**PEOPLE v. MARTINEZ**

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*THE PEOPLE, Plaintiff and Respondent, v. DANIEL MARTINEZ, Defendant and Appellant.*

Court of Appeals of California, Second District, Division Four.

Filed November 9, 2010.

***Attorney(s) appearing for the Case***

*Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.*

*Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.*

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EPSTEIN, P.J.

Daniel Martinez appeals from his jury conviction of second degree murder with true findings on special allegations. He argues that the conviction and findings must be reversed because they are the result of an illegal seizure of his person and admissions resulting from violation of his rights under *Miranda v. Arizona* (1966) [384 U.S. 436](https://www.leagle.com/cite/384%20U.S.%20436) and coercion. He also argues that the trial court erred in admitting certain photographs into evidence, that the evidence is insufficient for the gang enhancement, and that all of these errors are prejudicial. We disagree with these contentions, and affirm the trial court judgment.

**FACTUAL AND PROCEDURAL SUMMARY**

Appellant and his friends were members of a group known as "A2M"("Addicted to Money" or "Addicted to Murder"). George Gallegos was his friend and fellow gang member. Appellant's girlfriend, with whom he had a child, was Gallegos' sister. Alfonso Gallegos and Diego Navarette also were friends and members of the gang. The Harpys gang was allied with A2M. The S4M ("Sex for Money") gang was a rival of both A2M and Harpys.

On May 7, 2006, Navarette, Alfonso Gallegos and appellant were walking when shots were fired in their direction. Appellant was not hit, but Alfonso was wounded and later died, and Navarette was shot and rendered a paraplegic. On October 21, 2006 Brian Verdesoto, a Harpys member, was killed. His funeral was held on October 29, 2006. Appellant and George Gallegos were among the attendees at the funeral, and their signatures appear in the condolence book adjacent to each other. Navarette told police that, after the funeral, George Gallegos and appellant were "pumped up and mad" because of the Verdesoto murder. (Navarette later said he had lied to police in making these statements.)

On October 29, 2006 at approximately 7:00 p.m., Manuel Vega, Freddie Saravia, and Juan (whose last name is unknown) were outside a liquor store on Orchard Street, between 18th Street and Washington in Los Angeles. As they were standing outside, a black Nissan Sentra stopped about 15 feet in front of them. The passenger in the back right passenger seat asked Vega, "`What do you write?'" Vega responded, "`S4MK.'" (The K was for crew, as in tagging crew.) As Vega stepped off the sidewalk, he heard shots fired. He ducked and ran to a staircase where he found Saravia, who had been shot. After the shots were fired, the Sentra drove south on Orchard toward Washington. Vega could not identify the shooter or anyone else in the Sentra. Saravia died from a single gunshot wound to his chest. The police recovered two .22-caliber brass shell casings on the street at the scene of the shooting.

On July 3, 2007, police arrested George Gallegos for another murder. Immediately following the arrest, officers executed a search of Gallegos's home pursuant to a warrant. Appellant was at the location when the officers arrived. The officers directed the occupants of the house to exit, which they did. The officers drew their guns while in the house, but their weapons were holstered at all other times. No one was located inside the residence. Appellant's girlfriend (George Gallegos' sister) testified at the Penal Code section 1538.5[1](https://www.leagle.com/decision/incaco20101109007#fid1) suppression hearing that officers had their guns drawn outside the residence where appellant and the other occupants were waiting, and that defendant was handcuffed before being transported by the officers. The magistrate found her testimony not credible.

After the search, two officers transported Gallegos to the Newton police station. Contemporaneously, two other officers recognized appellant as a suspect in the Saravia murder. One of the officers approached appellant and asked to speak with him. No one else was present during this conversation. The officer said something to the effect of, "`Hey, we want to talk to you at the station. Would you mind coming back with us so we can speak to you?'" Appellant agreed, and the officers transported him to the station. Appellant was not handcuffed while being transported to the station, where he was placed into a small interview room.

The interview was in three segments. Each segment was recorded and played to the jury at trial. The first segment lasted about one hour and 35 minutes; the second one hour and 15 minutes. It was followed by a break of several hours, after which appellant was interviewed a third time, for about 25 minutes.

Before appellant was given his *Miranda* rights, a detective asked him general questions about his present and previous living arrangements, his work, his age, the shooting of Alfonso Gallegos, whether he was a tagger (he said he was not), a cousin, the existence of tagging crews in the neighborhood, whether any of his friends was killed in the previous several years (he said none was) and whether the killing of Alfonso Gallegos was an "accident." At that point the officers administered *Miranda* rights and admonitions, and defendant acknowledged hearing and understanding them.

The questioning then resumed. It became more pointed, with officers telling appellant that he had lied and confronting him with information that conflicted with his statements, such as being at the Saravia funeral with George Gallegos. Appellant gave varying versions of what happened in connection with the Saravia killing, denying being present when the shooting occurred, and implicating others (particularly George Gallegos). At that point a break was taken and appellant was offered food and drink. At the second interview appellant repeated versions of the shooting in terms that exonerated himself, and identified members of other gangs. He eventually admitted being in the car from which the shots were fired, but only as a passenger. Finally, in the third interview, he admitted being the driver of that vehicle. He explained that he had made up the other names because he was scared.

Appellant's trial counsel made numerous and overlapping motions to exclude evidence of appellant's statements to police during questioning. Counsel made a formal section 1538.5 motion to the magistrate to exclude the evidence as the product of an illegal search and seizure, in violation of the Fourth Amendment. He later made a separate motion to suppress these statements on the basis of *Miranda* violation and coercion, and to sever appellant's trial from that of his then codefendant, George Gallegos. The motion to sever was granted, and the suppression motions were denied. The issues were revisited at trial on appellant's in limine motions to exclude his statements to police, and a renewed motion under section 1538.5, subdivision (i). These motions were denied by the trial court. Appellant was sentenced to prison for 45 years to life and punishment for the gang enhancement was stayed.

Appellant's motion for a new trial was denied. He then filed this timely appeal.

**DISCUSSION**

As we have discussed, appellant's motion to suppress evidence on the basis of an illegal seizure of his person and to suppress his statements to police in interrogation, overlap. He argues that if he was illegally "seized" everything that followed should be excluded as "fruit of the poisoned tree" although he does not use that familiar phrase. The issue turns on whether he was "in custody" before he made the incriminating statements. We agree with the magistrate and the trial court that he was not.

**I**

Appellant was at the Gallegos residence when police arrived to execute a warrant for Gallegos' arrest. As we have discussed, appellant was one of several persons waiting outside the house while police went into the residence. An officer recognized him as a person another officer wanted to talk to in connection with the Saravia murder. That officer was not on the scene but indicated that he did want to talk to appellant. An officer told appellant that they wanted to talk to him, and asked if he would mind coming to the police station with them for that purpose. Appellant agreed to do so. The officers did not order him to come to the station. They were armed but their guns were holstered. In fact, they were wearing business suits and ties (without coats), with a "sand brown belt" [*sic*: Sam Brown]. Appellant was patted down before getting into the police vehicle, and he was not handcuffed. Once at the station he was escorted to an interview room. The door to the room was locked from the outside, but there is no indication that appellant was aware of this. He did not at any time ask the officers to stop the police vehicle so that he could exit, or to return him to the Gallegos residence, or to leave the interview room.

While the officers had differing subjective opinions about whether appellant was free to leave, and what they would have done had he asked to do so, whether a detainee is free to leave is based on what a reasonable person in his or her position would conclude, not on the unconveyed subjective thoughts of the officers. (*People v. Stansbury* (1995) [9 Cal.4th 824](https://www.leagle.com/cite/9%20Cal.4th%20824), 830.)

The determination whether a person was "`in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review." (*Thompson v. Keohane* (1995) [516 U.S. 99](https://www.leagle.com/cite/516%20U.S.%2099), 102.) "`On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.]'" (*People v. Holloway* (2004) [33 Cal.4th 96](https://www.leagle.com/cite/33%20Cal.4th%2096), 114.) We accept the factual inferences in favor of the judgment below. (*People v. Stansbury, supra,* 9 Cal.4th at p. 831.)

**A. Custodial Questioning**

Appellant contends that *Kaupp v. Texas* (2003) [538 U.S. 626](https://www.leagle.com/cite/538%20U.S.%20626), requires a finding that his affirmative answer to whether he would go with the officers to the station, was not a valid showing of consent under the circumstances. The case is distinguishable. In *Kaupp,* the officers went into the defendant's home at about 3:00 a.m. without a warrant, woke him by shining a flashlight in his face, identified themselves, and told him they needed to talk. (*Id.* at p. 628.) The defendant was taken to the station in handcuffs, shoeless, and dressed in boxer shorts and a T-shirt. (*Ibid.*) The court held that the defendant's response of "Okay" when told they needed to talk was "no showing of consent under the circumstances" because he was presented with no option but to go with the officers, and his doing so was nothing more than "`a mere submission to a claim of lawful authority.'" (*Id.* at p. 631.)

The present case is closer to *People v. Zamudio* (2008) [43 Cal.4th 327](https://www.leagle.com/cite/43%20Cal.4th%20327). In that case an officer approached defendant and asked if he would go to the police station to be interviewed as a potential witness and provide background information. (*Id.* at p. 342.) The defendant did not show any hesitation or unwillingness in going and did not indicate that he did not want to go. The court held that the evidence supported the conclusion that there was "no threat or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, and no command associated with the officers' request that defendant come to the police station." (*Id.* at p. 344.) Similarly, in our case the officers were dressed in business suits. They were armed, but did not draw their guns at any point except on entering the residence to execute the warrant. No one was placed in handcuffs while the search was conducted and nobody was told he or she was not free to leave. The officers offered appellant a ride to the station and he accepted. Their weapons were holstered at that time. Appellant was not handcuffed when he was in the van on his way to the police station.

Nor did the questioning become custodial during the initial interview, up to the point that appellant was given his *Miranda* rights. As we have discussed, the questions up to then were essentially innocuous. The officers then told appellant why he was there: they were investigating the murder of Saravia. Until that point the officers were not under an obligation to provide *Miranda* admonitions. They were required to do so for the next phase of the interview, during which they questioned appellant closely and challenged his statements. As we have seen, they provided the admonition at that point.

**B. *Did Appellant Waive His Miranda Rights?***

The next inquiry is whether appellant effectively waived his right to remain silent. We agree with the magistrate and the trial judge that he did.

"In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained." (*People v. Smith* (2007) 40 Cal.4th 483, 502.)

"The waiver inquiry `has two distinct dimensions': waiver must be `voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and `made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' [Citation.]" (*Berghuis v. Thompkins* (2010) [130 S.Ct. 2250](https://www.leagle.com/cite/130%20S.Ct.%202250), 2260.)

"[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." (*Berghuis v. Thompkins, supra,* 130 S.Ct. at p. 2264.) Courts can infer a waiver of *Miranda* rights "`from the actions and words of the person interrogated.' [Citation.]" (*Id.* at p. 2254.) "Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease." (*Id.* at pp. 2263-2264.)

Appellant argues that "[t]he officer's *Miranda* advisements were inadequate because they did not obtain express waivers of each of the rights" and "[a]ppellant was never asked unambiguously if he agreed to waive any of these rights." Appellant voluntarily spoke to the officers over a period of approximately six and a half hours after he received his *Miranda* warnings. He never asked for counsel and never asked to leave. As the magistrate concluded after listening to the tapes, it did not appear appellant "was in any stress nor felt under duress in any way," but rather that appellant "somewhat gladly answered all of the, even accusatory, questions that followed the advisement of his constitutional rights." Since appellant continued to speak freely to the officers, he impliedly waived his rights.

**C. *Was Appellant's Confession the Result of Coercion?***

Appellant argues that his confession was coerced because he had no prior experience with the criminal justice system and the officers' techniques were designed to force a confession. Appellant claims the officers used the following tactics which he assigns as coercive: (1) threats to appellant's family and child; (2) threats of imprisonment; (3) threats of gang retaliation; (4) accusations that appellant was a liar; (5) pretense that they knew the true circumstances; and (6) false promises of leniency. During the interrogation the officers implied they knew appellant was involved in the alleged crime, and one of the officers said they had three books of information and had spoken with other people in the "hood."

The Fourteenth Amendment of the Constitution prohibits the use of involuntary statements made to law enforcement as a result of coercion. (*People v. Neal* (2003) [31 Cal.4th 63](https://www.leagle.com/cite/31%20Cal.4th%2063), 79.) Whether a statement is voluntarily made is determined by looking at the "`totality of [the] circumstances.' [Citations.]" (*Ibid.*) "In assessing allegedly coercive police tactics, `[t]he 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. Smith, supra,* 40 Cal.4th 483, 501.) The "[s]tate has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." (*Florida v. Royer* (1983) [460 U.S. 491](https://www.leagle.com/cite/460%20U.S.%20491), 497.)

The trial court could "not remember one [interrogation] where the detectives were as low key as they were in this case" and said that "you might even use the word gentle in their questioning." It described the interrogation as a "dialogue or debate" between appellant and the officers. (See *People v. Holloway, supra,* 33 Cal.4th at p. 116 [interrogation "better characterized as a `dialogue or debate between suspect and police in which the police commented on the realities of [his] position and the courses of conduct open to [him]'"].) The court referred to *Holloway, supra,* saying that "once a suspect has been properly advised of his rights he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits." The trial court concluded that "the statements were voluntarily obtained" and did not find that the officers "threatened harm or falsely promised benefits in such a manner as to wrongly overbear the defendant's will and force him or obtain from him statements that he would not have otherwise made."

Appellant confessed during the third interview. There was a break of two hours and 25 minutes between the second and third interview. At the beginning of the third interview, the officers told him that they had spoken with Gallegos and that they needed appellant to clarify his story, explaining that this was appellant's last opportunity to tell the truth. Appellant asked the officers some questions regarding what would happen once he told them the truth. In response, the officers did not say appellant would be arrested but did say that if he admitted a crime he would be charged and tried in a court of law. After this exchange, appellant confessed to being the driver of the car.

These circumstances do not demonstrate coercion. Appellant's confession was a voluntary and informed decision and not the product of coercion.

**II**

Appellant contends the trial court erred at trial in admitting photographs of the victim in life, the victim's autopsy, and the crime scene because "the facts revealed by the photos were not in dispute, they were thus irrelevant, and were more prejudicial than probative."

"[T]he decision to admit victim photographs is a discretionary matter we will not disturb on appeal unless the prejudicial effect of the photographs clearly outweighs their probative value." (*People v. Taylor* (2001) [26 Cal.4th 1155](https://www.leagle.com/cite/26%20Cal.4th%201155), 1168.) To be admitted, evidence must be relevant and the probative value must outweigh any prejudice. (Evid. Code, §§ 210 & 353.) "Relevant evidence" is defined as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

There were five photographs taken at the crime scene. None of them shows anything gruesome. The victim's body is not shown in any of them. There is one photograph of the victim alive. There were also three autopsy photographs. Two of these photographs show a close-up of the bullet hole and only one of them shows the victim's face with a small smudge of blood under his nose. We conclude that these photographs were relevant and that the prejudicial effect does not outweigh their probative value. The trial court did not abuse its discretion in admitting them.

Appellant argues that the autopsy and crime scene photographs were cumulative of testimony regarding the victim's wounds and irrelevant to any disputed fact. The prosecution presented the autopsy photographs during the testimony of the deputy medical examiner. The crime scene photographs were presented by the prosecution during the testimony of an officer to illustrate what he saw when he responded to a call reporting the victim's shooting and to provide an overview of the crime scene.

"We have often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony." (*People v. Price* (1991) [1 Cal.4th 324](https://www.leagle.com/cite/1%20Cal.4th%20324), 441.) The photographs could have assisted the jurors "in understanding and evaluating the testimony presented to them." (*People v. Wilson* (1992) [3 Cal.4th 926](https://www.leagle.com/cite/3%20Cal.4th%20926), 938.) We have viewed the photographs and find them neither gruesome nor inflammatory. They were relevant: the autopsy photographs showed how the victim died and the crime scene photographs illustrated the shooting. No undue prejudice was shown by admission of this evidence.

Appellant claims that the photograph of the victim in life was irrelevant and offered only to show that the victim was a human being who had been alive and was now dead. Although courts have warned against using photographs of the victim alive "given the risk that the photograph will merely generate sympathy for the victims," they have allowed such pictures when they are relevant in assisting the jury in understanding a witness's testimony. (See *People v. Harris* (2005) [37 Cal.4th 310](https://www.leagle.com/cite/37%20Cal.4th%20310), 331.) The prosecution used the photographs of the victim while alive during the testimony of witnesses in order to identify the victim. We conclude that the use of the photograph of the victim while alive was relevant to this testimony. In any case, it was not more prejudicial than probative pursuant to Evidence Code section 352.

**III**

Appellant claims there is insufficient evidence that one of the primary activities of the A2M gang was the commission of one or more crimes enumerated in section 186.22, subdivision (f).

"`To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity.'" (*People v. Bragg* (2008) [161 Cal.App.4th 1385](https://www.leagle.com/cite/161%20Cal.App.4th%201385), 1399-1400; § 186.22, subd. (f).) Felony vandalism[2](https://www.leagle.com/decision/incaco20101109007#fid2) is one of the enumerated offenses. (§ 186.22, subd. (e)(20).)

Appellant claims that substantial evidence does not establish that A2M's primary activity was commission of crimes as required by section 186.22, subdivision (f). To establish a gang's primary activity for purposes of the gang statute, the prosecutor must show "evidence that the group's members *consistently and repeatedly* have committed criminal activity." (*People v. Sengpadychith* (2001) [26 Cal.4th 316](https://www.leagle.com/cite/26%20Cal.4th%20316), 324.) Expert testimony may serve that purpose. (See *People v. Gardeley* (1996) [14 Cal.4th 605](https://www.leagle.com/cite/14%20Cal.4th%20605), 619-620 [expert testimony based on conversations with gang members, investigations of many crimes committed by gang members, and from information from colleagues and other law enforcement agencies was sufficient for reasonable jury to conclude gang's primary activities involved commission of qualifying crimes].)

Appellant recognizes that the gang expert testified that the offense pattern of A2M was "mainly felony vandalism," but argues this is insufficient. Additionally, during cross examination the gang expert testified that tagging was A2M's primary activity. We see no significant difference between "mainly" and "primary." The words are interchangeable and mean the same thing. A jury reasonably could have concluded that "mainly" is the equivalent of "primary" for purposes of the gang enhancement.

Appellant also claims that there is insufficient evidence that the alleged tagging constitutes a felony resulting in more than $400 of damages and therefore it is not an enumerated offense under section 186.22, subdivision (e). Even if the expert's testimony that A2M was mainly involved in felony vandalism was not sufficient to support section 186.22, subdivision (f), the prosecution presented court records documenting that a member of A2M was convicted of felony vandalism in 2006. We conclude that there is substantial evidence to support a finding that felony vandalism was a primary activity of A2M.

**DISPOSITION**

The judgment is affirmed.

We concur:

WILLHITE, J.

MANELLA, J.

**FootNotes**

1. All statutory references are to the Penal Code unless otherwise indicated.

2. Under section 186.22, subdivision (e)(20) felony vandalism is "defacement, damage, or destruction" in the amount of $400 or more.