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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RICHARD LAVEL HILL, Defendant and Appellant.	B229096 (Los Angeles County Super. Ct. No. LA062046)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Affirmed.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Richard Lavel Hill appeals from a judgment of conviction entered after a jury found him guilty of assault with intent to commit sexual penetration by force or fear during the commission of a burglary (Pen. Code, § 220, subd. (b)), first degree robbery (*id*., § 211), and first degree burglary (*id*., § 459). The trial court found true the allegations defendant had suffered two prior serious felony convictions (*id*., §§ 667, subds. (a)(1), (b)-(i), 1170.12) and had served four prior prison terms (*id*., § 667.5, subd. (b)). The court sentenced defendant to state prison for a term of 37 years to life.

On appeal, defendant challenges the admission of evidence of uncharged sexual misconduct and instruction on the evidence. He also claims ineffective assistance of counsel and cumulative error. We affirm.

FACTS

A. *Prosecution*

1. The Charged Offenses

At about 1:30 a.m. on May 10, 2009, Melanie H. was getting ready for bed in her Van Nuys apartment. She heard a knock on the door. Assuming it was her friend and neighbor, Bret Cureton (Cureton), who had been visiting and left her apartment about 20 minutes earlier, she opened the door a few inches. Defendant was standing there. Melanie did not recognize him and tried to close the door, but defendant put his foot in the doorway, preventing her from closing the door.

Defendant asked to use the bathroom. He identified himself as Lavel and asked Melanie if she remembered him. Melanie then recognized him as someone her friend, Niece, had arranged for her to meet; defendant was the uncle of Niece's boyfriend. Niece and her boyfriend had brought defendant to Melanie's apartment. Melanie and defendant had used drugs together on that occasion. After that, defendant had called her two or three times to talk and to offer her drugs, but Melanie did not see him again. Three or

four months later, Niece said she had been stabbed and robbed; she thought defendant was involved and warned Melanie not to trust him.

Melanie told defendant it was late and she was not going to let him in. She said he should use the bathroom at a nearby gas station. She tried to close the door, but defendant was trying to push it open. Defendant told her that she knew him and it was okay. When Melanie pushed harder on the door, defendant hit the door, pushed it open and entered the apartment.

Defendant grabbed Melanie around the neck and pushed her into the kitchen. He slapped Melanie's face "really hard" a couple of times and told her that he did not want her disrespecting him. He said he wanted money. He picked up a decorative pink bottle from the counter and threatened to bash her head in.

Defendant dragged Melanie into her bedroom and demanded money. She gave him $35 from her pocket. He asked where her purse was, but she said she did not carry one. Defendant continued to slap and choke her while asking for her purse. Melanie told him she had given him all the money she had.

Defendant began looking through the dresser and vanity drawers. He found a vibrator in one of the drawers and ordered Melanie to undress. Because she was scared, Melanie complied. Defendant ordered her to "play with" the vibrator. She pretended to masturbate with the vibrator. She attempted to close her legs, but defendant slapped her legs and told her to open them.

Defendant then grabbed several purses that were hanging on the bedroom door and started shoving items into them, including Melanie's phones, a silver lighter case and jewelry. Defendant ordered Melanie into the second bedroom and shut the door. He told her he was leaving and that she should not come out of the bedroom. She heard the front door close. She waited a few minutes then came out of the bedroom and got dressed. Because defendant had taken her phones, Melanie went downstairs and had one of the apartment complex's security guards call the police.

Officers from the Los Angeles Police Department arrived a few minutes later. Melanie told them what happened and gave a description of defendant, telling the officers she had met defendant once before.

Officer Andrew Cullen arrived at Melanie's apartment about an hour later. He observed that the side of her face was bruised and swollen, and her lip was cut; Melanie complained of pain and soreness to her face and throat. She told Officer Cullen what had happened. She added that defendant had been holding a gold or silver beer can when he arrived; officers recovered a beer can matching that description on the steps near the apartment. It appeared to Officer Cullen that Melanie was in shock; she did not appear to be under the influence of drugs. After the interview, Melanie was taken to her son's home in Canoga Park so she would not have to stay alone in her apartment.

Melanie's apartment was dusted for fingerprints, and the decorative pink bottle was booked into evidence and checked for fingerprints. Defendant's fingerprints were found on the bottle.

Melanie tried to call Niece, but was unable to reach her. When she later asked Niece to talk to the police, Niece refused.

Two days later, Cureton called the police and gave them defendant's full name, which he had gotten from Melanie. Cureton said that defendant was a Pacoima gang member.

The police learned that defendant was on parole and conducted a parole search of the room he occupied in his mother's home. They found two purses under his bed, one containing a wallet, as well as heroin, a pipe containing rock cocaine, and a marijuana pipe. They spoke with defendant by telephone, telling him that they found heroin in his room and he needed to come home and explain himself. He said that the heroin belonged to his girlfriend. After he came home, he was read his *Miranda*[1] rights, which he refused to waive, and taken to the police station.

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

Melanie identified the purses and wallet recovered from defendant's room as hers. She also identified defendant from a photographic lineup.

Melanie was examined by a sexual assault nurse examiner on May 15. Photographs taken by the nurse showed bruising on Melanie's face and neck, and on her arms, chest and legs.

Melanie spoke to two defense investigators, whom she did not consider professional due to their demeanor. She denied telling them that she would be willing to settle the case for $250 or $350. About a month later, she received a telephone call from a man identifying himself as Niece's brother, although he sounded like one of the investigators. He said he was paid not to testify and asked her if she wanted to do the same. She said she did not.

Melanie admitted that she did not tell the prosecutor about using drugs with defendant until three days before trial because she did not want to get in trouble. She denied giving her property to defendant in exchange for drugs.

2. Uncharged Sexual Misconduct

At about 6:30 a.m. on June 1, 1998, defendant came to Kimberly M.'s[2] apartment in Panorama City and began banging on the windows. Kimberley had met defendant at a neighbor's home a month or two earlier, and she had spoken with him a couple of times. Defendant continued banging on the windows for about three hours. Kimberly was unable to call the police because she did not have a phone.

Defendant eventually was able to enter the apartment through a sliding glass door. He confronted Kimberly in the bedroom, telling her she had been avoiding him and he was going to break her jaw. He said she owed him money, which she denied. He slapped her face, stunning her, and called her names. He then apologized for hitting her

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[2] Kimberly was deceased. The trial court instructed the jury that she was unavailable as a witness and her testimony would be read from a prior transcript.

and took $7 from her dresser. After that, he held her down on the floor by the neck and forcibly engaged in sexual intercourse with her. Afterwards, he said he was sorry.

Kimberly denied that she was a prostitute or that she used drugs. She admitted that she had previously used drugs and been convicted of petty and felony theft, burglary, and being under the influence of a controlled substance.

B. *Defense*

Archie Johnson (Johnson), a registered process server and investigator, and Sherlock Watson Hayes (Hayes), a private investigator and paralegal, interviewed Melanie on August 29, 2009. According to Johnson, Melanie said that defendant had stolen a $200 cell phone and jewelry of sentimental value, including a necklace worth $40, from her. She would be willing to drop the case for $240. When they interviewed Melanie, she smelled of alcohol and appeared shaky.

According to Hayes, interviews with other witnesses established that Cureton was Melanie's boyfriend. Hayes observed that Cureton had very large hands.

Defendant testified on his own behalf. He testified that he met Melanie in September 2007. He had been to her apartment three to five times to use drugs. Although he was not a drug dealer, he had brought drugs to her because she did not have a car.

On May 10, 2009, early in the morning, he went to visit his friend Debbie, who lived in the same apartment complex as Melanie. Debbie was not home, so he went to visit Melanie. After he knocked on her door, she opened it and asked what he was doing there so late. He told her he had something. She said that she was expecting company, so they should "make it quick."

Defendant came in and sat down on the couch. He was holding a can of beer. When he put it down on the coffee table, he noticed there was a "little speck" of water on the table. He went into the kitchen to get a dish rag to wipe it off. While in the kitchen, he might have touched a vase or wine bottle.

Defendant took out a pipe and crack cocaine, smoked some and handed the pipe to Melanie. She wanted to go into the bathroom because she did not like to smoke in the living room. Defendant went with her into her bedroom, then she went into the bathroom. They then returned to the living room, where they talked for 10 to 15 minutes. Defendant then started to get up to leave, since Melanie had company coming over. However, Melanie playfully pushed him back down and said, "you ain't going nowhere."

Melanie asked defendant to wait a second. She went into the bedroom and returned with two old purses. She asked him to see if his girlfriend was interested in them and, if so, the girlfriend could keep them and defendant could bring her back some cocaine. Defendant gave Melanie a little piece of cocaine, and she asked if he had any speed. He said he had a little in his car, and she asked him to get it.

As defendant went to his car, he finished his beer and threw the can on the steps, because he did not want to drink and drive. As he was looking in his car for the drugs, he saw police officers arriving. He got nervous and drove away.

Defendant stated that he had known Melanie to "mess with some guy named Bret," and he had heard about Bret being in Melanie's apartment. Defendant denied knowing anything about a vibrator or intending to rob Melanie. Defendant also stated that the purses recovered from his room were in plain view, not under the bed.

Defendant admitted that he had been convicted of burglary in 1992 and 1999 and of manslaughter in 1994.

DISCUSSION

A. *Admission of Evidence of Uncharged Sexual Misconduct*

Prior to trial, the prosecutor sought to introduce evidence of uncharged sexual conduct by defendant against Kimberly M. in 1998 and Sharon N. in 1991. Defendant objected to admission of the evidence under Evidence Code section 352 (section 352) based on the remoteness of the two incidents and the fact he was not convicted of any crimes based on the incidents.

The trial court found that evidence of the incidents would be admissible under Evidence Code section 1108 (section 1108). It declined to exclude the evidence under section 352, stating, "I do think that they're highly relevant, and I don't think there's going to be any confusion of the issues or undue waste of time, or anything like that. But the only issue would be whether maybe I might allow one and not two incidents, based on [section] 352 analysis, and I have to think about that." Ultimately, evidence of only the Kimberly M. incident was admitted, because Sharon N. could not be located.

Section 1108, subdivision (a), provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."[3] Section 352 gives the trial court the discretion to exclude evidence if the probative value of the evidence is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury.

When ruling on the admissibility of evidence of another sexual offense, the trial court should consider "'such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.] Like any ruling under section 352, the trial court's ruling admitting evidence under

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[3] Section 1101, subdivision (a), prohibits, with specified exceptions, admission of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion."

section 1108 is subject to review for abuse of discretion. [Citations.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

Defendant contends the trial court abused its discretion in refusing to exclude evidence of the Kimberly M. incident, in that the incident "was far more inflammatory that the present offense and thus invited the jury to punish him for the past conduct rather than the instant charge." Additionally, the jury heard no evidence "that [defendant] had been convicted of the 1998 rape," increasing the likelihood that the jury would convict him to punish him for the prior conduct.[4]

Defendant also argues that "there was a degree of uncertainty as to the commission of the prior rape," in that he was not convicted of that offense. It appeared that the rape charge was dismissed as part of a plea bargain, possibly because of proof problems. Because the jury was not told of the dismissal, it "was likely to conclude that . . . if he did it once, he did it again in the present case."

We disagree with defendant's assessment of the Kimberly M. incident as "far more inflammatory that the present offense." While the assault against Kimberly M. included sexual penetration by defendant, the assault against Melanie clearly was humiliating, and it involved more physical violence, leaving Melanie shocked and in pain. The trial court was entitled to consider the circumstances of the instant case in concluding that the Kimberly M. incident was not so inflammatory that its prejudicial impact outweighed its probative value. (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1105-1106; see, e.g., *People v. Daniels* (2009) 176 Cal.App.4th 304, 317.)

The record affirmatively shows that the trial court carefully considered the prior incident and weighed the requisite factors in determining its admissibility under section 1108 and whether it should be excluded under section 352. We find no abuse of discretion in the trial court's rulings. (*People v. Dejourney*, *supra*, 192 Cal.App.4th at pp. 1105-1106.)

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[4] As defendant points out, the only evidence the jury heard on this issue was defendant's testimony that he was convicted of first degree burglary in 1999.

B. *CALCRIM No. 1191*

Defendant further contends that instructing the jury pursuant to CALCRIM No. 1191 that if it found he committed the 1998 sexual offense against Kimberly M., it could conclude defendant was likely to and did commit the charged sexual offense against Melanie H. Defendant acknowledges that the California Supreme Court has rejected a similar claim with respect to CALJIC No. 2.50.01 (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016), and the courts of appeal have upheld CALCRIM No. 1191 on that basis (See, e.g., *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1103-1104, review den. Feb. 16, 2011; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480, review den. Sep. 25, 2007). We acknowledge defendant's need to raise this issue in order to preserve it for federal review, but we reject his contention based on the Supreme Court's ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Miramontes, supra,* at p. 1104.)

C. *Ineffective Assistance of Counsel During Closing Argument*

Defendant claims that the prosecutor committed *Doyle*[5] error during her closing argument, when she commented on his postarrest silence. He contends that his counsel's failure to object constituted ineffective assistance of counsel.

Defense counsel began his argument by agreeing with the prosecutor that "all people deserve fair treatment, regardless of their lifestyle. This includes the defendant."

It was the defense's theory that Melanie was attacked by Cureton, who was her boyfriend, and she falsely claimed that it was defendant who had done it. In his argument, defense counsel attacked Melanie's credibility, pointed out discrepancies in her testimony and in what she told the police. He asked, "Isn't it . . . a more likely story that Bret Cureton, her abusive, controlling boyfriend saw [defendant] leaving Melanie's apartment, went out there, found out she had been doing drugs with [defendant], and

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5 *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91].

slapped her around a bit with his big hands, and then made her make up this story about being robbed and sexually assaulted?"

Defense counsel argued that defendant was "a very credible witness." Counsel concluded his argument by stating, "So now [defendant] is asking you to remember these things, these contradictions, lies, fabrications by Melanie H. Remember the actual believable evidence presented to you on the witness stand that vindicates [defendant]."

In response, the prosecutor began her closing argument by stating, "The defendant does deserve fair treatment, and he has received it. A jury by his peers, who gets to come in, evaluate the evidence against him, and decide what's happened, that's the fair treatment he's gotten. He's gotten fair treatment, in that, *he was questioned by police when he was arrested and he chose not to tell them the concocted story he chose to tell you.* He was treated fairly because he's been given his trial. That's taken care of." (Italics added.)

The prosecutor then challenged the defense's theory of the case as unsupported by the evidence and "a figment of the defense imagination." The prosecutor characterized defendant's explanation as to why his fingerprints were found on the pink bottle as "a story, a made-up explanation of some random water spilling." She asked, "*Why wasn't that told to anyone before trial? Despite being given the opportunity, why was that story never said to anyone a year and a half later?*"

Doyle prohibits the use of a defendant's postarrest silence following a *Miranda* warning to impeach the defendant's trial testimony. (*People v. Collins* (2010) 49 Cal.4th 175, 203.) Such use 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. . . .'"'" (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1555.)

"'An assessment of whether the prosecutor made inappropriate use of defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument. [Citation.] A violation of due process does not occur where the prosecutor's reference to defendant's postarrest silence constitutes a fair response to defendant's claim

or a fair comment on the evidence. [Citations.] " . . . *Doyle*'s protection of the right to remain silent is a 'shield,' not a 'sword' that can be used to 'cut off the prosecution's "fair response" to the evidence or argument of the defendant.'"'" (*People v. Delgado* (2010) 181 Cal.App.4th 839, 853.) However, if the prosecutor refers to the defendant's postarrest silence "'so that the jury would draw "inferences of guilt from [the] defendant's decision to remain silent after . . . arrest,"'" *Doyle* error occurs. (*People v. Hollinquest*, *supra*, 190 Cal.App.4th at p. 1556.)

Here, the focus of the prosecutor's argument was defendant's credibility, specifically his explanation of how his fingerprints got on the pink bottle and the defense claim that Cureton was responsible for Melanie's injuries. The prosecutor's intent was to convince the jury that defendant's explanations were a recent fabrication. There was no direct attempt to have the jury draw an inference of guilt from defendant's exercise of his right to remain silent. To the extent the prosecutor's comments could have been interpreted as requesting that the jury draw such an inference, the question is whether defense counsel's failure to object deprived defendant of the effective assistance of counsel.

In order "[t]o secure reversal of a conviction for ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that, to a reasonable probability, defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068.) "'"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

It is not reasonably probable that defendant would have been acquitted had his counsel objected to the prosecutor's statements. The jury would have been admonished, but the thrust of the prosecutor's statements would remain for the jury's consideration: that there was no evidence to support the defense's theory that Cureton caused Melanie's

injuries, and that defendant's explanation of how his fingerprints got on the pink bottle was patently unbelievable.

During argument, defense counsel pointed out the weaknesses and credibility problems in Melanie's testimony, and the prosecutor did the same with respect to defendant's testimony. The jury found Melanie to be the more credible witness. It is not reasonably probable this would have changed with an objection to two remarks by the prosecutor that might be interpreted as permitting an inference of guilt from defendant's failure to make known exculpatory information prior to trial. Accordingly, defendant was not deprived of the effective assistance of counsel. (*People v. Kraft, supra*, 23 Cal.4th at p. 1068.)

D. *Cumulative Error*

Defendant contends that the errors claimed above, when considered cumulatively, had the effect of denying him a fair trial, mandating reversal of his convictions. (*People v. Hill* (1998) 17 Cal.4th 800, 847; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) We disagree.

Only one of defendant's claims of error had arguable merit. There was no cumulative prejudice resulting from multiple errors. (*People v. Loy* (2011) 52 Cal.4th 46, 77.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.