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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHENG I. CHENG,

Defendant and Appellant.

A131820

(San Mateo County
Super. Ct. No. SC057836A)

Defendant Cheng I. Cheng appeals a February 15, 2011 judgment and sentence following his jury trial acquittal of attempted murder (count 1), but conviction for assault with a deadly weapon, a knife (count 2; Pen. Code, § 245, subd. (a)(1)), and for battery causing in serious bodily injury (SBI), with use of a deadly/dangerous weapon (count 3; Pen. Code, §§ 243, subd. (d), 12022, subd. (b)). The case stems from a June 2004 knife attack on James Connell, but did not come to trial until early 2011, following long delays due to changes of counsel (*People v. Marsden* (1970) 2 Cal.3d 118), a period in which Cheng represented himself (*Faretta v. California* (1975) 422 U.S. 806), repeated competency proceedings and commitments (Pen. Code, §§ 1367-1368), and a trial continuation after prospective jurors had to be dismissed due to outbursts by Cheng. By the time of sentencing, Cheng's custody and conduct credits of 4,585 days far exceeded his four-year prison term.

Cheng's trial counsel was Jesse S. Ortiz III, and Cheng contends that Ortiz rendered constitutionally ineffective assistance by not (1) objecting to tape and transcript mention of his domestic violence against witness Roxanne Connell, and (2) not using jury

argument to attack her credibility based on her having been granted immunity. We reject the contention and affirm the judgment.

BACKGROUND

The names of the three participants in the events are potentially confusing from the trial transcripts and documentary evidence. Cheng's first name is also Cheng, but he went by the name Kevin. James Connell went by his shortened middle name, Dan, and Roxanne, known as Fang Wang at the time of the events, married Connell afterward and was known as Roxanne Connell by the time she testified. For clarity, we refer to the participants as Cheng, Dan, and Roxanne.

By the time of trial, Roxanne and Dan lived in Nevada with their five-year-old son. The People moved to take Roxanne's testimony in a conditional examination (Pen. Code, § 1335 et seq.) in October 2010, while she was in California on business. Her examination was videotaped and ultimately played for the jury at the January 2011 trial. Dan testified personally; Cheng did not take the stand. We summarize the essential accounts of each participant, noting in parentheses some of the actual or arguable inconsistencies. Roxanne and Cheng are Taiwanese born and used Mandarin interpreters.

Roxanne. The knife attack took place on June 3, 2004. Roxanne explained that she had a live-together boyfriend/girlfriend relationship with Cheng between 2001 and 2004, but met and starting dating Dan in December 2003. She was living with Dan in his Redwood City apartment by June 2004 but, after Mother's Day in May (it might have been earlier), was "deceived" by Cheng into working with him at Shangri-La, a Chinese restaurant in Middletown where she and he shared a room in a workers' dormitory.¹ She had earlier that year lived with Dan, and then had her own place, in San Mateo, where

¹ The reporter's transcript gives the spelling of the town as Middletown or, more frequently, Middleton. We use the former spelling since the place is apparently Middletown, in Lake County. The form of one early question put to Roxanne at the conditional hearing implied that it was in the Bay Area, but Roxanne often referred to the place as "up the mountain," or in "the mountains," said it was "some distance" from San Francisco, and said it took her several hours to drive back to San Francisco from there. Dan testified that it was in "the northern part of California."

Cheng stalked her and followed her around. While at the dormitory, she tried to leave Cheng, but he locked the door, beat her up twice, choked her, shook her by the arms, leaving bruises, kept her from using the phone, threatened and stabbed her with a knife, and begged her not to leave. Her “colleagues” in the dormitory heard her screams but did not call the police. (She never reported any of this before the conditional examination, but attributed this in part to her Chinese cultural need to save face and work out her own problems). She was intimate with Cheng during this time and had email contact with Dan, who found out (whether from her or another way) that she was living with Cheng.

On June 2, Roxanne succeeded in leaving Middletown, spurred by a beating that made her lose “faith” and “dignity.” Cheng again shook and bruised her, argued with her, threatened her with a knife, and tore her clothes. (Police came before she left, but she did not mention the abuse to them.) Cheng tried to block her car as she left, but she left at 9:00 p.m., without telling Cheng where she was going. (Her preliminary hearing account was that he had luggage in the car and was to ride with her to San Francisco but opted not to go and walked “ ‘aimlessly on the highway.’ ”) She drove to Dan’s Redwood City apartment, arrived around 2:00 a.m., woke Dan to briefly tell him what happened, and stayed with him the rest of the night.

After Dan went to work the next morning, Cheng appeared at the apartment door, wanting to talk with Roxanne. She was afraid to speak with him face to face (or did not want Dan to “misunderstand the situation”) and so called her friend, Sam, who arrived within 30 minutes or so with a security officer. During the wait, Cheng was crying, saying he was wrong and wanted her to come back, and passing remorseful notes under the door. Roxanne was afraid of him and, when Sam arrived, she had Sam take her to the front office and then to his car, as Cheng kept begging, and take her to Dan’s workplace in San Mateo, where she waited outside. She later phoned Dan, and they went for lunch at a Chinese restaurant in Redwood City. While there, Cheng phoned her, wanting to meet with her but not with Dan. He phoned many times until she agreed to meet him back at Dan’s apartment. Dan was not angry about this at first and promised her, as he drove them back to the apartment, that he would not get upset. (She had told police, and

testified earlier, however, that he was very angry and that she tried to grab him to calm him down.)

They arrived, pulled to the curb in front of the apartment complex, and both got out. Cheng was already there, walking toward them. Standing to one side of Roxanne while Dan stood four feet away on the other, Cheng grabbed Roxanne's left wrist and shook it, saying in Chinese, "Why are you cheating me?" (Roxanne had told police that he held her hand gently, and testified at the preliminary examination that Cheng was not mad, just depressed.) Roxanne told him to calm down and not to do that. Dan said "Let her go," and when Cheng did not, pushed him. Cheng stumbled back and landed on his backside; Dan gave Roxanne his keys and told her to go inside. She got as far as the driver's door of the truck and looked back to see Cheng holding a large knife. He held it at his waist, pointing and waving it back and forth at Dan, who was backing off. The knife was nine inches long and one and a half to two inches wide. (She had not mentioned him waving the knife before the conditional examination, and had reported that he held it pointing up, not at Dan, and that Cheng was the one backing up.) Roxanne looked away again, this time to get someone to call 911, and when she looked back, saw Dan on top of Cheng on the ground. (She told police that she pulled at Dan but that he went toward Cheng again, and then said at the preliminary examination that Dan pushed her aside when she tried to block him from Cheng, and that Cheng had asked her to call the police.) Dan had a knee pressed on the arm by which Cheng held the knife, one hand holding Cheng's other hand, and Dan's other hand on Cheng's neck. He ordered Cheng to drop the knife, wrested it from his hand, threw it aside, and got up off of Cheng, who got up and ran. Roxanne did not see Dan being struck with the knife but saw, as he told her to call police, and briefly chased after Cheng, that he was bleeding from the back of his head, one hand, and one leg.²

² Dan suffered serious knife wounds. A treating emergency physician from Stanford Hospital recounted that Dan was given morphine and a blood transfusion for four lacerations to the back of the head (up to seven centimeters long), and others to a cheek, a wrist, a thigh, the back of a knee, an ear, and the soft part of the palm under one

Extensively challenged about her present account of Dan not being upset at first and only pushing Cheng away at the start of the row, Roxanne said, of inconsistent prior accounts, that she was “incorrect,” “misspoke,” “made a mistake,” or “lie[d]” (even under oath) to protect Cheng, being “stupid,” conflicted, and unwilling that he be jailed on her account. She also said he was harassing her from jail, by phone and letters, blaming her for his jailing. Regarding her previously painting Dan as the aggressor, she said “I made it up.” (Her story of torn allegiances was impeached by the fact that, when she made many of the false statements, she was already married to Dan.)

Police officers interviewed Roxanne the day after the incident and saw and photographed bruising on her arms and neck she said Cheng had inflicted in trying to keep her from leaving Middletown.

Dan. Dan, an engineer, lived at the time of the incident in his Redwood City apartment and commuted to his engineering company in South San Jose. A progressive hereditary condition at the time rendered him nearly deaf, unable to communicate by phone unless he knew the speaker’s speech patterns, able to hear only low frequencies, and almost entirely reliant on reading lips and body language. He used corrective hearing implants by the time of trial. He had been dating Roxanne for about seven months, and she had lived off and on with him, sometimes leaving for brief periods without taking all of her belongings. He had never seen or spoken to Cheng—known to him only as Kevin—and held no ill feelings toward him, but knew of Roxanne’s tumultuous prior relationship with him, and that she was trying to end all contact with him. Around Mother’s Day, Roxanne quit one job and, as Dan understood it, went to work at a restaurant with a friend, Betty, with whom Roxanne had worked before. Dan did not know the place was in Middletown. Roxanne was gone about three weeks, during which

pinky finger. He had permanent nerve damage and, at the time of trial, no feeling for six inches around the stab wound to the back of his knee, and impaired feeling in his finger and hand.

Cheng was treated at the same hospital, had no lacerations, abrasions, contusions or acute injuries, but was unresponsive and lacked a gag reflex. He was intubated, out of caution, and diagnosed with a “closed head injury.”

time they had some text and email contact. He suspected that Cheng was there, but had no idea Roxanne was sleeping with Cheng. (He had said at the preliminary examination that he *believed* Cheng was there.)

Around midnight on June 3, Dan awoke to find Roxanne standing by his bed crying. Wearing a yellow knit shirt ripped near the neckline, she said Cheng had hurt her. Concerned but relieved that she was out of danger, Dan urged her not to worry, and said they could talk about it in the morning. They slept, and he arose early the next morning and drove to work on his motorcycle. His phone buzzed along the ride, and upon checking it later at work, he saw an automated message that told him someone had rung his apartment from the outside gate. At lunchtime, he decided to take the rest of the day off and go back to see how Roxanne was doing. When he arrived, Roxanne and her things were gone. Puzzled, Dan spoke with her by phone. She told him that Cheng had come to the apartment and tried to break the door, that she had called Sam, who came over with someone from the front office, and that she was now with Sam. Dan and she agreed to go to lunch. She came to the apartment, and they spoke with a manager at the front office about the security situation before leaving in Dan's white pickup truck. At the restaurant, Dan got one or more further calls telling him someone was at his apartment's gate. Being deaf, he figured he must have turned the phone over to Roxanne to see who it was. He could see that she was not happy as she spoke on the phone, but after the two- or three-minute conversation, Roxanne told Dan it was Cheng and that she wanted to go talk with him. Knowing of their abusive and violent past relationship, Dan's impulse was to call 911 and have the police find Cheng, but Roxanne did not want to do that. So Dan agreed to drive her back, and Roxanne warned him on the way that Cheng might touch her, or try to hug or kiss her. She told him to be calm, and Dan told her, "[T]hat's fine, if you get rid of him and he doesn't come back, that's fine."

Dan drove up and parked at the curb in front of his apartment complex. Seeing a man he assumed to be Cheng in front of the complex, Dan got out and asked Roxanne to stay inside, but she jumped out right away and, right next to the truck, engaged Cheng in a loud conversation that appeared to be mostly in Chinese (which Dan did not understand

then). Roxanne looked extremely agitated, and Cheng seemed to be pleading or begging, almost at the point of tears. About 15 seconds into the encounter, Cheng grabbed and pulled on Roxanne's left wrist with his right hand, repeatedly shouting her Chinese nickname, Xu Wei. Seeing shock on her face as she tried to pull away, Dan shouted "hands off" several times, but Cheng completely ignored him. Stepping up to Cheng, Dan pushed on his sternum with the thumb, index and middle fingers of one hand. This broke Cheng's hold on Roxanne, and he stumbled back 10 to 15 feet before tripping and falling on his rear, still facing Dan. Dan gave Roxanne his keys, nudged her toward the apartment gate, and yelled for her to go inside the complex, but she resisted, "obviously" unhappy that he had pushed Cheng. Cheng was now back on his feet, yelling in Chinese or in English something that Dan could not make out, and thumping his chest like Tarzan in an old movie. Dan turned again to ask Roxanne to go inside, and looked back to see Cheng, still 10 to 12 feet away, but now in a "back stance" (knees bent and one leg back) holding an eight- to 10-inch chef's knife in his right hand, behind his head at the shoulder, waving it at Dan and yelling.

Dan, who at 48 years old and 270 pounds at trial described himself as "old and fat," was six feet tall and 40 pounds lighter at the time of the encounter, and significantly larger than Cheng. Dan was also a black belt in tae kwon do, having trained for 17 years and taught the martial art. This enabled him to describe and demonstrate the back stance, the ensuing attacks by Cheng, and his own defensive moves with some clinical precision for the jury. Dan first put both hands in the air, palms up near his head, and yelled several times that he did not want to fight, just talk, but Cheng rushed him, trying to stab him in the chest. Dan used an "outward block" to deflect the knife arm to one side and, during this "blocking phase," deflected several more, but not with complete success. Cheng managed to cut the side of Dan's jaw, the forehead above one eye, and an ear. Dan did not feel it at first, but was aware that he was cut when he felt bleeding down his face. The ear cut came when Roxanne tried to come between the men and Dan, fearing that she would be stabbed, pushed her aside with one arm while trying to block a blow

with the other. The block was poor, letting the knife slice through his ear and through the scalp behind it.

With that injury, Dan decided, “screw it, I’m just going to take the knife from him.” He impeded the next blow by grabbing Cheng’s right forearm with his left hand, but found his grip slippery from blood. Putting his right hand on Cheng’s left shoulder, he tried to knee him in the stomach but achieved only a glancing blow, stumbled, and fell forward onto Cheng, achieving a sloppy tackle to the ground as Cheng kept “slashing wildly.” Cheng got his knife arm loose, stabbed at Dan’s throat but missed, and wound up making a slice of seven centimeters to the back of Dan’s head. Dan regained control of the knife arm, and sat on top of Cheng with his left knee on Cheng’s arm and his left hand on the wrist holding the knife. An effort to twist the knife blade out of Cheng’s hand by using a pressure point on that hand only got Dan’s right wrist and hand cut.

But after switching hands on the restrained wrist, Dan yelled repeatedly for Cheng to let go of the knife, “just let go of it,” and eventually loosened his grip by pressing his left thumb on a pressure point beneath Cheng’s trachea, above the collar bone. Tiring of the struggle and having to increase the pressure when the move did not at first work, Dan was preparing to punch him in the neck when Cheng suddenly let go. Dan picked up the knife, looked at it—rejecting a fleeting thought of using it—and threw it behind him over his shoulder. With the knife no longer a threat, Roxanne saying something about his head and pulling him to get up, and Cheng coming to after about 30 seconds and saying, “Let me go,” Dan got up and let Cheng go. Cheng stumbled 20 to 30 feet down the sidewalk and then took off running. Dan sat dazed for a moment, then pushed Roxanne aside to keep her from restraining him, and lumbered after Cheng to see where he went, Roxanne following behind him, but he realized after just a block that he could not run because there was something wrong with his left leg. He had been stabbed dead center

behind the knee. He sat down, hurt and bleeding, and Roxanne, who had some medical training, attended to him until emergency personnel arrived.³

In the hospital, police officers found Dan to be in extreme pain as he was treated and had his wounds sutured, but he managed to give an initial interview. Defense counsel exploited some differences between that account and his trial testimony, but these were mostly events in the knife attack that Dan omitted to mention at the interview (e.g., awareness of certain injuries, or throwing the knife over his shoulder), or related in what might be construed as a different order (e.g., Roxanne's effort to intervene). Another was whether he "full force ran into" Cheng during the tackle. In his testimony, however, Dan clung to the detailed, blow-by-blow account he gave at trial, dismissing differences as out of context or incomplete, and stressing that he was in great pain, feeling sick, and not in the clearest mental state at the time. He recalled being questioned but not what was said, and he had never reviewed his interview. An interviewing officer confirmed that the interview was just 20 minutes long, and designed "to get a synopsis of what occurred"—meaning major points, not all the details.

In an interview given with his then-wife Roxanne nearly five months later, on November 1, 2004, Dan first related, to an investigating officer and a deputy district attorney, details as he would relate them at trial. Roxanne said in the interview that Dan was very angry from the moment they drove up to the apartment. The officer noted inconsistencies from Roxanne's prior statements and felt that she was evasive in her answers.

Cheng. Cheng did not testify but was apprehended soon after the incident and gave a recorded statement to a police officer at the hospital, after *Miranda* admonitions

³ A reserve police officer who called 911 from his apartment saw none of the preceding fight but, from his third floor deck, saw the back of a large bald-looking man, with blood on the back of his head and on his shoulders, possibly "holding something or someone" under him. The witness's attention was drawn by the sound of a woman yelling, and he saw an Asian woman near the man screaming, "Don't, don't." But by the time the witness walked down three flights of stairs, he no longer saw the woman at all and saw the man running up the street.

(*Miranda v. Arizona* (1966) 384 U.S. 436). The jury heard the statement in court, with a transcript provided. The knife used in the attack was discovered at the crime scene, and two Safeway receipts Cheng carried on him showed that he bought the knife in Redwood City at 10:50 a.m. on the day of the attack, after buying a small paring knife at 5:15 a.m. that same morning.

Redwood City police officers, responding at 5:23 p.m. to a report of a possible stabbing, and then a report that a possible involved party was hiding at a dry cleaner, arrived at the business to find Cheng crouched down trying to hide in a corner of the building. He was shirtless and wore jeans, had blood on his face, hands, chest and arms, and held a jacket that was also covered in blood. Ordered to stand up, Cheng said, “He hit me first,” and “I want to suicide.” Asked if he had a knife, he said he “bought the knife for this yesterday” and that it was in his jacket, but a search of his jacket and other belongings revealed no knife. When handcuffed and placed in a patrol car, he said, “I want to suicide,” and as related in an officer’s report: “He told me that he told the victim three times to stay away from his girlfriend.” He said he had bought the knife that day to kill the victim. Asked if he was hurt, he replied: “That’s his blood. I tried to kill him. Now I want to die, too.” (As related by one officer, Cheng said: “No, it’s his blood. I bought the knife, knife yesterday for this. She said good-bye. Now I want to suicide myself.”) Cheng was very calm initially but began breathing heavily, hyperventilating, and complaining of head and neck pain. He was taken by ambulance to the hospital and, on the way, became unresponsive, seeming to lose consciousness.

In the *Mirandized* interview with Detective Eric Stasiak the next day at the hospital, then-32-year-old Cheng conceded buying the knives the morning of the assault but said he bought the small one (at 5:00 a.m.) because he needed it for his work in a restaurant. Of the one purchased hours later, he said: “. . . I buy the big one just want kill myself. I want to die.” His account was confused and often inconsistent, but he related that Roxanne had been his girlfriend for three years, “cheated” him, and left to be with a guy she had been calling, to “get her green card.” He spoke of “walking about 20 mile in San Francisco,” showing up at the apartment at 5:00 a.m. that morning and calling

Roxanne, who did not answer her cell phone. She was living with “this guy,” and Cheng called Roxanne, waited outside for her, “and she say this guy want come too. No problem, wanna talk can talk everybody clear.” But when the guy saw him, “he punched me” and “put a hand in my neck and put it on the floor” (*sic*). The guy punched him “first,” he said: “I did not use the knife on him. I just tell him don’t punch me anymore. I cannot do anything. I just protect myself but he keep punching me[.]”

The following exchange came when Stasiak challenged Cheng’s account: “Det: We got witnesses out there that just saw him you were grabbing her. [¶] CC: I’m not. [¶] Det: Hold on. Listen to me. . . . That you were grabbing her, okay, he pushed you, okay, and then you came at him with the knife, and you start [¶] CC: Bullshit. See you in court. Very simple. [¶] Det: He was the one that sustain a lot of injuries, he got stabbed marks all over him. He got stabbed injuries all over, all over his head, all over back. [¶] CC: No. They’re bullshit. [¶] Det: Well I mean I’ve seen him. I’ve talked with him. [¶] CC: Bullshit.”

Jury arguments. Prosecutor Christopher Feasel noted the lack of dispute that Cheng slashed Dan with the knife he had bought and that the knife was, by Cheng’s admission, for “this.” On the count 1 attempted murder, Feasel argued that Cheng’s explanation that he tried to kill Dan showed intent to kill and that, if he entertained thoughts of harming himself or Roxanne, he made his choice when he saw Dan and attacked him. Against a lesser offense of voluntary manslaughter, Feasel argued lack of sufficient provocation for a reasonable person. As to a self-defense claim raised against all three counts, Feasel argued lack of a reasonable belief in the need to defend with deadly force, and that Cheng was the aggressor in any event. These conclusions followed, he argued, despite inconsistent statements.

Defense counsel Ortiz seized on the inconsistencies to argue that Cheng came to the encounter not intent on killing anyone, but depressed, suicidal, and wanting to talk to Roxanne, and that he wielded the knife in reaction to aggression by Dan, who was angry and jealous. Ortiz painted Roxanne’s inconsistencies, in particular, as born of conflicted

allegiances to two lovers, and ultimately influenced by her marriage to Dan. Ortiz also argued for all counts, although unsuccessfully, that Cheng acted in self-defense.

DISCUSSION

“ ‘ “In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel’s performance was deficient because it ‘fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] Unless a defendant establishes the contrary, we shall presume that ‘counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.’ [Citation.] If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” ’ [Citations.]” (*People v. Salcido* (2008) 44 Cal.4th 93, 170.) “ ‘[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel’s actions,’ claims of ineffective assistance of counsel generally must be raised in a petition for writ of habeas corpus based on matters outside the record on appeal. [Citations.]” (*Id.* at p. 172.)

Pending this appeal, Cheng filed a petition for writ of habeas corpus (A135436) that offers information behind the appellate record on his ineffective assistance claim. We ordered them considered together but address only the appeal in this opinion (*People v. Burgener* (2003) 29 Cal.4th 833, 880), and separately rule on the petition.

Ortiz did very well for Cheng overall, obtaining an acquittal of the most serious charge, attempted murder, and a hung jury on the lesser offense of attempted voluntary manslaughter, which the prosecutor elected not to retry. This lends some irony, at the outset, to Cheng’s attack on the aggravated assault and assault with SBI convictions in

counts 2 and 3, which offered the jury strategically valuable alternatives to convicting him of the attempt count. Ortiz's representation also secured a hung jury on a personal-infliction-of-great-bodily-injury (GBI) enhancement to count 2 that could have added a consecutive three years to the sentence (Pen. Code, § 12022.7, subd. (a)), and which was stricken at sentencing on the People's motion. Cheng nevertheless challenges the convictions on counts 2 and 3 on grounds that Ortiz did not (1) eliminate mention of his domestic violence against Roxanne, or (2) argue to the jury that Roxanne's credibility was suspect because she was granted immunity from prosecution during her conditional examination testimony.

Factual Setting

Immunity. There were various inconsistencies in Roxanne's account. Ortiz confronted her with some of them in cross-examination at the conditional examination on October 7, 2010, before Judge Mark Forcum, and when Roxanne testified that she "may have lied about some things" at a prior proceeding (i.e., the preliminary hearing), counsel was appointed for her with the hearing continued to October 21, 2010. When she retook the stand, it was before Judge Craig Parsons, given the unavailability of Judge Forcum, and she testified under a grant of use immunity from the prosecution (Pen. Code, § 1324) for "any perjury that may have been committed by her" on the dates of her preliminary hearing testimony of December 16, 2004 and January 5, 2005.

Domestic violence. A motion filed by prosecutor Feasel for the conditional examination sought to use evidence of domestic violence by Cheng against Roxanne, noting that Roxanne first told police in this case that Cheng seemed to be the aggressor but later told a defense investigator, and testified at the preliminary hearing, that it seemed like Dan was more aggressive and Cheng was defending himself. She had also testified that she was abused by Cheng in their prior relationship and had told Dan about the abuse. Feasel sought to use the abuse to demonstrate "bias in [Roxanne's] former and anticipated testimony. Moreover, should [Roxanne] testify as anticipated on behalf of defendant, the People would seek to introduce expert testimony . . . regarding 'Intimate Partner Battering' to explain the change in her statements." The cited source information

was an October 2002 report by Roxanne who, when living with Cheng in San Gabriel, told sheriff's deputies that Cheng tore her clothes and hit her because he thought she was cheating on him, punched her in the eye the day before and, a year and a half earlier, stabbed her in the stomach. Judge Forcum heard argument before Roxanne testified. Ortiz objected that the evidence was not relevant, and Feasel reiterated points from his motion, stressing the expert testimony. Judge Forcum said he was troubled by using domestic abuse earlier than the abuse just before the charged altercation, which did shed light on how "the whole incident may have evolved." So he allowed inquiry into that abuse but reserved ruling on earlier abuse, saying: "What I'll do is until I hear from this expert and what foundation will be laid on that I'm not going to make a ruling about whether that [earlier abuse] will actually come in or not."

Direct examination of Roxanne proceeded on that day (October 7, 2010) consistent with the ruling (and without expert testimony), except that Roxanne described numerous acts of abuse without specifying when they occurred and stated, in describing Cheng's efforts in Middletown to keep her from leaving, that "earlier . . . in the dormitory he used a knife in trying to stop me." Feasel reacted by guiding her back to the day before the charged incident. Then on cross-examination, when Ortiz itemized Roxanne's accounts of stabbing, choking, hitting, and grabbing her and asked, "When did all this supposedly happen?" Roxanne once again generalized. She said, "Many times, so many times," adding: "[S]ometimes it was in front of my colleagues, sometimes not. At least he beat me up twice while in the dormitory." Ortiz reacted by asking if she had ever called the police over any of those incidents, and Roxanne said her "colleagues" in the dormitory had wanted them to stop, but did not call the police. She added: "He beat me in a room, in our room, and everybody could hear my screaming. I wanted to leave and he locked the door and beat me up. And some colleagues knocked on the door and asked him to open the door, and he didn't. And he said if you want to go out of this door take all of your clothes off and walk out." To Ortiz's next question, "Are you making this up, Ms. Connell?" Roxanne answered that it was the truth. Pressed as to why she never reported the abuse, Roxanne explained that she was "really stupid" and "trying to

protect” Cheng from going to prison. Five transcript pages later, after grilling by Ortiz on discrepancies in her accounts, Roxanne conceded that she might have lied in prior proceedings, and the day’s session ended with a continuance and appointment of counsel for her.

After further examination of Roxanne at the continued hearing on October 21, 2010, Feasel asked Judge Parsons to rule on his earlier motion and allow examination about the early abuse, noting Judge Forcum’s preliminary ruling. Reiterating a ruling made in chambers that morning, however, Judge Parsons declined to consider the matter, reasoning that it was more properly considered by Judge Forcum. The record contains no mention of the matter at the ensuing trial before Judge Forcum, perhaps because Judge Parsons’s ruling left the early abuse unexplored in Roxanne’s testimony and she was no longer available as a witness.

Cheng’s appeal claim of ineffective assistance does not fault Ortiz’s conditional examination of Roxanne but, given that Ortiz knew of Judge Forcum’s ruling, faults his failure to object to the inclusion of references to possible Los Angeles domestic abuse in the statement he gave to Detective Eric Stasiak at the hospital, the day after the charged incident. Jurors heard an audiotape, and had a transcript, that included this passage, near the end: “Det: OK. What about the time, what about the time you stabbed her in the stomach? [¶] CC: No. I did not. [¶] Det: You never stabbed her? [¶] CC: No. [¶] Det: How about the time he [*sic*] hit her in the head with a bottle. [¶] CC: What bottle? [¶] Det: Down in Alhambra. [¶] CC: What in Alhambra? [¶] Det: When you lived down in LA? [¶] CC: When she go do the hooker one night come back, beat old lady. I (unintelligible) yelled at her. I just scared of her. I’m nut.”

Analysis

Failures to object to particular evidence or use a particular jury argument are quintessentially tactical matters that rarely show ineffective assistance. “ ‘[C]ompetent counsel may often choose,’ ” for example, “ ‘to forgo even a valid objection. “[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury’s apparent reaction to the proceedings. The choice of when to object is inherently a

matter of trial tactics not ordinarily reviewable on appeal.” [Citation.]’ [Citations.]” (*People v. Farnam* (2002) 28 Cal.4th 107, 202; *People v. Lopez* (2008) 42 Cal.4th 960, 972.) “Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’ [Citations.] The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” (*Harrington v. Richter* (2011) 562 U.S. ___, 131 S.Ct. 770, 788.) “There are . . . countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.’ [Citation.] Rare are the situations in which the ‘wide latitude counsel must have in making tactical decisions’ will be limited to any one technique or approach. [Citation.]” (*Id.* at pp. 788-789.)

Since Ortiz was not asked why he ultimately did not object to inclusion of the prior abuse questions, we may find ineffective assistance only if there could be no tactical basis for the inaction, and we cannot say there was such. Following his October objections before Judge Forcum, Ortiz had successfully elicited many inconsistencies from Roxanne about her more recent abuse. This provided vital impeachment of her as unreliable or worse, impeachment that Ortiz would in fact drive home to great advantage. Objecting to the Los Angeles abuse could have seemed risky. It could have spurred prosecutor Feasel to remind Judge Forcum of his October 2010 ruling and to hear further argument on having the jury hear an expert explanation for the inconsistencies via the proposed testimony on intimate partner battering. Ortiz could also reasonably rely on the fact that Cheng, in his statement, denied the stomach-stabbing incident outright and gave a noncommittal reply about the “beer bottle” throwing, answering: “When she go do the hooker one night come back, beat old lady. I (unintelligible) yelled at her. I just scared of her. I’m nut.” To the extent that jurors saw that vagueness as a concession of throwing the bottle, this would be cumulative of other evidence showing Cheng committing domestic abuse; on the other hand, the interview excerpt uniquely painted

Roxanne as a hooker, innuendo assisting in his strategy to discredit Roxanne. And while we cannot assess the witness's demeanor or character, or assess juror reactions, as Ortiz could, the record suggests that Roxanne was neither trust-inspiring nor likeable.

Prosecutor Feasel conceded in early jury argument, "Roxanne's statements, I would submit to you that she was a little all over the place," and after Ortiz's argument criticized Roxanne's veracity and motives, Feasel asked jurors not to view the trial as a "popularity contest" between witnesses, urging: "You don't have to like Ms. Wang, now Ms. Connell. You don't have to agree with any of the stuff that she did about seeing the defendant and seeing Mr. Connell at the same time. You don't have to like any of that."

~(RT 4778, 4805-4806)~ In short, rational tactical bases defeat the claim of ineffective assistance (*People v. Vines* (2011) 51 Cal.4th 830, 876), even if competent lawyers might have disagreed with those tactical decisions (*In re Scott* (2003) 29 Cal.4th 783, 829).

The same is true of failure to argue impeachment from Roxanne having been granted immunity. That further avenue of impeachment could have seemed distracting and less productive than the biases and inconsistencies Ortiz actually exploited in his jury arguments. This was not an instance where defense counsel could credibly argue that the witness was herself a cohort responsible for the crime who, after immunity, was eager to hang responsibility on the defendant. No reasonable construction of the evidence here implicated Roxanne as a knife-wielding assailant. Immunity had been granted, rather, as insulation from a possible perjury charge because she conceded having lied at the prior, preliminary hearing. Ortiz thoroughly exploited her biases and lies *directly*. The jury was informed, by stipulation, that Roxanne testified under a grant of immunity after saying she had lied previously, and Ortiz surely knew that they would be instructed by the court, under CALCRIM No. 226, that one factor to consider in assessing a witness's credibility was, "Was the witness promised immunity or leniency in exchange for his or her testimony?"

Nor do the claimed failures, even in combination, show prejudice. "With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.] It is not enough ‘to show that the errors had some conceivable affect on the outcome of the proceedings.’ [Citation.] Counsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’ [Citation.]” (*Harrington v. Richter, supra*, 131 S.Ct. at pp. 787-788.) Cheng’s defense to the charges in counts 2 and 3 was not to deny attacking and injuring Dan with the knife, but that he did so in self-defense. There is no particular indication that self-defense was a close issue for jurors that would have been altered by the absence of Ortiz’s omissions. Also, the victim’s account was far more internally consistent than Roxanne’s, and did not support self-defense.

Ineffective assistance of counsel is not shown.

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.