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Court of Appeal, Second District,
Division 8.

The PEOPLE, Plaintiff and Respondent,

v.

Jorge L. MONTES, Defendant and Appellant.

No. B208021.
(Los Angeles County Super. Ct. No. NA069209).
Dec. 18, 2009.

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard R. Romero, Judge. Affirmed.
Robert L.S. Angres, under appointment by 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, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

BIGELOW, J.

*1 A jury convicted Jorge L. Montes of two counts of attempted premeditated murder and one count of mayhem. A number of special allegations were also found true. Montes was sentenced to 50 years to life in prison. He appeals, claiming: (1) the trial court erred when it permitted the jury to hear his incriminating statements to the police; (2) there was insufficient evidence to support his conviction; and (3) the trial court failed to properly instruct the jury on a lesser included offense. We affirm.

FACTS

On January 29, 2006, R.G. and R.T. were shot by Saul Diaz and another man, known as Coco, while walking down the street in Wilmington. The shooters were in a white car driven by a third man; they stopped near R.G. and R.T. and asked them whether they were affiliated with a gang. When they denied any gang ties, Diaz and Coco got out of the car, ran toward them and fired over a dozen rounds. Bullets hit R.G.'s arm and buttocks. R.T. was shot in the lower back and as a result of his injuries, has had to use a colostomy bag ever since. At some point during the incident, someone in the car yelled "Eastside Wilmas."

Montes was arrested in connection with the crime on February 20, 2006. He submitted to two interviews and a polygraph test after waiving his *Miranda* [FN1] rights. In the first interview, held the night he was arrested, Montes told Detectives William Smith and Brian Gaspariaan of the Los Angeles Police Department that he lent his car to Diaz but denied any involvement in the shooting. When the detectives challenged his version of the story, Montes agreed to submit to a polygraph test the next day. After the polygraph examiner, Darrin Hayes, confronted him about lying during the examination, Montes admitted

that he was the driver of the white car. He told the detectives in a separate interview that Diaz had asked him to drive him to Wilmington to find those responsible for the beating of a man named Clown the day before. He denied knowing they had guns that day or that they intended to shoot anyone.

FN1. *Miranda v. Arizona* (1966) 384 U.S. 436.

An information charged Montes with two counts of attempted willful, premeditated and deliberate murder and one count of mayhem (Pen.Code, §§ 187, subd. (a), 203, 664). As to the attempted murder counts, it was further alleged that a principal personally used and discharged a firearm (Pen.Code, § 12022.53, subds.(b), (c) & (e)). As to all three counts, the information further alleged that a principal personally and intentionally discharged a firearm which caused great bodily injury (Pen.Code, § 12022.53, subds.(d) & (e)), that the offenses were committed for the benefit of a criminal street gang (Pen.Code, § 186.22), and that a principal was armed with a firearm during the commission of the offenses (Pen.Code, § 12022, subd. (a)(1)). Count one further alleged that Montes personally inflicted great bodily injury on R.G. (Pen.Code, § 12022.7).

After a nine-day jury trial, Montes was convicted on all counts and all of the special allegations were found true. The trial court sentenced Montes to 50 years to life with an award of 827 days of presentence confinement credit and 124 days of conduct credit. Montes timely appealed from the judgment.

DISCUSSION

I. Montes' Confession Was Not Coerced

*2 Prior to trial, Montes moved to suppress his admission that he was the driver of the white car on the grounds that it was the product of coercive police tactics and he was not properly given his *Miranda* warnings. The trial court denied the motion. Montes now contends the trial court erred in its ruling. He asserts that several instances of police misconduct occurred over the course of the two interviews and the polygraph test which, coupled with his lack of education and lack of experience with the criminal justice system, combined to undermine his free will and voluntary choice. We disagree.

To determine whether Montes was coerced into admitting he was the driver of the white car, we must determine whether his "will was overborne." (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208.) "No single event or word or phrase necessarily determines whether a statement was voluntary. The answer must be derived from the totality of the facts and circumstances of each case, keeping in mind the particular background, experience and conduct of the accused. [Citations.]" (*People v. Kelly* (1990) 51 Cal.3d 931, 950 (*Kelly*).) The record shows the following with respect to the interviews and polygraph examination at issue:

A. The First Interview

Montes was arrested on February 20, 2006, at 5:40 p.m. After he was given his *Miranda* warnings, he agreed to waive his rights and be interviewed by Detectives Smith and Gaspariaan. The detectives advised Montes that witnesses identified him and placed his car at the scene of the crime. Montes initially denied being there, explaining that he would not risk being involved because of his two young daughters. Throughout the interview, the detectives encouraged Montes to tell the truth. Otherwise, they warned him he could face a significant prison sentence and lose his family. Among other things, they told him:

"Your wife will meet somebody else, somebody else will be at Christmas with your daughters, there will be someone buying them gifts calling them Mija, and sitting on their lap and being there for her Quincenera, and taking the rest of it, they'll be calling him daddy, and you'll be in Pelican Bay, which is about eight-nine hours drive north."

"But here's the deal. Here's what happens on my job now. Tomorrow I go down to see the District Attorney and I tell the District Attorney, okay, I picked up Jorge last night, uh I would say Jorge is a hard head, didn't want to talk to me, which if [*sic*] your right I agree. Jorge doesn't want to talk to me, um, so

do what you got to do. And what they're going to do is they'll research the case and what, what that scenario I just went down with you. I'll say, well I talked to Jorge, I don't think Jorge is the shooter, I already told you I don't think you're the shooter, okay? I think out of the people in that car you were the least culpable of anybody.... I think Jorge got suckered into something and he's kind of fucked. But I talked to Jorge, we explained everything, he told me exactly what happened, we need to work with Jorge. Now, I can't make any promises. No promises. I'll get you a promise. Actually right now I'll get on the stand and say I don't think you're the shooter. That's what I'm going to do.... But what I want to do is I want you to tell me what happened out there, of why you were there. I'd much rather have you come to court and say, okay, I was there, I drove the car, blah, blah, blah, blah, blah, but I didn't do this shit because I didn't know this shit was going to happen. I think you got suckered into this.... Now, what happened is, there are different kind of charges here. You can go to jail for attempt (*sic*) murder, (unintelligible) gun, which is a big charge, they can basically charge you with an ADW, they can make you an accessory, um they can do this, I can't do this ... or the D.A. can say you know what? I'd rather have Jorge as a witness, make him a witness. Okay? And, and use you there. But that's a deal that they would have to work out between you and your attorney. That's between them, I can't do that. I can only feed them the information on what to do here."

*3 Montes became upset during the interview at the thought of not seeing his two daughters again. After the detectives continued to urge Montes to tell the truth for the sake of his daughters and himself, he admitted that he lent his car to Diaz on the day of the shooting and that he knew Diaz had been involved in a shooting. He maintained, however, that he was not the driver. When the detectives continued to challenge his story, Montes agreed to submit to a polygraph test the next day.

B. The Polygraph Test

The polygraph test was administered the next morning by an LAPD employee, Darrin Hayes. Before the test, Hayes confirmed that Montes had previously been read his rights. Montes again denied being at the scene of the crime, but broke down and began to cry after Hayes told him he failed the test and that he could be prosecuted as the shooter. Hayes explained to him, "It's a big different [*sic*] from the guy pulling the trigger and the guy that's driving the car, big difference." After continued prodding from Hayes, Montes admitted that he drove the getaway car.

C. The Second Interview

In an interview with the detectives immediately following his polygraph test, Montes said that Diaz came by his house and asked him to drive him and Coco to Wilmington to find the men who assaulted a fellow gang member, Clown. Diaz told him to pull over when they spotted two black men walking down the street. Diaz and Coco then began shooting at the two men. Although he told the detectives in the first interview that Diaz was "trigger happy," he denied knowing they were going to shoot anyone.

D. The Trial Court's Ruling

The trial court denied the motion to suppress, finding Montes knowingly waived his rights and that his statements were voluntary. The court ruled as follows:

"The defendant was aware of what he was facing. He realized that admitting to be a driver would put him into prison for 5, 10, 15 years, whatever he mentioned there. The statements made were voluntary.

"I find that there was no promise of leniency. There was a hope of leniency by your client, but the officers always made clear that they could not make that commitment, that they wanted to know all the facts, and based on those facts, he might be a witness, which is true, based on what the truth was, he might be a witness or might be something else. The defendant did repeatedly hope to be able to ... see his daughter again the following day. He was never promised that as a quid pro quo of giving a statement.

"I find what was most critical in the defendant's mind was during the polygraph interview, the polygraph examiner apparently made a very strong position that he, the examiner, knew that your client was lying about not being there. And that is not improper, no less than lying about evidence that implicates somebody being interviewed.

"Your client, in my opinion, made a knowing, intelligent decision to give the second statement that turned into a confession. His will was not overborne as shown by his denying originally to the first set of officers any involvement in the offense and ultimately admitting to it to the polygraph examiner because the examiner pressed him that-the examiner knew his business, was a good polygraph examiner, and he wasn't fooling the polygraph examiner.

*4 "And your client was hopeful that admitting to be a driver, although facing state prison, would be less than that as a shooter, and he wanted the facts to come out and was hopeful that he would get leniency, but there was no promise. So the motion to suppress the statements as involuntary and under *Miranda* is denied."

E. Analysis

Here, Montes contends his statements were involuntary because the detectives and the polygraph examiner: (1) "injected fear and alarm in appellant by insinuating that his lack of cooperation would result in the loss of contact with his daughters, who would soon depend on another man as a father-figure [;]" (2) led Montes to believe he would have reduced culpability in return for an admission that he was the driver; and (3) led Montes to believe he would suffer if he did not confess because the detectives would tell the district attorney that he was uncooperative.

Involuntary admissions "are excluded because they are untrustworthy, because it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime." (*People v. Atchley* (1959) 53 Cal.2d 160, 170.) Involuntariness may result from threats or promises of leniency, express or implied. (*Kelly, supra,* 51 Cal.3d at pp. 951-954, see also *Lynumn v. Illinois* (1963) 372 U.S. 528, 534-535 (*Lynumn*); *United States v. Tingle* (9th Cir.1981) 658 F.2d 1332, 1335 (*Tingle*).)

Courts have condemned interrogations in which the police exploited a defendant's fear of losing his family to coerce a confession. The United States Supreme Court, for example, has found coercive a police officer's warnings to a defendant that if she did not cooperate, her government aid would be cut off and her children would be taken away. (*Lynumn, supra,* 372 U.S. at pp. 530-534.) Similarly, in *Tingle,* an FBI agent, questioning a bank robbery suspect, told the woman she would not or might not see her child for a while if she went to prison. The agent also told the suspect she faced a lengthy sentence and had " 'a lot at stake.' " (*Tingle, supra,* 658 F.2d at p. 1334.) The Ninth Circuit found the objective of the interrogation was "to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time." (*Id.* at p. 1336.) The court noted the deep, fundamental relationship between parent and child and found an officer's deliberate preying upon her maternal instincts an improper influence leading to coercion. (*Ibid.*) The *Tingle* court concluded: "The warnings that a lengthy prison term could be imposed, that Tingle had a lot at stake, that her cooperation would be communicated to the prosecutor, that her failure to cooperate would be similarly communicated, and that she might not see her two-year-old child for a while must be read together, as they were intended to be, and as they would reasonably be understood. Viewed in that light, [the agent's] statements were patently coercive." (*Ibid.,* fns.omitted.)

*5 In *Kelly,* on the other hand, the California Supreme Court was satisfied that the police officer's attempt to appeal to the defendant's religious anxieties and to his love for his mother and wife were not so coercive as to overcome his free will. There, the officer stated, " 'I think it's a going to be a foregone conclusion you're going to be in prison for a lot of years. I don't know if your wife is going to stick around and wait for you. Okay. That's something you're going to have to work out with her....' " (*Kelly, supra,* 51 Cal.3d at p. 952.) The court concluded "none of the police comments here appear to have been calculated to exploit a particular psychological vulnerability of defendant; no acute religious anxiety or sense of guilt was apparent from prior questioning, and defendant was not particularly moved by appeals to family, either the victim's or his own." (*Id.* at p. 953.)

The questioning in both *Lynumn* and *Tingle* sought to exploit the defendants' fear with numerous references to a possible separation from their children. (*Lynumn, supra*, 372 U.S. at pp. 532-533; *Tingle, supra*, 658 F.2d at p. 1334.) By contrast, the interrogator in *Kelly* mentioned the defendant's family only once and failed to elicit much of a response. (*Kelly, supra*, 51 Cal.3d at p. 953.)

Even assuming the detectives manipulated Montes' love for his daughters in a manner that resembles those interrogations condemned under *Lynumn* and *Tingle*, there was still no error in admitting the confession. Where a threat or promise is made, but it is not the motivating cause of the admission, the admission is not considered involuntary. (*People v. Maury* (2003) 30 Cal.4th 342, 404-405.) Here, the trial court found that the detective's statements regarding a possible separation from his children did not cause Montes to confess. Instead, substantial evidence supports the trial court's finding that it was the polygraph examiner's statements that Montes had failed the polygraph test that caused him to admit to being the driver. As a result, we accept the trial court's factual determination and grant due deference to its finding. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1092-1093; *People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

We can similarly dispatch with Montes' remaining contentions of coercion-that the detectives improperly suggested Montes would receive leniency for his cooperation or would suffer for his refusal to cooperate. As described above, they were not the cause of Montes' admission. Indeed, our review of the record shows that neither the detectives nor the polygraph examiner made any promises of leniency. To the contrary, Detective Smith repeatedly told Montes that he could not make any promises and that it was up to the district attorney to decide whether to make Montes a witness or to prosecute him. The only promise the detectives made was to pass any information they gleaned from Montes to the district attorney. The record also fails to show any threats by the detectives that the district attorney would learn of his refusal to cooperate which would result in some further harm to his case. We find no error in the trial court's decision to allow the jury to hear Montes' admissions.

II. There Was Sufficient Evidence to Support the Conviction for Mayhem

*6 Montes next challenges his conviction of mayhem on the ground that the prosecution failed to present evidence at trial on one element of the crime-that the victim's member or organ was disfigured, disabled or rendered useless. (Pen.Code, § 203; *People v. Ausbie* (2004) 123 Cal.App.4th 855, 861.) According to Montes, R.T.'s testimony-that he was injured and was forced to use a colostomy bag as a result of his injury-was insufficient because he did not describe or name any organ that was disabled. We find no merit to this argument. Just as testimony that a victim had to use a wheelchair is sufficient for a jury to infer the victim's legs were disabled or rendered useless, the jury could reasonably infer from R.T.'s testimony that one or more organs which control his bowel movements were disabled or rendered useless and as a result, he was forced to use a colostomy bag. (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347.)

III. No Prejudice Resulted From the Failure to Instruct the Jury on a Lesser Included Offense

Finally, Montes contends the trial court erred when it failed to sua sponte instruct the jury on battery with serious bodily injury, a lesser included offense to the crime of mayhem. (*People v. Ausbie, supra*, 123 Cal.App.4th at p. 859.) We find this contention lacks merit.

It is settled that in criminal cases, even in the absence of a request, the trial court must instruct the jury on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Assuming arguendo it was error to fail to instruct on battery with serious bodily injury, we find any such error harmless. (*People v. Moye* (2009) 47 Cal.4th 537, 541.)

The California Constitution provides that "[n]o judgment shall be set aside" for various kinds of error in the conduct of the trial, including "misdirection of the jury" and "improper admission or rejection of evidence," unless "an examination of the entire cause, including the evidence" indicates that the error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13.) Accordingly, we must make an individualized prejudice assessment on the trial court's failure to instruct the jury on the lesser included

offense of battery with serious bodily injury. (*People v. Breverman, supra,* 19 Cal.4th at p. 175.) Our review focuses not on what a reasonable jury could do, but what such a jury is likely to have done if the battery instruction had been included. "In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Id.* at p. 177.)

*7 Here, Montes asserts he was entitled to an instruction on the lesser included offense because "[a] rational jury could have concluded that since the record was devoid of evidence that the shooting resulted in a specific organ being impaired or disabled, the evidence only established that appellant was guilty of aiding and abetting a battery with serious bodily injury." The jury heard testimony from R.T. that he is forced to use a colostomy bag as a result of the gunshot wound. As discussed above, that is more than sufficient to support a conviction for mayhem. We find it unlikely that the outcome would have been different even if the trial court had instructed the jury on the lesser included offence of battery with serious bodily injury.

DISPOSITION

The judgment is affirmed.

We concur: RUBIN, Acting P.J., and FLIER, J.

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• 2009 WL 4823812 (Oral Argument) Oral Argument (Oct. 30, 2009)

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