grimes claimed that, after the altercation with Dawson, he drove to his house less than one minute away and told his brother, Keith Grimes, what

had happened. Keith Grimes told him to stay out of trouble. Grimes followed that advice. He left his house five minutes later, picked up his girlfriend and drove to the beach in Malibu. Grimes maintained he drove in the opposite direction from where the shooting occurred; his car was never at the site of the shooting. He told detectives he did not call his friends about the altercation in the parking lot because it “[w]asn’t a big deal.” He also claimed he had been in “shock” after he was punched. Grimes insisted the firearms depicted in the photographs found on his cell phone were “props,” not real. He did not know where the “prop guns” depicted in the photographs were.

A few hours after his custodial interview, police placed Grimes in a jail cell with an informant posing as a fellow inmate, a police practice described in *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*) and sometimes referred to as using a “confidential *Perkins* agent.” Their jail cell conversation was recorded and played for the jury over Grimes’s objection. Throughout this conversation Grimes maintained he was not the shooter. After the incident with Dawson at the strip mall, he picked up his girlfriend and went to the beach. However, he also stated that he had urged his friends to “do their homework” on the “fifi,” a term Grimes used to refer to Robinson, the female witness. When the informant asked whether the homework Grimes referred to related to trying to get Robinson “out of the way,” Grimes replied, “Do it and fast.” He stated his friend had shot a gun in his car one time and the shells “went everywhere and we could not find them.” Grimes hoped “they don’t find no shells and match it for some other shit.” Later in the conversation Grimes told the informant he had spoken to his brother and “my boys” and urged them to apply “all gas no brakes” to “[a]nybody that was related

to the situation,” “[b]aby and all.” Grimes also stated the only thing he was worried about was police finding “some type of [gunpowder] residue, or shells.” When the informant suggested that gunpowder residue remains when a gun is fired from inside the car, especially out of the right window, Grimes responded, “Out the left.” Grimes also told the informant the shooting had occurred “two minutes” after the strip mall incident. Police had previously told Grimes in his interview the shooting happened a short time after the strip mall incident. They did not disclose the fact it occurred within two minutes of the assault.

During one of several recorded jailhouse telephone calls played for the jury, Grimes advised the others on the line not to say “too much” because the call is being recorded. An unidentified male voice responded, “All you need to know is that, that the heam is gone. It’s gone.” Grimes responded, “[D]o your homework on the fi, on the fi.” A police detective testified the term “heam” was code for “heat,” which referred to a gun, although on cross-examination the detective could not recall a specific case where “heam” rather than “heat” was used as a slang term for gun.

b. *The defense case*

Grimes testified in his own defense and claimed this was a case of misidentification. He acknowledged his involvement in the collision at the strip mall, but insisted he had not seen Dawson after leaving the parking lot. Grimes stated, after Dawson punched him, he (Grimes) got in his car and backed up to a safe place at the opposite end of the lot to look for his insurance information. When he could not find that information, he drove away, believing it was safer to leave rather than to stay and

explain anything to Dawson, who he suspected was a violent gang member.

Grimes stated he drove out of the lot after the assault and turned south on Figueroa Street and then on to 61st Street where he sometimes lived with his family. He did not drive on Hoover Street. When he arrived at his house, a block or two away from the strip mall, he told his brothers what had happened. His brothers assured him not to worry about anything. He smoked marijuana with them for five minutes, then left his house and drove to his hotel room in Claremont, where he operated his marijuana sales business. He testified he had lied to the police when he told them he had gone to Malibu after leaving the strip mall because he was scared law enforcement would discover his illicit marijuana business, which he operated in Claremont to avoid trouble with gangs selling drugs in his neighborhood.

Grimes conceded he may have telephoned his friend Blaze after he left the parking lot to tell him about the incident and asked him to find out about Dawson. However, he insisted he did not know at the time he called or texted Blaze that Dawson had been shot. Grimes claimed his text message to Blaze that “it’s kill or be killed and not fight for no reason” simply referred to his decision not to fight Dawson because he could be killed if he were to fight a gang member. Grimes acknowledged he felt Dawson had disrespected him. But he also insisted, both during his statement to police and during cross-examination at trial, that being “sucker punched” had been “no big deal” to him.

Grimes claimed all the firearms in the photographs on his cell phone were fake “prop” guns or BB guns. As for the cartridge casings found in his car, Grimes explained Blaze had fired a gun in his car through the open sunroof a few weeks earlier to

celebrate the new year; he speculated cartridge casings may have been left behind unnoticed despite his efforts to clean the car after that event. He did not recall how many shots Blaze had fired.

During his recorded jailhouse calls, Grimes had asked for help from his family and friends in finding information on Robinson because she had wrongly accused him of the shooting. He did not want to harm her. To the extent he suggested anything different to the *Perkins* agent during their conversation, he felt intimidated and scared by the older man and had simply wanted to get along with a cellmate who had told him he had killed someone.

A construction worker who was employed near the site of the shooting initially told police the shooter's car was "silver or gold," explaining he and his coworkers had disagreed over the color of the shooter's car. He told police later that day, and testified at trial, that he had meant to say silver or gray, not silver or gold. He also testified the shooter's car was "sportorized," which to him meant it had "fancy tires and wheels" and looked like a "low rider." The witness also testified that Grimes's gold Mercedes, which did not have fancy tires and wheels, looked "sportorized" to him.

Keith Grimes testified that he had tried to find information about Dawson after the assault because he knew about local gangs in the area and was worried for his brother, who had upset a local gang member. After Grimes's arrest Keith Grimes retrieved \$3,000 cash, jewelry and marijuana from Grimes's hotel room in Claremont because he did not want police to find out about his brother's illicit marijuana business. He did not see or retrieve a gun. Both Grimes and Keith Grimes testified they

regularly used the word “heam,” which they described as a hybrid of “herb and money,” to refer to marijuana and cash, not a gun.

Several other expert witnesses testified for the defense. Michael Jones, an audio-visual expert, enhanced the surveillance footage and still photographs on Hoover Street to obtain a clearer picture of the car the People argued was Grimes’s. While Jones did not offer an opinion on whether the car in the video was the same make or model as Grimes’s Mercedes, defense counsel urged the jury to compare photographs and was confident they would determine the car in the surveillance footage was not Grimes’s. Grimes also provided expert testimony from a psychologist regarding inaccuracies in eyewitness identifications and from a physicist/accident reconstruction expert who opined, based on various models he had constructed, that Robinson had less than one second to see the shooter’s car and even less time to see the shooter. Defense counsel also argued Robinson’s identification of Grimes in a photographic lineup must have been based on her memory of the incident at the strip mall; she could not have seen the shooter to confidently identify him.

3. Jury Instructions, Verdict and Sentence

The court instructed the jury on first degree premeditated murder and second degree murder. The court refused Grimes’s request to instruct the jury on voluntary manslaughter/heat of passion, ruling there was no substantial evidence to support the instruction.

The jury found Grimes guilty of second degree murder and found each of the specially alleged firearm enhancements true. The court sentenced Grimes to an aggregate state prison term of 40 years to life, 15 years to life for second degree murder plus

25 years to life for the section 12022.53, subdivision (d), firearm enhancement.

DISCUSSION

1. *The Court Did Not Err in Refusing To Give a Voluntary Manslaughter Instruction*

a. *Governing law and standard of review*

“Murder is the unlawful killing of a human being . . . with malice aforethought.’ (§ 187, subd. (a).) ‘Manslaughter is the unlawful killing of a human being without malice.’ Manslaughter is a lesser included offense of murder, and a defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. Heat of passion is one of the mental states that precludes the formation of malice and reduces an [intentional] unlawful killing from murder to manslaughter.” (*People v. Nelson* (2016) 1 Cal.5th 513, 539 (*Nelson*); accord, *People v. Beltran* (2013) 56 Cal.4th 935, 942 [“a person who acts without reflection in response to adequate provocation does not act with malice”].)

The heat-of-passion form of voluntary manslaughter has both objective and subjective components. (*People v. Rountree* (2013) 56 Cal.4th 823, 855; *People v. Enraca* (2012) 53 Cal.4th 735, 749.) The subjective component requires the defendant to have actually killed under the immediate influence of provocation. (*Rountree*, at p. 855; *People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The objective component “focuses upon whether the person of average disposition would be induced to react from passion and not from judgment.” (*Nelson, supra*, 1 Cal.5th at p. 539.)

No specific type of provocation is necessary; the passion can be anger or rage or any violent or intense emotion other than revenge. (*People v. Beltran, supra*, 56 Cal.4th at p. 949.) When

evaluating the adequacy of provocation, the proper inquiry is whether the provocation would cause an emotion “so intense that an ordinary person would simply *react*, without reflection,” obscuring ordinary reason and judgment. (*Ibid.* [the question is not whether the defendant’s homicidal response to the provocation was reasonable, but whether the provocation was sufficient to overcome a reasonable person’s reason and judgment].) If sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter. (*People v. Moya* (2009) 47 Cal.4th 537, 545-550.)

“An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense.” (*Nelson, supra*, 1 Cal.5th at p. 530.) This duty exists even when the lesser included offense “is inconsistent with the defense elected by the defendant” (*People v. Breverman* (1998) 19 Cal.4th 142, 157, italics omitted; accord, *People v. Barton* (1995) 12 Cal.4th 186, 195 [duty to instruct on lesser included offenses is broader than duty to instruct on defenses; while a requested defense instruction need not be given when it is inconsistent with the defendant’s theory of the case, an instruction on a lesser included offense must be given even when the defendant expressly rejects it or when it is inconsistent with the defense presented]; *People v. Jo* (2017) 15 Cal.App.5th 1128, 1164.)

“On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense.” (*Nelson, supra*, 1 Cal.5th at p. 539.) We review the

evidentiary support for an instruction in the light most favorable to the defendant (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137) and resolve all doubts as to the sufficiency of the evidence to warrant the instructions “in favor of the accused.” (*People v. Tufunga* (1999) 21 Cal.4th 935, 944; accord, *People v. Wright* (2015) 242 Cal.App.4th 1461, 1482.)

b. *There was no substantial evidence of Grimes’s subjective heat of passion to support the instruction*

Citing evidence of Dawson’s sudden and violent assault of him at the strip mall followed by the shooting less than two minutes later, Grimes contends there was substantial evidence of adequate provocation to instruct the jury on voluntary manslaughter/heat of passion. (See *People v. Beltran*, *supra*, 56 Cal.4th at p. 946 [“angry and sudden [physical] assaults” by victim have historically been considered adequate provocation to support voluntary manslaughter/heat of passion]; *People v. Elmore* (1914) 167 Cal. 205, 211 [“blows given” in unprovoked attack “would naturally arouse a sudden passion” sufficient to support theory of voluntary manslaughter]; *People v. Millbrook*, *supra*, 222 Cal.App.4th at p. 1139 [adequate provocation to support heat-of-passion instruction when victim, “who was much bigger” than defendant, had acted belligerently toward defendant and initiated or escalated a physical altercation before he was shot]; cf. *People v. Gutierrez* (2009) 45 Cal.4th 789, 827 [the “simple assault” or “tussle” that defendant described—the victim scratched the defendant’s chest, kicked him and grabbed his shirt—did “not rise to the level of provocation necessary to support a voluntary manslaughter instruction”].)

Even if Dawson’s sudden assault was legally adequate to satisfy the objective component of the heat-of-passion form of voluntary manslaughter (see *People v. Millbrook*, *supra*,

222 Cal.App.4th at p. 1140 [“[g]enerally, it is question of fact for the jury whether the circumstances were sufficient to arouse the passions of the ordinarily reasonable person”]), there was no evidence Grimes was in fact enraged, upset or otherwise acting under the heat of passion following the parking lot incident. To the contrary, the only evidence on this point came from Grimes, who told police and testified at trial the altercation had been “no big deal” to him. To be sure, the jury was free to disbelieve Grimes. But even if it did, there was still no evidence, let alone substantial evidence, from which a jury could infer that Grimes’s reason was actually, subjectively, obscured.

Recognizing this evidentiary deficiency, Grimes suggests his subjective mental state may be inferred from the provocative act alone. That is, if an ordinary person’s judgment would be obscured by being sucker punched, it stands to reason, and a jury could reasonably infer, so too was Grimes’s. In *People v. Seden* (1974) 10 Cal.3d 703, 709 the Supreme Court rejected a similar argument, explaining, “It is not enough that provocation alone be demonstrated. There must also be evidence from which it can be inferred that the defendant’s reason was in fact obscured by passion at the time of the act.” Although the Supreme Court has since overruled *Seden* to the extent it suggested the burden to demonstrate an absence of malice was on the defendant, rather than the People (see *People v. Breverman*, *supra*, 19 Cal.4th at p. 163, fn. 10), the Court has continued to hold there must be affirmative evidence of the defendant’s actual, subjective mental state in addition to the provocative act to warrant the instruction. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1252 [“for voluntary manslaughter, ‘provocation *and* heat of passion must be affirmatively demonstrated”]; see *People v. Gutierrez*, *supra*,

45 Cal.4th at p. 827 [no instruction on voluntary manslaughter was warranted when defendant denied killing the victim and there was no evidence that the defendant was actually, subjectively, inflamed]; *People v. Manriquez* (2005) 37 Cal.4th 547, 585 [“There was no showing that defendant exhibited anger, fury, or rage; thus there was no evidence that defendant ‘actually, subjectively, kill[ed] under the heat of passion’”; “[t]he subjective element of the heat of passion theory clearly was not satisfied, and for that reason the trial court did not err in refusing to instruct the jury as to heat of passion”].) The court did not err in refusing the voluntary manslaughter/heat-of-passion instruction.

2. *The Court’s Ruling Denying Grimes’s Motion To Suppress His Custodial Interview, While Error, Was Harmless*

a. *Grimes’s custodial interview and motion to suppress*

According to the undisputed evidence at the suppression hearing, Los Angeles Police Detectives Young Mun and Refugio Garza interviewed Grimes at the police station following his arrest. At the very beginning of the interview, just after the detectives asked for Grimes’s complete name, Grimes stated, “Christopher, and before I speak I want a lawyer present.” Asked to repeat himself, Grimes said again, “Can I please have a lawyer present?” Garza replied, “Okay, that’s what my partner is going to do right now. Read you your rights.” Mun began to read Grimes the prophylactic warnings required under *Miranda*. When Mun came to the part advising Grimes he had the right to the presence of an attorney during questioning and stated, “If you cannot afford an attorney one will be appointed for you free of charge before any questioning if you want,” Grimes replied, “Yes,

and that's what I want." Mun replied, "And that's what you want. Okay."

Detective Garza told Grimes, "You don't have to say anything because you asked for your lawyer, but that does not mean we cannot tell you what we're here—what we're doing here, okay? We're conducting a very serious investigation in which you've been . . . implicated in." "Okay? You've been . . . basically identified as a person responsible in this incident." Garza showed Grimes a photograph of the strip mall parking lot. Grimes replied, "Mhm." Garza continued, "And I can tell you that . . . that's basically a still photograph from surveillance video. Okay? So there's a lot more surveillance video than just that." Detective Mun stated, "And because you've already asked for a lawyer, we're not going to ask you any questions, we're just going to tell you." Garza then showed Grimes a photographic lineup containing Grimes's picture and told him someone had identified him. Garza continued, "And this investigation is about a murder." Grimes gasped and turned away. Garza continued, "Somebody has died." Grimes replied, "Well, I'm not worried about anything for sure then." Garza told Grimes that he was going to be arrested for murder. Grimes replied, "Why would I be arrested for murder?" Garza responded, "Because somebody has died. Okay? Somebody is dead. We are homicide detectives. You're at the 77th Police Station. Okay? Like I said. You can just sit there and listen to me. If you want to talk you have to do it without your attorney. You've already asked for your attorney. I'm just letting you know, young man, you're young. Very serious situation here." Grimes said, "I don't understand man." Garza replied, "That's what we were trying to do with you is to talk to you about it. Okay, but you chose a different path. All I can tell

you is, it's bad." Grimes stated, "I know but like, I don't understand how I'm getting charged—charged with something. Like you showed me a picture of stuff like" Garza responded, "We already showed you something—that's not all, okay? I can't sit there and go through everything with you unless you want to sit here and talk to me about what happened" with this incident. Grimes asked, "What incident?" He continued, "I didn't murder nobody, so I really need you like—if you want me to help you I really need some help too bro, 'cause I'm not, I'm not. . . ." Detective Mun told Grimes to stop. Garza stated, "[W]e read you your rights and you say you want an attorney. Do you want to wait for an attorney or do you want to speak with us about what happened?" Grimes told the detectives he wanted to speak and help the detectives but he was scared and did not want to incriminate himself.

Detective Garza asked Grimes, "Okay you said you want to talk. Do you want to talk? Yes or no?" Grimes said "yes." Detective Garza confirmed, "And, again, that's without your attorney?" Grimes said, "Yeah." Detective Mun then told Grimes he would read Grimes his *Miranda* rights one more time and said, "I need you to be clear about what you want before we go on any further. You understand that?" Grimes replied, "And one question. It's like, it's kind of hard for me to make sense of what you're telling me. 'Cause you're telling me you're going to read me my rights, and then I tell you I want a lawyer and that means I'm going to jail. But basically, regardless, the way I go I'm still getting charged for murder." Mun responded, "Christopher, when I read you your rights earlier, just like maybe five/six minutes ago, Okay? What you said to the question of 'Do you want an attorney present during questioning' you said you

want your attorney, [o]kay? At that point we can't ask you any more questions." Mun continued, "But you keep asking us questions and you keep saying you want to talk to us." "So this is what we want—we need straightened out before we talk to you. Before you ask us questions, and we ask you questions. Alright? You understand that part?" Grimes said, "I understand." Mun then read Grimes the *Miranda* advisement again. Grimes said he understood and began answering questions.

Grimes moved to suppress his custodial statement in its entirety on the ground it was obtained in violation of *Miranda* after he invoked his right to have counsel present during questioning. The trial court denied Grimes's suppression motion. The court found, although Grimes had unequivocally invoked his right to counsel at the inception of the interview, he voluntarily reinitiated further conversation and, therefore, had affirmatively waived his right to counsel. The court stated, "Between the time that defendant may have invoked and the time that he said he wanted to speak again, the officers made no statement to the defendant that was designed to elicit an incriminating response, and as such, the defendant's indication that he wanted to talk is free and voluntary. The motion is denied."

b. *Governing law and standard of review*

"As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to

any questioning if he so desires.” (*People v. Martinez* (2010) 47 Cal.4th 911, 947, quoting *Miranda*, *supra*, 384 U.S. at p. 479.) These “*Miranda* admonitions” (advising a defendant of his or her right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel) must be given, and a suspect in custody must knowingly and intelligently waive those rights before being subjected to either express questioning or its “functional equivalent.” (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301; *People v. Ray* (1996) 13 Cal.4th 313, 336.)

Interrogation includes both express questioning and “words or actions” that are “reasonably likely to elicit an incriminating response from the suspect.” (*Rhode Island v. Innis*, *supra*, 446 U.S. at p. 301; *People v. Enraca*, *supra*, 53 Cal.4th at p. 752.) Whether the words or actions are “reasonably likely to elicit an incriminating response is judged by what the suspect reasonably perceives, not what the police intend. (*Innis*, at p. 301.)

“[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation [There is to be no] 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 v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*); accord, *Maryland v. Shatzer* (2010) 559 U.S. 98, 103-104, 110; *People v. Molano* (2019) 7 Cal.5th 620, 654.)

The reason for the bright-line rule is plain: “In the absence of such a bright-line prohibition, the authorities through “[badgering]” or “overreaching”—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and

persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.' [Citation.] '[I]t is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of . . . "inherently compelling pressures" and not the purely voluntary choice of the suspect.' [Citations.] 'Thus, the People must show both that the defendant reinitiated discussions and that he knowingly and intelligently waived the right he had invoked.'" (*Molano*, at p. 654; accord, *Shatzer*, at pp. 105-106.)

"An accused "initiates" further communication, when his words or conduct '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. Molano*, *supra*, 7 Cal.5th at p. 656.) "[W]here reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation. [Citations.] Thus, the People must show both that the defendant reinitiated discussions and that he knowingly and intelligently waived the right he had invoked. [Citation.] If instead the police reinitiate discussion without a break in custody, any further statements by the defendant are presumed involuntary and rendered inadmissible." (*People v. Gamache* (2010) 48 Cal.4th 347, 384-384, internal quotation marks omitted.)

When, as here, the facts are undisputed, we independently determine whether the accused unambiguously invoked his or her right to counsel as articulated in *Miranda* and, if so, whether the accused reinitiated discussions about the investigation and knowingly, intelligently and voluntarily waived that right to

counsel. (*People v. Jackson* (2016) 1 Cal.5th 269, 580 (*Jackson*); *People v. Suff* (2014) 58 Cal.4th 1013, 1068.)

c. *The detectives violated Miranda when they continued to interrogate Grimes after he invoked his right to counsel; nevertheless, the error was harmless*

The People concede Grimes unequivocally invoked his right to counsel at the inception of his custodial interview. However, relying on *People v. McCurdy* (2014) 59 Cal.4th 1063 (*McCurdy*) and *Jackson, supra*, 1 Cal.5th 269, the People argue, and the trial court found, the detectives had honored that invocation and only began interrogating Grimes after he reinitiated discussion with the detectives and expressly waived his right to counsel. Such an expansive application of *McCurdy* and *Jackson* to the interrogation in this case lacks merit.

In *McCurdy* the defendant was advised of his *Miranda* rights and waived them. As the interrogation progressed, the defendant stated, “I want a lawyer.” The deputy sheriff who was interrogating the defendant closed his file and prepared to leave the room. “Around 20 seconds later, [the] defendant said, ‘I don’t know if you guys got any other suspects or what.’ [The officer] explained they were talking to several people. The questioning then resumed.” (*McCurdy, supra*, 59 Cal.4th at p. 1082.) The Supreme Court found the defendant had reinitiated a discussion about the investigation and impliedly waived the right he had previously invoked. (*Id.* at p. 1089.) Considering the totality of the circumstances, the Court ruled, the defendant’s implied waiver was knowing, intelligent and voluntary. (*Id.* at p. 1090.)

In *Jackson* the defendant in custody waived his *Miranda* rights after receiving them and agreed to be interrogated. During the interrogation the defendant stopped answering

questions and stated he did not want to talk anymore. The detectives stopped the interrogation and left the room. About five minutes later, a different officer came into the room and asked the defendant whether he was thirsty and wanted any water to drink. The defendant told the officer that he needed to speak to someone right now because he needed to find out what they were going to do with him. The officer told the defendant, who had become increasingly agitated, to relax and take a breath. The defendant said he needed his medication, and the officer told him it was unlawful for him to dispense medication. The defendant replied, "Well, they need to come on and do what they need to do man." The officer asked if the defendant wanted him to get the interrogating officers, and the defendant replied yes. When the interrogating officers re-entered the room, they asked the defendant if he wanted to talk to them again. He said, "yes sir" and proceeded to make incriminating statements. (*Jackson*, *supra*, 1 Cal.5th at pp. 337-338.)

On appeal following the trial court's denial of his motion to suppress, the defendant in *Jackson* argued his statements were obtained after he had invoked his *Miranda* right to remain silent. The *Jackson* Court affirmed the denial of the suppression motion, finding the officers had acceded to the defendant's desire to stop talking when they left the room. "It was only after [the defendant] asked to speak with the detectives again, and Detective Sutton confirmed that this was his wish, that the detectives returned. Even then, Detective Barnes began by asking: 'Did you say you want to talk to us again Bailly, at your request?'" When the defendant confirmed he did, the detective asked "what's up?" rather than a pointed question about the investigation. The defendant responded by making incriminating

statements. (*Jackson, supra*, 1 Cal.5th at p. 340.) The Court held there was no *Miranda* violation because the defendant had reinitiated conversation with police about the investigation. (*Ibid.*)

In both *McCurdy* and *Jackson* the police officers honored the defendant's invocation of his *Miranda* rights by ceasing questioning, and either preparing to walk out (*McCurdy*) or actually leaving the interview (*Jackson*). Here, in contrast, after Grimes twice stated he wanted a lawyer, both before the *Miranda* admonition and immediately thereafter, Detectives Mun and Garza continued with direct statements about the investigation, telling him he had been identified by a witness and showing him his photograph from a photograph lineup and a photograph of the strip mall where the initial altercation with Dawson had occurred moments before the shooting. Although framed as declarative statements rather than questions, the detectives' comments about the case were more than "small talk" or innocuous efforts to obtain background information for booking purposes. (Cf. *People v. Gamache, supra*, 48 Cal.4th at p. 388 [officer's innocuous question about defendant's military service was not interrogation; question constituted "small talk"]; *People v. Mickey* (1991) 54 Cal.3d 612, 644 [officer's "small talk" with defendant unrelated to investigation was not interrogation]; *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601 [routine background questions for booking purposes not interrogation].) Reasonably construed, they were statements designed to elicit an incriminating response. (See *People v. Davis* (2005) 36 Cal.4th 510, 555 [officer's declarative statement to suspect that indirectly accused the suspect of committing the alleged shooting constituted interrogation]; *People v. Sims* (1993) 5 Cal.4th 405, 443-444

[confronting suspect with evidence linking him to crimes is a “technique of persuasion” likely to induce the defendant to incriminate himself, even if the officer did not ask the suspect questions]; *In re Albert R.* (1980) 112 Cal.App.3d 783, 790 [officer statements may amount to custodial interrogation without being phrased in questioning form].) Because Grimes’s query to the detectives followed a continuing interrogation, not a break in interrogation, it cannot be said Grimes “reinitiated” questioning. (See generally *Maryland v. Shatzer*, *supra*, 559 U.S. at pp. 103-104 [a waiver that comes at the interrogator’s behest after failing to cease questioning is not a voluntary waiver of the invoked right to counsel]; *People v. Molano*, *supra*, 7 Cal.5th at p. 654 [citing law].)

Nonetheless, any error in admitting Grimes’s custodial interview at trial was harmless beyond a reasonable doubt. (*People v. Case* (2018) 5 Cal.5th 1, 22 [erroneous admission of a defendant’s pretrial statements obtained in violation of *Miranda* “is reviewed for prejudice under the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18”; under that test we must reverse a conviction that rests on evidence from an interrogation conducted in violation of *Miranda* and used by the prosecution for a nonimpeachment purpose unless the erroneously admitted evidence was harmless beyond a reasonable doubt].)

Grimes contends the error was prejudicial because the interview portrayed him as a liar in a case where his credibility was of paramount importance to his defense. That characterization of the record overstates the import of his interview, which Grimes admits was not particularly incriminating. Throughout the police interview Grimes denied

shooting Dawson and claimed this was a case of mistaken identity, a position he consistently maintained throughout trial. Although the People used the interview to show that Grimes had lied about going to the beach after the assault at the strip mall, suggesting his consciousness of guilt, Grimes explained at trial he said he had gone to the beach because he did not want to disclose he had a hotel room in Claremont, where he sold illegal drugs. In any event, even if his lie about going to the beach was of some significance, he made the same statement to the *Perkins* agent, which, as we explain, was admissible at trial. Accordingly, on this record, which involved eyewitness identification, video surveillance footage, text messages, recorded jailhouse telephone calls and incriminating comments made during Grimes's recorded jail cell conversation, there is no question the admission of Grimes's custodial interview, although obtained in violation of *Miranda*, was harmless beyond a reasonable doubt.²

3. *The Court Did Not Err in Denying Grimes's Motion To Suppress His Recorded Conversation with the Jailhouse Informant*

In *Perkins*, *supra*, 496 U.S. 292 the Supreme Court held an undercover law enforcement officer posing as an inmate was not required to give *Miranda* warnings to an incarcerated suspect before asking questions that could elicit an incriminating response. The Court reasoned that the policy underlying

² Grimes emphasizes it took the jury eight days to reach a verdict and argues the length of deliberations shows this was an extremely close case. In fact, the delay was apparently caused by replacement of jurors with alternates after jurors fell ill, requiring deliberations to begin anew each time with the newly reconstituted jury. The final reconstituted jury deliberated for three days before reaching a verdict.

Miranda—protecting a suspect from the coercion inherent in the “police-dominated atmosphere” of a custodial interview—is not implicated “when an incarcerated person speaks freely to someone that he believes to be a fellow inmate.” (*Perkins*, at p. 296 “[w]hen a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking”]; but cf. *id.* at p. 299 [government may not use an undercover agent to circumvent a suspect’s Sixth Amendment right to counsel once that right has attached following commencement of criminal proceedings]; *People v. Clair* (1992) 2 Cal.4th 629, 657 [same]; *People v. Williams* (1988) 44 Cal.3d 1127, 1141-1142 [same].)

In *Perkins* the defendant had not invoked his *Miranda* rights when he was questioned by an undercover officer whom he believed to be a fellow inmate. Justice Brennan identified this fact as significant in his concurring opinion in *Perkins*, stating, “Nothing in the Court’s opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If respondent had invoked either right, the inquiry would be whether he subsequently waived the particular right.” (*Perkins, supra*, 496 U.S. at pp. 300-301, fn * (conc. opn. of Brennan, J.).)

Because he invoked his Fifth Amendment right to counsel under *Miranda* before he was placed in the cell with the informant, Grimes argues, *Perkins* does not apply and his statement to the informant violated *Miranda*, as suggested by Justice Brennan’s concurring opinion in *Perkins*. Neither the United States Supreme Court nor the California Supreme Court has addressed the application of *Miranda* in a case where the defendant has invoked his or her *Miranda* rights prior to the

Perkins interview. However, relying on language in *Perkins* and the underlying policy of *Miranda* and *Edwards*, the California courts of appeal have long rejected the argument Grimes makes here, holding that *Miranda* and *Edwards* are not implicated when a defendant who has invoked the *Miranda* right to counsel subsequently speaks to a person he or she does not know is an agent of the police. (*People v. Orozco* (2019) 32 Cal.App.5th 802, 814 [*Miranda* forbids coercion, not strategic deception; “[t]o construe *Miranda* to reach the noncoercive police conduct in this case is to untether *Miranda* from its purpose and, in so doing, undermine its legitimacy as one of the many bulwarks protecting the constitutional rights of criminal defendants”]; accord, *People v. Plyler* (1993) 18 Cal.App.4th 535, 544-545; *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1539-1543.) Other states that have considered the issue have, with one exception, reached the same conclusion. (See *People v. Hunt* (Ill. 2012) 969 N.E.2d 819, 827; *Halm v. State* (Fla.Dist.Ct.App. 2007) 958 So.2d 392, 395; *State v. Fitzpatrick* (Mo.Ct.App. 2006) 193 S.W.3d 280, 288; *State v. Anderson* (Alaska Ct.App. 2005) 117 P.3d 762, 768; *State v. Hall* (2003) 65 P.3d 90, 100; but see *Boehm v. State* (Nev. 1997) 944 P.2d 269, 271-273 [holding *Perkins* practice of using jailhouse informant violated Fifth Amendment right to counsel under the United States Constitution and Article 1, section 8 of the Nevada Constitution when employed after suspect had formally invoked right to counsel under *Miranda*].) We find the reasoning of *Orozco* and the like-minded appellate cases persuasive.

4. *The Trial Court Complied with Its Obligations Under Pitchess v. Superior Court*

Prior to trial Grimes moved for discovery of the police personnel records of Detectives Garza and Mun pursuant to Evidence Code sections 1043 and 1045 and *Pitchess v. Superior*

Court (1974) 11 Cal.3d 531. The court granted his *Pitchess* motion and conducted an in camera proceeding to review the records, but found no discoverable information. At Grimes’s request, which the People did not oppose, we have reviewed the sealed record of the in camera proceedings and conclude the trial court satisfied the minimum requirements in determining whether there was discoverable information. No abuse of discretion occurred. (See *People v. Townsel* (2016) 63 Cal.4th 25, 68; *People v. Mooc* (2001) 26 Cal.4th 1216, 1225.)

5. *Remand for Resentencing Is Not Necessary*

At Grimes’s sentencing hearing on April 25, 2018, Grimes’s counsel moved to strike the firearm-use enhancement citing the recent legislative amendment to section 12022.53, subdivision (h) (“The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section”).³ The court denied the motion, explaining it was “only for the grace of God the bullet did not hit the [baby]” in Dawson’s car.

Grimes contends remand for resentencing is required because there is nothing in the record indicating the court understood it had discretion to strike the section 1022.53, subdivision (d), enhancement and impose one of the lesser

³ Before January 1, 2018 the court was not permitted to strike or dismiss a mandatory firearm-use enhancement imposed under section 12022.53 or 12022.5. (See §§ 12022.53, former subd. (h), 12022.5, former subd. (c).) Effective January 1, 2018, the Legislature amended both of those sections to permit the trial court in its discretion to strike or dismiss a firearm-use enhancement in furtherance of justice. (See Sen. Bill No. 620 (2017-2018 Reg. Sess.) Stats. 2017, ch. 682; see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080.)

section 12022.53 firearm-use enhancements found true by the jury. The argument is without merit. The trial court stated it understood its discretion under the then-recently amended section 12022.53, subdivision (h), and explained why it was imposing the most severe firearm-use enhancement in this case. There was no misunderstanding of its discretion. Remand is not appropriate.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.