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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PATRICK DEWIN McDANIEL, SR., Defendant and Appellant.	A130570 (Lake County Super. Ct. No. CR-917541A)

Defendant was convicted following a jury trial of the lesser offense of attempted voluntary manslaughter (Pen. Code, §§ 66/192, subd. (a)), assault with a firearm (Pen. Code, § 245, subd. (a)) with personal use of a firearm (Pen. Code, § 12022.5) and infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)), possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)), possession of ammunition by a convicted felon (Pen. Code, § 12316, subd. (b)(1)), and carrying a loaded firearm in a public place (Pen. Code, § 12031, subd. (a)). In this appeal and a related petition for writ of habeas corpus, defendant argues that evidence of the prior misdemeanor convictions of prosecution witnesses was either erroneously excluded, or his counsel was ineffective for failing to seek admission of the evidence. We conclude that the trial court did not err by excluding a conviction of indecent exposure suffered by one of the witnesses, and no prejudice resulted from the absence of evidence of other misdemeanor criminal conduct by the witnesses. We therefore affirm the judgment.

STATEMENT OF FACTS

The convictions are all associated with a brief physical altercation the evening before Thanksgiving in 2008, that occurred between occupants and visitors at two residences next to each other on Second Street in Clearlake Oaks, and culminated in the shooting of Patrick O'Connor, Sr., known as Rick. Defendant did not contest that he committed the shooting, but claimed the shot was fired due to accidental discharge of his handgun during a struggle with the victim.

The victim and his wife Maria, Rick's son Patrick O'Connor, Jr., and his wife Angelica and their children, and Rick's brother James O'Connor, occupied one of the houses.[1] The adjacent house was occupied by Jill Robbins, who was visited that evening by her former boyfriend Daniel Clapp, an acquaintance Willard Moleiro and his companion Kim, defendant and his companion Stephanie, and defendant's brother Cecil. Defendant and his brother are African-Americans; the O'Connors are White.

During the course of the evening, the gathering at Robbins's house became boisterous. Moleiro observed defendant waving a "small caliber automatic" gun, while "ghetto trash talking."

When the victim and his son Patrick heard yelling and swearing at Robbins's house, they proceeded to the fence at the corner of their yard to "see what was going on." Defendant was standing on Robbins's front porch talking loudly on his cell phone. Robbins testified that she heard "voices raised" outside, so she walked out her front door and asked defendant to "please lower his voice." Defendant told Robbins to, "shut the hell up," or "bitch shut up," which according to her was typical language from him.

Rick and James heard an offensive verbal exchange between defendant and Robbins on the front porch. They also observed defendant push Robbins, although Robbins testified that defendant never touched her. The "men next door" asked Robbins if she needed help; her response was, "No, absolutely not." Rick told defendant, "That's enough of that." Rick and James testified that defendant retorted, "Fuck you, nigger."

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[1] For the sake of clarity and convenience we will refer to the O'Connor's by their first names. For the same reasons we will also refer to defendant and his brother Cecil by their first names.

Incensed that defendant called him "a name," Rick rushed through a gate into Robbins's yard, followed by Patrick and James. Robbins testified that as they pushed past her toward the front porch, Rick was holding what appeared to be a stick or pipe, and Patrick had what "looked like a screwdriver." She also heard one of them yell, "Get those fucking niggers." Patrick and Rick testified that they did not have any weapons in their hands, although Rick acknowledged that he carried a "tiny old-timer pocketknife" in his pocket as he approached defendant.

As Rick reached the porch, defendant struck him on the side of his head "with a hard object." Rick pushed defendant, who took "a couple steps back." According to Rick, defendant then stepped forward, raised a gun, and shot him.

Cecil, who had joined defendant on the porch, swung his fist at Patrick, but missed when Patrick ducked. As Patrick pushed Cecil away, he heard the "boom" of a gunshot, looked over, and saw the "flash" of a gun in defendant's right hand. Rick stumbled back and yelled, "I've been shot." Patrick testified that he heard two more two "clicking sounds" as he and Rick started to run away.

James heard the shot as he jumped the fence into Robbins's yard. When he reached the porch James asked Cecil if he shot Rick. Cecil immediately punched him in the jaw, knocking him to the ground. Robbins testified that James called defendant "a nigger," whereupon Cecil said, "You called my brother a nigger," and punched James in the face. James sustained a broken jaw from the punch.

Rick, Patrick and James retreated to their yard and awaited medical help. Rick was transported to the hospital for treatment of a gunshot wound that entered the base of his neck just above the sternum, and exited his back. Both defendant and Cecil ran through the front gate, out of the yard, and onto Second Street. At the hospital later that night a photo lineup was displayed to Rick; he identified defendant as the man who shot him.

A police investigation of the scene of the shooting that night revealed "blood drops" on Robbins's front porch, but no expended shell casings or weapons of any kind. The next day, a Walther PPK .380-caliber semi-automatic pistol was found in the dirt on

the side of a carport, three houses away from Robbins's residence. Two rounds were "jammed" in the chamber, and three more were in the magazine. Upon inspection, dirt and a piece of cloth were discovered in the ejection port and the magazine of the gun. The registered owner of the gun was not determined, and it was not identified as the weapon used to shoot the victim.

The prosecution offered expert testimony on the condition and operation of the Walther PPK .380-caliber semi-automatic pistol. Sergeant Donald McPherson of the Lake County Sheriff's Department testified that the gun was equipped with an "internal safety" mechanism that prevented accidental firing without the "trigger being pulled." However, he testified that the gun may accidentally discharge if a person mistakenly left a finger on the trigger while holding it. The Walther PPK .380-caliber semi-automatic pistol was functional, but failed to properly reload and jammed occasionally during test firing.

The defense expert, Kenneth Gaudet, also examined the Walther PPK .380-caliber semi-automatic pistol found near the scene of the shooting. He agreed that the gun was functional, despite its dirty condition and oxidation. When the gun was test fired, Gaudet noticed that it malfunctioned intermittently due to "a failure to feed" from the magazine into the chamber.

Defendant was arrested in Las Vegas in December of 2008. In his ensuing statement to the police defendant asserted that after he exchanged insults and offensive epithets with the O'Connors, he observed them walk into Robbins's yard, "all riled up." Defendant became concerned when he observed one of the O'Connors carrying a "buck knife," so he removed the gun from his coat pocket and struck the victim in the head with it. When defendant hit Rick with the gun, it accidentally "went off." "Bam!" Defendant stated that he did not mean to shoot Rick. He insisted that if he had intended to kill the victim he would have fired multiple shots, not "just one." He then "panicked" and fled down the street. He threw the gun in someone's front yard as he left.

DISCUSSION

Defendant argues that the trial court erred by limiting defense impeachment evidence. Evidence of misdemeanor convictions suffered by James and Rick was offered by the defense to impeach the witnesses: James's conviction of burglary in 2001 and possession of stolen property in 2002; and Rick's convictions of indecent exposure in 1990, violation of a domestic restraining order in 2004, battery in 2005, disturbing the peace in 2008, and assault on a domestic partner in 2009. The court granted the defense request to impeach James with the fact and nature of both of his prior misdemeanor convictions, but not the conduct associated with them. The court excluded the proffered evidence of Rick's misdemeanor convictions for indecent exposure and disturbing the peace, but admitted the fact of his remaining convictions as impeachment evidence.

Defendant presents two contentions related to the exclusion of evidence offered to impeach James and Rick. First, he complains that the court "abused its discretion in excluding the indecent exposure incident." Second, he argues that the court erred by admitting "the mere fact of prior convictions for misdemeanors," and excluding "evidence of the specific conduct" by Rick and James that resulted in the convictions. Defendant maintains that the court's limitation on defense impeachment evidence deprived him of the opportunity to "show the jury that these witness were likely dishonest and morally lax," in violation of his "right to confrontation, cross-examination and due process." He submits that the limitation placed on the ability of the defense to "properly confront and cross-examine these two key witnesses prejudiced his right to a fair trial," and requires reversal.

We begin our inquiry with recognition of the fundamental constitutional premise that, " '[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 538.) Further, a defendant in a criminal case must have an opportunity to present a complete defense to the charges

against him. (*People v. Adams* (2004) 115 Cal.App.4th 243, 253–254; *People v. Sixto* (1993) 17 Cal.App.4th 374, 398–399.) " 'Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 269.) The rights to confront witnesses and to present exculpatory evidence are not absolute and have limitations. (*Taylor v. Illinois* (1988) 484 U.S. 400, 410; *People v. Brown, supra*, at p. 538; *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203.)

The right of cross-examination "includes exploration of bias." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 349; see also *People v. Box* (2000) 23 Cal.4th 1153, 1203.) " 'Evidence showing a witness's bias or prejudice or which goes to his credibility, veracity or motive may be elicited during cross-examination.' [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1054.) " '[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 946.) Confrontation clause questions arise where restrictions imposed by the trial court effectively " 'emasculate the right of cross-examination itself.' " (*Delaware v. Fensterer* (1985) 474 U.S. 15, 19, quoting *Smith v. Illinois* (1968) 390 U.S. 129, 131.) " 'It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. ' " (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1139, citing *Alford v. United States* (1931) 282 U.S. 687, 691–693.)

The "right of confrontation is not absolute, however [citations], 'and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' [Citation.]" (*Alvarado v. Superior Court, supra*, 23 Cal.4th 1121, 1138–1139;

see also *People v. Stritzinger* (1983) 34 Cal.3d 505, 515; *People v. Harris* (1985) 165 Cal.App.3d 1246, 1257.) " '[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' [Citations.] Exclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation." (*People v. Greenberger, supra,* 58 Cal.App.4th 298, 350; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; *People v. Cooper* (1991) 53 Cal.3d 771, 817; *People v. Harris* (1989) 47 Cal.3d 1047, 1091.) Ordinarily, proper application of the statutory rules of evidence does not impermissibly infringe upon a defendant's due process rights. (See *People v. Lucas* (1995) 12 Cal.4th 415, 464; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103; *People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) "In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.)

"The confrontation clause 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citations.]" (*People v. Clair* (1992) 2 Cal.4th 629, 656, fn. 3; see also *People v. Cooper, supra,* 53 Cal.3d 771, 817.) " 'Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494; see also *People v. Brown, supra,* 31 Cal.4th 518, 545–546.)

I. The Exclusion of the Indecent Exposure Conviction.

The trial court excluded the impeachment evidence of Rick's indecent exposure conviction offered by the defense on grounds that it was more prejudicial than probative. The court particularly focused on the remoteness of the 1990 conviction, the potential for

prejudicial impact on the jury, and the lack of probative value to challenge the witness's credibility. Defendant argues that the exclusion of the prior conviction to impeach Rick was an abuse of the court's discretion.

In *People v. Wheeler* (1992) 4 Cal.4th 284, 295–297 (*Wheeler*), the California Supreme Court "determined that a person can be impeached in a criminal case by evidence of prior misdemeanor *conduct* that involves moral turpitude." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522.) "Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach" a witness. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) " '[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.' [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).)

Evidence of an indecent exposure conviction has the requisite moral turpitude to qualify for admission to impeach the testimony of a witness. The "requirement of lewdness, which is needed for a conviction of indecent exposure in California, supplies the assurance that a conviction for indecent exposure is one which necessarily involves moral turpitude." (*People v. Ballard* (1993) 13 Cal.App.4th 687, 696.)

Nevertheless, a "trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207.) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Clark, supra,* 52 Cal.4th 856, 931.)

Review of a trial court's exclusion of impeachment evidence "pursuant to Evidence Code section 352 is subject to abuse of discretion analysis. [Citations.] 'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . .'

[Citation.]" (*People v. Greenberger, supra,* 58 Cal.App.4th 298, 352.) "The determination whether a defendant has been denied the right of confrontation is focused on the individual witness. The standard for determining if a confrontation clause violation has occurred is whether a reasonable jury might have received a significantly different impression of the witness's credibility had the defendant been permitted to pursue his proposed line of cross-examination." (*Id.* at p. 350.) We find error only if the trial court's decision exceeded the bounds of reason. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion [citations]." (*Clark, supra,* 52 Cal.4th 856, 932.)

While commission of an indecent exposure offense may evince some moral turpitude, in the present case the probative value of the proffered evidence to impeach the witness was minimal. First, the California Supreme Court "has recognized that evidence of misconduct not amounting to a felony is less probative of immoral character than is a prior felony conviction." (*Clark, supra,* 52 Cal.4th 856, 933.) In addition, the nature of the particular indecent exposure offense committed by Rick was far from egregious or indicative of dishonesty or a " 'general readiness to do evil' " from which a readiness to lie may be inferred. (*People v. Castro* (1985) 38 Cal.3d 301, 314; *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1379–1380; *People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) When queried by the trial court, Rick disclosed that the offense consisted of "moon[ing] someone." The prior conviction was also quite remote, having occurred nearly 20 years before trial, thus having even less probative value to prove the witness's present credibility.

Defense counsel was permitted to attack Rick's credibility with other prior convictions for violation of a domestic restraining order, battery, and assault on a domestic partner, offenses that were both much more recent and more indicative of his dishonesty and willingness to lie. Further, during cross-examination the defense was otherwise afforded the opportunity to thoroughly explore other factors that adversely

affected Rick's credibility: inconsistencies between his testimony at trial and prior statements; the discrepancies between his description of the incident and those of other witnesses; his provocative behavior during the incident; and his ingestion of alcohol. Even without the indecent exposure evidence, the witness was not in the least left with a false aura of veracity. (*People v. Hill* (1995) 34 Cal.App.4th 727, 739.) We are persuaded that the jury would not have received a significantly different impression of Rick's credibility even if the excluded evidence had been admitted. (*People v. Whisenhunt, supra,* 44 Cal.4th 174, 208.) And finally, evidence of the indecent exposure evidence would have evoked emotional bias against the witness and entailed undue consumption of time on a collateral matter that offered inconsequential probative value to the defense. We conclude that the trial court did not abuse its discretion by excluding the evidence of the prior indecent exposure conviction.

II. The Failure of the Trial Court to Admit Evidence of the Acts Associated with the Prior Misdemeanor Convictions.

We move to defendant's claim that the trial court erred by limiting the impeachment evidence to the "fact" of the prior misdemeanor convictions, rather than admitting evidence of the "specific conduct perpetrated by the witness." The court ruled that defense counsel could question James "about the nature" of the two convictions, the dates, the code sections violated and "the description." As for Rick's prior convictions, the court obtained a stipulation that he suffered a misdemeanor conviction for battery in violation of section 242 in Lake County in 2005. Impeachment evidence of Rick's other two prior convictions — for violation of a domestic restraining order and assault on a domestic partner — was admitted without discussion or explanation of the nature of the evidence or inquiry permitted. During Rick's testimony he admitted a 2004 misdemeanor conviction of violation of a court order and a 2009 conviction for assault of a domestic partner.

Defendant complains that he was "entitled to introduce evidence of Rick's and James's conduct that resulted in their misdemeanor convictions." He points out that the critical issue in the case revolved around the jury's consideration of the defense theory —

predicated in great measure on defendant's statements to the police — that the shooting was in self-defense and the result of an accidental discharge of the gun balanced against the testimony of Rick, James, and Patrick that described both the provocation preceding the shooting and the nature of the shooting itself. The prosecution presented "no evidence that corroborated Rick's and James's testimony about the provocation or the shooting." Thus, defendant asserts that the credibility of Rick and James "was of crucial importance to the prosecutor's case." He claims that "the exclusion of specific facts of prior dishonest conduct by Rick and James left the jury with an imbalanced view of their credibility," and "gave the prosecution an unfair advantage" in the assessment of their credibility.

In accordance with *Wheeler, supra*, 4 Cal.4th 284, 293–295, specific prior acts of misdemeanor conduct bearing on a witness's veracity may be used as impeachment evidence. (See also *People v. Chavez, supra,* 84 Cal.App.4th 25, 28.) The fact of misdemeanor conviction alone, however, is not relevant to a witness's credibility; instead, "a witness's prior convictions are relevant for impeachment, if at all, only insofar as they prove criminal *conduct* from which the factfinder could infer a character inconsistent with honesty and veracity." (*Wheeler, supra*, at p. 299; see also *People v. Lopez, supra,* 129 Cal.App.4th 1508, 1522.)[2]

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[2] The court in *Wheeler* rejected the argument that misdemeanor convictions are admissible under the business or official records exceptions to the hearsay rule (Evid. Code, §§ 1271, 1280), because such a record is "competent only to prove the *act it records*," not "that the witness committed the underlying criminal conduct." (*Wheeler, supra*, 4 Cal.4th 284, 300, fn. 13; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459–1460.) The court also noted that the Legislature was not precluded from creating a hearsay exception that would allow the use of misdemeanor convictions for impeachment in criminal trials. (*Wheeler, supra*, at p. 300, fn. 14.) The Legislature responded. Evidence Code section 452.5, subdivision (b), enacted in 1996, now provides: "An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 *to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record*." This section "creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred." (*People v. Duran, supra,* at p. 1460; see also *People v. Wesson* (2006) 138 Cal.App.4th 959, 967–968.)

A. The Lack of an Objection by Defendant.

As both defendant and the Attorney General point out, the defense made no objection at trial to the limited admission of the impeachment evidence. In fact, defense counsel neither specifically sought admission of evidence of the conduct underlying the prior convictions nor challenged the court's admission of only the fact of the misdemeanor convictions to impeach the witnesses. The lack of a timely objection or specific request to admit misconduct evidence by defendant both compromises his right to consideration of the issue on appeal and impacts our review of the trial court's evidentiary ruling.

A challenge to the admission of evidence must be made at trial or is considered forfeited on appeal. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 823; *People v. Fauber* (1992) 2 Cal.4th 792, 831.) "Under Evidence Code section 353, subdivision (a), a judgment can be reversed because of an erroneous admission of evidence only if the record contains an objection both ' "timely made and so stated as to make clear the specific ground of the objection" ' or motion. [Citation.] If a defendant fails to make a timely objection on the precise ground asserted on appeal, the error is not cognizable on appeal." (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194; see also *People v. Lewis* (2008) 43 Cal.4th 415, 503.) " 'While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 666–667; see also *People v. Doolin* (2009) 45 Cal.4th 390, 438.) Here, defense counsel's presentation of impeachment evidence and failure to object to the ultimate limitation on the admission of the evidence to the prior misdemeanor convictions themselves did not alert the trial court to the basis of the challenge in this appeal.

Recognizing the impediment of forfeiture, defendant asserts that his counsel's failure to object and urge the admission of the conduct evidence constituted ineffective assistance of counsel. The principles that govern defendant's claim of "constitutionally inadequate representation are settled." (*In re Lucas* (2004) 33 Cal.4th 682, 721.) "To

establish a claim of inadequate assistance, a defendant must show counsel's representation was 'deficient' in that it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] In addition, a defendant is required to show he or she was prejudiced by counsel's deficient representation. [Citations.] In determining prejudice, we inquire whether there is a reasonable probability that, but for counsel's deficiencies, the result would have been more favorable to the defendant." (*People v. Frye, supra,* 18 Cal.4th 894, 979, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687–688.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215; see also *In re Jones* (1996) 13 Cal.4th 552, 561.)

Further, a judgment will be reversed "on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People v. Frye, supra,* 18 Cal.4th 894, 980.) "To prevail, defendant must overcome the strong presumption that counsel's actions were sound trial strategy under the circumstances prevailing at trial." (*People v. Freeman* (1994) 8 Cal.4th 450, 498.) The " 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' [Citation.]" (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1335–1336.) "Where the record contains no explanation for the challenged representation, we will reject an ineffective assistance claim unless counsel was asked to explain his performance and failed to provide an explanation, or unless there simply could be no satisfactory explanation." (*People v. King* (2010) 183 Cal.App.4th 1281, 1299; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058; *People v. Rios* (1992) 9 Cal.App.4th 692, 704.) " 'To sustain a claim of inadequate representation by reason of failure to call a witness, there must be a showing from which it can be determined whether the testimony of the alleged additional defense witness was material, necessary, or admissible, or that defense counsel did not exercise proper judgment in failing to call him.' " (*In re Noday* (1981) 125 Cal.App.3d 507, 522, quoting *People v. Hill* (1969) 70 Cal.2d 678, 690–691.) " 'Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim

of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728–729.)

We proceed to examine the propriety of the admission of the misdemeanor conduct evidence both to address the issue on the merits and to resolve defendant's associated claim of ineffective assistance of counsel. (*People v. Valli* (2010) 187 Cal.App.4th 786, 802; *People v. Reyes* (2008) 165 Cal.App.4th 426, 433–434.)

B. The Admissibility of Misdemeanor Conduct Evidence.

Evidence of the past misdemeanor *conduct* of Rick and James evincing moral turpitude was admissible for impeachment, subject to the trial court's discretion to exclude the evidence under Evidence Code section 352. (*Wheeler, supra*, 4 Cal.4th 284, 295; *People v. Duran, supra*, 97 Cal.App.4th 1448, 1459–1460.) With a specific request or objection by the defense, the trial court would have at least been required to entertain discretion to admit the conduct evidence. (*Clark, supra*, 52 Cal.4th 856, 932–933; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1514–1515.)

Without a request by defendant to admit the underlying conduct evidence or an offer of proof of its content, we do not know what the underlying conduct was, whether or what extent it would have been probative on the witnesses' veracity, the degree of prejudice associated with the witnesses' misdemeanor conduct, how defendant would have attempted to prove it, or whether he even could have ultimately done so. (See *People v. Chatman* (2006) 38 Cal.4th 344, 373.) We are also presented with the difficulty of assessing the correctness of a ruling the trial court was never asked to make. (*Ibid.*)

Even if we proceed on the assumption that the misdemeanor conduct evidence was admissible, however, we do not find that prejudicial error or ineffective assistance of counsel occurred. First, the trial court, having admitted the evidence of the convictions themselves, may have justifiably determined that the additional conduct evidence would have entailed undue prejudice and consumption of time, without probative value to the impeachment effort of the defense. On the record before us, no basis has been presented

to conclude that excluding the conduct evidence would have been an abuse of the court's broad discretion. (See *People v. Chatman, supra,* 38 Cal.4th 344, 374.)

More importantly, no prejudice to the defense resulted from the omission of the misdemeanor *conduct* evidence. The misdemeanor convictions themselves effectively accomplished the impeachment of the witnesses sought by the defense. The additional impeachment value of the conduct evidence was negligible in relation to the misdemeanor convictions already admitted. Although we agree with defendant that the jury's evaluation of the credibility of Rick and James was a critical factor at trial, we are convinced the jury would not have received a significantly different impression of their veracity even if the conduct evidence had been admitted. (*People v. Whisenhunt, supra,* 44 Cal.4th 174, 207–208.) And as we have noted, the defense otherwise thoroughly engaged in impeachment of the witnesses at trial. Finally, the evidence of defendant's commission of attempted voluntary manslaughter was quite strong, whereas the theories of self-defense and accidental shooting offered by the defendant were correspondingly weak. We conclude that counsel's failure to obtain admission of the misdemeanor conduct evidence to impeach the witnesses was harmless under the reasonable probability test of *People v. Watson* (1956) 46 Cal.2d 818, 836, or under the beyond a reasonable doubt test of *Chapman v. California* (1967) 386 U.S. 18, 23–24. (*People v. Hartsch* (2010) 49 Cal.4th 472, 497–498; *People v. Guerra* (2006) 37 Cal.4th 1067, 1144–1145; *People v. Robinson* (2005) 37 Cal.4th 592, 628; *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1094.)[3] It follows that defense counsel's failure to seek admission of the impeachment evidence was not prejudicial. (*People v. Myers* (2007) 148 Cal.App.4th 546, 554.)[4]

Accordingly, the judgment is affirmed.

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[3] We observe that "the *Strickland* 'reasonable probability' standard applies to the evaluation of a Sixth Amendment claim of ineffective assistance of counsel, even when defense counsel's alleged error involves the failure to preserve the defendant's federal constitutional rights." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008–1009.)

[4] Defendant has presented several additional claims of incompetence of counsel in a related petition for writ of habeas corpus, A133603, which we have reviewed. We deny the petition by separate order filed this date.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.