

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN RETANA PEREZ,

Defendant and Appellant.

G047573

(Super. Ct. No. 02WF2857)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a))¹ and found true that he personally used a knife in committing the murder (§ 12022, subd. (b)(1)). The court sentenced him to 25 years to life in state prison for the murder and an additional one year prison term for personal use of a knife, for a total of 26 years to life.

After defendant was arrested, he waived his *Miranda*² rights and conversed with detectives for approximately 45 minutes. He then asserted his *Miranda* rights. At trial, defendant moved *in limine* to preclude the prosecutor from cross-examining defendant on why he did not reveal at the time of the interview unspecified facts he might testify about (e.g. “If that is true, why did you not tell the detectives that at the time of the interview?”). This would, in defendant’s view, impermissibly comment on defendant’s exercise of his right to remain silent under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), given that he exercised his *Miranda* rights part-way through the interview. During the course of argument on the motion, the prosecutor conceded the merits of defendant’s argument and agreed to cross-examine solely on *inconsistencies* between the interview statements and any trial testimony. The trial court denied the motion, however, and in doing so suggested the prosecutor *could* question defendant about why he had not previously revealed additional details. Defendant chose not to testify and now raises a single issue on appeal: whether the court erred in denying the motion.

We hold defendant failed to preserve the error by electing not to testify. Defendant’s election leaves us without an adequate factual basis to determine whether any inadmissible evidence would have been admitted, or questions permitted, particularly in light of the prosecutor’s concession. Likewise, we could only speculate as to what

¹ All statutory references are to the Penal Code.

² *Miranda v. Arizona* (1966) 384 U.S. 436

harm these unidentified questions would have done to the unidentified testimony. Accordingly, we affirm.

FACTS

In either 1997 or 1998, defendant began dating Rocio Leon, the victim in this case. Later they moved in together and had a son, who was born in 1999.

Things apparently turned rocky later that year, as defendant was convicted of committing domestic violence against Leon in September of 1999. According to Leon's older son, who was 13 or 14 at the time, the baby was crying and defendant attempted to calm the baby by throwing him up in the air. Leon disapproved and took the baby away from defendant. This angered the defendant and he began punching Leon in the back while she was holding the baby. Leon's older son attempted to intervene but was slapped and thrown to the ground by defendant. His intervention bought enough time for Leon to put the baby down. When defendant turned his attention back to Leon, he threw her on the ground and continued hitting and kicking her. Leon's older son then retrieved a baseball bat and struck defendant in the head. This disoriented defendant, allowing Leon to escape with her two sons.

In December of 2000, defendant and Leon separated, though they continued to see each other.

In 2001 Leon worked for the Orange County Register (Register) as a newspaper delivery person. She would collect the newspapers at the Register's distribution center in Garden Grove. The newspapers would be bundled in a stack and Leon would use a steak knife to cut the bindings. In April of 2001 defendant was a construction worker working at a site near Leon's home. Defendant would occasionally go with Leon to help deliver newspapers.

In early April of 2001, Leon began dating a new man. Shortly afterwards, defendant's sister noticed that defendant started "acting strangely for a few days, a week before [the murder]," and was angry towards Leon because he "found something [she] did to him."

Around 3:50 a.m., on April 18, 2001, Garden Grove police officers were dispatched to an area three or four blocks away from the Register's distribution center. Leon's dead body was in the street. Nearby was a knife resembling a kitchen knife with a wooden handle, the bottom part of the handle having a burn mark. The blade was bent. Blood was on the victim's face and sweatshirt. Her neck had a six and one-half inch slash across it. The left side of her chest had three stab wounds, one of which was fatal. Her left arm had defensive wounds. There were tar or oil marks across the right side of her forehead, chin, and neck as well as her left arm and leg. These were apparently the result of being run over by a car. There were a total of eight knife wounds on her body. Nearby was a pool of blood. Officers could not locate a purse, wallet, driver's license, or any form of identification.

Around 6:20 a.m. that same day, defendant went to a gas station near the construction site where he worked to buy a cup of coffee. Leon's former brother-in-law worked at the gas station. He testified defendant "appeared to be acting very strange." Defendant was "extremely nice" to him, which was unusual because they did not get along. Defendant then went to work, which was within walking distance of the gas station. His boss at the construction site likewise noticed he was acting out of character that morning, appearing anxious and distant and not wanting to talk to him. Around 9:00 a.m., defendant called his sister to ask if anyone had called asking for him.

Around noon that day, defendant called his boss, who had already left the job site, and asked for an advance on his paycheck of \$1,000. He had never done so before. His boss agreed to the advance and offered to bring the money the next morning. Defendant insisted on obtaining the money that day and drove out to a grocery store near

his boss's home and picked up a check. Defendant claimed he was going to send the money to his mother in Mexico, and his boss expected him to be at work the next day. Instead, defendant fled to Mexico, leaving behind his baby son.

Leon's sister confirmed that the knife left at the scene belonged to Leon. Investigators tested the knife for DNA and determined it contained defendant's DNA as well as Leon's. Investigators searched defendant's residence and found tennis shoes belonging to him with four drops of blood on the sole. DNA testing revealed the blood to be Leon's.

Eight years later, defendant was arrested in Arkansas, where he was living under the alias Giovanni.

He was brought to California and interviewed by investigators for 35 to 45 minutes after having been read his *Miranda* rights. He generally denied killing Leon and claimed he left California because he saw police at his apartment and was worried Leon had falsely claimed he committed domestic violence again and did not want to be arrested. At approximately the 45 minute mark in the interview, defendant invoked his *Miranda* rights and the interview ended. The video of the interview prior to the *Miranda* invocation was played for the jury.

After the close of the prosecution's case, defense counsel indicated defendant intended to testify. Counsel then moved in limine to preclude the prosecutor from "question[ing] him about his post-arrest silence. In other words, not inquire of him, well, you never told the police A, B, and C. That would be what I believe to be *Doyle* error, which is impeaching a defendant with his post-arrest silence after he invokes." The prosecutor initially disagreed. After taking a break and reviewing some case law, however, the prosecutor acknowledged the merit of defense counsel's argument: "However, I do think there is some merit to — in fact, a lot — defense counsel's argument that an open-ended question of something that was new for me to say, you had all the time in the world to tell that to police and you didn't, . . . I think that would either

border on or possibly be improper.” “I’m going to take the safer route, and I’ve told [defense counsel] this, when I cross-examine the defendant, if there are things that are absolutely inconsistent, I find them to be inconsistent, I woke up at 8:00, no, I slept in till 12:00, I’m going to go there. [¶] But in regards to anything new — and, of course, this is sort of in a vacuum because we don’t know — I have no idea if the defendant will even testify at this point, let alone say new things. If I find there is new things, . . . I don’t plan on asking the defendant you never mentioned that in your first statement.” In response, defense counsel stated, “I would submit it, your honor. I believe myself and the prosecution have reached an agreement on that issue.”

The court then denied the motion in a ruling that is ambiguous regarding whether the court was permitting questioning solely regarding inconsistencies or additionally permitting the prosecutor to ask why defendant had not provided additional details during the interview. “Defendant’s attempt to characterize a conflicting statement as silent [*sic*] cannot stand and is not supported by the evidence. [¶] [D]efendant was not silent on his whereabouts at the time of the murder. Questions regarding the defendant’s failure to tell the police the same story [are] not designed to draw meaning from the silence, but to elicit an explanation from a prior inconsistent statement.” “I’m finding that *Doyle* doesn’t apply to our case. And, again, the case law is allowing the D.A. in the court’s opinion to ask him about those prior statements. In addition, we now have the D.A. and the defense agreeing that it can be done in a certain way. [¶] So the court is very confident it’s on solid ground in allowing the cross-examination in reference to the earlier statements. [¶] So that’s my ruling on the *Doyle* issue. [¶] I’m going to deny your motion to exclude it under *Doyle*.”

Defense counsel then took a moment to confer with defendant, after which he stated, “Your honor, I have inquired of my client as to whether he wishes to testify, and he’s indicated to me in light of the court’s rulings, he’s not going to take the stand.” Defendant timely appealed from the judgment.

DISCUSSION

Defendant raises a single issue on appeal: whether the court prejudicially erred under *Doyle* in denying the motion in limine described above because it would have permitted the prosecutor to impermissibly comment on defendant's silence. The Attorney General contends there was no error, but that, in any event, defendant forfeited the argument by electing not to testify. We agree the issue is forfeited.

Our analysis begins with *People v. Collins* (1986) 42 Cal.3d 378. In *Collins*, after the prosecution rested, the defense moved to preclude the prosecution from impeaching defendant with a prior conviction in the event defendant chose to testify. (*Id.* at p. 383.) The motion was denied, and defendant elected not to testify due to the court's ruling. (*Ibid.*) On appeal, defendant claimed denial of the motion was error, but our high court held defendant had forfeited the issue by electing not to testify. (The court also held, however, the forfeiture rule would apply prospectively only.) (*Id.* at p. 383.) The court, following *Luce v. United States* (1984) 469 U.S. 38 (*Luce*), articulated three reasons for its decision.

First, "the trial court [must] weigh the probative value of the conviction against its prejudicial effect, and 'To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify.' [Citation.] Likewise, an appellate court cannot review that balancing process unless the record discloses 'the precise nature of the defendant's testimony.'" (*Collins, supra*, 42 Cal.3d at p. 384.)

Second, "'Any possible harm' from such an in limine ruling is 'wholly speculative.' To begin with, the trial court has discretion to make a different ruling as the evidence unfolds. Next, when the defendant does not testify, the reviewing court also has no way of knowing whether the prosecution would in fact have used the prior conviction to impeach: if the prosecution's case is strong and the defendant is impeachable by other

means, the prosecutor might elect not to use a questionable prior conviction in any event.” (*Collins, supra*, 42 Cal.3d at p. 384.)

“Third, when the trial court errs in ruling the conviction admissible the reviewing court cannot intelligently weigh the prejudicial effect of that error if the defendant did not testify. The Supreme Court reasoned that if such rulings were reviewable on appeal, ‘almost any error would result in the windfall of automatic reversal; the appellate court could not logically term “harmless” an error that presumptively kept the defendant from testifying. Requiring that a defendant testify . . . will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole; it will also tend to discourage making such motions solely to “plant” reversible error in the event of conviction.’” (*Collins, supra*, 42 Cal.3d at pp. 384-385.)

These reasons apply with even more force to the facts in this case. Because defendant did not testify, we have no idea what his testimony would have been. He did not make an offer of proof, and even if he had, *Collins* rejected the notion that an offer of proof would preserve the error, stating, “his trial testimony could, for any number of reasons, differ from the proffer.” (*Collins, supra*, 42 Cal.3d at p. 384.)³ Not only do we not know what defendant’s testimony would have been, we do not know what the prosecutor’s questions would have been — particularly in light of the prosecutor’s stipulation to avoid the sort of questions defendant was worried about. Unlike in *Collins*

³ Defendant made an offer of proof for the first time on appeal in a footnote in his opening brief. As we noted above, the offer of proof would not have preserved the error. We further note that defendant cites no authority, and we are aware of none, permitting defendant to make an offer of proof for the first time on appeal. Although it makes no difference to the outcome of this appeal, we would reject such an offer. We review the record in the trial court. An offer of proof at the trial level does more than just preserve a record; it offers the trial court an opportunity to make a ruling based on specific evidence rather than, as here, in the abstract. It is too late to make an offer of proof now.

where it was clear what evidence the prosecutor wanted to admit — a prior conviction — here we simply do not know, which provides an even greater justification for finding a forfeiture.

Defendant complains the prosecutor’s stipulation left the prosecutor too much “wobble room.” But the prosecutor is an officer of the court, and we will take his word at face value until given reason to doubt it. Here, defendant did not testify, and thus we were never given reason to doubt it.

Defendant contends we should reject the forfeiture argument on the authority of *People v. Brown* (1996) 42 Cal.App.4th 461 (*Brown*) and *People v. Jablonski* (2006) 37 Cal.4th 774 (*Jablonski*). We find those cases distinguishable.

In *Brown* defendant contended certain statements made during an interview were obtained after he had invoked his right to counsel, and were thus inadmissible. The trial court held they were admissible, and defendant elected to not testify. (*Brown*, 42 Cal.App.4th at p. 468.) Defendant appealed the evidentiary ruling, and the court held the issue was preserved despite the election to not testify. It distinguished *Collins* as follows: “the need for a full factual record, does not apply in reviewing legal issues concerning the admissibility of confessions obtained in violation of the Constitution. Although a challenge to an improperly admitted prior felony conviction involves factual determinations, the trial court and the reviewing court can determine whether a constitutional violation occurred based on the evidence presented in a motion to suppress.” (*Brown*, at pp. 470-471.)

In our view, the rule in *Brown* applies where a *discrete piece of evidence* is proffered in violation of a constitutional mandate, such as the recorded statements at issue in *Brown*. Although the issue here touches on an issue of constitutional dimension — the right to remain silent — we do not deal with a discrete piece of evidence obtained in violation of that right because we do not know what defendant’s testimony would have

been nor what questions the prosecutor would have asked. Thus we *do* have a need for a full factual record.

In *Jablonski*, investigators obtained statements from defendant in violation of his *Miranda* rights and the prosecution sought to use them as impeachment. (*Jablonski, supra*, 37 Cal.4th at p. 810.) The defense moved to exclude the statements, but the trial court held it could not assess, for purposes of impeachment, whether the statements were voluntary, and would thus decide it on a case-by-case basis during the testimony. Defendant elected not to testify and appealed the ruling. (*Id.* at p. 812.) Our high court first considered whether the issue had been preserved. It noted that cases such as *Luce* and *Collins* did not arise in the context of evidence obtained in violation of the Constitution, and that *Brown* had held that forfeiture did not apply in such cases. The court did not resolve that issue, however, instead relying on the principle that “[w]here, as here, the question of whether a defendant has preserved his or her right to raise an issue on appeal is a ‘close and difficult’ one, we sometimes assume the issue has been preserved and proceed to the merits.” (*Jablonski*, at p. 813.) Defendant urges us to apply the same principle.

However, we do not consider the present case to be a close and difficult one. Unlike *Brown* and *Jablonski*, we do not know what evidence or questions are even at issue. All we have is a tentative ruling on an abstract legal issue. Further, the prosecutor specifically said he would avoid the sort of questions defendant objected to. On that record, the issue is not difficult: defendant forfeited the argument by electing not to testify.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.