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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	D054988
Plaintiff and Respondent,	
v.	(Super. Ct. No. INF056054)
MICHAEL ANUNCIATION,	
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Riverside County, James S. Hawkins, Judge. Reversed.

On retrial after a hung jury and a mistrial on a first degree murder charge, a jury found Michael Anunciation guilty of second degree murder (Pen. Code, § 187, subd. (a)).[1] On appeal, Anunciation contends the murder conviction should be reversed because the trial court prejudicially erred by (1) admitting expert testimony conveying a

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

nontestifying forensic pathologist's autopsy findings, in violation of the Sixth Amendment's confrontation clause; (2) admitting statements Anunciation contends were obtained in violation of his Fifth Amendment rights; and (3) refusing to instruct the jury on the lesser-included offense of voluntary manslaughter based on theories of heat of passion and imperfect self-defense. We agree with Anunciation's contention regarding the autopsy report testimony, and accordingly reverse.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Anunciation was acquainted with 85-year-old Garvin Shallenberger, who had paid him a number of times for oral sex. On the day he was killed, Shallenberger — accompanied by a weekend helper he employed to assist him around the house, Michael Brinkmann — picked up Anunciation at a local store and brought him back to Shallenberger's trailer home at Portola Country Club to have oral sex. Brinkmann, who was aware of the purpose of the meeting, left Shallenberger and Anunciation at the home after Shallenberger asked Brinkmann to go to the clubhouse pool and wait there.

More than an hour later, Brinkmann and some neighbors looked through a crack in a sliding glass door in Shallenberger's trailer home, saw Shallenberger lying on the floor of the living room between the couch and the coffee table, and called 911. Responding paramedics jimmyed the sliding glass door open and found Shallenberger dead.

Anunciation was arrested after interviews with the lead homicide investigator, Jeff Buompensiero, in which Anunciation admitted strangling Shallenberger.[2] Anunciation told Buompensiero that after Brinkmann left the house, Shallenberger took off his clothes, sat on the couch as Anunciation stood in front of him and performed oral sex on Anunciation. Shallenberger started to make choking sounds, which, Anunciation said, "grossed me out." According to Anunciation, Shallenberger had bitten his penis, after which Anunciation pushed Shallenberger off, grabbed him and choked him until he turned blue. Anunciation then took Shallenberger's wallet, laptop computer and telephones, and left the house.

Anunciation was charged with first degree murder (§ 187, subd. (a)), grand theft and robbery (§§ 487, subd. (a), 211).

In the first trial, a jury found Anunciation not guilty of first degree murder, but was unable to reach a verdict as to second degree murder or voluntary manslaughter, and the court declared a mistrial as to that charge. The jury found Anunciation guilty of two counts of petty theft in violation of section 488, which was a lesser included offense of the theft and robbery charges.

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2 The trial court denied Anunciation's motion to suppress these statements in both trials, and the prosecution showed the jury videotapes and transcripts of the interviews with Buompensiero. As we explain in part III., *post*, Anunciation's contention that the statements should have been suppressed is without merit.

Anunciation was retried on a second degree murder charge. On retrial, as in Anunciation's first trial, the prosecution introduced autopsy findings regarding Shallenberger's injuries and the circumstances, manner and cause of his death through the testimony of Joseph I. Cohen, chief forensic pathologist for Riverside County. The autopsy findings were made by a contract pathologist for the county, Darryl Garber. Garber did not testify at either trial or at any point in the proceedings. Cohen did not supervise or participate in the autopsy, but reviewed all of the written autopsy records, including the autopsy report, and testified at length about the injuries to Shallenberger that the autopsy revealed.

Because the injuries to the body showed Shallenberger was beaten multiple times while conscious, and then manually strangled to death after he was unconscious, Cohen opined Shallenberger's killer used a significant amount of force for a sustained period of time.[3] Based on Cohen's testimony, the prosecution argued that Anunciation intended to kill Shallenberger, or at least knew his actions were likely to kill Shallenberger, and was thus guilty of second degree murder.

Cohen also testified Shallenberger's injuries were not consistent with a reflexive reaction by one who was bitten while receiving oral sex. This opinion undercut the

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[3] Cohen described at length the findings from the autopsy report that supported this opinion, including discoloration, bruising and abrasions on Shallenberger's head, neck and tongue; a large amount of hemorrhaging in his eyes and the internal tissues of his neck; and multiple fractures of his larynx and hyoid bone, which were not common in manual strangling.

defense's voluntary manslaughter theories, namely, that Anunciation had killed Shallenberger in imperfect self-defense or in the heat of passion following the bite to his penis. On retrial, the trial court refused to give the jury instructions requested by Anunciation on voluntary manslaughter.

The jury found Anunciation guilty of second degree murder. Anunciation waived a jury with respect to the prior conviction enhancement allegations and then admitted two prior convictions for which he had served a prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Anunciation to prison for 15 years to life, plus a concurrent sentence of 180 days for the convictions of misdemeanor theft, and consecutive terms of one year for each prior conviction.

II.

DISCUSSION

The Admission of Cohen's Testimony Requires Reversal

Anunciation contends that in permitting Cohen to testify in reliance on the findings from Garber's autopsy report, the trial court violated his right to confrontation under the Sixth Amendment to the United States Constitution. Specifically, Anunciation argues that he was precluded from "from cross-examining the percipient witness whose observations of the injuries formed the basis for . . . critical conclusions" on the "key issue" in the case, namely "whether the crime committed was murder or manslaughter." As we explain in part II.C., *post*, we agree that admission of Cohen's testimony, which

conveyed findings from the autopsy report prepared by Garber, constituted prejudicial error in this case.

A. *Anunciation Did Not Waive the Error Because Objection Would Have Been Futile*

As an initial matter, we address the Attorney General's contention that Anunciation has forfeited his Sixth Amendment challenge because he failed to object to Cohen's testimony in the trial court. Anunciation admits he failed to object, but contends that any objection would have been futile under then-controlling law. Generally, a defendant who fails to object to the admission of evidence on the basis of the confrontation clause waives the right to raise that issue on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) However, an objection is not required where it would be futile under controlling law. (*People v. Morton* (2008) 159 Cal.App.4th 239, 249.)

The controlling authority for admitting forensic testimony at the time of Anunciation's retrial in September 2007 was the California Supreme Court's decision in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). *Geier* held that testimony about a DNA report, laboratory notes and test results was admissible when conveyed through a testifying supervisor, rather than the laboratory analyst who performed the tests, because the report, notes and results were not "testimonial" evidence subject to the demands of the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36, 59 (*Crawford*) and subsequent Supreme Court precedent. (*Geier*, at pp. 602-604, citing *Davis v. Washington* (2006) 547 U.S. 813, 817 (*Davis*).) Construing *Crawford* and *Davis*

to require courts to focus their inquiry on how the evidence was created, *Geier* reasoned that the results were not testimonial because they were recorded contemporaneously as they were observed, even if they were prepared for use at trial. (*Geier*, *supra*, 41 Cal.4th at pp. 606-607.)

Cohen's testimony was analogous to the laboratory supervisor's testimony that *Geier* found admissible, in that Cohen was chief pathologist and he conveyed what were apparently contemporaneously-recorded observations made by Garber during his autopsy of Shallenberger. At the time Anunciation was retried, the trial court was thus bound by *Geier* to admit Cohen's testimony. Any objection by Anunciation would have been futile. We conclude, therefore, that Anunciation has not waived his Sixth Amendment claim.

B. *The Trial Court Constitutionally Erred in Admitting Cohen's Testimony Based on the Garber Autopsy Report*

The Sixth Amendment issue raised by Anunciation's appeal is whether Cohen's testimony conveying findings from the autopsy report authored by Garber, who did not testify at trial or at any point in the proceedings, violated Anunciation's right to confrontation. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) This right renders testimonial statements by a nontestifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant. (*Crawford*, *supra*, 541 U.S. at p. 59 & fn. 9.)

To resolve whether the Sixth Amendment provides Anunciation the right to confront the actual author of the autopsy findings, we first determine whether the findings were "testimonial" under *Crawford*, and if so, whether Anunciation's confrontation right was satisfied by his opportunity to cross-examine Cohen, who did not participate in the autopsy or preparation of the autopsy report, but conveyed its findings through his testimony. In making these determinations, we must apply the United States Supreme Court's latest decision applying the *Crawford* standard in the context of forensic evidence, which was decided while this appeal was pending. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527; 174 L.Ed2d 314] (*Melendez-Diaz*).)

1. *Applicable Legal Principles After Melendez-Diaz*

In *Melendez-Diaz*, the United States Supreme Court held that certificates of forensic drug analysis were "testimonial" under the confrontation clause because they were formally prepared for the purpose of proving a fact at trial, and thus were " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Melendez-Diaz*, *supra*, 557 U.S. ___, 129 S.Ct. at p. 2532, quoting *Crawford*, *supra*, 541 U.S. at p. 52, and citing *Davis*, *supra*, 547 U.S. at p. 830.)

The drug analysis certificates at issue in *Melendez-Diaz* were sworn statements of chemical analysis performed by a state laboratory upon police request, as required by Massachusetts state law. (*See Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at pp. 2530-2531, citing Mass. Gen. Laws, ch. 111, § 12 (2006).) The certificates then were

admitted as "'prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed,'" under state law. (*Melendez-Diaz*, at p. 2531.) The purpose of the affidavits was to prove a fact necessary to the prosecution, namely, that the substance the defendants possessed was cocaine, and their sworn nature put them within the "'core class of testimonial statements,'" described in the high court's previous decisions. (*Id*. at p. 2532.) The certificates were therefore "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Ibid.*, quoting *Davis*, *supra*, 547 U.S. at p. 830.)

We are bound to apply *Melendez-Diaz* to determine whether the autopsy findings at issue are testimonial. (*Chesapeake & Ohio Ry. Co. v. Martin* (1931) 283 U.S. 209, 220-221; *General Motors Corp. v. City of Los Angeles* (1995) 35 Cal.App.4th 1736, 1749.) We recognize that *Melendez-Diaz* conflicts to some degree with our Supreme Court's holding in *Geier* that a DNA report, laboratory notes and test results, which reflected a laboratory analyst's contemporaneous recordation of observable events, were not testimonial and were therefore admissible through the testimony of an expert witness. (*Geier*, *supra*, 41 Cal.4th at pp. 606-607.) Because *Geier* has not been overruled, we examine whether we may decline to follow it on the ground that its reasoning cannot be reconciled with *Melendez-Diaz*.[4]

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4 We have considered the parties' supplemental briefing regarding the *Melendez-Diaz* decision. The parties rely to varying degrees on the decisions of various California appellate courts applying *Melendez-Diaz*, which reflect a split of authority over the extent

Geier is based on at least three analytical premises that are addressed, and undermined, in *Melendez-Diaz*. First, *Geier* posits that the results of scientific tests are not accusatory, but are rather inherently neutral and reliable. A laboratory analyst who conducts scientific analysis, and makes notes and reports analyzing the procedures used, does so "as part of her job, not in order to incriminate the defendant." (*Geier*, *supra*, 41 Cal.4th at p. 607.)[5] Ergo, the laboratory analyst is not a witness who bears testimony "against" the defendant. (*Geier*, *supra*, 41 Cal.4th at p. 607.) *Melendez-Diaz* found no support in the Sixth Amendment or case law for that idea, stating that the confrontation clause applies to all witnesses against the defendant, not simply those who are accusatory. The certificates in *Melendez-Diaz* "certainly provided testimony *against* [the defendant], proving one fact necessary for his conviction — that the substance he

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to which *Geier* remains good law. The California Supreme Court recently granted review in these cases, and we therefore do not cite to or rely on the superseded opinions. (Cal. Rules of Court, rule 8.1115; see *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046.)

5 *Geier* specifically cites two cases involving autopsy reports in which state appellate courts had held such reports were not testimonial, in part because they consist of "'routine and descriptive observations'" of the physical body. (*Geier*, *supra*, 41 Cal.4th at pp. 602, 606, citing *State v. Lackey* (Kan. 2005) 120 P.3d 332, 351; *Rollins v. State* (Md. App. 2005) 866 A.2d 926, 954.) The Kansas Supreme Court recently recognized that its reasoning in *Lackey* was "undercut" in *Melendez-Diaz*. (*State v. Appleby* (Nov. 20, 2009, No. 98,017) ___ P.3d ___ [2009 Kan. Lexis 1080, at *76].) As this case illustrates, and we note hereafter, although autopsy findings may be routine and descriptive, they are nonetheless subject to the performing pathologist's discretion and judgment (see fns. 15 & 16, *post*) and may be testimonial (see part II.B.2., *post*).

possessed was cocaine." (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2533.) Therefore, the laboratory analysts who prepared the certificates were witnesses "against" the defendant. (*Id.* at p. 2534.)

Melendez-Diaz also rejects the contention that evidence of scientific testing is inherently reliable, noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation," particularly because in most forensic laboratories, the laboratory administrator reports to the head of a law enforcement agency. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2536.) *Melendez-Diaz* emphasizes that cross-examination is not only a useful means of assuring accurate forensic analysis, but also is the *only* means that is guaranteed under the confrontation clause. "'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'" (*Melendez-Diaz*, at p. 2536, quoting *Crawford*, *supra*, 541 U.S. at pp. 61-62.)[6] Thus, contrary to the since-rejected theory established under *Ohio v. Roberts* (1980) 448 U.S.

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6 "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well," and "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2537.) The Court noted chemical analysis, for example, "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." (*Ibid*.)

56,[7] the courts may not substitute a test for reliability or trustworthiness for the right of confrontation. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2536; see also *id.* at p. 2533.)

Second, *Geier* construed *Crawford* and *Davis* as holding that a statement was not testimonial if it represented the contemporaneous recordation of observable events. (See *Geier*, *supra*, 41 Cal.4th at pp. 606-607.) Focusing on how the statement was made, then, *Geier* concluded that where a laboratory analyst who performed scientific tests contemporaneously recorded the results, the statement of results was not testimonial. (*Ibid.*) *Melendez-Diaz*, on the other hand, minimized the weight to be given to contemporaneity in confrontation clause analysis. *Melendez-Diaz* emphasized that courts must focus instead on whether the statements were "'"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2532.)

Finally, *Geier* favorably reviewed decisions from other states holding that forensic test results are admissible as business records. (*Geier*, *supra*, 41 Cal.4th at p. 606.) However, *Melendez-Diaz* observed that statements in official records produced for use at

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[7] In *Crawford*, *supra*, 541 U.S. 36, the United States Supreme Court abrogated the prior rule of *Ohio v. Roberts*, *supra*, 448 U.S. 56, under which a hearsay statement made by an unavailable witness could be admitted without violating the confrontation clause if the statement contained adequate guarantees of trustworthiness or indicia of reliability.

trial or records of a business whose "regularly conducted business activity is the production of evidence for use at trial" may only be admitted subject to the demands of the confrontation clause. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2538.)[8] Under *Melendez-Diaz*, documents prepared for use at trial may *not* be admitted under the hearsay exceptions for business or public records without offending the defendant's right to confrontation. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S. Ct. at pp. 2538-2540.)[9]

Given that *Melendez-Diaz* so thoroughly displaces the analytical reasoning underlying *Geier*, we conclude we must apply the principles set forth in *Melendez-Diaz*, and not those in *Geier*, to determine (1) whether the Garber autopsy report and its findings are testimonial, and (2) whether the introduction of the autopsy findings through Cohen's testimony violated the confrontation clause.

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8 In this light, *Melendez-Diaz* specifically noted that in American jurisprudence, coroners' reports historically were not admissible without the opportunity for confrontation. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2538.)

9 *Crawford* and *Melendez-Diaz* establish that documents that qualify as business and official records do not, for that reason, escape confrontation clause analysis, thereby implicitly overruling those prior California cases holding that autopsy reports were admissible as reliable and trustworthy business and official records without violating the confrontation clause. (E.g., *People v. Beeler* (1995) 9 Cal.4th 953, 979-980 [admission of autopsy report under business records exception did not violate defendant's right of confrontation]; *People v. Clark* (1992) 3 Cal.4th 41, 158 [admission of testimony regarding autopsy report deemed official record did not violate the confrontation clause].)

2. *The Garber Autopsy Report and Its Findings Are Testimonial*

Applying *Melendez-Diaz* in determining whether the Garber autopsy report and its findings are testimonial, we focus our inquiry on whether the report and findings were prepared for the purpose of proving a fact "'"under circumstances which would lead an objective witness reasonably to believe that it would be available for use at a later trial."'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2532.)

The purpose of an autopsy is established under California law. Where a death is potentially criminally related, the county coroner must determine the circumstances, manner and cause of the death, and must document in permanent form the detailed medical findings from the autopsy. (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277; Gov. Code, §§ 27491, 27491.4.)[10] That official inquiry by the coroner into a criminally related death is "certainly part of law enforcement investigation." (*Dixon v. Superior Court*, *supra*, 170 Cal.App.4th at p. 1277.)

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10 Government Code section 27491 provides in pertinent part: "It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; . . . known or suspected homicide . . . ; . . . deaths due to . . . strangulation . . . ; death in whole or in part occasioned by criminal means; . . . deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another. . . . Inquiry pursuant to this section does not include those investigative functions usually performed by other law enforcement agencies." Government Code section 27491.4, subdivision (a) requires "[t]he detailed medical findings resulting from an inspection of the body or autopsy" to be "reduced to writing" or otherwise permanently preserved. (*Ibid*.)

Here, Shallenberger's autopsy was performed during the homicide investigation by Garber, a contract forensic pathologist who worked for the coroner's office on an as-needed basis. A homicide detective investigating Shallenberger's death was present at the autopsy.[11] As required under California law, Garber determined the circumstances, manner and cause of Shallenberger's death, and documented his detailed medical findings in a report.

Garber's autopsy findings, conveyed to the jury through Cohen's testimony at trial, described in detail the nature and scope of the injuries observed on Shallenberger's body, including bruising of the head and neck, bleeding within the eyes and neck tissues, and fractures of bones within the neck. Cohen testified these injuries showed Shallenberger was beaten five to 10 times and then manually strangled to death with significant force. The prosecution presented no other evidence of the injuries to Shallenberger's body, apart from one photograph showing injury to his head.

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11 California law requires the express consent of the coroner for any person to be present during the performance of an autopsy. (Gov. Code, § 27491.4, subd. (a).) *Melendez-Diaz* and *Geier* both underscore that circumstances indicating the participation of law enforcement in making a statement are significant in determining whether that statement is testimonial. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2536 [noting that most forensic laboratories are administered by law enforcement agencies and "[a] forensic analyst responding to a request from a law enforcement official may feel pressure — or have an incentive — to alter the evidence in a manner favorable to the prosecution"]; *Geier*, *supra*, 41 Cal.4th at p. 605 [concluding that statement must be "made to a law enforcement officer or by or to a law enforcement agent" in order to be testimonial].)

Using the autopsy findings, the prosecution argued repeatedly that "based on the very, very extensive injuries that Garvin Shallenberger suffered — the extensive beating to his face, his forehead, his mouth, and . . . the bleeding around the esophagus" showing significant force was used — Anunciation intended to kill Shallenberger or at least "[h]e knew that what he was doing was dangerous to human life."

From this, we conclude that the Garber autopsy findings were prepared as part of a homicide investigation for the purpose of proving a fact for criminal prosecution — namely, that the injuries to Shallenberger's body show he was killed with malice. Therefore, like the certificates at issue in *Melendez-Diaz*, the findings in the autopsy report are "'"a solemn declaration or affirmation made for the purpose of establishing or proving some fact,"'" and were "'"made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial."'" (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2532.) We therefore conclude that the Garber autopsy report and the medical findings contained therein are testimonial.[12]

Having concluded that the autopsy report findings here are testimonial, we next consider whether Anunciation's Sixth Amendment rights were violated when the findings were conveyed to the jury through Cohen's testimony.

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12 The Attorney General contends that the autopsy report was not introduced into evidence because of Anunciation's failure to object, and that therefore it is impossible for us to evaluate whether it is testimonial. For the reasons discussed above, we disagree.

3. *Admitting Cohen's Testimony Conveying Garber's Autopsy Findings Violated the Sixth Amendment's Confrontation Clause*

The Attorney General contends Anunciation's confrontation right was not violated because Anunciation was permitted to, and did, cross-examine the chief forensic pathologist Cohen. We disagree.

Where an expert witness for the prosecution discloses the testimonial autopsy findings of a nontestifying pathologist, and relies on the independent truth of those findings in rendering his opinions, the confrontation clause requires that the defendant have the opportunity to confront the pathologist or medical examiner who conducted the autopsy. Substituted cross-examination is not constitutionally adequate. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2536 [while there may be "other ways — and in some cases better ways — to challenge or verify the results of a forensic test . . . , the Constitution guarantees one way: confrontation" (fn. omitted)].) As the United States Supreme Court noted in *Melendez-Diaz*, where the results of forensic analysis are introduced in a criminal prosecution, the failure to call the performing analyst as a witness prevents the defense from exploring the possibility that the analyst (here, the contract pathologist performing the autopsy) lacked proper training or had poor judgment, or from testing the analyst's "honesty, proficiency, and methodology." (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2538.)

Crawford and *Melendez-Diaz* make clear that no hearsay exception or rule of evidence permits the introduction of testimonial hearsay in violation of the confrontation

clause. (*Crawford*, *supra*, 541 U.S. at pp. 51-56; see also *Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at pp. 2538-2540.) The confrontation clause "trumps" evidentiary rules where testimonial evidence is involved. Therefore, an expert's testimony conveying autopsy findings that are both testimonial and being introduced for their truth may only be admitted where the right of confrontation is satisfied.[13]

In this case, although the autopsy report was not admitted, Cohen conveyed its findings regarding the injuries to Shallenberger's body to the jury and relied upon the truth of those findings in rendering his expert opinion. He was asked to testify in great detail, injury by injury, about what was observed during the autopsy by "another doctor," and he relayed how the injuries were "described," "noted" and "documented" in the

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13 As we will explain, in this case Cohen's testimony about the autopsy findings were clearly introduced for the truth of the findings and therefore could not have been properly admitted as the basis for his opinion under Evidence Code section 801, subdivision (b). California law prohibits a court from admitting out-of-court statements as the basis for an expert opinion where the jury is allowed to consider them for the purpose of proving the matter asserted. (*Korsak v. Atlas Hotels, Inc*. (1992) 2 Cal.App.4th 1516, 1524-1525 ["Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact."].) Therefore, we do not apply those cases finding no violation of the confrontation clause where the materials on which an expert bases his or her opinion are not introduced for the truth of their contents. (E.g., *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; see Cal. Evid. Code, § 801, subd. (b); *Crawford*, *supra*, 541 U.S. at p. 59, fn. 9 [the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"], citing *Tennessee v. Street* (1985) 471 U.S. 409, 414.)

"findings" of the autopsy report.[14] The prosecution used that testimony, which was the only detailed evidence of Shallenberger's injuries, to argue — again in graphic detail — that the injuries showed Anunciation had beaten and strangled Shallenberger with malice.

The record leaves no doubt Garber's findings were admitted for their truth. The jury was instructed to determine whether the findings, as "the information on which [Cohen] relied," were "true and accurate." In considering the weight to give the findings, the jury needed to consider Garber's credibility, perceptions and abilities — not those of Cohen — because autopsy findings are the product of the performing pathologist's observation and discretion.[15] As we have explained, Garber's findings were critical to

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14 Cohen expressly relied on, conveyed and quoted the findings from the autopsy report in his testimony. He did not state that he reached any conclusions or opinions independent from the findings of the autopsy report, and the record contains no foundation for his opinions other than those findings. Given this record, we need not address whether it would have been permissible to admit Cohen's expert opinions based solely on the autopsy photographs or other data, or without admitting the findings themselves. (See, e.g., *Commonwealth v. Avila* (Mass. 2009) 912 N.E.2d 1014, 1029-1030 [substitute medical examiner may give opinions but may not testify on direct examination about the underlying factual findings of a nontestifying medical examiner contained in an autopsy report].)

15 As the standards for autopsy performance recognize, a forensic pathologist performing an autopsy exercises discretion to determine the need for additional dissection and laboratory tests, and is responsible for formulating all interpretations and opinions as well as obtaining all necessary information to do so. (Nat. Assn. of Medical Examiners, Forensic Autopsy Performance Stds., American J. of Forensic Medicine & Pathology (Sept. 2006) vol. 27, issue 3, stds. B4, B5, pp. 200-225.) Likewise, the record here supports the conclusion that the autopsy findings by the performing pathologist reflected discretion and judgment that could have been explored on cross-examination. (See fn. 16, *post*.)

establish an element of the prosecution's case.[16] Garber, the performing pathologist who made the observations and wrote the findings, became a nontestifying "witness" for purposes of the Sixth Amendment. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2532.)

Under these circumstances, we conclude that the right to confront Garber — the person making the autopsy findings — could not be satisfied by cross-examining Cohen. The prosecution's failure to call Garber as a witness at trial deprived Anunciation of the opportunity to test the accuracy of the autopsy findings and, absent a showing that Garber was unavailable and that Anunciation had a prior opportunity to cross-examine him, violated his right to confrontation. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2538.)[17]

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16 For example, Cohen explicitly relied on the report's findings of bruising showing blunt force injuries to infer that Shallenberger was beaten before he was strangled, which helped show malice and refute the defense's theory that Anunciation choked Shallenberger in the heat of passion or in self-defense. However, the bruising described in the autopsy report overlapped areas of Shallenberger's skin colored by postmortem lividity, which was due solely from the pooling of blood after death. In order to distinguish the two, pathologists "look at . . . the degree of the visible finding, the distribution of the discoloration, and . . . how well defined the discolorations are," among other things. Cohen did not actually make each of these findings, and he did not have photographs to support every one. Cohen necessarily relied on Garber's finding that the bruising was "nearly confluent," about which he could not effectively be cross-examined.

17 Since *Melendez-Diaz*, appellate courts in three states have held that because autopsy reports are testimonial, expert testimony based upon them is inadmissible. (E.g., *State v. Locklear* (N.C. 2009) 681 S.E.2d 293, 304-305 [opinion testimony based on an autopsy report, including forensic pathology and dental analyses, was "testimonial" in

Relying on the California Supreme Court's decision in *Geier*, the Attorney General contends that the trial court properly admitted Cohen's testimony about Garber's autopsy findings because Cohen was available for cross-examination about the autopsy process and results. We disagree. As we explain above, *Melendez-Diaz*, together with *Crawford*, make clear that because the confrontation clause is a procedural guarantee, a trial court may not admit expert testimony about testimonial autopsy findings for their truth, even where those findings are reliable or the defendant may "test" their reliability through means other than confronting the pathologist who made them. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2536 ["We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available."]; *Crawford*, *supra*, 541 U.S. at pp. 61-62.) Indeed, in the case of autopsy findings, it would be impossible

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nature and violated a defendant's right to confrontation where the state failed to show that the pathologist and dentist were unavailable or that defendant had prior opportunity to cross-examine them]; *Wood v. State* (Tex. Ct. App., Oct. 7, 2009, No. 03-08-00257-CR) 2009 Tex. App. Lexis 7882; see also *Long v. State* (Tex. Ct. App., Aug. 20, 2009, No. 11-07-00319-CR) 2009 Tex. App. Lexis 6577 [results of toxicology tests performed as part of autopsy were testimonial and therefore improperly admitted]; *Commonwealth v. Avila*, *supra*, 912 N.E.2d at pp. 1029-1030 [substitute medical examiner testifying as expert witness may not testify about the underlying factual findings of the unavailable medical examiner contained in autopsy report].) In contrast, one court has held the admission of a chief medical examiner's testimony about an autopsy performed by another pathologist did not violate the confrontation clause where the testifying examiner reviewed and discussed the findings and the wording of the autopsy report with the performing pathologist at the time of the autopsy and cosigned the report. (*State v. Lui* (Wash. Ct. App., Nov. 23, 2009, No. 61804-1-I) 2009 Wash. App. Lexis 2892.)

for a defendant to repeat the autopsy and test the process or results by doing so. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2536, fn. 5.)

The Attorney General's reliance on *Geier* as authority for permitting a substitute witness to testify to testimonial autopsy findings is inapposite in at least two respects. First, the *Geier* court held that a DNA report, laboratory notes and results were admissible through a testifying laboratory supervisor — rather than the laboratory analyst who performed the tests — because the report, notes and results were *not* testimonial. (*Geier*, *supra*, 41 Cal.4th at p. 607.) *Geier* does not suggest that the defendant's confrontation right would have been satisfied had the underlying report, notes and results been testimonial, as we have concluded the autopsy findings are in this case. (*Ibid*.) Second, in *Geier*, the testifying laboratory supervisor had cosigned the report of the testing results, providing an opportunity for the defendant to cross-examine the individual who issued the results. (*Id.* at p. 596.) Here, on the other hand, Cohen neither participated in the autopsy, nor certified or signed the autopsy report, precluding any opportunity for Anunciation to test the underlying process and findings.

Because the autopsy findings were testimonial and the prosecution failed to establish the performing pathologist Garber was unavailable and that Anunciation had a prior opportunity to cross-examine him,[18] the trial court's admission of Cohen's

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[18] A witness generally is not considered unavailable under the confrontation clause "unless the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial." (*Barber v. Page* (1968) 390 U.S. 719, 725.) The Attorney

testimony violated Anunciation's right of confrontation. Anunciation is therefore entitled to a reversal of the conviction for murder, unless that error was harmless. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2542, fn. 14 [noting that, despite finding admission of the affidavits violated the defendant's confrontation clause rights, the resulting error was subject to harmless error review].) We thus next address whether the error in admitting Cohen's testimony conveying, and relying on the independent truth of, the autopsy findings was prejudicial.

C. *Admission of Cohen's Testimony Conveying and Relying on Findings of the Nontestifying Pathologist Was Not Harmless*

In determining whether a confrontation clause violation is prejudicial, we employ the harmless error standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Cage* (2007) 40 Cal.4th 965, 991-992.) Under the *Chapman* standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) In making this inquiry, we consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-

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General does not contend any effort was made to have Garber testify. In addition, the Attorney General does not contend Anunciation had any previous opportunity to cross-examine Garber, and the record shows no such opportunity.

examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Id.* at p. 684.)

Cohen's testimony conveying Garber's findings was the primary evidence that enabled the prosecution to argue to the jury that Anunciation intended to kill Shallenberger, or at least knew that his actions were likely to kill him. The findings were therefore pivotal to the prosecution's proof of malice — an element necessary for conviction of second degree murder. The prosecution argued at length in closing argument that "based on the very, very extensive injuries that Garvin Shallenberger suffered, the extensive beating to his face, his forehead, his mouth, and . . . the bleeding around the esophagus," there was no way "that man could have done that to Mr. Shallenberger and say, but I didn't intend to kill him." The prosecution then argued, based on the same evidence, that at the very least Anunciation "knew that what he was doing was dangerous to human life."[19] Given the importance of Cohen's testimony conveying Garber's findings, we cannot conclude beyond a reasonable doubt that a rational jury would have found Anunciation guilty of second degree murder had it been

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19 As we have previously noted, by testifying that the injuries observed by Garber were not consistent with having been inflicted by a reflexive reaction, Cohen's testimony also undercut the defense theory of voluntary manslaughter, although the trial court did not instruct the jury on that theory. (See fn. 16, *ante*.)

excluded.[20] We therefore conclude the error was not harmless, and Anunciation's conviction must be reversed.

III.

The Trial Court Did Not Err in Denying Anunciation's Motion to Suppress

Anunciation contends the trial court prejudicially erred in denying his motion to suppress the statements obtained from him by Buompensiero in violation of the Fifth Amendment. Although we reverse Anunciation's murder conviction for the reasons discussed in part II., *ante*, we address this contention to provide guidance to the trial court in the event of a retrial.[21]

A. *Factual and Procedural Background of Anunciation's Interviews*

After Shallenberger's killing, Investigator Buompensiero identified Anunciation as a suspect from phone records and store surveillance videotapes showing Anunciation

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20 As we have previously explained, Cohen's testimony conveyed the autopsy report's findings, and he relied on the independent truth of the findings contained in the report in rendering his opinions. Cohen did not state, and we find no indication in the record, that any of his opinions or conclusions could have been or were reached independently of the report. (See fn. 14, *ante*.)

21 On appeal, Anunciation also contends the trial court erred in refusing to instruct the jury on voluntary manslaughter, but we need not address this issue in light of our reversal of his conviction on Sixth Amendment grounds. Because the instructions to be given at any retrial necessarily depend on the issues raised by the evidence, we are unable to provide guidance on that issue in this appeal. (*People v. Moye* (2009) 47 Cal.4th 537, 548.)

using Shallenberger's credit cards after the killing. Buompensiero told Anunciation's former girlfriend, Mia Fletcher, that Anunciation was a suspect and that he should call Buompensiero. Anunciation called Buompensiero the next day, 11 days after Shallenberger's death, and agreed to come to the station to answer questions. He asked for a ride and Buompensiero sent detectives to pick him up.

Two detectives (in plain clothes with holstered guns) met Anunciation at Fletcher's house, and Anunciation voluntarily agreed to accompany them to the sheriff's station. Anunciation sat in the front seat of their sedan and was not handcuffed.

The interview, which was videotaped, was held in a small, carpeted room with two chairs at the Palm Desert Sheriff's Station. The only other person in the room was Buompensiero, who interviewed Anunciation. The interview began with Buompensiero reading Anunciation his *Miranda* rights.[22] Anunciation responded that he would like to have a lawyer. Buompensiero left the room for 15 minutes and when he returned, before questioning, he reminded Anunciation that he had come voluntarily, and that he was free to leave and was not under arrest. Buompensiero told Anunciation that he could leave at any time during the questioning. Anunciation acknowledged that he understood, and that he knew how to leave the room and the building.

Buompensiero then asked Anunciation about his use of Shallenberger's credit cards. Anunciation admitted he had met with Shallenberger on the day he was killed,

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22 *Miranda v. Arizona* (1966) 384 U.S. 436, 444 (*Miranda*).

was "whacked out" on "speed" and just wanted some money. Anunciation stated that Shallenberger had paid him on multiple occasions for oral sex, but claimed that on the day of the killing he did not want to have oral sex with Shallenberger. Annunciation said Shallenberger became irate, and Anunciation took Shallenberger's wallet, credit cards, laptop computer and telephones, and he left.

After about 45 minutes of questioning, Anunciation asked Buompensiero if he was "busted" for taking Shallenberger's credit cards and property. Buompensiero said that they would wait to see what the district attorney wanted to do, and then asked Anunciation where he would be staying. Anunciation said he could be reached at his mother's, telling Buompensiero, "I'm not going nowhere." Anunciation left the station, alone, after waiting approximately 20 minutes in the lobby of the station for a detective to give him a ride.

A short time later, the detective who was to give Anunciation a ride found Anunciation at a bus stop, some distance from the station. The detective asked Anunciation if he wanted a ride, and he accepted. As the detective drove Anunciation toward his mother's house, Buompensiero called the detective's cell phone and asked him to see if Anunciation would return to the station to answer more questions. Anunciation agreed to return.

Anunciation's second interview, which was also taped, lasted 34 minutes. Buompensiero began the interview by stating that Anunciation was not under arrest and was free to leave at any time, as before. Anunciation said he understood that, and knew

where the door was. A few minutes into the interview, after asking about what had occurred on the day Shallenberger was killed, Buompensiero told Anunciation he had some more questions for which he would read Anunciation his *Miranda* rights. Buompensiero read Anunciation the *Miranda* warnings. Anunciation acknowledged that he understood each of them. Buompensiero asked Anunciation about his telephone calls to Shallenberger, told Anunciation that Shallenberger was dead, and asked him to explain what had happened since Annunciation was the last person with him.

In response, Anunciation admitted to choking Shallenberger until he turned blue after Shallenberger bit him during oral sex. After making these admissions, Anunciation said to Buompensiero that he ". . . better get a lawyer now" and asked if he could go home for the night. Buompensiero told Anunciation he would discuss "a few things here with my boss" and left the room. When he returned, Anunciation was placed under arrest and shackled with leg irons.

Before his first trial, Anunciation sought to exclude his statements to Buompensiero. The trial court denied his motion to suppress after an evidentiary hearing, ruling that Anunciation had not been in custody. The trial court found Anunciation voluntarily went to the police station to be interviewed, and that Anunciation had reinitiated questioning after being told he was free to go. The trial court also found Anunciation voluntarily returned for the second interview and made his admissions about killing Shallenberger after being read his rights and implicitly waiving them. The

interviews were not coercive, but low-key and conversational, without heavy-handed tactics, and Anunciation was calm and not nervous.

B. *Anunciation's Fifth Amendment Rights Were Not Implicated Because He Was Not in Custody When He Gave His Interview Statements*

Anunciation contends that because he was in continuous custody during both interviews, and asked for a lawyer at the outset of the first interview, his statements in response to Buompensiero's questions were obtained in violation of his Fifth Amendment privilege against self-incrimination and were therefore inadmissible at trial. Anunciation also contends admission of his statements was improper because he never validly waived his *Miranda* rights. We disagree. Based on the trial court's findings and our independent review of the undisputed facts contained in the record, we conclude that Anunciation was not in custody when he was questioned by Buompensiero and admitted strangling Shallenberger. Without custody, Anunciation's request for an attorney had no legal effect and there was no need for a waiver of his *Miranda* rights.

1. *Pertinent Law*

The scope of our review of a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's Fifth Amendment rights is well established. "'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally

obtained.' [Citations.] We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033; *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1447-1448; *People v. Memro* (1995) 11 Cal.4th 786, 827 [trial court's assessment of credibility of police officers and defendant's witnesses at suppression hearing must be accepted on appeal, if supported by substantial evidence].)

The Fifth Amendment to the United States Constitution provides no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) In *Miranda*, the United States Supreme Court held the privilege is "fully applicable during a period of custodial interrogation." (*Miranda*, *supra*, 384 U.S. at pp. 460-461.) Thus, the prosecution may not use a defendant's statements obtained during custodial interrogation by law enforcement unless, prior to questioning, the defendant is advised of his or her rights to silence, to consult with a lawyer, to have the lawyer with him during interrogation and to appointed counsel. (*Id.* at p. 471.)[23] If an individual subject to custodial interrogation requests a lawyer, the interrogation must stop until the individual's counsel is present, unless the individual initiates further communication, exchanges, or conversations with the police. (*Minnick v. Mississippi*

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[23] In *Miranda*, the United States Supreme Court explained that these warnings were needed to safeguard the individual's Fifth Amendment privilege against the "inherently compelling pressures" of in-custody interrogation "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (*Miranda*, *supra*, 384 U.S. at p. 467.)

(1990) 498 U.S. 146, 153 (*Minnick*); *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*).)

The right to counsel under *Miranda* does not attach and cannot be invoked outside of the context of custodial interrogation. (*Montejo v. Louisiana* (2009) 556 U.S. ___ [129 S.Ct. 2079, 2090, 173 L.Ed.2d 955, 969] ["If the defendant is not in custody, then [the *Miranda/Edwards*] decisions do not apply"]; see also *id*. at p. 2091, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 ["'We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"'"]; *People v. Nguyen* (2005) 132 Cal.App.4th 350, 355 [defendant who called attorney during arrest but before interrogation did not effectively assert right to counsel]; *People v. Avila* (1999) 75 Cal.App.4th 416, 422 & fn. 8 [because *Miranda* rights cannot be invoked except during custodial interrogation, accused being arraigned on one charge cannot prospectively invoke his or her *Miranda* rights to counsel as to some other unrelated charge by a written "invocation of rights" form].) As both parties recognize, the threshold issue in this case is therefore whether Anunciation was in custody when he was questioned by Buompensiero.

A suspect is in custody for purposes of the Fifth Amendment when he is "'deprived of his freedom of action in any significant way.'" (*People v. Mickey* (1991) 54 Cal.3d 612, 648, 661; *People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088; *Miranda*, *supra*, 384 U.S. at p. 444.) To determine whether a person who has not been formally arrested is in custody, we examine, based on a totality of the circumstances, "how a

reasonable man in the suspect's position would have understood his situation." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442; see also *Yarborough v. Alvarado* (2004) 541 U.S. 652; *People v. Ochoa* (1998) 19 Cal.4th 353, 401 (*Ochoa*).) "[T]he ultimate inquiry is simply whether there is a '. . . restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125 (*Beheler*); *Ochoa*, at p. 401.) The test is objective, and the subjective views harbored by the interrogating officers or the defendant are not generally relevant to the determination. (*Stansbury v. California* (1994) 511 U.S. 318, 323 (*Stansbury*).)

In determining whether a defendant is "in custody," courts consider a number of objective criteria, such as whether contact was initiated by law enforcement; whether the suspect voluntarily agreed to an interview; the ratio of officers to suspects during the interview; the officers' demeanor; whether the officers informed the suspect he was under arrest or free to terminate the interview and leave; whether the officers dominated and controlled the course of the interrogation; whether the officers manifested a belief the person was culpable and they had evidence to prove it; whether techniques to pressure the suspect were employed; and whether the suspect was arrested at the close of the interview. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162 (*Aguilera*); *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) "[C]ourts [also] consider highly significant whether the questioning was brief, polite, and courteous or lengthy, aggressive, confrontational, threatening, intimidating, and accusatory." (*Aguilera*, at p. 1164.)

2. *Analysis*

Substantial evidence supports the trial court's findings that Anunciation voluntarily participated in the interviews, and reinitiated questioning after requesting a lawyer.[24] The evidence shows that Anunciation called Buompensiero of his own accord, agreed to meet with him and asked for a ride to the station. After Anunciation said he wanted a lawyer, Buompensiero told Anunciation that he was free to leave, and Anunciation acknowledged he was free to leave and knew how to leave. At that point, Anunciation reinitiated the conversation, saying "What do you want to ask me?" Anunciation left the sheriff's station after the first interview on his own. He also willingly accepted another ride from a detective to go to his mother's house, and agreed to return to the station for more questions. Additionally, having reviewed the videotapes and transcripts of the interviews, we find the trial court accurately characterized the questioning as "low-key, slow questions, no heavy-handed tactics . . . not intense, persistent, or accusatory." The questioning remained so throughout both interviews.

Applying the law to the facts found by the trial court and to the undisputed facts contained in the record, we conclude that Anunciation was not in custody during the

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[24] Because we conclude Anunciation was not in custody, we need not, and do not, decide whether Anunciation's reinitiation of communication with Buompensiero would be sufficient to satisfy the exception, under *Edwards* and *Minnick*, that permits questioning by police after a defendant has requested counsel but then reinitiates "'communication, exchanges or conversations with the police.'" (*Minnick*, *supra*, 498 U.S. at p. 152; *Edwards*, *supra*, 451 U.S. at pp. 484-485.)

police interviews. Anunciation called Buompensiero of his own accord and indicated he was willing to answer questions, both before and during the interview. Anunciation was not restrained during the interviews, which took place over a period of approximately two hours. He repeatedly acknowledged that he understood he was free to go and he actually left the station. He willingly accepted a ride home from officers and agreed to return to the station to answer additional questions. The detective's questioning remained low-key and conversational. A reasonable person in Anunciation's circumstances would have felt free to terminate the questioning and leave. (*U.S. v. Norris* (9th Cir. 2005) 428 F.3d 907, 911 [defendant was not "in custody" for *Miranda* purposes where he voluntarily accompanied the officers to the police station; was told that his cooperation was voluntary, that he was free to terminate the interview at any time and that he was not under arrest; was never restrained in any way; and, upon completion of the interview, was taken home by the officers]; *U.S. v. Kim* (9th Cir. 2002) 292 F.3d 969, 974-975 ["If the police ask — not order — someone to speak to them and that person comes to the police station, voluntarily, precisely to do so, the individual is likely to expect that he can end the encounter"]; *Aguilera*, *supra*, 51 Cal.App.4th at p. 1162, citing *Green v. Superior Court* (1985) 40 Cal.3d 126, 131-135 [concluding a reasonable person would not have felt in custody where defendant voluntarily accompanied officers to the station for an interview, questioned him intermittently in a detailed way over a total period of two hours within a locked room, saying he could leave if he wanted to]; *People v. Spears* (1991) 228 Cal.App.3d 1, 22, 25 [concluding defendant was not in custody during hour-

long interview at police station in which officers were "courteous and polite" and told defendant at various times he was free to leave].)

Anunciation contends certain facts compel a finding he was in custody, including that he was already the focus of Buompensiero's investigation when he was questioned and the interview took place in the homicide unit's interrogation room at the sheriff's station. We disagree. Even a direct statement to a person under interrogation that he is a prime suspect is not dispositive unless it also "would have affected how a reasonable person in that position would perceive his or her freedom to leave." (*Stansbury*, *supra*, 511 U.S. at p. 325; *In re Joseph R.* (1998) 65 Cal.App.4th 954, 960.) Here, although Anunciation knew from his former girlfriend that Buompensiero considered him a suspect, Buompensiero did not mention it during Anunciation's interviews. Given the atmosphere of the interviews, Anunciation's voluntary cooperation, and the fact that he came and went, a reasonable person would have felt free to leave, despite being at the sheriff's station and under suspicion. (E.g., *Beheler*, *supra*, 463 U.S. at pp. 1122, 1125 [suspect not in custody despite being the target of a police investigation, where he had accompanied the police willingly to station house for questioning].)[25]

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[25] Anunciation argues that because he was "released" from custody so briefly between the first and second interviews and then "recapture[d]," it was evident that the police statements that he was free to go were never true, and there was a "taint" that remained from his request for an attorney that lasted through the second interview. We disagree, given our conclusion that he was not in custody. Moreover, the cases that Anunciation relies upon as showing custody under similar facts are inapposite. (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1482 [police took defendant immediately from

Because the totality of the circumstances show Anunciation was not "in custody" before he admitted strangling Shallenberger, the essential predicate for the application of the Fifth Amendment under *Miranda* is lacking.[26] Anunciation cannot show his Fifth Amendment rights were violated when his statements to Buompensiero were admitted at trial.

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crime scene, prevented him from going to hospital with his injured wife and never told him he was free to leave]; *People v. Storm* (2002) 28 Cal.4th 1007, 1021 [Cal. Sup. Ct. did not rule on whether defendant accused of lying after flunking a polygraph examination was in custody].)

[26] Because Anunciation was not in custody when given the *Miranda* warnings in the second interview, we need not address his contention that he did not validly waive his *Miranda* rights by acknowledging the warnings and continuing to answer questions thereafter. (*Ochoa*, *supra*, 19 Cal.4th at p. 401 [where suspect not in custody, "'*Miranda* simply [did] not come into play,'" and no waiver was needed].)

DISPOSITION

Anunciation's conviction for second degree murder is reversed and the matter is remanded. In all other respects, the judgment is affirmed.

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IRION, J.

WE CONCUR:

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HALLER, Acting P. J.

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O'ROURKE, J.