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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TYWAN RENE RANSOM,

Defendant and Appellant.

E052215

(Super.Ct.No. FSB702709)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Ron Jakob and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

According to an eyewitness, defendant Tywan Rene Ransom shot another teenager in the chest, once, at close range, killing him. Defendant testified to an alibi.

A jury found defendant guilty of first degree murder (Pen. Code, § 187, subd, (a)), with an enhancement for personally and intentionally discharging a firearm and causing death (Pen. Code, § 12022.53, subd. (d)). He was sentenced to 50 years to life in prison, plus the usual fines and fees.

Defendant contends:

1. The prosecutor committed misconduct by asking leading questions which — although the trial court sustained objections to them — disclosed inadmissible hearsay to the jury.

2. The trial court erred by allowing the prosecutor to ask defendant about his uncle's presence at the scene of the shooting, when defendant had already testified to an alibi and when defendant's only source of knowledge on this point was his uncle's inadmissible hearsay statements.

3. When defendant testified to inadmissible hearsay on cross-examination, defense counsel rendered ineffective assistance by failing to object and move to strike.

4. The trial court violated the confrontation clause as well as state law by admitting certain out-of-court statements that defendant's cousin made to the police.

5. Defense counsel rendered ineffective assistance by failing to object, based on *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S. Ct. 2240, 49 L. Ed. 2d 91], to evidence that defendant had asked potential alibi witnesses not to talk to the police.

We agree that the trial court erred by allowing the prosecutor to question defendant about his uncle's presence at the scene, when defendant's answers were necessarily based on hearsay. We conclude, however, that the error was harmless. Otherwise, we find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Prosecution Case.*

As of July 16, 2007, defendant was 16; victim Cecil Scott was 15.

On that date, sometime after 4:00 p.m., Scott and his friend Walter Chambers were walking to the Dorjil apartment complex (commonly known as the Dorjils) in San Bernardino. Scott and Chambers were both members of a drill team; they were going to the drill team director's apartment to get a ride to practice.

Scott was wearing blue shorts and blue shoes. Neither Scott nor Chambers was a gang member.¹

Defendant came walking up behind them. Chambers went to the same school as defendant and knew him as "Scooter." Defendant was wearing a baggy red T-shirt over blue shorts.

¹ Scott and Chambers had posted photos of themselves on MySpace holding handguns and throwing apparent gang signs.

Chambers testified, however, that the guns were BB guns and that the signs were (1) peace signs, (2) signs for "three the hard way" (referring to their group of three friends), or (3) meaningless. According to a gang expert, the signs were not associated with any known gang.

Defendant asked where they were from. They both replied, "I don't bang." At the time, Scott was dating a girl named "Tati." He asked defendant, "Did you tell Tati that you was going to shoot me?" Defendant denied making this threat.

Defendant asked where they were going. They said to the Dorjils. Defendant then parted from them; Chambers saw him take a shortcut that led to the Dorjils.

When Scott and Chambers arrived at the Dorjils, defendant was standing in front of the Little Zion apartment complex, directly across the street. Defendant walked up to them and told Scott to take off his blue shoes. Defendant and Scott were nose to nose. Defendant then pulled out a gun, took a step back, and shot Scott once, in the chest. Scott fell. Defendant ran away, toward Little Zion. Chambers ran to his drill team director's apartment.

Scott bled to death. Soot inside the wound and gunpowder on his clothing indicated that the shot was fired from one to three inches away. The bullet's path was slightly downward; Scott was five feet six inches tall.

When the police first interviewed Chambers, he described the shooter as a young Black male, five feet six or seven inches tall. He did not tell them that he knew the shooter by name.

In a second interview, however, about three hours after the shooting, Chambers identified the shooter as "Scooter." This time, he said that the shooter was five feet five or six inches tall. Chambers proceeded to identify defendant in a photo lineup.

According to defendant's school records, he was five feet three inches tall. However, this information could have dated back a year or more before the shooting.² At the time of trial, in 2010, defendant was five feet six inches tall.

In October 2007, defendant's cousin, Turell Clay, who was in custody at the time, told the police that defendant was in North Carolina with one Roman "Benzo" Arroyo. Arroyo was a member of the Gilbert Street Bloods.

In 2009, defendant was arrested in North Carolina. He was in a house with a number of other people, including Leo Johnson, another member of the Gilbert Street Bloods. Defendant was in possession of a gun and over 50 Ecstasy pills. He claimed he was "holding the[pills] for somebody else inside the house"

In jailhouse phone calls, defendant answered to the name "Scooter." Also, he addressed people as "blood," which is "gang language" for persons associated with the Bloods. He told his girlfriend not to tell the police anything, or he would beat her. He also asked a family member to make sure that his girlfriend did not say anything to the police.

Janay Powell, who was acquainted with both defendant and Scott, testified that defendant associated with gang members.

According to a gang expert, the scene of the shooting is surrounded by the territories of various gangs, particularly gangs affiliated with the Bloods. Gang attacks

² Defendant testified that, at the time of the shooting, he was five feet two inches tall.

were known to occur outside the Dorjils, because the Dorjils were surrounded by a long, high wall that left “nowhere to run or hide”

In the expert’s opinion, defendant was an associate of two interrelated gangs, the Gilbert Street Bloods and the Little Zion Manor Bloods.

B. *The Defense Case.*

Defendant testified on his own behalf. He denied any gang affiliation. He admitted knowing “Tati,” but he denied ever dating her.

Defendant admitted a prior conviction for unlawful possession of a firearm. When arrested on that charge, he was in possession of “3 nickel bags” of marijuana, for personal use. As of the shooting, he was still on probation.

Defendant was staying temporarily at his aunt’s apartment in Little Zion. When he first encountered Scott and Chambers, he assumed they were Crips, because they were both wearing blue. Scott asked him, “Are you Scooter from the Projects?” Defendant said, “No, I’m not from the Projects. I don’t gang-bang.”

At that point, defendant recognized Chambers and greeted him. Scott then asked, “Did you tell Tati you were going to kill me?” Defendant denied making this threat. He thought of telling Chambers to take off a “blue rag” around his neck, but he denied actually telling either Chambers or Scott to take anything off.

After leaving them, defendant went to his aunt’s apartment. He was there, with his aunt and his aunt’s friend, when they heard one or two gunshots.

Defendant's friends and family members started phoning him; they told him that he was being accused of shooting Scott and that he had been seen in the area. He was afraid, so he immediately got a lift to the Greyhound station and went to North Carolina.

On rebuttal, a police officer testified that, in January 2007, he arrested defendant for possession of an unregistered handgun and possession of marijuana. While being booked, defendant admitted that he was a member of the Family Swan Bloods.

II

QUESTIONS ABOUT DEFENDANT'S UNCLE'S PRESENCE AT THE SCENE

On cross-examination, the prosecutor asked defendant a series of questions designed to establish that his uncle, Darrell Fowler,³ was present when the shooting occurred. First, she asked him leading questions about out-of-court statements by his cousin, Turell Clay, to the effect that Fowler was present. The trial court, however, sustained objections to these questions. Next, she asked if defendant "knew" that Fowler was present. The trial court overruled objections to these questions, even after defendant testified that he knew Fowler was present only from reading Fowler's out-of-court statements.

Defendant contends that the first set of questions, about Clay's out-of-court statements, constituted prosecutorial misconduct. Defendant also contends that the trial court should have sustained the objections to the second set of questions, about what he

³ Sometimes also spelled "Darryl" in the record.

knew. Finally, defendant contends that defense counsel rendered ineffective assistance by failing to object to and move to strike defendant's testimony that he knew, from Fowler's out-of-court statements, that Fowler was present.

A. *Additional Factual and Procedural Background.*

1. *Background.*

Chambers testified that, just before the shooting, he saw defendant talking to "this bum dude" outside the Little Zion complex. After the shooting, the bum dude said, "That's fucked up. He didn't have to do him like that." Chambers handed the bum dude his cell phone and told him to call an ambulance, but the bum dude stole it.

2. *The challenged line of questioning.*

On cross-examination, when asked who Darrell Fowler was, defendant answered that Fowler was his uncle. Defendant then testified that he did not see Fowler on the day of the shooting at all. The prosecutor asked:

"Q Well, you know that Turell Clay said that Mr. Fowler was with you that day, right?"

"[DEFENSE COUNSEL]: I object. That assumes facts not in evidence."

"THE COURT: Sustained."

"Q . . . [Y]ou've read the reports in this case, haven't you?"

"A Yes, my discovery."

"Q Okay. You've read the report of Turell Clay stating that your uncle was with you when you shot [Scott]?"

“[DEFENSE COUNSEL]: Objection. Same basis.

“THE COURT: Sustained. Calls for hearsay.

“Q . . . Did you read that report?

“[DEFENSE COUNSEL]: Object. Relevance.

“THE COURT: Sustained.

“Q . . . Have you ever seen Mr. Fowler at the Zions?

“[DEFENSE COUNSEL]: Objection. Relevance.

“THE COURT: Overruled. He can answer.

“THE WITNESS: No, I haven’t.

“Q . . . Did you know that Mr. Fowler is the one that took Walter Chambers’
phone?

“[DEFENSE COUNSEL]: Objection. Assumes facts not in evidence. Lack of
foundation from this witness.

“[PROSECUTOR]: Asking if he knows.

“THE COURT: Overruled. He can answer.

“THE WITNESS: No, I did not find that out until later.

“Q . . . But you found out, right?

“A Yes, later.

“Q And when you found that out, did you, then, know that Mr. Fowler was at the
Little Zions?

“[DEFENSE COUNSEL]: I object. That would call for speculation.

“THE COURT: Sustained.

“Q . . . How did you find out that he had gotten that phone?

“[DEFENSE COUNSEL]: I object. Relevance. And it would call for hearsay, possibly.

“THE COURT: Overruled.

“THE WITNESS: In his statement that he made when he was incarcerated in West Valley.

“Q . . . You knew that Darrell Fowler took . . . Walter Chambers’ phone?

“[DEFENSE COUNSEL]: I object, because it calls for hearsay.

“THE COURT: Overruled.

“Q . . . You knew that, right?

“THE WITNESS: I have my uncle’s statement that he made in 2009, in my discovery. He tells what happened.

“Q . . . And Mr. Fowler was there when [Scott] got shot. Darrell Fowler is the one that said, ‘You didn’t have to do him that way,’ correct, when you shot [Scott]?

“[DEFENSE COUNSEL]: I object. That calls for hearsay.

“THE COURT: Overruled.

“THE WITNESS: That’s not what it says in the discovery.

“Q . . . I’m asking you, when you shot [Scott], isn’t it Mr. Darrell Fowler that was there that said, ‘You didn’t have to do him that way,’ and then he took [Chambers]’s phone?

“[DEFENSE COUNSEL]: I object. That’s argumentative, and assumes facts not in evidence.

“THE COURT: Overruled.

“THE WITNESS: I did not kill or shoot [Scott], and I did not see my uncle that day. So, you telling me what he say, I wasn’t there to hear any of that.

“Q . . . I’m not telling you. You already told me you knew he took the phone.

“A In his statement, he quoted, [y]es, after the boy got shot, he ran over and helped [Scott].

“And the witness couldn’t talk. He was too emotional on the phone, so my uncle grabbed the phone and said, ‘Somebody get help.’

“Q And took his phone?

“A He did not steal his phone. Chambers admits to running off, so he left my uncle with that phone.

“Q And your uncle said, ‘He didn’t have to do him that way,’ didn’t he?

“A He didn’t say that in his statement.

“Q Do you remember hearing him say that?

“A I don’t remember hearing any of that. I wasn’t there.”

3. *The prosecutor’s use of the evidence.*

Later during her cross-examination of defendant, the prosecutor asked:

“Q . . . [W]hen you . . . got to the Zions, your uncle was there and you got a gun from somewhere, right?

“A Never seen my uncle, and I never went to go recover a gun. [¶] . . . [¶]

“Q And, when you walked up to [Scott] and told him to take those blue slippers off, because this is a red neighborhood, he disrespected you . . . , didn’t he?

“[DEFENSE COUNSEL]: Objection. Assumes facts not in evidence. Misstates the testimony.

“THE COURT: Overruled.

“Q . . . He disrespected you, right?

“A I never walked up to [Scott]. I never walked up to Chambers. I never told them to take off anything. . . . I never pulled out no gun, and I never shot nobody.

[¶] . . . [¶]

“Q And, when [Scott] wouldn’t take those shoes off, that was disrespectful in front of your uncle, who’s involved in gangs, also; is that right?

“[DEFENSE COUNSEL]: Objection. Assumes facts not in evidence. Argumentative.

“THE COURT: Overruled.

“THE WITNESS: Never seen my uncle. I don’t know if my uncle is a gang member or if he isn’t a gang member. If he is, I don’t know he’s a gang member. And I never told anybody to take off no . . . shoes.”

During closing argument, the prosecutor stated:

“[PROSECUTOR:] And this is the third element. Was it done with malice? . . . Even the defendant’s uncle, who was present during the murder, who took [Chambers]’s phone —

“[DEFENSE COUNSEL]: I object. That is a misstatement. It misstates the testimony during trial.

“THE COURT: Overruled.

“[PROSECUTOR]: — indicated that the shooter did not need to do that to the victim.”

She also argued: “[H]e gets into the Little Zions, where his people are, where his weapons are He’s got his uncle there. And he arms himself.”

Similarly, she argued: “[Defendant]’s not going to get punked by anybody. And he certainly isn’t going to get punked by [Scott] in those blue shoes in front of his uncle.”

Finally, she argued: “Everything that [Chambers] says in his account is matched by the evidence. We knew that his phone was taken. The defendant tried to say, ‘Well, my uncle didn’t steal this phone. [Chambers] ran away.’ That’s not what [Chambers] said. . . . [¶] He couldn’t call because there was no phone for him to call on.

“So he had to leave his friend, and run around all the way to the back of the [Dorjils] to make some type of contact with the people who were expecting them to show up for drill team practice. Why? Because the uncle took the phone. Why didn’t the uncle just come in and say, ‘Well, I was there. And it wasn’t my nephew.’ There’s no

reason for that not to have occurred. Why didn't the uncle say, 'Hey, police officer, the guy wanted me to use this phone and call for help. But then he left. Here's his phone.'"

4. *The jury's question.*

After about half an hour of deliberations, the jury asked, "Who was the name of the uncle that took the phone?"

The trial court proposed to give the jury a readback of Chambers's testimony regarding the "bum dude," plus defendant's testimony regarding his uncle's statement.

Defense counsel concurred with a readback of Chambers's testimony, but he objected to a readback of defendant's testimony: "[Defendant]'s testimony is as to what's in his discovery. That's all. . . . I made objections throughout all this. I guess I'm sort of arguing that my objections should have been sustained."

The trial court overruled the objection and ordered the readback.

B. *Analysis.*

1. *Prosecutorial misconduct.*

We begin with defendant's contention that the prosecutor's questions about Clay's out-of-court statements constituted misconduct.

Defense counsel forfeited this contention by failing to request an admonition. (*People v. Fuiava* (2012) 53 Cal.4th 622, 679-680.) We see no reason why this would have been futile — especially as the trial court *sustained* defense counsel's objections — or why it would not have cured the harm.

In support of his argument that there was no forfeiture, defendant relies on *People v. Tate* (2010) 49 Cal.4th 635. There, however, defense counsel did raise an evidentiary objection (“assumes a fact not in evidence”) and did request an admonition. (*Id.* at p. 702.) The Supreme Court proceeded to assume, without deciding, that the evidentiary objection was sufficient to preserve a prosecutorial misconduct contention. (*Id.* at p. 703.) Here, by contrast, defense counsel never requested an admonition.

Defendant therefore argues that this very failure constituted ineffective assistance. Once again, however, the trial court had *sustained* defense counsel’s objections. The jury was instructed that the attorneys’ questions are not evidence, and that they should ignore any question to which an objection was sustained. (CALCRIM No. 222.) Defense counsel could reasonably conclude that an admonition was unnecessary, or that it would only call the jurors’ attention to the objectionable insinuation. (See *People v. Freeman* (1994) 8 Cal.4th 450, 495 [“Since the objection was sustained, counsel may have felt it best not to emphasize the matter in front of the jury. His failure to request a specific admonition was therefore not incompetent.”].)

2. *Hearsay.*

We turn to defendant’s contention that the trial court erred by overruling his objections to the prosecutor’s questions about what defendant knew about his uncle’s presence.

This testimony was based on the uncle’s out-of-court statements. Moreover, as defendant points out, it was actually based on police reports relating those statements;

thus, it involved a two distinct layers of hearsay. The prosecutor was clearly offering it for its truth; it was not relevant for any other purpose. And, ultimately, she used it for its truth in closing argument. It was not within any exception to the hearsay rule. Hence, it constituted inadmissible hearsay.

The People argue that the prosecutor's questions did not necessarily call for hearsay; she may have been assuming that defendant was present (i.e., that he was the shooter), and thus he could answer them based on personal knowledge. At a minimum, they argue, she should have been allowed to cross-examine defendant with regard to whether he was present.

Her questions, however, were not limited to matters of which defendant had personal knowledge. For example, her very first objectionable question was, "Did you know that Mr. Fowler is the one that took Walter Chambers' phone?" If defendant knew this, whether from personal knowledge *or* hearsay, he had to say yes. At that point, it was established as a fact, even if based on hearsay. Defense counsel quite properly objected that no foundation had been laid as to how or whether defendant would know. The trial court erred by overruling that objection. (See *People v. Fusaro* (1971) 18 Cal.App.3d 877, 886 [question asking one undercover agent if he knew what another undercover agent had done was "devoid of foundational inquiry to ascertain the witness' personal knowledge and thus invit[ed] potential hearsay"], disapproved on other grounds in *People v. Brigham* (1979) 25 Cal.3d 283, 292, fn. 14.) The prosecutor could easily

have fixed her question by asking, “Did you *see* Mr. Fowler take Walter Chambers’s phone?”

If the prosecutor (or the trial court) was assuming that defendant was present, that assumption had not yet been established as fact. To the contrary, defendant had already testified, on direct, that he was *not* present during the shooting. Accordingly, defense counsel’s additional objection, “Assumes facts not in evidence,” also should have been sustained. And finally, once defendant specifically stated that his only source of information was Fowler’s own statement, the prosecutor had to know that she was asking for hearsay.⁴

We turn to whether the error was prejudicial. As defendant concedes, “[a]bsent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.’ [Citation.]” (*People v. Watson* (2008) 43 Cal.4th 652, 686.)

The fact that defendant’s uncle was present at the shooting was a pro-prosecution point, but a relatively minor one. The key evidence of guilt was that Chambers identified defendant as the shooter. Moreover, there was little doubt about that identification. Chambers saw the shooter up close. He already knew defendant from school. There was

⁴ Defendant does not contend that the prosecutor’s questions about *Fowler’s* out-of-court statements (as opposed to Clay’s) constituted prosecutorial misconduct. In any event, defense counsel forfeited this contention, too, by failing to request an admonition.

no evidence that he had any bias against defendant or any other reason to lie about the identity of the person who had just killed his friend.

The defense tried to cast doubt on the identification in two respects. First, when the police initially interviewed Chambers, he did not identify the shooter as “Scooter.” However, there was no evidence that, during that interview, they asked him if he knew the shooter. Second, Chambers told police that the shooter was about five feet six inches tall. Defendant’s school records showed that he was five feet three inches tall. However, the defense never showed the date of that school record. One would expect a teenaged boy to grow. At the time of trial, defendant was five feet six inches tall.

Moreover, defendant corroborated at least some of Chambers’s testimony. He admitted the first encounter with Scott and Chambers (including the discussion of whether he had previously threatened Scott). Although he denied the second encounter — and thus, he denied telling Scott to take off his blue shoes — he did admit that he at least considered telling Chambers to take off his “blue rag.”

Defendant admitted that he was in the area. And his response to hearing that he was accused of the murder was extraordinary. According to his testimony, he had two alibi witnesses who could testify that he was inside his aunt’s apartment when the shooting occurred. Nevertheless, defendant — a 16-year-old high school student whose only income was from an allowance and mowing lawns — left immediately for North Carolina. He did not even stop home for luggage. He stayed away for over a year. This was an unusually compelling showing of consciousness of guilt.

Finally, the prosecution demolished defendant's claim that he was not affiliated with any gang. Janay Powell testified that defendant hung out with gang members, including some identified by the gang expert as Bloods. When defendant was arrested in North Carolina, he was with a member of the Gilbert Street Bloods. In jailhouse phone calls, he addressed people as "blood." Most tellingly, in January 2007, defendant had admitted to a police officer that he was a member of a Blood gang.

In light of this strong evidence of guilt, the hearsay evidence regarding defendant's uncle was overkill.⁵ There was no evidence that defendant's uncle actually was a gang member. There was no evidence that he actually had a gun or that he supplied defendant with one. While the uncle's failure to step forward and testify for his nephew was somewhat incriminating, in light of the similar failure of defendant's aunt and of defendant's aunt's friend (see part IV, *post*), it was cumulative.

We recognize that the jury asked a question regarding the uncle. However, all it asked for was the uncle's *name*. It was the trial court's decision to give it a readback of *all* of the testimony regarding the uncle. Moreover, that was only its first question. Ten minutes later, it sent out a second question; the next day, it sent out four more, all asking for evidence unrelated to the uncle. The fifth question asked for the investigating officer's "testimony about [Chambers]'s ID of the shooter." The sixth question asked for

⁵ Indeed, the prosecutor's style throughout tended toward overkill. While such matters as defendant's activities during his time in North Carolina were at least marginally relevant, they also made the case more complex and confusing.

“Walter Chamber’s [*sic*] testimony[,] all of it.” This indicates that the jury’s focus had shifted to the crucial issue of Chambers’s identification. It would appear that the jury did not regard the testimony regarding the uncle as dispositive or even particularly helpful.

At oral argument, defendant asserted that the error was prejudicial because it enabled the prosecutor to argue that Chambers was credible because he knew that, if he lied, defendant’s uncle could contradict him.

In her rebuttal argument, the prosecutor stated: “If [Chambers] was going to lie, he could have picked anyone. If he knew that this guy was around other people, why would he make that up? Because he would know, ‘Hey, if he’s with his auntie, saying he’s the one that shot him, the aunt will merely come in and say, “No, he was with me.” Now, I’m a liar. *Or the uncle will say, “I saw the shooting.”*” Walter knows somebody else saw that shooting. He knows two other people saw that shooting, the murderer and the uncle. And there’s a likelihood that either, most likely *the uncle will come forward, if someone is falsely accused . . .*” (Italics added.)

This inference that Chambers was credible, however, flowed from his testimony that a “bum dude” was present. It had nothing to do with the erroneously admitted evidence the bum dude was, in fact, defendant’s uncle. Indeed, there was no evidence that *Chambers* ever knew that the bum dude was defendant’s uncle. Thus, this portion of the prosecutor’s argument did not capitalize on the error in any way.

We therefore find no reason to suppose that defendant would have obtained a more favorable verdict if his testimony that his uncle was present at the shooting had been excluded.

III

DEFENDANT'S COUSIN'S STATEMENT TO THE POLICE THAT DEFENDANT TALKED TO HIM ABOUT THE SHOOTING

Defendant contends that the admission of his cousin Turell Clay's out-of-court statements to the police violated the confrontation clause, as well as state law.

A. *Additional Factual and Procedural Background.*

The prosecution called Turell Clay as a witness. However, he refused to answer any questions, invoking his right against self-incrimination.

The prosecutor argued that her questioning of Clay was not necessarily incriminating. The trial court responded, "[I]f [Clay] told the police he knew where [defendant] was in North Carolina, that could be [incriminating]."

On cross-examination, the lead investigator testified that he had talked to members of defendant's family, including Clay. Clay told him that defendant was staying in North Carolina with somebody named "Benzo."

On redirect, the prosecutor asked:

“[PROSECUTOR]: Let's talk about what Mr. Clay told you. Mr. Clay also told you that [defendant] would not be at [his grandmother]'s house . . . because they knew the police . . . were watching that house, correct?”

“[DEFENSE COUNSEL]: I object. This is hearsay. It’s leading.

“[PROSECUTOR]: Goes to the statement that he opened.

“THE COURT: Overruled. It’s from an unavailable witness. [¶] . . . [¶]

“THE WITNESS: Yes.

“Q . . . And he stated that [defendant] has been staying in the Little Zion apartment complex with a [relative], correct?

“A Correct.

“[DEFENSE COUNSEL]: I object. That’s leading and hearsay. Violation of the confrontation clause.

“THE COURT: Overruled on hearsay grounds.

“Q . . . Mr. Clay also said that [defendant] spoke to him about the shooting, correct?

“A *Yes, he did.*

“Q But Mr. Clay didn’t want to give you that information. [¶] Is that fair to say?

“A He did not.

“[DEFENSE COUNSEL]: Objection. Leading.

“THE COURT: Sustained.

“Q . . . Was Mr. Clay willing to give you the information about what [defendant] told him about the shooting?

“A *No.*” (Italics added.)

B. *Analysis.*

Defendant does *not* challenge the admission of the answers to *all* of the prosecutor's questions quoted above. To the contrary, he concedes that "some of Clay's information involved nonhearsay because it ostensibly assisted [the officer] in apprehending [defendant] in North Carolina." Defendant challenges only the admission of the two answers that we have italicized.

Defense counsel forfeited this contention, however, by failing to object to these questions. (*People v. Dement* (2011) 53 Cal.4th 1, 23.) Defendant argues that any objection would have been futile, because the trial court had already overruled an objection on confrontation clause grounds to an earlier question. As noted, however, defendant concedes that the earlier question was distinguishable, because it had a nonhearsay purpose. We cannot conclude an objection to the challenged questions necessarily would have been futile.

Defendant therefore argues that his trial counsel rendered ineffective assistance by failing to object to these questions. ". . . 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption 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. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal 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 there simply could be no satisfactory explanation. [Citation.]’ [Citation.]” (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

“‘[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.] The rule is particularly apt when the asserted deficiency arises from defense counsel’s failure to object. ‘[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.’ [Citations.]” (*People v. Salcido* (2008) 44 Cal.4th 93, 172.)

Here, the two challenged answers were not particularly prejudicial. The first indicated that defendant had talked to Clay about the shooting. However, it did not include what defendant said; for all we know, his statement to Clay was perfectly consistent with his trial testimony. The second indicated that Clay was not willing to tell the police what defendant had said. This was not actually hearsay; it was nonassertive conduct — a refusal to disclose. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 350-351 [victim’s failure to say that her wallet was missing was nonassertive conduct, not hearsay].) Defendant argues that, in light of Clay’s hearsay statement that defendant had,

in fact, talked to him about the shooting, Clay's refusal to reveal what defendant had said implied that defendant's statement to Clay was a confession. This is not at all clear.

Clay was defendant's cousin, but there was no other evidence regarding his relationship with (or attitude toward) defendant. Indeed, as Clay was cooperating with the police — at least to the extent of telling them that defendant was in North Carolina with “Benzo” — it is a reasonable inference that, if defendant's statement had been a confession, Clay would have shared it with them.

As we already discussed in part II.B, *ante*, the evidence of guilt was fairly strong. The two challenged answers, by contrast, were only weakly and equivocally relevant. On this record, we see no reasonable probability that defense counsel's failure to object to them had any effect on the outcome.

We therefore conclude that defendant has not demonstrated ineffective assistance of counsel.

IV

DOYLE ERROR

Defendant contends that the admission of evidence that he had asked potential alibi witnesses not to talk to the police violated *Doyle v. Ohio, supra*, 426 U.S. 610. He further contends that, by failing to raise this particular objection, his trial counsel rendered ineffective assistance.

A. *Additional Factual and Procedural Background.*

Defendant testified that, when the shooting occurred, he was in his aunt's apartment. The aunt, Lanesha Moreno, and her friend, Nicole Jones,⁶ were with him; his aunt heard the shots.

On cross-examination, the prosecutor asked:

“Q And, has [Lanesha Moreno] come to visit you recently?”

“A She came to visit me, like, two weeks ago, three weeks ago”

“Q Did you tell her, ‘Hey, Aunt Lanesha, I’m going to tell them now that I was with you at the time of the shooting?’”

“[DEFENSE COUNSEL]: Objection. Relevance.”

“THE COURT: Overruled.”

“Q . . . Did you tell her that?”

“A No, I didn’t make no specific — I told her I’m going to take the stand at trial.”

“Q Did you tell her, ‘Hey, I’m going to tell her I was with you. And, do you remember when we heard the shots?’”

“A No.”

“Q Did she say, ‘Tywan, my nephew, let me talk for you’?”

“[DEFENSE COUNSEL]: I object. Hearsay.”

“THE COURT: Overruled.”

⁶ Apparently Jones was also defendant’s girlfriend’s older sister.

“Q . . . Did you guys have a discussion like that?

“A I wouldn’t put her in the type of position that you’re putting me in.

“Q What? Having to tell the truth?

“A No, trying to discredit my character.

“Q By what means?

“A By any means. Through family, through friends, through living on the west side, just attacking my family as saying we’re intimidators, we work with fear, we work with gang members, we have gang family. [¶] . . . [¶]

“So, I would not allow my auntie to try to take the stand and try to plead for me. I would take the stand and try to plead for myself.

“Q So your auntie never told anybody that you were with her during the shooting, did she?

“[DEFENSE COUNSEL]: I object. speculation. And, calls for hearsay.

“THE COURT: Sustained. [¶] . . . [¶] . . . As calling for speculation.

“Q . . . Have you talked about that with your aunt?

“A No, I haven’t.

“Q Do you know whether or not she’s told the police?

“A I know she haven’t made a statement.

“Q . . . [H]ave you asked her to?

“A No.

“Q Well, she’s the one that was with you, right?

“A Nicole Jones was with me, too.

“Q Did you ask Nicole to make a statement?

“A No.

“Q So the two people that were with you during this shooting, you asked neither one of them to come forward to the police, to the District Attorney, in three years and say, ‘Hey, you guys got the wrong guy —[’]

“[DEFENSE COUNSEL]: I object.

“Q . . . ‘— he was with me’?

“[DEFENSE COUNSEL]: Argumentative.

“THE COURT: Overruled.

“THE WITNESS: I wouldn’t allow them to make a statement, on the simple fact of the same way I didn’t make a statement.

“Q You wouldn’t allow them?

“A No. They told me, ‘I will go to the police and tell them.’ ‘No, don’t, because whatever I say or whatever you say will be used against me in a court of law. So don’t say nothing.’

“Q The fact that you didn’t do it is going to be used against you?

“A That’s the law, yes. Just like right now.”

In closing argument, the prosecutor stated:

“But, now, we have a new story. You heard the story when I heard it. That there was an aunt that was with the defendant. When did that story occur? We don’t know.

And it's just something that is now said. Not subject to scrutiny, not on tape, not — no reports written, nothing that can be tested.

“And that should cause you some concern, when there are statements that are made and you can't test the veracity of that statement, because no one came forward at the time that it happened. That's cause for concern.

“[DEFENSE COUNSEL]: I object. That's Griffin error.

“THE COURT: Overruled.”

After the jury had retired to deliberate, the trial court stated:

“[D]uring the prosecution's opening argument, defense counsel made an objection that her reference to witness [*sic*] not coming forward was Griffin error, which the Court overruled.

“I want to further explain the Court's ruling on that.

“In context, the prosecutor was talking about the witness, in particular the aunt not coming forward. And failure to call logical witness [*sic*] is appropriate argument.

“To the extent that the argument was that the defendant didn't come forward, certainly, if the defendant had not testified and there was an argument that, ‘Well, if the defendant wasn't there, he should have come forward,’ clearly, that would be Griffin error.

“But, here, the defendant did testify, did testify that he was in the apartment with his aunt at the time of the shooting. He was cross-examined about that issue by the prosecution, as well as questioned about that issue by defense counsel, as to, ‘Well, why

didn't you just tell people, "I didn't do it, I was in the apartment with my aunt"? And, there was an explanation given. So, there was evidence of his failure to come forward, and an explanation of his failure to come forward. This was part of the evidence in this case, and, therefore, it was proper for the prosecution to argue inferences from that evidence.

"And, so, that was not Griffin error."

B. *Analysis.*

Under *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], the Fifth Amendment prohibits the prosecution from commenting on the defendant's failure to testify at trial. (*Id.* at p. 615.) Here, defendant did testify at trial. Thus, as the trial court ruled, there was no violation of *Griffin* in this case. Defendant does not argue otherwise.

In *Doyle*, however, the Supreme Court held that due process similarly prohibits the prosecution from "seek[ing] to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda^[7] warnings at the time of his arrest." (*Doyle v. Ohio, supra*, 426 U.S. at p. 611, fn. omitted; see also *id.* at pp. 617-619.) "The basis of the rule is that 'it is fundamentally unfair, and a deprivation of due process, to promise an arrested person that his silence will not be used against him, and then to breach that promise by using silence

⁷ *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

to impeach his trial testimony.’ [Citation.]” (*People v. Clark* (2011) 52 Cal.4th 856, 959.)

As defendant essentially concedes, his trial counsel forfeited any claim of error under *Doyle* by failing to raise it below. (*People v. Tate, supra*, 49 Cal.4th at p. 692.)

Defendant’s claim that this constituted ineffective assistance of counsel fails because the record does not show that defendant ever received *Miranda* warnings. “[T]he Constitution does not prohibit the use for impeachment purposes of a defendant’s silence . . . after arrest if no *Miranda* warnings are given [citation].” (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 628 [113 S.Ct. 1710, 123 L.Ed.2d 353].)

Defendant argues that it is inferable that the police gave him *Miranda* warnings, as they “typically” do so. *Miranda* warnings, however, are required only if the defendant is subjected to custodial interrogation (*Miranda v. Arizona, supra*, 384 U.S. at p. 444); the record does not indicate whether defendant was ever interrogated after his arrest. If not, this would explain defense counsel’s failure to raise a *Doyle* claim. Because defendant cannot show that he was given *Miranda* warnings, he cannot meet his burden of showing that defense counsel’s representation was objectively unreasonable.

This claim also fails for the additional reason that the prosecutor did not question defendant about his own silence, but rather about the silence of his aunt and her friend. *Griffin* and *Doyle* do not prohibit comment on the silence of potential witnesses. (*People v. Santos* (1990) 222 Cal.App.3d 723, 736-737.) “Although a prosecutor is forbidden to comment “either directly or indirectly, on the defendant’s failure to testify in his

defense,” the prosecutor may comment ““on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses.”” [Citation.]’ [Citation.]” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1333.) Here, defendant not only failed to call two logical witnesses, but, by his own admission, he affirmatively told them not to talk to the police. The right to remain silent does not amount to a right to dissuade witnesses. The prosecutor was entitled to ask the jury to infer that these witnesses, if called, would not actually support defendant’s alibi.

VI

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.