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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TEDROY DAVIS,

Defendant and Appellant.

B237536

(Los Angeles County
Super. Ct. No. BA373310)

APPEAL from an order of the Superior Court of the County of Los Angeles, Sam Ohta, Judge. Affirmed.

Sara H. Ruddy, 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, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Following trial, a jury found defendant and appellant Tedroy Davis (defendant) guilty of second degree murder and of being a felon in possession of a firearm. On appeal, defendant contends that during a rebuttal examination of one of the investigating detectives, the prosecutor committed *Doyle*¹ error when, on four separate occasions, she asked the detective improper questions about statements defendant made or failed to make after he invoked his right to counsel.

We hold that defendant forfeited each of the claims of *Doyle* error by failing to object to the questions in issue and request curative instructions. We do not reach defendant's claim of ineffective assistance of counsel, as such a claim is more appropriately raised by way of a writ of habeas corpus. We therefore affirm the judgment of conviction.

FACTUAL BACKGROUND²

A. The Shooting

Hubert McFarlane owned a restaurant which defendant frequented. About a week before the shooting, McFarlane witnessed an altercation outside the restaurant between defendant and the victim during which McFarlane heard the victim tell defendant to "take off his red shirt." During that incident, McFarlane saw a gun in defendant's pants pocket which defendant always carried.

On July 3, 2010, defendant followed the victim and two other men into a market near McFarlane's restaurant. Defendant left the market and returned to the front of the

¹ *Doyle v. Ohio* (1976) 426 U.S. 610.

² Because defendant's claims of *Doyle* error involve only certain portions of his testimony and the rebuttal testimony of the investigating detective, we do not include a detailed discussion of the other evidence.

restaurant. As the victim and the two other men left the market, defendant gestured and exchanged words with them. The victim then confronted defendant. Defendant and the victim argued, and the victim threw a punch at defendant. Defendant pulled a gun and shot and killed the retreating victim. Defendant then ran to his truck and left. A surveillance videotape showed defendant at the scene at the date and time of the shooting. Defendant was arrested in Arizona on July 30, 2010.

B. Defendant's Testimony

Defendant testified in his own defense. Among other things, defendant testified he was aware the victim was a gang member and that he armed himself on the day of the shooting because he was afraid of the victim who had threatened to kill him. He also said he did not intend to hurt the victim. He thought the victim was reaching for a gun. Defendant admitted he shot the victim out of fear and that he was the man depicted in the surveillance video.

C. Rebuttal Testimony of Investigating Detective

In rebuttal, the prosecutor called one of the investigating detectives who had questioned defendant while he was in custody in Arizona. The detective testified that he and his partner advised defendant of his *Miranda*³ rights.

1. First Claim of Doyle Error

After eliciting testimony from the detective that defendant had been advised of his *Miranda* rights, the prosecutor asked the detective, "And how did defendant respond?" In response, the detective stated, "He said that he wanted an attorney." Defense counsel did not object, seek to strike the answer, or request a curative admonition.

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

2. *Second Claim of Doyle Error*

The prosecutor next asked the detective the following questions: “And after the defendant said he wanted an attorney, how did you or your partner respond? [¶] A. We said we would still want to talk to him to get some basic information from him.

[¶] Q. Did you attempt to get basic information from him? [¶] A. Yes. [¶] Q. What type of information did you attempt to get from him? [¶] A. Where he lived, who his wife or significant other was. Things like that. [¶] Q. Did he ask any questions about why he was being there or why he was arrested? [¶] A. Yes. [¶] Q. And did you respond? [¶] A. Yes. [¶] Q. And why [*sic*], did you all say? [¶] A. We told him we had a warrant for his arrest for the crime of murder. [¶] Q. And did he ever tell you, during his interview, and give you any—well, did he ever tell you that he shot the victim because he was scared of the victim? [¶] A. No. [¶] Q. Did he ever tell you that? [¶] [Defense Counsel]: Object. Counsel leading the witness. [¶] The Court: That is sustained. Sidebar please.”

During the sidebar conference, the trial court told the prosecutor that because defendant had invoked his right to counsel, the prosecutor must limit the questions to what defendant said, and must not ask questions about what defendant did not say because “he invoked.” Defendant’s counsel did not object based on *Doyle* and did not request a curative admonition.

3. *Third Claim of Doyle Error*

Following the sidebar conference, the prosecutor asked the detective, “[W]hat did [defendant] tell you during your interview with [him] about any murder?” The detective responded, “My recollection was that [defendant said] he didn’t know anything about a murder.” Defense counsel did not object, move to strike, or request a curative admonition.

4. *Fourth Claim of Doyle Error*

The last question the prosecutor asked the detective was, “Do you remember the defendant say[ing] anything else about that murder that day?” The detective responded that “[defendant] didn’t say anything else about the murder.” Defense counsel did not object, move to strike, or request a curative admonition.

In addition to failing to object based on *Doyle* during the rebuttal testimony, defendant did not raise any *Doyle* error in his motion for new trial. And neither the prosecution nor the defense referred in their opening statements or closing arguments to anything that transpired in connection with the claimed *Doyle* errors.

PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant in count 1 with murder in violation of Penal Code section 187, subdivision (a)⁴ and in count 2 with being a felon in possession of a firearm in violation of section 12021, subdivision (a)(1). The District Attorney alleged that in the commission of the murder, defendant personally used a firearm, personally discharged a firearm, and personally discharged a firearm causing death or great bodily injury within the meaning of section 12022.53, subdivisions (b), (c), and (d).

Following trial, the jury found defendant guilty of the lesser included offense of second degree murder and of being a felon in possession of a firearm. The jury also found the firearm allegations to be true. The trial court sentenced defendant to a total term of 40 years to life, comprised of a 15 years to life term on count 1, plus a 25 years to life term based on the section 12022.53, subdivision (d) firearm enhancement, and a concurrent term of three years on count 2. The sentence enhancements under section 12022.53, subdivisions (b) and (c) were stayed. The trial court also imposed fines and assessments and stayed the parole revocation fine.

⁴ All further statutory references are to the Penal Code unless otherwise noted.

DISCUSSION

A. Applicable Legal Principles

Defendant contends that the prosecutor committed *Doyle* error during her rebuttal examination of one of the investigating detectives. According to defendant, the prosecutor improperly elicited testimony from the detective concerning defendant's silence after he invoked his right to counsel.

Under *Doyle*, a prosecutor's use of a defendant's post-*Miranda* advisement silence to impeach the defendant violates due process. (*People v. Collins* (2010) 49 Cal.4th 175, 203 (*Collins*).) *Doyle*, however, "does not apply when a defendant presents exculpatory testimony at trial inconsistent with a voluntary post-*Miranda* statement." (*Id.* at p. 203, citing *Anderson v. Charles* (1980) 447 U.S. 404.) When a defendant provides such testimony, voluntary post-*Miranda* statements and voluntary statements obtained in violation of *Miranda* are admissible to impeach that defendant. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 29, citing *Harris v. New York* (1971) 401 U.S. 222, 225-226; see *Oregon v. Hass* (1975) 420 U.S. 714, 722; *People v. Peevy* (1998) 17 Cal.4th 1184, 1188.) The Supreme Court has also stated in *People v. Thomas* (2012) 54 Cal.4th 908, 936, "The *Doyle* rule is not violated when "the evidence of [a] defendant's invocation of the right to counsel was received without objection and the remarks of the prosecutor did not invite the jury to draw any adverse inference from either the *fact* or the *timing* of defendant's exercise of his constitutional right.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 199 [41 Cal.Rptr.3d 593, 131 P.3d 995].) Moreover, a ' . . . *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant's postarrest silence against him at trial' (*Clark*, at p. 959.)" (See also *Greer v. Miller* (1987) 483 U.S. 756, 764.)

B. Forfeiture

It is well established that the failure to object on *Doyle* grounds and request a curative admonition constitutes a forfeiture of claims of *Doyle* error. (*People v. Tate*

(2010) 49 Cal.4th 635, 691-692; *Collins, supra*, 49 Cal.4th at p. 202; *People v. Huggins* (2006) 38 Cal.4th 175, 198; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

Defendant's counsel objected to only one of the four alleged instances of *Doyle* error at trial, and did not object on *Doyle* grounds in that instance, but rather on the ground that the question was leading. The trial court apparently treated the objection as one based on *Doyle* in any event and clarified that the prosecutor could ask only about the defendant's statements, not his silence. Defense counsel did not ask for any curative admonition. With regard to the other allegedly improper questions by the prosecutor, defense counsel made no objection and did not request any curative admonitions. Accordingly, defendant forfeited the claims of *Doyle* error. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1207 [even assuming *Doyle* error, "defendant has failed to show that a prompt admonition . . . would not have cured any harm"].)

C. Ineffective Assistance of Counsel

Defendant asserts that if there was a forfeiture by failing to object, that failure constituted ineffective assistance of counsel. "[N]ormally a claim of ineffective assistance of counsel is appropriately raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal . . . can be brought to light." (*People v. Snow* (2003) 30 Cal.4th 43, 111; see *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

There is no indication or contention that the only apparent reason for calling the detective was to establish defendant's invocation of his *Miranda* rights, in which case, the trial court may have had a duty to intervene. (See *People of the Territory of Guam v. Veloria* (9th Cir. 1998) 136 F.3d 648, 652; O'Neill, *California Confessions Law* (2012 ed.) § 15:4, p. 324.) Moreover, there are possible reasons justifying defense counsel's failure to object. As to the second claim of *Doyle* error, defense counsel objected, and the trial court sustained the objection and held a sidebar to discuss the permissible areas of inquiry. The Supreme Court has said that if an objection is made on a non-*Doyle*

ground, and it is sustained, the “incipient *Doyle* misconduct” [was] “nipped in the bud.” (*People v. Tate, supra*, 49 Cal.4th at p. 92.)

As to the other claims of *Doyle* error, defense counsel may have concluded, as the Supreme Court later said in *People v. Thomas, supra*, 54 Cal.4th at page 936, that because “the prosecutor did not attempt and was not permitted to use the comment against defendant by inviting the jury to draw any adverse inference from the remark. . . . there was no violation of the *Doyle* rule.” Moreover, defense counsel may have resisted objecting in order not to place any undue emphasis before the jury on the interrogation. This is especially so in light of defendant’s statement during that interrogation that he knew nothing about a murder and his insistence that he was not the person in a photograph from the surveillance video, both of which statements were inconsistent with his trial testimony. Given defendant’s inconsistent statements, it is possible that defense counsel’s failure to make objections was not out of ignorance of the law, but rather tactical. (See *People v. Hinton* (2006) 37 Cal.4th 839, 867.)

This is not a case in which there is no explanation for a failure to object other than ineffective assistance of counsel. Accordingly, the contention is not appropriate in this case on direct appeal.

DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.