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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

LINDA TAMMY GABALDON,

Defendant and Appellant.

C076944

(Super. Ct. No. 13F02595)

A jury convicted defendant Linda Gabaldon of murdering her roommate, and former girlfriend, Rebecca Brau. Prior to trial, the trial court ruled three of defendant's prior felony convictions could be used to impeach her credibility, but the convictions would be referred to only as felony crimes of moral turpitude without mention of the specific offenses. The trial court then modified its ruling to provide that information about the specific offenses would be admitted if defendant's expert considered the specific felonies as part of the basis of her opinion.

Defendant appeals her conviction contending: (1) the prosecutor engaged in misconduct by violating the trial court's ruling on the use of her prior felony convictions;

and (2) her trial attorney provided ineffective assistance of counsel when he failed to adhere to the trial court's ruling regarding her prior convictions and failed to object to the prosecutor's misconduct as to cross-examination on those convictions. We find defendant forfeited the claim of prosecutorial misconduct by failing to object. We also conclude there was a reasonable tactical explanation for trial counsel's decision to specify the nature of defendant's prior convictions on direct examination and, similarly, for not objecting to the prosecutor's cross-examination about those convictions. Accordingly, we affirm the judgment.

### **I. PROCEDURAL HISTORY**

An information charged defendant with first degree murder. (Pen. Code, § 187, subd. (a).)<sup>1</sup> The information also alleged defendant had intentionally and personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and had a prior strike conviction (§ 667, subds. (b)-(i)).

A jury found defendant guilty of first degree murder and found the firearm enhancement true. In bifurcated proceedings, the trial court found the prior strike allegation true. The trial court sentenced defendant to an aggregate term of 75 years to life.

### **II. FACTUAL BACKGROUND**

Defendant met Brau almost 30 years before the trial. About 17 years into their friendship, the relationship became intimate. When defendant went to prison, in 2001, she and Brau remained in contact and defendant identified Brau as her significant other. After being released from prison in 2012, and completing a mandatory drug treatment program, defendant moved in with Brau. By April 2013, defendant had been living with Brau and her children for several months. Defendant and Brau occasionally argued.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Defendant claimed the arguments were not just verbal, but also physical. Brau repeatedly hit defendant and was very abusive, demanding and aggressive when she was drunk, which was every day. One time Brau hit defendant with a belt to her leg and another time Brau punched defendant in the chest twice. After one argument, Brau threw water at defendant and hit her arm.

On April 23, 2013, defendant called the Sacramento County Sheriff's Department to report "her roommate was dead on the floor. Possibly shot in the head." Brau had four gunshot wounds. One wound was just below her chin with stippling, another was at the back right side of her head, the third was near her right armpit, and the fourth near her right abdomen. The stippling near the chin indicated the shot had been fired at close range, less than 18 inches. Brau also had blunt force injuries to her head and legs. The gunshot wounds to the head and abdomen were fatal in and of themselves. Without immediate medical attention, the other two gunshot wounds could have also been fatal. Some of the shots could have been fired when Brau was already on the ground. Deputies found a large bullet embedded in the carpet padding under Brau, which was consistent with a bullet passing through the body while it was lying on the ground.

When sheriff's deputies arrived at the scene, defendant was "moaning loudly," she "was making crying noises," but she was not shedding any tears and her face was not red or puffy. Brau was lying on the ground, on her back, arms over head, and there was "a lot of blood around her head." Defendant denied there were any guns in the house and the deputies did not find any weapons at the scene. There were sheets on the bed covered with a large amount of blood. The sheets had clearly been on the victim previously. It also appeared from the blood patterns that Brau's arm had been moved at some point.

Deputies took samples from defendant's hands and found particles associated with gunshot residue. Nothing at the scene indicated an intruder had broken into the house and there were no signs of a robbery.

Deputy Michael Heller interviewed defendant at the scene. Defendant explained that she and Brau had recently been in an altercation, after which defendant had moved out of the house. Brau later convinced defendant to move back in. She had last seen Brau the night before the shooting. She had gone out in the morning to the post office, returned to the home, and stayed in her room until 1:30 or 2:00 p.m. Brau's son called defendant around 2:45 p.m. and asked her to pick him and his sister up from school, because Brau had not. Defendant left to pick the children up, but returned after she was informed she was not authorized to do so. When she returned home, she saw Brau on the floor with blood everywhere. She claimed she had not heard anything, but acknowledged she had moved a sheet and pillowcase from the ground near Brau to the top of the bed.

At trial, defendant provided a version of events that differed from what she had told Deputy Heller. She testified that the night before the killing, Brau was drinking and she and defendant started arguing. The next morning, as defendant was getting ready to go to the post office, Brau stood in the hallway pointing a gun at defendant and said, "You, bitch. Come here." Defendant walked toward Brau and Brau backed up into the bedroom, still pointing the gun at defendant. Defendant tried to grab the gun from Brau, and as they struggled, the gun went off and Brau fell.

### **III. TRIAL**

The People made a motion in limine to allow impeachment of defendant with her three prior felony convictions for robbery and resisting arrest in 2001 and battery on a noninmate in 2008. The trial court ruled it would allow impeachment that "defendant has been convicted of two felony crimes of moral turpitude in 2001, and a felony crime of moral turpitude in 2008." The People sought clarification of the ruling relative to the expert witness's testimony. Specifically, the prosecutor inquired about the ability to cross-examine the expert on her opinion by "asking her about instances because [defendant's] a battered woman yet we know there's a battery on an inmate that she got convicted and did extra time. I understand the Court wanting to make it moral turpitude

for that purpose, but I would request to [be] able to approach and talk about its relevancy at that time under those circumstances.” The trial court recognized the proffered defense and defense expert “muddie[d] the water” on the limited use of the prior convictions, and stated, “I believe that if this does come in, it is a factor in which [the expert] took into consideration for the basis of her opinion. It will be allowed in.”

During direct examination, defense counsel asked defendant about her prior convictions.

“[DEFENSE COUNSEL]: Let me talk to you about your prior felony conviction. You have a prior felony conviction for robbery, correct?

“[DEFENDANT]: Yes.

“[DEFENSE COUNSEL]: That was in the year approximately 2000?

“[DEFENDANT]: Yes.

“[¶] . . . [¶]

“[DEFENSE COUNSEL]: Also in year 2000 you had a felony conviction for resisting arrest?

“[DEFENDANT]: Yes.

“[DEFENSE COUNSEL]: And based on those two felony convictions at some point you were sentenced to prison?

“[DEFENDANT]: Yes.

“[DEFENSE COUNSEL]: Do you recall how long your prison sentence was?

“[DEFENDANT]: Six years, eight months. Then added for the other one was four years.

“[DEFENSE COUNSEL]: The other one being battery on a non-inmate?

“[DEFENDANT]: Yes.

“[DEFENSE COUNSEL]: So at some point, were you actually released from the original sentence and then taken back into custody because of the alleged battery on a non-inmate?

“[DEFENDANT]: Yes.

“[¶] . . . [¶]

“[DEFENSE COUNSEL]: Okay. When you first went to prison, did you have any problems adjusting?

“[DEFENDANT]: Yes.

“[DEFENSE COUNSEL]: And those problems were basically you got into fights with some other inmates?

“[DEFENDANT]: Yes.”

Later, on cross-examination, the People also asked about defendant’s prior convictions.

“[PROSECUTOR]: Okay. At some point you got into the criminal behavior that led to your three convictions that [defense counsel] talked about?

“[DEFENDANT]: Yes. . . .

“[PROSECUTOR]: Did you—you pled guilty to the robbery?

“[DEFENDANT]: Yeah.

“[PROSECUTOR]: Was that March of 2011?

“[DEFENDANT]: Yes.

“[PROSECUTOR]: You pled guilty to felony resisting arrest with police officers?

“[DEFENDANT]: Yes.

“[PROSECUTOR]: From those two cases, [defense counsel] said you got sentenced to six years, eight months in prison?

“[DEFENDANT]: Yes, I did.

“[PROSECUTOR]: Now, while you were in prison, you committed your third felony, a battery on a non-inmate?

“[DEFENDANT]: The incident happened, yes.

“[PROSECUTOR]: You pled guilty to that, right?

“[DEFENDANT]: Uh-huh.

“[PROSECUTOR]: Yes?

“[DEFENDANT]: Yes.

“[PROSECUTOR]: You got an additional four years for battery on a non-inmate?

“[DEFENDANT]: Yes. Officer said I assaulted her. I didn’t. There was no serious injury. I should have fought it, but I did not.

“[PROSECUTOR]: You pled guilty to a felony battery on a non-inmate, right?

“[DEFENDANT]: Yeah. Yes.”

Later in cross-examination, as the prosecutor questioned defendant further on her allegations of abuse by Brau, he asked why defendant had not done something to defend herself. Defendant answered, “I’m on high risk parole. Couldn’t touch anybody. I’d go [to] prison like that. There’s no way. I would never harm [Brau] or hit [Brau] or anything. I don’t believe in violence.” After getting further clarification on the self-defense training defendant had received, the prosecutor asked why defendant had not moved out after Brau’s alleged abuse. Defendant answered:

“[DEFENDANT]: She apologized, then she said that she— because I’m passive and because I cared about her, and I loved the kids.

“[PROSECUTOR]: You’re passive?

“[DEFENDANT]: Yes. I grew accustomed to the living arrangement. I forgave her again. Told her if she hit me one more time, I would leave.

“[PROSECUTOR]: [Defendant], you had a felony conviction for resisting arrest. You held a knife at police officers, right?

“[¶] . . . [¶] [Sustained objection to answer as unresponsive]

“[PROSECUTOR]: [Defendant], you indicated to the Court that you’re passive in nature. I’m asking you, didn’t you plead guilty to felony resisting arrest in which you held a knife at police officers?

“[DEFENDANT]: No. Held a knife to my own wrist.

“[PROSECUTOR]: When they sprayed you with mace, you didn’t drop the knife, did you?

“[DEFENDANT]: Then I went blind. I don’t remember.

“[PROSECUTOR]: They had to spray you again with mace and still wouldn’t drop the knife.

“[DEFENDANT]: I can’t recall. A long time ago.

“[PROSECUTOR]: You pled guilty to a battery on a non-inmate while in prison, right?

“[DEFENDANT]: Yes, I did.

“[PROSECUTOR]: That’s not passive behavior is it? Just yes or no.

“[DEFENDANT]: No.

“[PROSECUTOR]: And the robbery that you pled guilty to, you actually sat on someone’s chest and beat them about the face or head; isn’t that right?

“[DEFENDANT]: Never touched Gordon. I was falsely accused of robbery. Falsely accused of assault. I never touched that man.

“[PROSECUTOR]: You pled guilty to it?

“[DEFENDANT]: I didn’t have no choice due to the fact of me going over there asking him a favor, asking him for money to put this woman in a motel. She robbed him. I was responsible, so I took six years, eight months for robbery. Yes, I did.

“[PROSECUTOR]: You never—

“[DEFENDANT]: Never touched him. Never touched him.

“[PROSECUTOR]: The battery on a non-inmate wasn’t your fault either, right?

“[DEFENDANT]: The battery on non-inmate, I was flushing tobacco down the toilet. The officer grabbed me remanded me, threw me on the ground and said I assaulted her with my elbow. I never touched that cop. No physical injury on the report as well. There’s nothing there.

“[PROSECUTOR]: So we have a robbery you pled guilty to in which the accusation was you beat a person, and got personal items from them that you say you never touched him but pled guilty?”

“[DEFENDANT]: Pled guilty only because I went to his—

“[PROSECUTOR]: Yes?”

“[DEFENDANT]: Yes.

“[PROSECUTOR]: Then you have a battery on a non-inmate that apparently you committed a battery on a correctional officer, in which now you’re saying a second time you did not touch the person, yet you pled guilty, right?”

“[DEFENDANT]: You can look at the report. I’m not lying.

“[PROSECUTOR]: Just asking if you pled guilty to a second case in which—

“[DEFENDANT]: Yes. Only because I was—I had tobacco and flushed it, yes, I [was] responsible for that.

“[PROSECUTOR]: Then the felony resisting arrest, you had a knife, and you say the knife was only used on your own wrist and you never resisted arrest of the officers, but you pled guilty to that also, right?”

“[¶] . . . [¶] [Sustained objection to answer as non-responsive]

“[PROSECUTOR]: Would it be fair to say that you pled guilty to three felony crimes that involved some degree of violence, all of which you deny ever occurring?”

“[DEFENDANT]: You can look at the report. I’m not lying. Yes.

“[PROSECUTOR]: In this particular instance, you’re denying shooting Rebecca Brau?”

“[DEFENDANT]: Never touched Rebecca Brau. Struggled with her.

“[PROSECUTOR]: This was [Brau’s] fault? She had the gun, and she shot herself during the struggle?”

“[DEFENDANT]: I don’t understand how this happened. Yes.”

Dr. Linda Barnard testified on defendant's behalf as an expert in domestic violence. In addition to interviewing defendant about her history of abuse with Brau, amongst other things, Dr. Barnard reviewed police reports for this incident, arrest reports for defendant's prior felonies, a toxicology report, the coroner's report, a police report of a March 2013 domestic violence call from defendant regarding Brau, defendant's prison medical records, and the transcript of the sheriff's interview of defendant from the night of the shooting. Dr. Barnard also discussed all three prior convictions and their underlying facts with defendant in her examination. Dr. Barnard concluded defendant had been the victim of intimate partner battering. On direct examination, she testified she based this conclusion on her examination of defendant and the materials she reviewed in preparation for that examination.

#### **IV. DISCUSSION**

Each of defendant's claims on appeal relates to the trial court's in limine ruling on the permissible use of her prior convictions, and both defense counsel and the People's examinations of defendant relative to these convictions. Defendant contends the prosecutor committed misconduct by not following the ruling. Defendant also argues defense counsel was ineffective for not adhering to the ruling himself, and for failing to object to the prosecutor's detailed inquiries about defendant's prior convictions.

##### *A. Prosecutorial Misconduct*

Defendant contends the prosecutor committed misconduct by "violating the court order regarding the permissible scope of impeachment of [defendant] with her prior felony convictions." Defendant forfeited this claim by failing to object and request curative admonitions in the trial court. (*People v. Lopez* (2008) 42 Cal.4th 960, 965-966.)

Recognizing that the failure to object and request a curative admonition forfeits this issue on appeal, defendant contends this claim may be considered here, because "the case is closely balanced and there is grave doubt of defendant's guilt, and the acts

of misconduct are such as to contribute materially to the verdict . . . ’ (*People v. Lambert* (1975) 52 Cal.App.3d 905, 908.)” The cases stating this rule have long since been overruled on this point (*People v. Green* (1980) 27 Cal.3d 1, 28-34, overruled on other grounds as noted in *People v. Dominguez* (2006) 39 Cal.4th 1141, 1155, fn. 8), and the “close case” exception once used to avoid the forfeiture rule is no longer recognized (*People v. Cain* (1995) 10 Cal.4th 1, 48).

Moreover, we do not agree the prosecutor violated the trial court ruling. The People sought to admit defendant’s prior felony convictions to generally challenge her credibility. (Evid. Code, § 788.) The trial court ruled that the prosecution could impeach defendant’s credibility by indicating she had been convicted of three crimes of moral turpitude, without specifying the nature of the specific convictions. To the extent defendant complains that the prosecution improperly cross-examined her regarding the specific nature of the prior convictions, she is estopped from making this claim. Defense counsel identified the nature of the convictions on direct examination.<sup>2</sup> “Since defendant is responsible for the introduction of the evidence, [s]he cannot complain on appeal that its admission was error.” (*People v. Moran* (1970) 1 Cal.3d 755, 762.)

As to the cross-examination on the facts underlying defendant’s convictions, we do not agree this was included within the scope of the court’s ruling. The in limine ruling pertained to a prior conviction being offered as a specific instance of conduct “tending to prove a trait of [defendant’s] character,” (Evid. Code, §§ 787, 788) such as dishonesty. The questioning on the facts underlying defendant’s convictions was not offered as evidence of a character trait to attack defendant’s general credibility. Rather, it was offered as testimonial contradiction, to contradict and disprove defendant’s specific testimony that she was nonviolent and passive. (Evid. Code, § 780, subd. (i); *People v.*

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<sup>2</sup> Defendant also raises claims of ineffective assistance of counsel regarding this conduct. We address those claims separately below.

*Cooks* (1983) 141 Cal.App.3d 224, 324; *People v. Reyes* (1976) 62 Cal.App.3d 53, 65.) This was proper cross-examination and not precluded by the trial court's in limine ruling.

*B. Ineffective Assistance of Counsel*

Defendant raises two claims of ineffective assistance of counsel. First, defendant claims counsel was ineffective by eliciting testimony on the specific nature of her prior convictions, despite the trial court's ruling admitting only a description of the convictions as involving moral turpitude. Second, defendant claims counsel was ineffective by failing to object to the prosecutor's alleged misconduct in cross-examining defendant as to facts underlying her prior convictions. We conclude defendant has not demonstrated that counsel's representation was deficient.

In order to prove ineffective assistance of counsel, defendant must show: "(1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126 (*Rodrigues*); see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693].) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*Rodrigues, supra*, at p. 1126.)

"We presume 'counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and accord great deference to counsel's tactical decisions. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 674 (*Lewis*).) "[W]hen the reasons for counsel's actions are not readily apparent in the record, we will not assume constitutionally inadequate representation and reverse a conviction unless the appellate record discloses 'no conceivable tactical purpose' for counsel's act or omission." (*Id.*, at pp. 674-675; cf. *People v. Ray* (1996) 13 Cal.4th 313, 349 ["In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or

omission”].) “ [T]he defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” ’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 446.)

It is not deficient performance for defense counsel to fail to make “objections that counsel reasonably determines would be futile,” (*People v. Price* (1991) 1 Cal.4th 324, 387) or objections that “would have likely been overruled by the trial court. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 678 [counsel not ineffective in failing to make a futile objection to introduction into evidence a photograph of the crime scene]; *People v. Sanchez* [(1997)] 58 Cal.App.4th [1435,] 1450 [counsel not ineffective in failing to object to introduction of the gang evidence likely to be admissible in any event].)” (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 924 (*Mendoza*).

#### *1. Ineffective Assistance of Counsel in Direct Examination*

Defendant contends she received ineffective assistance of counsel “by her counsel’s ignorance of a favorable in limine ruling.” She asserts “[d]espite the fact that defense counsel obtained a partially favorable ruling on his motion in limine to exclude for impeachment purposes evidence of [defendant’s] prior felony convictions, based on his direct examination of [defendant], it appears he completely forgot the court’s ruling.” Specifically, defendant complains counsel was ineffective by eliciting testimony on direct examination of defendant about her prior convictions, referencing the specific offenses of robbery, resisting arrest, and battery on a noninmate; rather than referring to the crimes simply as involving moral turpitude. We disagree.

Even “where defense counsel may have ‘ elicit[ed] evidence more damaging to [defendant] than the prosecutor was able to accomplish . . . ’ ” [citation], we have been ‘reluctant to second-guess counsel’ [citation] where a tactical choice of questions led to the damaging testimony.” (*People v. Williams* (1997) 16 Cal.4th 153, 217 (*Williams*)). Here, the record does not affirmatively establish there was “ ‘ “no conceivable tactical purpose” ’ ” for trial counsel’s questions. (*Lewis, supra*, 25 Cal.4th at p. 675.) To the

contrary, defense counsel may have elicited specifics about the prior convictions because he knew the specifics were going to be admissible because they were considered by defendant's expert.

Defense counsel provided the expert with the materials she relied upon in forming her opinion. Therefore, he knew that the details of the prior convictions, including the specific charged offenses and underlying factual details, were included in that information. Based on the trial court's pretrial ruling, defense counsel also knew the prosecution would be able to cross-examine defendant's expert on those specific charged offenses. Knowing the specific offenses for which defendant was convicted would be admitted in cross-examination of the expert, defense counsel's choice to preemptively bring the prior convictions out in defendant's testimony could have been to limit or reduce their potential impact on the jury. It could also "be fairly characterized as a reasonable tactical choice designed to demonstrate defendant's candor and honesty to the jury." (*Mendoza, supra*, 78 Cal.App.4th at p. 928.) As acknowledged by defendant on appeal, her credibility was imperative to her defense. The attempt to minimize the impact of the prior convictions on defendant's credibility was a reasonable tactical choice. Accordingly, we cannot find counsel's performance was deficient and defendant's claim of ineffective assistance of counsel fails. (*Williams, supra*, 16 Cal.4th at p. 218.)

## 2. *Ineffective Assistance of Counsel in Cross-Examination*

Defendant contends trial counsel was also ineffective for failing to object to the prosecutor's "improper cross-examination" as to the facts underlying her prior convictions. "An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.)

"Evidence tending to contradict a witness's testimony is relevant for purposes of impeachment." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1025; see also Evid. Code, § 780, subd. (i).) Even a so-called collateral matter may be relevant to a witness's

credibility, particularly as to the existence or nonexistence of any fact testified to by the witness. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) As discussed above, the cross-examination of defendant, relative to the facts underlying her convictions, was a proper effort to contradict specific testimony by defendant that she was passive and nonviolent. It did not run afoul of the trial court's in limine ruling, and it was likely admissible under Evidence Code section 780, subdivision (i).

In addition, the evidence also would have likely been admissible under Evidence Code section 1103, which sets forth exceptions to the general rule that character evidence is inadmissible to prove acts consistent with that character on a specific occasion. (Evid. Code, § 1101, subd. (a).) One such "exception allows a criminal defendant to offer evidence of the victim's character to show the victim acted in conformity with it. (Evid. Code, § 1103, subd. (a)(1).) If the defendant offers evidence showing the victim has a violent character, then the prosecution may offer evidence of the *defendant's* violent character to show the defendant acted in conformity with it. (Evid. Code, § 1103, subd. (b).)" (*People v. Myers* (2007) 148 Cal.App.4th 546, 552.) "In other words, if . . . a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that (1) the victim was not a violent person and (2) the defendant was a violent person, from which the jury might infer it was the defendant who acted violently." (*People v. Fuiava* (2012) 53 Cal.4th 622, 696.) Defendant offered evidence that the victim, Brau, was violent and acted violently on the morning of the shooting. She testified Brau had been abusive and violent toward her on a number of occasions, including hitting her with a belt, punching her in the chest, throwing water at her and hitting her arm. She also testified that the struggle started with Brau pointing a gun at her and saying, "You, bitch. Come here." The People were entitled to rebut the evidence that Brau was a violent person with

evidence that defendant was a violent person. The facts underlying her convictions were evidence on that point.

Because there were two independent grounds on which the facts underlying defendant's convictions could have been admitted, trial counsel could have reasonably determined that any objection to the cross-examination regarding those facts was futile or likely to be overruled. Accordingly, the failure to object in these circumstances was not ineffective assistance of counsel.

#### **IV. DISPOSITION**

The judgment is affirmed.

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RENNER, J.

We concur:

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NICHOLSON, Acting P. J.

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MAURO, J.