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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.

KEVIN SCOTT WALKER,

Defendant and Appellant.

A133351

(Humboldt County
Super. Ct. No. CR1005785)

Defendant was convicted following a jury trial of forcible rape in concert (Pen. Code, § 264.1) and forcible oral copulation in concert (Pen. Code, § 288a, subd. (d)(1)). He complains in this appeal that the prosecutor committed misconduct, and he was improperly denied a hearing on his motion for substitution of counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). We conclude that under the circumstances no *Marsden* hearing was required, and no prejudicial prosecutorial misconduct was committed. We therefore affirm the judgment.

STATEMENT OF FACTS

The victim, Jane Doe,¹ testified that on the evening of July 5, 2010, she went with her boyfriend Ben Schultz to the town plaza in Arcata to listen to music. She had smoked marijuana earlier that day, but was “thinking clearly” when they reached the plaza. Doe

¹ As the parties did at trial, we will refer to the victim as Jane Doe.

also took some sips from a bottle of rum that was passed around among a group of people at the concert, but did not feel impaired.

Doe became enraged when Schultz told someone else at the concert that she “was some whore he picked up off the side of the road,” and attempted to hit him in the face with her elbow. Defendant, who was present nearby with “another gentleman” when Doe began to “fight” with her boyfriend, grabbed her arm to prevent her from striking Schultz. Schultz left, whereupon defendant and his friend agreed to accompany Doe to the bus stop at her request. Defendant introduced himself as “Kevin.”

Doe was “upset” and without money for bus fare, so before they reached the bus station she agreed to “smoke a bowl” of marijuana with defendant and his friend. They walked from the plaza to a wooded area, where Doe fell or was shoved, and “busted” her knee. Doe “went black” temporarily. When Doe regained “consciousness” she realized she was on her back with defendant “raping” her, while his friend was forcing her “to perform oral sex on him.”

After the assault ceased, Doe grabbed her clothes, put them on, and “ran out of the trees,” into “the middle of a baseball field.” Witnesses at the baseball field testified that Doe “came out of the woods,” very upset, crying, shaking and hyperventilating. She “looked very disheveled,” her tank top was ripped, her hair was “messed up,” and the top button of her pants was “undone.” Doe exclaimed that she “was just raped” by “this guy and his friend,” and needed to call her father. Two of the witnesses discovered defendant, “who was trying to tuck [himself] under a log” in the area behind the softball dugouts from which Doe came. One of the witnesses told defendant that “[s]ome girl just said somebody back here raped her. Is it you?” Defendant “didn’t really say anything” in response, but instead “kind of rolled over,” like he “was falling back asleep” or “passing out.”

Someone called 911 for Doe, and Arcata police officers arrived at the baseball field parking lot within “a couple minutes.” Doe appeared “extremely distraught and crying;” her clothes were messy, and one of her pant legs was ripped. She gave a statement to the police before she was taken to the hospital. Doe mentioned she was

“fuzzy in her memory,” but stated that she was “pushed over and forcibly raped” by two men.

The police were directed by bystanders to the wooded area near the baseball diamond where defendant was lying on his side, unresponsive. Police officers testified that defendant was uncooperative and did not make a statement when told that he was under arrest for rape. He subsequently became very combative when medical personnel attempted to treat him. As a result he was handcuffed and placed on a gurney.

The victim’s blue underwear was found on the ground in a small dirt clearing in the wooded area. Photographs were taken of her injured knee at the scene.

Doe was transported to a hospital emergency room, where a sexual assault examination was performed. She was crying intermittently, but cooperative. Doe reported that she had been “thrown” to the ground by two men, one named Kevin, who then removed her clothes and committed acts of forcible rape and oral copulation. Her hair and clothes were dirty and her pants were ripped at the knee. The victim’s injuries were cataloged in the sexual assault report: a scrape and blood on one knee, and redness on both knees; a small scrape to the abdomen; redness on the back of her left calf; redness on the right side of her mouth; irritation and blunt object trauma to the vaginal area; her cervix, ovaries, and internal abdomen were tender. Doe’s injuries were consistent with her report of forcible rape. Doe also disclosed that “she had consensual intercourse the day prior,” and her partner wore a condom.

Defendant was taken into the hospital on a gurney for a “field show-up.” Doe said she was “175 percent sure that’s him.”

Forensic evidence was collected and tested. Doe had a blood-alcohol level of .09 percent, which would have been appreciably higher, probably 0.13 or 0.14 percent, two hours earlier, when the incident occurred. Defendant’s blood-alcohol level when taken at the hospital was 0.29 percent. A “penis and pubic area swab” taken from defendant revealed a mixture of male and female DNA, with “strong evidence” that Doe was the source of the female DNA. The “vaginal swab” from Doe contained “sperm DNA” that did not match defendant.

Defendant testified in his defense that he and Doe met at the concert, talked, and “became friendly.” Doe was “dancing to music” and “cool.” He and Doe, along with others in a small group, drank from a liquor that was passed around, until someone else asked if they would “like to smoke some pot.” Doe became “involved in a confrontation” with another male, apparently her boyfriend, so she and defendant left the plaza with two others to “smoke weed” elsewhere. When they reached a “discarded campsite” in the wooded area, they smoked marijuana and the two others left. He and Doe then started “making out.” As Doe began to perform oral sex on defendant he suddenly became severely nauseated, leaned over on his side, and told her to “hold on.” Doe apparently thought defendant “wasn’t attracted to her,” so she angrily yelled insults at him. Defendant “growled at her,” and told her, “Get away from me you fucking bitch.” Defendant then closed his eyes and Doe left. Defendant’s next conscious moment occurred as the police were waking him.

DISCUSSION

I. The Denial of Defendant’s Motion for Substitution of Counsel.

Defendant argues that the trial court erred by failing to conduct an adequate inquiry into his request for substitution of counsel during presentation of the defense case at trial. Defendant made two motions pursuant to *Marsden, supra*, 2 Cal.3d 118, to relieve his appointed counsel before trial: he withdrew the first motion when a new attorney was appointed for him; the second motion was denied following a hearing. Immediately before defendant was scheduled to testify, out of the presence of the jury the parties discussed the court’s proposal to sanitize a prior assault conviction admitted for impeachment to delete the “details” of the conviction and limit the reference to a “crime of moral turpitude.” Defendant interjected: “ I’m filing a Marsden motion right now. I’m firing him right now. I don’t want him representing me anymore and I would like to know exactly what moral turpitude is.” The trial court responded, “we’re not going to take up a Marsden motion at this juncture, ten to nine in the morning ahead of closing argument.” The court added: “So what we’ll be doing is asking the jury in and you’re going to have the right to testify if you choose, or not to testify. That’s perfectly fine.

But we're not going to stop at this juncture and conduct a Marsden hearing, as you would term it, and fire the attorney. [¶] So we'll take that up after, but not at this point."²

Defendant complains that the court denied the *Marsden* motion without granting him "the opportunity to explain the basis for his complaint." Defendant maintains that the court's failure to conduct an inquiry to "fully explore" the reasons for his "dissatisfaction with the current appointed attorney" requires reversal of the judgment, "or, at a minimum," a remand to the trial court to conduct a hearing on his *Marsden* motion, and, if necessary, appointment of "new counsel to make any needed motions or applications."

The " "contours of the rule set forth in *Marsden, supra*, 2 Cal.3d 118," " " are " "well settled. " "When a defendant seeks to discharge his appointed counsel and substitute another attorney, *and asserts inadequate representation*, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." " [Citation.]" " [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 878, italics added.) "*Marsden* imposes four requirements" on the trial court: "First, if 'defendant complains about the adequacy of appointed counsel,' the trial court has the duty to 'permit [him or her] to articulate his [or her] causes of dissatisfaction and, if any of them *suggest* ineffective assistance, to *conduct an inquiry* sufficient to ascertain whether counsel is in fact rendering effective assistance.' [Citations.]" (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367.)

At " "any stage of the trial" " a criminal defendant " "must be given the opportunity to state reasons for a request for new counsel.' [Citation.]" (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814.) In ruling on a *Marsden* motion, our Supreme Court stated "the

² The court also advised defendant to speak with his attorney on the matter.

trial court must apply the same standard it would apply in ruling on a preconviction *Marsden* motion: substitute counsel should be appointed when, ‘in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].’ ” (*People v. Johnson* (2009) 47 Cal.4th 668, 673, fn. 2, quoting from *People v. Smith* (1993) 6 Cal.4th 684, 696.)

“After hearing from the defendant, a trial court is within its discretion in denying the motion unless the defendant establishes substantial impairment of his right to counsel. [Citation.] On appeal we review the denial for an abuse of discretion.” (*People v. Vera* (2004) 122 Cal.App.4th 970, 979.)

Here, defendant unequivocally expressed that he wanted to “fire” his attorney. What he did not do is indicate in any way that his appointed attorney was affording him inadequate representation. Nor did defendant even mention that he was dissatisfied with counsel. “With a *Marsden* motion, the defendant is seeking a new lawyer on the ground his or her current attorney is providing ineffective assistance.” (*People v. Percelle* (2005) 126 Cal.App.4th 164, 174.) “*Marsden* and its progeny require that when a defendant complains about the adequacy of appointed counsel, the trial court permit the defendant to articulate his causes of dissatisfaction and, if any of them suggest ineffective assistance, to conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance. (*Marsden, supra*, 2 Cal.3d at pp. 123–124; *People v. Crandell* (1988) 46 Cal.3d 833, 854 [251 Cal.Rptr. 227, 760 P.2d 423], abrogated on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365 [121 Cal.Rptr.2d 580, 48 P.3d 1136].) If the defendant states facts sufficient to raise a question about counsel’s effectiveness, the court must question counsel as necessary to ascertain their veracity. (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1219 [10 Cal.Rptr.2d 358]; *People v.*

Penrod (1980) 112 Cal.App.3d 738, 747 [169 Cal.Rptr. 533].)” (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695.)

The first of the four *Marsden* requirements is that, “ ‘if “defendant complains about the adequacy of appointed counsel,” the trial court has the duty to “permit [him or her] to articulate his [or her] causes of dissatisfaction and, if any of them suggest ineffective assistance, to conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance.” . . . ’ [Citation.]” (*People v. Reed* (2010) 183 Cal.App.4th 1137, 1146, italics added.) We “ ‘require an *indigent* criminal defendant who is seeking to substitute one *appointed* attorney for another to demonstrate either that the first appointed attorney is providing inadequate representation [citation], or that he and the attorney are embroiled in irreconcilable conflict’ ” that has compromised the right to effective representation. (*People v. Hernandez* (2006) 139 Cal.App.4th 101, 107–108, citing *People v. Ortiz* (1990) 51 Cal.3d 975, 983–984.)

Defendant made no complaint that his appointed counsel was inadequate. Defendant’s proclamation that he was “firing” his attorney did not necessitate a *Marsden* hearing absent an accompanying grievance that his counsel was in some way ineffective. The focus and nature of a *Marsden* motion is on the disruption of the attorney-client relationship to the point of an irreconcilable conflict and accompanying inadequacy of representation afforded by appointed counsel. (*People v. Smith, supra*, 6 Cal.4th 684, 694–695.) A defendant is not entitled to substitute an appointed attorney at will, and “a trial court is not bound to accede to a request for substitute counsel unless the defendant makes a ‘ ‘ ‘sufficient showing . . . that the right to the assistance of counsel would be substantially impaired’ ” ’ if the original attorney continued to represent the defendant. [Citation.]” (*People v. Sanchez* (2011) 53 Cal.4th 80, 87.) The trial court’s “duty to conduct an inquiry arises only when the defendant ‘ ‘ ‘asserts directly or by implication that his counsel’s performance has been so inadequate as to deny him his constitutional right to effective counsel.’ ” [Citation.]’ [Citation.]” (*People v. Carter* (2010) 182 Cal.App.4th 522, 527–528.)

As we read the record in the present case, defendant expressed confusion and displeasure with the “moral turpitude” delineation attached to admission of his prior conviction, and informed the court that he “pled to an assault,” not “to any sexual charges.” He made no reference to lack of competent representation. The court suggested that defendant speak with his attorney about the issue, and any *Marsden* inquiry would be discussed thereafter. Defendant did not subsequently reiterate his request for a new attorney, and never offered any claim that his appointed counsel was inadequate. Therefore, the court did not err by declining to conduct a *Marsden* hearing.

II. The References to Defendant’s Silence.

Defendant complains of several acts of prosecutorial misconduct, the first of which is that during the presentation of evidence and closing argument the prosecutor improperly referred to his “post-arrest and pre-trial silence” in violation of *Doyle v. Ohio* (1976) 426 U.S. 610, 618–619 (*Doyle*). Defendant specifically points to the prosecutor’s questioning of two officers who were present at the scene of his arrest, the “multiple inquiries” by the prosecutor during his cross-examination “concerning his pre-trial silence following his invocation of *Miranda*’s protections,” and a statement during closing argument that implicated his silence.

We review all of the claimed instances of misconduct in accordance with the “ ‘applicable federal and state standards regarding prosecutorial misconduct’ ” that are “ ‘well established. “ ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” [Citation.]’ [Citation.] ‘[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citation.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 960; see also *People v. Prieto* (2003) 30

Cal.4th 226, 260.) “We note that, as will be applicable to many of defendant’s assertions of misconduct, ‘[a]lthough it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.’ [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.)

A. *The Failure of Defendant to Object.*

We first confront the Attorney General’s contention that defendant forfeited his assertions of *Doyle* error on appeal by failing to object in the trial court. Our review of the record discloses that the defense did not object to any of the claimed instances of misconduct at trial. “Generally, ‘ ‘a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.’ ” [Citation.]” (*People v. Avila* (2006) 38 Cal.4th 491, 609.) “[A] reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial.” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215; see also *People v. Scott* (1997) 15 Cal.4th 1188, 1217; *People v. Davis* (1995) 10 Cal.4th 463, 537.) “ ‘To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.’ ” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130, quoting *People v. Price* (1991) 1 Cal.4th 324, 447; see also *People v. Arias* (1996) 13 Cal.4th 92, 159.) Specifically, claims of *Doyle* error are forfeited by lack of an objection on that ground in the trial court. (*People v. Tate* (2010) 49 Cal.4th 635, 692.)

Despite the lack of objections from the defense at trial, to resolve defendant’s assertion that any prejudice from the remark could not readily have been cured by the court’s intervention, and to respond to his additional contention that counsel was ineffective for failing to object, we proceed to the merits of the individual claims of misconduct. (See *People v. Turner* (2004) 34 Cal.4th 406, 431; *People v. Lucas* (1995) 12 Cal.4th 415, 457; *People v. Hawkins* (1995) 10 Cal.4th 920, 948–949; *People v. Clark* (1993) 5 Cal.4th 950, 1013.)

B. The Questioning of Officers at the Scene of Defendant's Apprehension.

Two officers who responded to the scene of defendant's arrest offered testimony at trial. Officer Billy Kijisriopas testified that he advised defendant of his arrest on rape charges. He was asked by the prosecution if defendant made "any statements at that time," and responded, "I don't recall." During cross-examination by defense counsel Officer Kijisriopas added that defendant was unresponsive and did not say "anything at all." Then during redirect questioning the prosecutor elicited testimony from the officer that defendant was uncooperative. The prosecutor also asked if the officer was "ever able to get a statement" from defendant, and the officer responded that he did not.

Officer Chris Wilson similarly testified that defendant, although conscious, was unresponsive to questions, but became combative when treated by medical staff. When asked by the prosecutor, Officer Wilson testified that defendant yelled at the emergency personnel, but did not make any statements.

We assess the prosecutor's questions and the officers' testimony in light of the decision in *Doyle*, where "the United States Supreme Court held that it was a violation of due process and fundamental fairness to use a defendant's postarrest silence following *Miranda*³ warnings to impeach the defendant's trial testimony. (*Doyle, supra*, 426 U.S. at pp. 617–618.)" (*People v. Collins* (2010) 49 Cal.4th 175, 203; see also *People v. Earp* (1999) 20 Cal.4th 826, 856.) " 'Post-arrest silence also may not be used against a defendant at trial in order to imply guilt from that silence.' [Citation.]" (*Stone v. United States* (6th Cir. 2007) 258 Fed.Appx. 784, 787; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.) "The Supreme Court has explained the rationale of this holding in these terms: '[The] use of silence for impeachment [is] fundamentally unfair . . . because "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental

³ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

C. The Cross-Examination of Defendant.

We next direct our attention to the cross-examination of defendant, during which the prosecutor inquired if he was conscious when he was arrested by the officers for rape. After defendant answered that he was, the prosecutor asked: “And at that point you didn’t deny your culpability? You didn’t protest your arrest; is that true?” Defendant responded that he did not “understand” his arrest, and the prosecutor asked, “Did you tell the officer that?” Defendant commented that the officers were not asking him any questions. He was also asked if, a year after the crime, “this is the first time you’ve told anybody about this version of events?” Defendant testified that he “discussed it” with his attorney, but the question and his answer were stricken upon objection by defense counsel.⁴

We agree that the prosecutor violated the principles of *Doyle* by asking defendant if he protested his arrest or denied his culpability to the officers. The inquiry during cross-examination into defendant’s failure to protest his arrest or deny his guilt was designed to impeach his explanation of events offered subsequently at trial, or suggest he did not discuss an innocent explanation for his incriminating presence at the crime scene – or, for that matter, any other facts related to the case – under circumstances in which he may have been expected to do so. (*Doyle, supra*, 426 U.S. 610, 617–618.)

D. The Prosecutor’s Closing Argument.

Defendant asserts that the prosecutor also impermissibly remarked on his silence during closing argument by stating, when comparing the credibility of defendant and the victim: “Let’s be frank, the charges facing Mr. Walker are indeed serious. Mr. Walker has had a year to consider his testimony and Mr. Walker’s liberty is at stake. Mr. Walker, who is already a dubious moral character, has everything to gain and nothing to lose by coming into court and feeding you a version of events where he is the real victim.” Defendant claims that this “argument violated *Doyle* by telling the jury that an

⁴ The prosecutor withdrew a question directed at defendant’s meeting with a police officer the day after his arrest.

innocent person is not silent before trial; an innocent person tells his story from the beginning to the police.”

We find that the prosecutor’s argument did not violate *Doyle*. The prosecutor’s comment on defendant’s opportunity to consider his testimony, when evaluated in context, did not encourage the jury to speculate that his prior silence exhibited consciousness of guilt or compromised the credibility of his testimony at trial. The prosecutor merely maintained that defendant had both the opportunity and a motive to concoct a version of the incident favorable to him.

E. Prejudice.

We turn our focus to an examination of the prejudicial impact of the single instance of misconduct that occurred during the cross-examination of defendant. The test of prejudice is the standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24: we must reverse the judgment unless beyond a reasonable doubt the error complained of did not contribute to the verdict. (*United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1163; *People v. Waldie* (2009) 173 Cal.App.4th 358, 367 (*Waldie*); *People v. Champion* (2005) 134 Cal.App.4th 1440, 1453.) “ ‘To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.’ [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is ‘whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.’ [Citation.]” (*People v. Neal* (2003) 31 Cal.4th 63, 86.) “ ‘When deciding whether a prosecutor’s reference to a defendant’s post-arrest silence was prejudicial, this court will consider the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant’s guilt.’ [Citation.]” (*United States v. Lopez* (9th Cir. 2007) 500 F.3d 840, 845.)

We conclude that the reference to a defendant’s post-arrest silence during his cross-examination was not prejudicial to him. The inquiry into defendant’s failure to deny his guilt or contest his arrest was brief and inconsequential. Defendant explained

that he had just awakened and was still feeling unwell. He did not understand what was happening. He added that he was not asked any questions by the officers. Thus, the jury was given a very plausible explanation for defendant's failure to offer an innocent account of the incident when he was arrested. The prosecutor did not, either through other evidence or argument, stress that defendant's failure to speak to the officers exhibited his guilt or rendered implausible his testimonial account of his interaction with the victim.

The trial court's instructions did not exacerbate the effect of the error. The jury was not directed to draw an inference of guilt from defendant's silence. (*People v. Medina* (1990) 51 Cal.3d 870, 890–891.) While the trial court gave an instruction that authorized the jury to consider evidence of an adoptive admission (CALCRIM No. 357), the focus of the instruction was on defendant's failure to deny that he raped the victim when questioned by a third party who found him hiding under a log following the assault, not any invocation of the right to remain silent when he was confronted by the officers. Further, the adoptive admission instruction directed the jury to consider defendant's silence an admission of guilt only if four requisite elements were present.

In light of the context of the inquiry into defendant's silence, along with his testimony in response to the prosecutor's inquiry that he did not understand his arrest, was still "not feeling well at all," and the officers were not asking him questions, we think reliance by the jury on defendant's silence for any purpose was extremely unlikely. Finally, the evidence of defendant's guilt was formidable, particularly in light of the victim's injuries and the remaining physical evidence, and was not based in the least on his failure to provide an innocent explanation of the charged crimes when he was arrested. In contrast, defendant's account of the incident inherently lacked credibility for reasons that also did not at all relate to the reference to his silence.

In view of the nature of the *Doyle* error, the prosecutor's argument, the instructions, and the totality of the evidence, we conclude that beyond a reasonable doubt the admission of evidence of defendant's silence did not influence the jury verdict. (See *United States v. Lopez, supra*, 500 F.3d 840, 846; *People v. Delgado* (2010) 181

Cal.App.4th 839, 854; *Waldie, supra*, 173 Cal.App.4th 358, 367.) Therefore, the prosecutorial misconduct based on violation of the *Doyle* rule was harmless error, and we find no prejudicial incompetence of counsel. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

III. The Prosecutor's Reference to the Victim.

Defendant claims that two other instances of misconduct occurred during closing argument. First, he complains of the prosecutor's statement: "I hope that none of us learn how it feels as a victim to come to court and be judged. To sit up on the witness stand and talk about very personal details before a judge, before a defense attorney, before a prosecutor, and before fourteen members of the community who are strangers to you." Defendant maintains that the comment contravened the "'Golden Rule' argument, where the prosecutor asks the jury to put themselves in the place of the victim during the crime."⁵

"'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' [Citations.]" (*People v. Redd* (2010) 48 Cal.4th 691, 742–743.) "It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.) Specifically, "'a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim.'" [Citations.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 969–970.) "Our Supreme Court has never departed from the opinion that 'During the guilt phase of a capital trial, it is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim. "We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective

⁵ Again, defendant waived this issue by failing to preserve it by an objection at trial. (*People v. Stanley* (2006) 39 Cal.4th 913, 959.)

determination of guilt.” ’ [Citations.]” (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1192.)

Here, the prosecutor did not ask the jury to feel sympathy for Doe, or view the crimes through her eyes. Rather, the context of the argument was a response to defense counsel’s efforts to portray the victim as distraught due to the directly preceding events at the concert, sexually aggressive, and vindictive, and thus inclined to fabrication or lack of credibility. The prosecutor argued that in evaluating Doe’s testimony, the jurors should consider her understandable emotional state during and immediately after the assault, and on the witness stand. This was not an appeal to the jurors’ sympathy, or an attack on defense counsel’s integrity, but rather argument associated with the evidence, and a permissible assertion directed at bolstering the victim’s credibility. (See *People v. Lopez, supra*, 42 Cal.4th 960, 968–970.) We perceive no impropriety in the argument.

IV. The Prosecutor’s Statement to the Jury to Take a Rapist Off the Streets.

The prosecutor also argued: “Kevin Walker, who also aided and abetted his compatriot, was the rapist. You have this opportunity as jurors and members of the community to do two things, tell the rape victims that it’s okay to come forward and to take a rapist off of the streets of Humboldt County.” Defendant argues that the prosecutor’s appeal to the jury to “protect both the community and future rape victims, constitutes an inflammatory appeal to the jury’s passions,” and a request to “convict for reasons of fear and retribution,” rather than “based on the evidence presented at trial.”

An appeal to the jurors’ fear at the guilt phase of trial is prosecutorial misconduct. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) Further, a prosecutor should not refer to facts not in evidence unless they are matters of common knowledge or drawn from common experience. (*People v. Hill* (1998) 17 Cal.4th 800, 823.) We also recognize that a prosecutor should not encourage the jury to evaluate the case based on an emotional reaction to a societal problem rather than on the evidence. (See *United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252, 1256–1257; *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149–1150.)

However, a prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence; only improper remarks, so egregious as to render the entire trial unfair, violate the federal Constitution. (*People v. Ledesma* (2006) 39 Cal.4th 641, 726; *People v. Navarette* (2003) 30 Cal.4th 458, 506.) A comment on the danger to the community created by criminal conduct and a reminder to the jury of its important role in the criminal justice system is not improper as long as the prosecutor does not urge the jury to find the defendant guilty based on community sentiment or bias or as a means to “incite the jury against defendant.” (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 513.) In *Adanandus* the court concluded that the “prosecution’s references to the idea of restoring law and order to the community were an appeal for the jury to take its duty seriously, rather than efforts to incite the jury against defendant. Thus, they were not misconduct.” (*Ibid.*)

Similarly, the prosecutor’s remarks in the present case were not reprehensible, provocative or deceptive, and did not invite the jury to consider a speculative matter beyond the evidence. The supplication to remove defendant from the streets – that is, to convict him – was made in the course of describing the crime and injuries to Doe, along with her demeanor following the assault. As we read the comment, the prosecutor was attempting to persuade the jurors of the importance of convicting defendant based on the evidence, not seeking to incite the passion and prejudice of the jury. No misconduct was committed during closing argument.

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.