Filed 7/24/09

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS BUSKIRK, Defendant and Appellant.	D054757 (San Bernardino Super. Ct. No. FMB700183)

APPEAL from a judgment of the Superior Court of San Bernardino County, Rodney A. Cortez, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts II, III and IV.

A jury convicted Nicholas Buskirk of second degree robbery (Pen. Code,[1] § 211), but found the attendant firearm use allegation not true (§ 12022.5). Buskirk admitted he had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Buskirk to a total prison term of six years.

Buskirk appeals, contending the trial court prejudicially erred in denying his motion to suppress his pretrial statements obtained in violation of the Fifth Amendment to the United States Constitution after he had invoked his right to counsel, in failing to instruct the jurors that a witness was an accomplice as a matter of law, and in failing to advise him of his *Boykin-Tahl*[2] rights before he admitted his prison prior was true. Buskirk also requests, and the People do not oppose, that this court review the sealed record of the in camera hearing conducted by the trial court regarding the testifying purported accomplice to determine whether any information should have been disclosed which would be relevant to her credibility as a witness, and if so, to permit him to file a supplemental brief on the question of prejudice due to the alleged erroneous nondisclosure by the trial court.

In the published portion of this opinion we determine Buskirk did not clearly and unequivocally invoke his right to counsel. In all other respects, we affirm.

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

2 *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*).

FACTUAL BACKGROUND

On April 22, 2007, a masked man pointed a black gun at Lillian Abrams and said, "Give me your purse, bitch," as she was getting into her car in the parking lot of the Stater Brothers Market shopping center in Twentynine Palms in San Bernardino County, California. Scared, Abrams handed her purse to the man and he fled across the parking lot and a major intersection to Cactus Drive where he jumped into the passenger side of a tan Mazda truck and crouched down in the seat. Two men, who were in a car in the parking lot and had observed the robbery and the assailant get into the truck on Cactus Drive, memorized the license plate number of the truck as it drove away before returning to assist the victim and call 911.

San Bernardino County (SBC) Sheriff Deputy Steven Everhart responded to the scene of the robbery where he interviewed Abrams and the witnesses, obtaining a general description of the suspect and his clothes, and a license plate number for the Mazda truck in which he fled. Based on the interviews, Everhart also collected recent shoe imprints in a dirt field the suspect had run across to reach the truck on Cactus Drive.

On April 30, 2007, SBC Sheriff's Detective James Thornburg, assisting in the follow-up investigation of the robbery, received information from another sheriff's deputy that there were two people involved in the crime, named Buskirk and Nicole Alexander, and that Alexander drove a tan Mazda pickup truck similar to the one seen by the witnesses the day of the robbery. When Thornburg ran a check on Alexander's vehicle registration, it came back "with a Mazda pickup truck with a license plate [number] that was extremely close to the ones written down by the witnesses of the robbery."

Thornburg then located an address for Alexander on Henry Road in Wonder Valley, sent several deputies to confirm the address, authored a search warrant and executed it at that location the same day.

Buskirk was contacted by SBC sheriff's deputies Rick Millard and Jeffery Joling and subsequently arrested at the Henry Road address. During a search of the property, a pair of men's tennis shoes was found in Buskirk's mother's car that was parked in the driveway and a black BB gun, a utility bill in Buskirk's name and a day planner with his name inside were found in the house. Thornburg, who was an expert in tracking, noted that the measurement and tread on those shoes was similar to the shoe print found at the robbery crime scene.

After Buskirk was transported to the Morongo Basin Sheriff's station, he waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), initially denied any involvement in the robbery, but then changed his story after Thornburg told him that Stater Brothers had a surveillance video camera in the parking lot and that Alexander was in custody being interviewed. When Buskirk wanted a deal before talking further, Thornburg terminated the interview and walked Buskirk back to his cell. Although Buskirk expressed a desire at that time to again speak with Thornburg, the deputy told Buskirk he would have to come back later.

After Buskirk told another deputy at the jail that he wanted to talk again with Thornburg, Buskirk was interviewed again, but this time by SBC Sheriff's Detective Randy Warfield and Sgt. Jeff Joling. Buskirk admitted to Warfield that he had

committed the robbery, but minimized his conduct, saying he only used a brown and black water pistol.

At Buskirk's trial, in addition to presenting the above evidence, Alexander testified and the prosecutor played for the jury the redacted portions of Buskirk's interviews with Thornburg and Warfield.

Alexander, who had originally been charged as a codefendant in this case and had pled guilty to being an accessory after the fact and was awaiting sentencing, testified that according to her plea agreement she was to testify truthfully about the events surrounding the robbery. As background, she explained that she had met Buskirk while working at a Denny's restaurant and that he was good friends with both her and her husband who was a Marine deployed overseas at the time of the robbery. On the day of the robbery, Alexander had spent the day with Buskirk, first having lunch at his mother's house and then running errands with him in Twentynine Palms in her tan Mazda pick-up truck. At some point, she dropped Buskirk off at the Stater Brothers Market shopping center so he could pick up medication for his mother at the Rite Aid store next to the market while she looked at some properties for rent on Cactus Drive, a street adjacent to the shopping center.

A short time later, as Alexander was stopped in her car writing down information from a rental sign, she saw Buskirk running down the street with his sweatshirt hood over his head. He jumped into the passenger side of her truck holding a purse, crouched down in the seat and told her to "go" and "not to stop" because he had just snatched a purse.

She drove to some friends' house where, once inside, Buskirk rummaged through the purse and told her and the friends what had happened.

Later that evening, Alexander drove Buskirk back to her home on Henry Road. As she did so, Buskirk tossed some of the contents of the purse out the truck's window. Once they arrived at her house, Buskirk went into the backyard, doused the purse with lighter fluid and burned it in a fire pit.

About a week later, Alexander was contacted by sheriff's deputies and interviewed at the station house about the robbery. She initially lied about any involvement, but during a second interview admitted she drove the car in which Buskirk fled. Although Alexander conceded that Buskirk had talked in general about committing a robbery because he had done one before, she denied any knowledge that he was going to commit the robbery that day and denied planning to commit it with him. Alexander said that Buskirk had purchased the tennis shoes in evidence on the Friday before the robbery at a mall in Palm Springs and that he was in possession of a nine millimeter handgun on the day of the robbery.

Sgt. Joling additionally testified about his encounter with Buskirk outside of Alexander's house, stressing that in spite of Buskirk's denial that the Henry home was his primary residence, his day planner and a utility bill in his name for that address were found during the search of the home that day.[3]

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[3] Although the parties characterize Joling's testimony as rebuttal, the record reflects it was presented out of order in the prosecution's case-in-chief.

The Defense

On his behalf, Buskirk called Detectives Warfield and Thornburg as defense witnesses to further expound upon Alexander's evasiveness and untruthfulness during her interviews. He also presented the testimony of two volunteer workers at the Way Station, a Christian facility involved in providing food and clothing to the needy, who identified two food box slips dated April 26, 2007, one bearing Buskirk's name and the other with Alexander's name. One of the volunteers noted that the Way Station carried shoes similar to those in evidence that had been found with Buskirk at Alexander's house. The forms, however, did not indicate whether any clothing or shoes had been given along with the food to Buskirk or Alexander on April 26, 2007.

Buskirk additionally presented the testimony of a woman named Tanya Luke who had been driving on Cactus Drive near the time of the robbery. Luke saw a man wearing a hooded sweatshirt running down the street carrying a purse toward a tan Mazda truck that was pulling away from the curb and driving east toward her on Cactus. Luke then saw the man run across the front of the car and get into the passenger side of the truck. As the truck passed Luke's car going the opposite way, she saw that the driver of the truck was a thin, white male, about six foot two inches tall, who was wearing a baseball cap. Although Luke was able to get a partial license plate number of the truck, which she gave to the 911 operator, she did not think the photograph of Alexander's truck in evidence depicted the same truck she saw that day.

DISCUSSION

I

MOTION TO SUPPRESS BUSKIRK'S POSTARREST STATEMENTS

After the preliminary hearing in this case, Buskirk brought a motion to suppress his statements made after he was arrested at the house on Henry Road for a parole violation and he asked for an attorney. At the hearing on the motion, after the court noted it had read the parties' respective papers, the following evidence was presented by the prosecution.

Detective Millard testified that he had gone with Sergeant Joling to Alexander's Henry Road residence on April 30, 2007, to obtain a physical description of the property for a search warrant regarding the robbery case. When they arrived, they unexpectedly saw Buskirk in the front yard, whom they recognized from earlier contacts and knew was on parole. Millard told Buskirk the officers were investigating a missing person's report and engaged him in idle conversation for about 10 minutes while confirming his identity, that Alexander lived at the residence, and her relationship with Buskirk. Most of that initial conversation was recorded.

Millard also recorded two other segments of conversation with Buskirk. He estimated about 11 minutes lapsed before he began recording the second portion, during which time Joling had contacted Buskirk's parole agent and had obtained permission to conduct a parole search of the residence. Millard decided to start recording again because Buskirk had become agitated and was talking about going to jail every time he had an encounter with the police. In addition to including more small talk, the second

taped portion included Millard handcuffing Buskirk and telling him he was being arrested for a parole violation. When Millard told Buskirk in response to an inquiry that he would "find out" what his parole violation was later, Buskirk said, "Well, I want a lawyer. Right now." Millard made no attempt to clarify what Buskirk meant, but merely tried to calm him as Buskirk immediately began shouting questions at Joling about why he was being arrested, whether he could go into his friend's house, and generally denying that he lived at the residence. At some point, Joling held up a utility bill he had found in the residence and asked Buskirk why it was in his name. Joling also held up a BB gun found in the search, saying he thought it was Buskirk's gun. Joling, however, refused to answer any questions posed by Buskirk regarding his parole violation, telling him that he would have to talk to Millard about his *Miranda*[4] rights before asking the detectives any questions.

The third taped conversation began about three minutes later with Millard reading Buskirk his rights under *Miranda*, and Buskirk agreeing to speak with the detectives "depending on the circumstances." When Buskirk asked them why he was being investigated, the detectives told him they would inform him at the police station. Millard testified that he and Joling intentionally did not ask Buskirk any questions about the robbery case because they wanted to wait until they got to the police station to interrogate him.

Detective Thornburg then testified that he interviewed Buskirk at the sheriff's station after he read him his *Miranda* rights and Buskirk waived them without any

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

hesitation and showed a willingness to talk. Although Buskirk initially denied any involvement in the robbery, toward the end of the interview he asked Thornburg "about his exposure if he, quote, copped to it." When Buskirk indicated he would not talk to Thornburg without a deal, the interview ended "abruptly," with Thornburg telling Buskirk he had no authority to make any deals with him. As Thornburg walked Buskirk back to the jail, Buskirk "requested that we go back to the room and talk again." Because Thornburg had other matters he needed to "take care of," he told Buskirk "[n]ot right now."

Later that day, Thornburg was contacted by SBC Sheriff's Detective Steve Wilson, the jail corporal, about Buskirk wanting to talk with Thornburg again. Thornburg then stopped by to see Buskirk at the jail and asked him what he wanted to talk to him about. When Buskirk "alluded to his case," Thornburg told him he was busy, but would come back "in a little while to get him and we would talk again." Subsequently, Thornburg returned to retrieve Buskirk and escorted him to the station's interview room.

On cross-examination, in response to questions as to whether Buskirk ever mentioned wanting a lawyer any time during the interview after he had been read his rights under *Miranda*, Thornburg replied that there were several times he had "made reference to asking about an attorney." Thornburg explained that the first mention occurred when Buskirk became upset that another detective was in the room and said he would talk with Thornburg, "[b]ut if Detective Warfield was in the room, that he wanted an attorney." Warfield immediately left the room and Buskirk continued to talk to Thornburg. The other mention, occurred as Thornburg was leaving the interview room,

and Buskirk said, "I [need] a lawyer." Thornburg did not hear the request at that time because his back was to Buskirk. Thornburg only became aware of the request when he played back the videotape about six weeks later. No further questions were asked of Buskirk as Thornburg walked him back to the jail.

After the videotaped portion of the interview showing the second request was played for the court, it confirmed that Buskirk's request for an attorney was made while Thornburg was walking toward and opening the door to leave the interview room.

Detective Wilson testified at the motion hearing that while he was having some general conversation at the jail with Buskirk on May 1, 2007, whom he knew from previous contacts, Buskirk asked him to let Thornburg know that he wanted to talk to him. "[W]ithin 15 minutes or so," Wilson contacted Thornburg about the request.

Detective Warfield, who had been present for a portion of the interview with Buskirk earlier in the day and was the primary participant during the second interview at the station later that day, also testified at the motion hearing. Before any questioning at the second interview, Buskirk not only acknowledged to Warfield that he had been read his *Miranda* rights earlier by Thornburg, but also recited a significant portion of them, including his right to remain silent and his right to have an attorney present during or after questioning. Although Buskirk indicated he was willing to waive those rights and speak with Warfield, Warfield verified the facts that Buskirk had asked to talk with the detectives and that he understood he did not need to speak to them. No threats or promises of leniency were made to Buskirk before he waived his rights and talked with

Warfield. During the interview, Buskirk admitted to Warfield that he was the assailant who had robbed the victim in the parking lot and also implicated Alexander in the crime.

In addition to entering into evidence the various transcripts and video recordings of the interviews with Buskirk, the prosecutor provided the court with a certified copy of Buskirk's rap sheet for the limited purpose of showing his familiarity with the criminal justice system due to his numerous contacts with law enforcement.

In argument on the motion, defense counsel stressed that Buskirk had asserted his right to counsel while he was in custody at the Henry Road residence, that there had been a violation of that right by the continued questioning of him without counsel, and that the violation was not cured by a subsequent advisal and waiver of his *Miranda* rights, either in the field or at the station interviews. Although counsel conceded that Buskirk had initiated the second station interview where he voluntarily made incriminating statements, counsel asserted those statements as well as any made in the first station interview must be suppressed because they were tainted by the earlier *Miranda* violation. The prosecutor disagreed, submitting that no *Miranda* violation occurred because Buskirk's request for an attorney at the time of his arrest for a parole violation was made "anticipatorily" before he was interrogated, he subsequently reinitiated contact with the detectives and waived his *Miranda* rights in the field before the first station interview where he again validly waived his rights and he also initiated the contact with the detectives before the second station interview.

After reiterating that he had reviewed "the moving papers, the responding papers, and the reply filed by [defense counsel]," as well as the relevant case law, the trial judge denied Buskirk's motion to suppress his postarrest statements, stating:

> "Starting with Mr. Buskirk. Some of the questions the court wanted answered were obviously the circumstances surrounding [his] request for an attorney when he made that request [when] he was told to put his hands behind his back. And, yes, it's clear that at that time he was . . . in custody. [¶] [T]he court then turns to what was the nature of this arrest and what was told to Mr. Buskirk at that time. . . . And it's clear, in reviewing the transcripts and what we heard today, that what was related [to] Mr. Buskirk [was] that he was being taken into custody for a parole violation [about] which he continued to ask questions and more questions. [¶] So at that point . . . he then asked . . . specifically, 'What is my violation?' in response to him being placed on a parole violation. He was told, 'You'll find out.' And his response was, 'Well, I want a lawyer right now.' It appears to the court from those statements and the statements that continued on in that same transcript, including the . . . questions that he continued to ask, he continued to ask both detectives for a reasonable answer. And he was told if you want to ask more questions, you're going to have to . . . talk to Detective Millard about your *Miranda* rights first. That was stated by Detective Joling. It's clear in that regard to this court that it is analogous to the case of *People v. Nguyen* [(2005) 132 Cal.App.4th 350 (*Nguyen*)] in that his request for an attorney appeared to be specific as to his parole violation and being taken into custody for a parole violation at that time because that's all he had been told up to that point. [¶] The next issue that the court turns to then [is] the *Miranda* rights that were given to [Buskirk] at the station, and when he decided he didn't want to talk and he was taken back to the jail. It's clear in listening to the testimony of Detective Wilson that that contact was initiated by Mr. Buskirk. They were talking about nothing, but it seemed just like kind of passing conversation. . . . Detective Wilson wasn't investigating anything and the court found Detective Wilson to be honest, truthful, forthright. [A]t the request of Mr. Buskirk, [Wilson] informed the detectives' bureau that Mr. Buskirk wanted to have [an] additional opportunity to speak with them. And so I don't know necessarily that we even need to get into this being an anticipatory request for an attorney because the court, as it views the evidence presented, it seems like what Mr. Buskirk

was requesting was a lawyer to advise him in his custody regarding a parole violation because it was made very clear to him that's why he was being taken into custody. [¶] In the *Edwards* case, [*Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*)], the *Miranda* warnings require [at] a minimum -- some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police. And the defendant, further, must ask for the particular sort of lawyerly assistance, that is the subject of *Miranda*. That's in the *McNeil* [*v. Wisconsin* (1991) 501 U.S. 171 (*McNeil*)] case. And clearly at the point that he asked for a lawyer out in the field . . . when he was taken into custody for the parole violation, his request for an assistance of an attorney in dealing if this was going to be a custodial interrogation by the police was on that issue, of his arrest for a parole violation. And so the court finds that he was then not necessarily asking for a lawyer in [the] future, which then would get us back to the anticipatory request for a lawyer, which would not be proper. [¶] On the other issue that the court heard evidence o[n] and asked to see the videotape, was where [Buskirk] again asked for a lawyer, and that was as Detective Thornburg was taking him out of the . . . interview room. And it was clear to the court that at the point that he asked for a lawyer, Detective Thornburg had stood up, had turned toward the door, and was opening the door when Mr. Buskirk said that he wanted a lawyer. Detective Thornburg . . . testified that he did not hear that statement. And so that was one of the reasons I wanted to see that videotape. Because as Detective Thornburg testified, it didn't appear that he was being anything but truthful. But obviously we had the evidence. That's the best evidence. So I was able to view that with counsel and Mr. Buskirk. And this court in viewing that, . . . , it appears that Detective Thornburg was truthful, that he very easily did not hear that statement because they weren't facing one another. Detective Thornburg appeared to have been frustrated at that point, got up, and was saying this interview was over and was preparing to take the defendant out of the room. So the court doesn't find that there was a *Miranda* violation there either. [¶] And then, finally, at the request of Mr. Buskirk, he was brought back. He wasn't prodded into coming back and he was again reminded of his *Miranda* warnings. The court doesn't find that there was a *Miranda* violation even leading up to his final interview. So there wouldn't . . . be anything that would be tainted. [¶] In just reading the papers, it was a difficult decision. And leading up, I had no idea how I was going to rule on this. Now after hearing the evidence, viewing the tapes, listening to the evidence, the court finds

> under [*Edwards*] and *People v. Nguyen* that Mr. Buskirk's rights were not violated and the motion by the defense will be denied."

On appeal Buskirk contends the trial court erred "in finding that [his] invocation [of his right to counsel] was a legal nullity." He argues that all of his incriminating statements made after he invoked his right to counsel "in response to questioning regarding the robbery" while being arrested at the house on Henry Road must be suppressed under the dictates of *Edwards, supra*, 451 U.S. 477 and that this court should find their improper admission prejudicial error mandating reversal of his conviction. We conclude the trial court properly denied Buskirk's motion to suppress his statements made during the various interviews.

A. Pertinent Law

The law is well established that "[w]hen reviewing a trial court's decision on a motion that [statements were] collected in violation of the defendant's rights under *Miranda, supra*, 384 U.S. 436, we defer to the trial court's resolution of disputed facts, including the credibility of witnesses, if that resolution is supported by substantial evidence. [Citation.] Considering those facts, as found, together with the undisputed facts, we independently determine whether the challenged statement[s were] obtained in violation of *Miranda*'s rules [citation], that is, whether (assuming the defendant was in custody) the statement[s were] preceded by the now-famous admonition of *Miranda* rights: the defendant has the right to remain silent, any statement he might make can be used against him, he has the right to the presence of an attorney, and an attorney will be

provided at state expense if he cannot afford one. [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 918.)

Once a custodial defendant has "expressed his desire to deal with the police only through counsel, [he] is not subject to 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, supra*, 451 U.S. at pp. 484-485.) "If police officers subsequently question the suspect in counsel's absence, assuming there has been no break in custody, the suspect's statements are presumed involuntary even where the suspect waives his *Miranda* rights and voluntarily agrees to speak with investigating officers. This bright-line rule is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' [Citation.] The *Edwards* rule, moreover, is *not* offense-specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, officers may not seek the suspect's permission to discuss other crimes unless counsel is present. [Citation.]" (*Nguyen, supra,* 132 Cal.App.4th at p. 354.)

However, the *Edwards* rule applies "only when the suspect 'has [clearly] expressed' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. [Citation.] It requires, at a minimum, some statement that can reasonably be constructed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (*McNeil, supra,* 501 U.S. at p. 178.) As the high court in *McNeil* observed, it had "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'. . . ." (*Id*. at p. 182,

fn. 3.) Thus, "in order for a defendant to invoke his *Miranda* rights the authorities must be conducting interrogation, or interrogation must be imminent." (*U.S. v. LaGrone* (7th Cir. 1994) 43 F.3d 332, 339; see also *Nguyen, supra*, 132 Cal.App.4th at p. 357; *People v. Beltran* (1999) 75 Cal.App.4th 425, 432; *People v. Calderon* (1997) 54 Cal.App.4th 766, 770-771.) Although a defendant is not required to wait until a formal *Miranda* admonition before invoking the right to counsel, the circumstances must be such that the custodial defendant could reasonably conclude that interrogation is pending or imminent (*Nguyen, supra*, 132 Cal.App.4th at p. 357) and that a reasonable officer would know that the defendant's request for counsel was unequivocal for purposes of the interrogation (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1123-1125).

Because "[i]t is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation" (*Illinois v. Perkins* (1990) 496 U.S. 292, 297), "the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect *in custody is subjected to interrogation*." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300, italics added.) Interrogation consists of express questioning or word or actions on the part of the police that "are reasonably likely to elicit an incriminating response from the suspect." (*Id*. at p. 301.) In other words, " '[t]he police may speak to a suspect in custody as long as the speech would not be reasonably construed as calling for an incriminating response.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 993.) "In deciding whether police conduct was 'reasonably likely' to elicit an incriminating response from the suspect, we

consider primarily the perceptions of the suspect rather than the intent of the police. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 554.)

B. Analysis

Here, Buskirk's motion to suppress his postarrest statements was premised on three separate encounters with sheriff's detectives, first at the Henry Road residence where he was arrested for a probation violation; second, at the station with Thornburg after waiving his *Miranda* rights; and third, again at the station with Warfield after initiating the interview and waiving his rights. Buskirk essentially argues that regardless of his incriminating statements coming only in the last two interviews and the majority of them in the third one, which he freely initiated,[5] they should be suppressed because all encounters with the detectives were tainted after he invoked his right to counsel when he was being arrested at the Henry Road residence. However, we agree with the trial court's conclusion that as to the first encounter, Buskirk's saying he wanted a lawyer in response to being handcuffed and taken into custody for a parole violation was not a clear, unequivocal assertion he desired counsel to deal with custodial interrogation by the detectives.

Similar to the situation in *Nguyen*, *supra*, 132 Cal.App.4th 350, where the defendant there told the officers she was calling her attorney as she was being arrested, although the defendant was then in custody, there was no indication an attorney's assistance was being sought to help with impending police interrogation. (*Id*. at p. 357.)

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[5] None of Buskirk's statements made during the Henry Road encounter were entered into evidence at trial.

Quite simply, at the time Buskirk was arrested at the Henry Road home, even though he was in custody, he was not being interrogated by the officers. Contrary to Buskirk's representation in his opening brief on appeal that he invoked his right to counsel "in response to questioning regarding the robbery," the record reflects that no questions were asked of him by the detectives regarding the robbery during the Henry Road encounter even after he continued to question them about why his parole was being violated and Millard subsequently read him his rights under *Miranda*. Consequently, because no *Miranda* violation occurred during the first encounter when Buskirk was placed into custody, the subsequent station interviews were not tainted.

Further, with regard to those interviews, we accept the trial court's findings that Thornburg and Wilson were credible, its resolution of the factual issue regarding Buskirk's request for an attorney that Thornburg did not hear at the end of the first station interview, and its implied finding that there was no police pressure placed on Buskirk to participate in the second station interview. Buskirk does not challenge that he voluntarily waived his rights under *Miranda* during the station interviews and initiated the second station interview in which he freely admitted that he had committed the Stater Brothers' parking lot robbery. Thus, even assuming there had been a *Miranda* violation at the time of his arrest on the parole violation, Buskirk would be hard pressed on this record to show under *Edwards, supra*, 451 U.S. at pages 484 to 485, that the second station interview was tainted. As to the first interview, an independent review of the record reveals that although Buskirk did not initiate it, he voluntarily continued to talk with Thornburg after the detective stopped questions until Warfield left the interview room

pursuant to Buskirk's conditional request for counsel if Warfield were to stay. At no time did Buskirk unequivocally express a desire for the assistance of counsel in dealing with the questioning by the detectives even though he was given the opportunity to do so when advised of his *Miranda* rights three times. In sum, the court properly denied Buskirk's motion to suppress his postarrest statements made during his interviews.

II

IN CAMERA REVIEW OF ALEXANDER'S RECORDS

Before trial, Buskirk requested copies of Alexander's probation report and her military personnel and medical records. During pretrial motions, the trial court noted it had received some documents relating to Alexander and had reviewed them in camera. Regarding such matter, the court explained it was mindful that under case law "cross-examination to test the credibility of a prosecution witness in a criminal case should be given wide latitude, and a witness may be cross-examined about his or her mental condition or emotional stability to the extent it may affect his or her powers of perception, memory, recollection or communication." It also commented that although attempts to impeach a prosecution witness by expert psychiatric testimony has generally been rejected under case authority, it was within the discretion of the court to admit such expert testimony when the witness's mental or emotional condition may affect the ability of the witness to tell the truth.

Based upon such authorities and its in camera review, the court found "there is no reasonable probability that the protected psychotherapy records or the records that the court has reviewed would have any materiality or assist in the defense. And so for that

reason, the court will not release those documents." In response to defense counsel's inquiry as to whether any of the records reviewed included military records, the trial judge replied "[t]hose were military records that I reviewed." The court also noted that it had reviewed reports of discipline, including the reasons for Alexander's discharge or separation from the military service and found those "are not disclosable to the defense."

Later, after a three-week continuance due to witness issues, and ruling on several other in limine motions, the court noted it would provide the defense with page 3 of Alexander's probation report, which included her statements about the events on the day of the robbery in this case. The court denied Buskirk's renewed request that the defense be provided with copies of Alexander's military, psychological, discipline, and other personnel records "per the earlier ruling." The court specifically found there was nothing in those records that would fit the criteria of the type of mental disorder discussed in the cases it had reviewed that would be probative of Alexander's ability to comprehend and accurately relate the subject of her testimony and thus they would "remain confidential and will not be turned over to the defense."

Yet later, during in limine motions, the court denied Buskirk's counsel's request to obtain Alexander's military records to show her propensity for violence and familiarity with firearms based on an incident during her duty with the Marine Corps military police where she had confronted a suspected drunk driver and ultimately broke his arm during a physical altercation. The court agreed with the prosecutor that any mention of such contact that Alexander may or may not have had on the military base while acting as a military police officer would be excluded under Evidence Code section 352 because there

was insufficient foundation of relevancy to overcome its prejudicial effect where Alexander's propensity to violence was not an issue in this case and not relevant to her credibility. Defense counsel disagreed, stating his belief that the incident was relevant because that was the reason Alexander was counseled and separated from military service and asked that the information be disclosed.

The trial judge again denied the request for disclosure, stating:

> "I reviewed the documents that were provided to me from the military, and the court still at this point finds that the information that was contained in those documents will remain confidential and discovery of that will not be provided to either prosecution or to the defense, that there is nothing of relevance in that record that would provide information for either side that would be of assistance on any of the prosecution or the defense of the charges before this court."

On appeal, Buskirk asks this court to independently review the sealed documents that were before the trial court and to determine if there is any discoverable information in those materials relevant to Alexander's credibility that should have been turned over to the defense. If so, Buskirk asks this court to then determine whether the court's nondisclosure denied him the right to a fair trial. (See *People v. Gurule* (2002) 28 Cal.4th 557, 595.) The People agree we should independently examine the documents to determine whether the trial court abused its discretion in ruling that there was no relevant discoverable information. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

We ordered the sealed materials produced for our independent review. Having received and reviewed those documents, we agree with the trial court that nothing contained in such material was required to be disclosed in response to Buskirk's various

pretrial discovery requests and motions to ensure he obtained a fair trial. Accordingly, we conclude the trial court did not abuse its discretion in ruling there was no discoverable material after its in camera review of those records.

III

QUESTION OF WHETHER ALEXANDER WAS AN ACCOMPLICE

Pretrial, the prosecutor opposed Buskirk's motion to have Alexander declared an accomplice as a matter of law, basically arguing that the evidence was conflicting on whether her involvement in the robbery made her liable to prosecution for the identical offense charged against Buskirk and requesting the court reserve determination until the close of evidence at trial. The court denied Buskirk's motion without prejudice to renew, finding that the issue at that time was a question for the jury. The court later denied Buskirk's renewed motions to find Alexander an accomplice as a matter of law on an aider and abettor theory that she was the getaway driver based on *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165 (*Cooper*) and deferred ruling on whether to instruct the jury under CALCRIM Nos. 334 or 335.

Subsequently, during discussions on which instructions to give, when the court commented it would strike the captions to CALCRIM Nos. 334 and 335 and just identify either instruction with the caption that "Accomplice Testimony Must Be Corroborated," defense counsel stated he thought CALCRIM No. 334 was "the better instruction in general." Counsel explained that he had only wanted CALCRIM No. 335 to be given because of its original caption, which stated there was no dispute whether a witness is an

accomplice and preferred that the court give CALCRIM No. 334 even if it determined Alexander is an accomplice as a matter of law.

The court found that "based upon the evidence that's been presented, it appears to the court that CALCRIM [No.] 334 would be the appropriate instruction." The court cited support for its decision to give CALCRIM No. 334 in the case notes for CALCRIM No. 335, which stated that "when the witness is a codefendant whose testimony includes incriminating statements, the court should not instruct that the witness is an accomplice as a matter of law. That's in the [*People v.*] *Hill* [(1967) 66 Cal.2d 536, 555] case" and the fact that there was a dispute in the evidence as to whether Alexander is an accomplice. Both the prosecutor and Buskirk's counsel agreed that CALCRIM No. 334, as modified, was the appropriate instruction to be given in this case.

The court further modified CALCRIM No. 334 to include a defense pinpoint paragraph regarding possession of stolen property for deciding whether Alexander was an accomplice and modified CALCRIM No. 301 regarding single witness testimony to read, "[e]xcept for the testimony of Nicole Alexander, which requires supporting evidence as to the crime of Robbery, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

The court then instructed the jury on the law, including giving CALCRIM No. 301 as modified and CALCRIM No. 334 as follows:

> "Before you may consider the statement or testimony of Nicole Alexander as evidence against the defendant regarding the crime of Robbery, you must decide whether Nicole Alexander was an

> accomplice to that crime. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime, or if he or she knew of the criminal purpose of the person who committed the crime, and . . . he or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime. The burden is on the defendant to prove that it is more likely than not that Nicole Alexander was an accomplice. [¶] If you decide that a declarant or witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness. [¶] If you decide that a declarant or witness was an accomplice, then you may not convict the defendant of Robbery based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if, one, the accomplice's statement or testimony is supported by other evidence that you believe; two, that supporting evidence is independent of the accomplice's statement or testimony, and that supporting evidence tends to connect the defendant to the commission of the crime. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] If you find that the witness possessed stolen property, you may consider that in determining whether she is an accomplice to the Robbery. Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

In closing, both counsel stressed that Alexander's testimony must be viewed with caution and must be corroborated as to the robbery if the jury found she were an accomplice on the conflicting evidence. Defense counsel also argued the same standards applied regardless of whether Alexander was an aider and abettor or an accomplice.

On appeal, Buskirk contends the trial court prejudicially erred in failing to give CALCRIM No. 335 rather than CALCRIM No. 334 as he repeatedly requested below because Alexander was an accomplice as a matter of law under an aider and abettor to the robbery theory under *Cooper, supra,* 53 Cal.3d 1158. Aside from the record reflecting that Buskirk essentially requested CALCRIM No. 334 be read as modified rather than CALCRIM No. 335, the court properly determined the issue of whether Alexander was an accomplice or an accessory after the fact of the robbery was disputed and that CALCRIM No. 334 was the appropriate instruction to be given in this case.

The law is well settled that "[a]n accomplice is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (§ 1111.) To be so chargeable, the witness must be a principle under section 31. That section defines principals as '[a]ll persons concerned in the commission of a crime, whether . . . they directly commit the act constituting the offense, or aid and abet in its commission . . . . ' (§ 31.) An aider and abetter is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense." (*People v. Avila* (2006) 38 Cal.4th 491, 564.) " ' "Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' " ' [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 312.)

Here, Buskirk's claim that Alexander's status as an accomplice was undisputed based on *Cooper, supra,* 53 Cal.3d 1158 is incorrect. Although a getaway driver may become an accomplice to a robbery based on his or her conduct and intent (see *People v. Jones* (2003) 30 Cal.4th 1084, 1112-1113), the court in *Cooper* recognized that a purported getaway driver may also only be an accessory after the fact depending on the particular facts of a case. (*Cooper, supra*, 53 Cal.3d at p. 1168.) "A getaway driver, whose intent to aid in the escape is formed after asportation has ceased, cannot facilitate or encourage commission of the robbery. Rather, the effect of his or her actions is only to lessen the chance that the perpetrator[] will be captured and held accountable for [his] crimes. Thus the culpability of such a getaway driver is that of an accessory after the fact, rather than that of a principal." (*Ibid.*, fn. omitted.) The evidence in this case was disputed as to whether Alexander intended to facilitate or encourage the robbery before Buskirk reached a place of temporary safety with the stolen purse. Alexander testified she had no knowledge of his plans to commit the robbery and she had driven away from where she was parked on Cactus Drive when Buskirk got in the car with the purse without knowing he had snatched it. She said it was only after she started driving away that Buskirk told her about taking the purse and he did not tell her the full details of the crime until after they had arrived at a friend's house. Because Alexander's car was arguably a temporary place of safety for Buskirk and her intent may have only been to aid him in his escape after he had ceased running with the purse taken in the parking lot robbery that was not visible from her car, the court properly refused to find Alexander an accomplice as a matter of law. In light of the conflicting inferences from the evidence as

to whether or when Alexander formed an intent to facilitate or encourage Buskirk in the commission of the robbery or just aid in his escape, the issue of whether Alexander was an accomplice was properly given to the jury to decide.

Moreover, even assuming that the trial court erred in this matter, Buskirk could not have been prejudiced on this record. In addition to Alexander's testimony, Buskirk's own statements to the detectives admitting that he committed the robbery rendered any inadequacy in the accomplice instructions harmless. (*People v. Brown* (2003) 31 Cal.4th 518, 557.) Further, there was circumstantial evidence that Buskirk was the robber based on his shoe treads matching the footprints recovered from the crime scene and his physique matching the descriptions given by the independent witnesses of the masked robber. The given instructions as a whole clearly told the jury to view Alexander's testimony with caution and that her testimony needed support regarding the robbery charge. Thus, under the entirety of the circumstances, it is not reasonably probable that the jury would have reached an outcome more favorable to Buskirk had the court found Alexander an accomplice as a matter of law and had instructed the jury under CALCRIM No. 335. (*People v. Lewis* (2001) 26 Cal.4th 334, 371.) No prejudicial instructional error is shown.

IV

ADMISSION OF PRISON PRIOR

In limine, after the court had granted Buskirk's request to bifurcate the prior prison term allegation for trial and had ruled on several other motions, defense counsel apprised the court that Buskirk had indicated his willingness to waive trial on the issue of the prior

and admit that he had "suffered prior convictions." Buskirk personally acknowledged that such representation was correct. When the court then asked Buskirk whether he understood that he had "a right to have a jury trial on that issue just as you have a right to have a jury trial on the underlying charges," Buskirk replied, "Yes, sir." The court further explained that Buskirk had a right to have a jury make that determination beyond a reasonable doubt and asked whether he wanted "to waive that right and admit the allegation . . . that is alleged in the first amended information." Buskirk indicated several times that he was waiving his right to a jury trial on the issue and admitting the prison prior allegation would be true if he were found guilty of one or more of the underlying charges. Counsel joined in the waiver and admission, and the prosecutor accepted the admission. The court then found that Buskirk had "knowingly and intelligently waived his right for a jury trial on the allegation, if that becomes an issue, depending on what the jury decides."

Near the end of trial, during jury instruction discussions, the court asked defense counsel with regard to the bifurcated portion, whether Buskirk, if found guilty, wanted to continue with the jury or wanted to waive his right to a jury and have the court decide the matter. Counsel again noted that Buskirk was willing to waive his right to a jury trial on the bifurcated issue and Buskirk again personally waived his right to have a jury make the decision. The court noted for the record that Buskirk had made "an intelligent decision to waive his right to a jury, and it will be contingent if we get to that point by the court."

After the jury found Buskirk guilty of second degree robbery and was dismissed, the court noted that Buskirk had previously waived his right to a jury trial on the prior prison term allegation issue and asked how counsel wanted to proceed. After taking several moments to discuss the alternatives with Buskirk, counsel noted that "with respect to the issue that has been bifurcated, that is, whether he served a prior prison term, [Buskirk] is prepared to waive his right to trial by court and admit that allegation is true." Buskirk acknowledged that counsel's representation was correct.

The court explained that although Buskirk had already waived his right to a jury trial, he still had a right to have a court trial on the issue and have the prosecutor prove beyond a reasonable doubt the allegation that he had suffered a conviction in 2002 and had served a prison term for that offense and had not remained "free of prison custody for and did commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of that term." When the court then asked whether Buskirk wanted to waive that right and admit that he did in fact violate that allegation, Buskirk answered, "Yes." Defense counsel again joined and the prosecutor accepted the admission.

On appeal, Buskirk contends the trial court's failure to advise him of his constitutional right against self-incrimination and his right to confront witnesses against him before accepting his admission to his prison prior conviction constituted an incomplete advisal of his constitutional rights under *Boykin-Tahl*, which requires reversal. Although Buskirk recognizes that the question of prejudice must be decided based on a "totality of the circumstances" test (*People v. Mosby* (2004) 33 Cal.4th 353,

364-365 (*Mosby*); *People v. Howard* (1992) 1 Cal.4th 1132, 1175 (*Howard*)), he argues the entire circumstances here do not show his admission was knowingly made because he did not testify at the just completed trial on the robbery charge and the record is silent as to whether he was aware of his right to testify or whether he knew from his earlier offense about his *Boykin-Tahl* rights. We disagree.

The law is well established that before a trial court accepts the admission to the truth of a prior conviction allegation that forms the basis for a sentencing enhancement, it is required to advise the defendant and obtain waivers of his constitutional rights to a jury trial, to remain silent and to confront and cross-examine witnesses. (*Howard, supra*, 1 Cal.4th at pp. 1175, 1177.) "Proper advisement and waivers of these rights in the record establish a defendant's voluntary and intelligent admission of the prior conviction." (*Mosby, supra*, 33 Cal.4th at p. 356.) However, "if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*Id.* at p. 361.) When the defendant has *just* participated in a jury trial in which he was represented by counsel, confronted witnesses, and exercised his right not to incriminate himself by not testifying, a reviewing court can conclude the defendant knew of his right to confront witnesses and his right to remain silent. (*Id.* at p. 364.) Further, " 'a defendant's prior experience with the criminal justice system' is, as the United States Supreme Court has concluded, 'relevant to the question [of] whether he knowingly waived constitutional rights.' [Citation.] That is so because previous experience in the criminal justice system is

relevant to a recidivist's ' "knowledge and sophistication regarding his [legal] rights." ' " (*Id.* at p. 365.)

Here, although we agree the trial court gave deficient *Boykin-Tahl* advisements by failing to advise Buskirk of his rights against self-incrimination and to confront witnesses against him and taking a waiver of those rights before accepting his admission of his prison prior allegation, we conclude the error does not require reversal because the totality of the circumstances reveal his admission was voluntarily and intelligently made. (See *Mosby, supra*, 1 Cal.4th at pp. 361-365.)

Buskirk, who was at all times represented by counsel, had expressly waived his right to a jury trial on the bifurcated prison prior enhancement allegation three times, once before trial, once during jury discussions when the bifurcation issue was again raised, and yet again after the verdicts were returned. Before he specifically waived his right to a court trial and said he wanted to admit the truth of that allegation, Buskirk had just sat through a jury trial in which he had observed his counsel cross-examine every witness, had exercised his right against self-incrimination by not testifying and had heard the instructions given which told the jurors that he had "an absolute constitutional right not to testify." (CALCRIM No. 355.) Buskirk also had been advised by the court that as part of his right to a trial on his prior he had the same rights as at the trial of his substantive charge and that the prosecutor would be required to prove the truth of the prison prior allegation beyond a reasonable doubt. He had additionally conferred with his counsel about his various alternatives on the issue before agreeing to waive his right to a court trial and admit the prior prison allegation. Even though it is not known whether

Buskirk's prior felony conviction for which he served the prior prison term was the result of a plea or of a trial, we can infer from his experience with the criminal justice system, which also included several misdemeanor convictions and parole violations, that he was aware of his legal rights. (*Mosby, supra*, 33 Cal.4th at p. 365.)

Based on the above circumstances, we find the record reflects that Buskirk had knowledge of his rights to confront witnesses and to remain silent at a trial on his prior. (See *Mosby, supra*, 33 Cal.4th at p. 364.) Consequently, under the totality of the circumstances, we conclude Buskirk voluntarily and intelligently admitted his prison prior conviction "despite being advised of and having waived only his right to jury trial." (*Id*. at p. 365, fn. omitted.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.