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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ARSELLERS C. SCOTT, Defendant and Appellant.	B226851 (Los Angeles County Super. Ct. Nos. MA044131, MA042425)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden Zacky, Judge. Affirmed.

Richard C. Neuhoff and Barbara A. Zuras, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven E. Mercer and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Arsellers Scott was convicted, inter alia, of the first-degree murder of Angel Martinez. He appeals, claiming error in permitting his silence in a recorded conversation to be considered an adoptive admission; improper arguments based on polygraph examinations; prosecutorial misconduct; constitutionally significant error in the exclusion of impeachment evidence; cumulative error; and, if any claims were not preserved for appeal, ineffective assistance of counsel from the failure to properly object. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Angel Martinez was murdered by crossbow bolt as he took a late-night walk in Lancaster on March 11, 2008. Martinez died from blood loss after the bolt, which had a "bleeder" tip, punctured his pulmonary artery, his aorta, and his left lung.

The sheriff's department mounted an investigation but the case had gone cold until Scott, in jail on another matter, volunteered that he had information on the Martinez murder and wanted to speak with detectives. Detectives interviewed Scott on July 2, 2008. Scott promised the detectives information about the murder if they got him out of jail. He drew a picture of an arrow and told the detectives that an arrow looking like that was used in the killing; that a crossbow was used, and that the weapon had been chopped up and disposed of somewhere where scuba gear would be required to retrieve it. Scott claimed to know the killer, that the killer had admitted killing Martinez, and that he (Scott) could tell them where the weapon was.

At the time of the interview, it was generally known that Martinez was killed in the general area Scott identified in the interview. The detectives had no idea what had become of the murder weapon, so the information Scott gave with respect to that—that it was in water and that it had been cut—was not generally known. Law enforcement had withheld the fact that the weapon was a crossbow and that the tip was a bleeder tip. Only the killer would have known that information.

Detectives met with Scott again on July 15, 2008. He was temporarily removed from jail and at Scott's direction they drove him to a road passing over the aqueduct (a

location that Scott favored for fishing). Scott took the officer to an opening in the barbed wire fence separating the parking lot from the aqueduct and said that he had been with the killer at the time the killer disposed of the pieces of the crossbow by throwing them into the aqueduct through the hole in the fence. Based on this information, scuba divers searched the aqueduct in Lancaster and found a piece of an arrow at the bottom, approximately 100 feet down the aqueduct from the location Scott had identified as the deposit site.

In August 2008 detectives, Scott, and representatives of the district attorney's office met. Scott would not divulge the name of the person he claimed was responsible for the killing, so no deal was made. Investigators began listening to Scott's phone calls from jail with his girlfriend, Shannon Elliott.[1] They learned the name "Tim" as someone who might have been responsible for the murder. They threatened Shannon Elliott with arrest and told her that Scott had told them who was responsible for the killing, so that it was time that she told them what she knew. Eventually Shannon Elliott took them to the home of Tim Perry. She later identified Perry from a photograph as the person Scott claimed was involved in the murder.

A search of one of Perry's homes turned up nothing significant. At the other, however, two crossbow bolts with practice tips were recovered. When Perry was interviewed, he blamed Scott for the murder. He told the police that he had possessed three bolts with bleeder blades, and that he had given them to Scott when he sold Scott his crossbow.

Faced with two suspects, each blaming the other for the crime, the officers decided "to tell both of them that we were going to charge both of them with murder and bring them back to court. And we were going to put them into a cell together, a holding cell, separated, obviously, so there would be no issues with them getting after each other, but place them in a cell, have it recorded, wired for sound, and see what they would talk about." After listening to the recorded conversation between Perry and Scott, detectives

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[1] As several witnesses shared the last name Elliott, we refer to each by first name for clarity.

concluded that Perry was not involved in the killing. Scott became the focus of the investigation.

A search of Scott's home found grinders like those Perry had said he loaned Scott. Members of Scott's family identified Scott as the killer, and Scott was charged with first degree murder (Pen. Code, § 187).[2]

At trial, Perry testified that he had purchased a crossbow from Big 5 Sporting Goods. The crossbow had come with black bolts with yellow and red feathers. The bolts had come with target tips, but he had replaced them with bleeder tips—razor tips designed for hunting large animals. Scott had been interested in the crossbow when he saw it hanging in the garage at Perry's house, and in February 2008 Perry sold it to him, along with the three bolts with bleeder tips. After Martinez was killed, Perry called Scott and said that he had better not have "done something stupid." Scott said he could not speak over the telephone, and came over to Perry's home. Scott told Perry not to worry, reminding him that when Perry sold the crossbow to Scott, at Scott's direction Perry had wiped down the arrows so there would be no prints on them. Scott was excited and ecstatic, and reported that the crossbow was powerful and accurate. Scott said that no one would care what happened because the victim was "a homeless person." Perry did not contact the police. Perry also testified that he had lent two grinders to Scott—tools that can cut metal—around the time that Martinez was killed.

Perry testified that the detectives offered to give him a polygraph examination, that he agreed, and then asked to take it right away. Perry took a polygraph test. He also offered to give blood for a DNA analysis, explaining that he was willing to do so "[b]ecause I was not there in the vicinity or didn't know nothing about it, so I have no problems. I have nothing to hide."

Kathleen Elliott, the mother of Scott's girlfriend Shannon, testified that on the night of the killing, she heard Scott arguing with one of her daughters downstairs at her

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[2] Scott was also charged with crimes unrelated to the murder, but because no issues relating to those offenses have been raised on appeal we do not discuss that aspect of the trial court proceedings.

home. Scott left, then returned later and directed Kathleen to go for a drive down Avenue K to see "something." Scott's demeanor made Kathleen fearful, so she and her daughter Amy got in the car. Kathleen drove down Avenue K. and saw a body in the street. She returned home and went to her bedroom, scared that Scott probably had committed the killing. She testified that she knew Scott to have a crossbow but that she never saw it again after the night of the killing. Kathleen's daughter Amy testified to going on the drive and seeing the body. Elliott's son Patrick confirmed Scott had a crossbow.

Elliott's daughter Jennifer testified that there had been an argument between Scott and Amy on the night of the killing, and that she heard Scott leave and drive away in Kathleen's car. She testified that on the night of the killing she saw Scott with a crossbow, and that she never saw it again after that night. She watched news coverage about the killing during the morning after it occurred, and Scott told her to watch her back because there were crazy people out there. Several weeks later, Scott told her that he had killed the man; she was scared of him because he became violent when he got angry. Under cross-examination, Jennifer testified that Scott had not said that he killed the man. On redirect examination, Jennifer testified that she would not frame Scott; that he had not said that he killed someone; that she wanted to go home; and that she had not told the truth when the court asked why she had testified that he had said he killed someone because she wanted to go home. The following day, upon the resumption of testimony, Jennifer testified that Scott had not said he had killed someone. A recording of a law enforcement interview with Jennifer was then played for the jury, in which she said that Scott had said he was so angry that night that he had to take it out on someone; that he admitted he shot the bow, and that he threw the crossbow into the aqueduct. She also acknowledged that at the preliminary hearing she testified that Scott admitted to the killing.

Scott was convicted of first degree murder. He appeals.

DISCUSSION

I. Adoptive Admissions/*Doyle* Error

Over Scott's objections to the evidence and instructions, the trial court instructed the jury that it could consider Scott's failure to deny Perry's accusations when they were in the courthouse holding cell together as an adoptive admission of guilt to the murder of Martinez. Scott contends that permitting the jury to consider his silence as evidence of his guilt violated due process based on principles set forth in *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

In *Doyle*, the Supreme Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving *Miranda*[3] warnings violates due process. (*Doyle*, *supra*, 426 U.S. at p. 619.) Since *Doyle*, courts have recognized that its underlying principles are equally applicable to cases in which a defendant does not testify and that the *Doyle* rule may, under certain circumstances, apply to a defendant's silence in the presence of private parties rather than police interrogators. (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1556-1558 (*Hollinquest*).)

In the context of private parties, *Doyle* applies when the evidence demonstrates that the defendant's silence in front of a private party results primarily from the conscious exercise of his constitutional rights. (*People v Eshelman* (1990) 225 Cal.App.3d 1513, 1520 (*Eshelman*).) Accordingly, in *People v. Medina* (1990) 51 Cal.3d 870, 890-891, an incarcerated defendant's silence in the face of his sister's questions during a jail visit could properly be introduced as evidence against him because the record did not suggest that he believed his conversation was being monitored or that his silence was intended to be the invocation of a constitutional right. In *Eshelman*, in contrast, the defendant expressly told his girlfriend that he could not answer her questions on the advice of his counsel. This was sufficient to demonstrate that his silence was an assertion of his

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

constitutional rights to counsel and to silence; *Doyle* therefore precluded the use of his silence as evidence of guilt. (*Eshelman*, *supra*, at pp. 1520-1521.)

The facts in *Hollinquest*, *supra*, 190 Cal.App.4th at page 1557, were more ambiguous than those in *Eshelman* because the defendant did not expressly or implicitly assert the right to silence and counsel; his silence took place during telephone calls that featured intermittent recorded warnings that the telephone calls were being recorded. Under such circumstances, the court concluded that the context of the telephone calls was indicative of an exercise of the constitutional rights to silence and counsel, and therefore "assum[ed]" that the defendant's silence was an assertion of the right to remain silent. (*Ibid*.) Accordingly, *Doyle* error occurred when the prosecutor urged the jury to draw an inference of guilt from the defendant's silence during the phone calls. (*Id*. at pp. 1557-1558.)

The factual context here is not similar to any of these cases. Significantly, this defendant was actively communicating with the police and offering to deliver information incriminating another person in exchange for his release. At the time of the conversation with Perry, Scott had sought out the officers investigating the Martinez killing, had given them information to use in their investigation, and had pledged that he would deliver the name of the culpable individual upon his release. Far from engaging in post-arrest silence, Scott was engaged in post-arrest negotiations.

When the person Scott was trying to blame for the murder was unexpectedly placed in the same courthouse cell and immediately accused Scott of framing him for murder, Scott did not choose to remain silent. First he elicited information from Perry about why he was in jail: upon being accused of setting Perry up, he asked Perry "Who?" and "What are you talking" about, and then, what Perry was doing in the cell. Perry responded that he was there because of the "shooting," and Scott inquired further, "What shooting?" Perry clarified that it was the crossbow killing, and Scott responded, "What about it? I don't know nothin' about that." Perry accused Scott, Shannon and Kathy Elliott of testifying against him, and Scott sighed and said, "Man."

Perry told Scott he was being arraigned that day for murder, because of the statements made by Scott and the Elliotts. He continued, "I'm glad other people fuckin' know when you bought that from me cuz that's the only thing saving my ass." Scott immediately elicited more information from Perry: "Bought what?" Perry said, "You know what." "Ah, cmon," Scott answered. "That cross-bow," said Perry. Scott tried to turn things around on Perry, saying, "Why are you trying to put me in that shit?" to which Perry replied, "Shit. Don't even try that shit, man."

Perry said that a person named Thomas would testify for him, and Scott responded, "I ain't got nothin' to say to ya." Perry told Scott that there was telephone record evidence against Scott, accused him again of trying to pin the blame on him, and expressed a number of reasons why the accusation was ludicrous. Perry said, "[You s]hould have put it off on someone else, man." Scott cleared his throat in response.

Perry expressed personal hurt at Scott's actions: "All a mother fucker ever done was try to be a friend to you and fuckin' help you through some shit and you do this to em. That's why you ain't got no friends, that's why you ain't got no people fuckin' ever wantin' to help you man, but your old lady because of the kid." During these statements, Scott said, "Mmmm," cleared his throat, and groaned. Perry complained that he had tried to help Scott, and this was the treatment he received in response: "This is how you return the favor, huh?"

Scott asked Perry what the charges were against him, and Perry responded that they were charging him for the killing and that the paperwork had been prepared. Scott asked Perry why Perry had been put in the cell with him then. Perry said he did not know. Scott responded, "Hmm. I don't know, man."

Perry said he was not worried because his history in California and everything he had been telling Scott about how preposterous it was to accuse him of the murder was "all gonna come out." Scott responded that he had "nothin' to say about this shit" and that he knew nothing about it. "It'll all come out," said Perry, and Scott agreed, saying, "Yeah." Perry said he would not serve time for something he had not done, "especially

when fuckin' you got people fuckin' settin' you up for it." Scott said, "Yeah. Mmm. Mmm-hmm."

Having gathered what information he could from Perry, Scott then went largely silent, responding substantively again only when Perry spoke about what would happen to Scott's child (out of home placement) and threatened that Scott should be in protective custody because Perry would have "paperwork" out on him.

As the record of the conversation itself does not include direct evidence of Scott's motivation for first inquiring into the case with Perry but later refusing to respond to Perry's accusations, we look to the context of the conversation for indications that Scott intended to invoke his constitutional right to remain silent. (*Hollinquest*, *supra*, 190 Cal.App.4th at p. 1557.) We detect no indication that Scott's refusal to respond to Perry's questions and accusations was meant to be an invocation of his constitutional right to remain silent. Instead, Scott prompted Perry to reveal as much information as he could elicit about the investigation and about Perry's circumstances; it was only when Perry focused exclusively on accusations and expressions of his indignation and fury at being framed for the crime that Scott stopped conversing. Even then, however, Scott continued to participate in the exchanges for some time, responding with "Yeah," "Mmm," and "Mmm-hmm," before falling completely silent.

We acknowledge that the placement of a deputy near the cell, Scott's awareness that recordings were made of telephone calls and in-person visits, and Scott's suspicious question to Perry about why Perry was placed with him all suggest that Scott may have been aware that the conversation was being monitored or recorded. We are also aware that the *Hollinquest* court "assum[ed]" when a defendant knew with certainty (due to recorded announcements) that he was being recorded that his silence was an invocation of his constitutional rights. (*Hollinquest*, *supra*, 190 Cal.App.4th at p. 1557.) Here, there were no announcements advising the men that they were being recorded, and, more significantly, nothing about the conversation tended to suggest that Scott fell silent in furtherance of his constitutional rights. Indeed, Scott asked Perry multiple questions and conversed about the investigation, and only failed to respond to Perry's various

accusations that he had set Perry up. In light of Scott's ongoing voluntary conversations about the crime with the police and his attempts to negotiate his freedom in exchange for divulging the identity of the killer, Scott's deliberate elicitation of as much information about the investigation as possible from an irate Perry before going silent in the face of Perry's accusations suggests not that Scott was deliberately invoking his constitutional right to remain silent, but rather that he had attempted to obtain information from the conversation and did not care to participate further when no useful information was supplied. We conclude that there was no *Doyle* error and no violation of due process in permitting the evidence of Scott's silence to be considered as a potential adoptive admission.

II. Polygraph Discussions

During trial, counsel stipulated that both attorneys could question witnesses about whether they had volunteered to take a polygraph test and whether they had been threatened with one. The parties also entered into a stipulation permitting references to polygraph tests as follows: "The attorneys may ask witnesses about polygraph examinations, whether or not they were offered to take one. And that will be admissible solely for the purpose of the witness's state of mind as it pertains to threats, coercion or whether or not they entirely were cooperative with respect to their interviews in this case. [¶] That will be the extent to which polygraphs will be mentioned."

The prosecutor elicited evidence that both Perry and Scott agreed to undergo polygraph examinations, and that while Perry did take the examination, Scott asked for his counsel to be there and the test was not done. The jurors were admonished that polygraph evidence was admitted "'solely for the purpose of determining a witness' state of mind,'" and they were further instructed that "'a defendant has the right to have his attorney present during all questioning asked by law enforcement once criminal charges have been filed.'"

In closing argument, the prosecutor told the jury he was going to address the defense position that the Elliotts had been harassed by police into making statements that incriminated him. The prosecutor explained that he had two general points, and that then he would address the statements of each of the family members individually. He made his first point: "First of all, it is absolutely fine for a police officer to say, I'm going to put somebody on a polygraph, a lie detector, because the only people who have to be worried about taking a polygraph are people who know they are lying. People who know they are telling the truth say, that's okay. Tim Perry, they go up and they say, did you do it? And Tim Perry says, no. And they say, we don't believe you. We're going to put you on a polygraph. He says, great. Good. Let's go do it right now, because then you'll know that I am telling you the truth and you'll stop hassling me. [¶] That's what an innocent person does, a person who is telling the truth. A person who is lying starts sweating and thinks, I'm going to flunk. . . . The people who are telling the truth say, that's okay."

The prosecutor's second general point was that another acceptable police tactic was telling interview subjects that the police believed that the person was lying. He argued that law enforcement does not approach witnesses and say, "[H]ey, I'm from Sheriff's homicide and I think you have some information about the Angel Martinez murder." Then, if a witness says, "[N]ope, don't know what you're talking about," the police do not simply respond, "Okay, sorry to bother you. Let me shut the door on my way out. Didn't mean to waste your time." Instead, the prosecutor argued, police work requires aggressive work to cause reluctant witnesses to divulge information. But, the prosecutor emphasized, "[T]he important thing is, they let the witnesses tell them what happened. They come up with this stuff on their own."

The prosecutor's argument about police interrogation tactics fell within the scope of the parties' stipulation, which permitted the discussion of polygraph examinations "for the purpose of the witness's state of mind as it pertains to threats, coercion or whether or not they entirely were cooperative with respect to their interviews in this case." The prosecutor was countering the defense position that the Elliotts were coerced by police

interrogation tactics into their statements inculpating Scott. He argued to the jury that police are permitted to use threat of polygraph examinations to assess an individual's truthfulness based on his response. He continued by making the reasonable inference—permitted by the stipulation—that Perry's immediate assent and his willingness to take the polygraph examination demonstrated his state of mind: Perry was not worried because he had nothing to hide, a cooperative state of mind that one would expect from an innocent person. Then, the prosecutor continued his argument by turning to another police interrogation tactics and a defense of the need for such tactics for effective law enforcement.

Scott argues, however, that with this argument the prosecutor invited the jury to draw impermissible negative inferences from Scott's request for counsel in connection with the polygraph examination. Implicit in this argument, Scott contends, was an invitation to conclude that Scott was dishonest and guilty: by saying that the way Perry handled the request—the offer to take it immediately—showed that he was an innocent person, the prosecutor invited the jury to conclude that a person who did not take the polygraph test immediately (i.e., Scott, the only person who had not taken a polygraph examination) was not innocent. While the parties' stipulation and the evidence that Scott refused to take the polygraph without his counsel enables that inference to be drawn from these sentences when considered in isolation, the context of the argument does not suggest that the prosecutor was inviting the jury to make that impermissible inference. The phrases Scott finds objectionable were part of a larger argument of how police officers conduct interrogations—they challenge their subjects aggressively and say they are lying, or they threaten them with a polygraph test—so that they may observe their responses and obtain more information. The prosecutor was emphasizing that the investigation of a homicide is not an occasion for politeness and niceties and that investigators appropriately employ forceful tactics to elicit information. Whatever the tactics, he argued, the officers do not put words in the witnesses' mouths, but instead "let the witnesses tell them what happened. They come up with this stuff on their own." This was the prosecutor's way of handling the defense contention that the police bullied and

harangued the witnesses into making incriminating statements. Scott was not mentioned in this portion of the argument, nor did the argument pertain to him because there was no claim that the police had used improper interrogation techniques with respect to him. Read in its full context, the prosecutor's statement is not susceptible to Scott's interpretation that it was an artful invitation to condemn Scott based on his refusal to take the polygraph examination without his attorney being present.

III. Exclusion of Evidence about Perry's Tendency to Violence

During cross-examination, Perry was asked about the threats he made against Scott during their courthouse holding cell conversation. Perry admitted that he had told Scott he would "put papers out on him," meaning that he was going to tell other inmates what Scott had done so that Scott could be injured or killed. The defense attorney asked, "So you had that in you to do that?" and Perry responded, "No, I haven't, because I have not put out no paperwork. I haven't put the word out. I haven't done none of it." On appeal, Scott describes this interaction as a claim by Perry that "he 'didn't have that in me' to carry out his threats," and he claims that by making this statement, Perry "injected his supposed lack of propensity for violence into the case," and made it appropriate for the defense to introduce evidence of Perry' juvenile violent offenses and the way he trained his pit bull dog to attack. Scott contends that the exclusion of this evidence violated his rights to confront witnesses, to due process, and to present a meaningful defense.

This brief exchange during cross-examination cannot support the import Scott seeks to attribute to it. With the question about what he had in him, defense counsel tried to prompt Perry to claim that he was not a violent person, but Perry did not say what Scott reports he said in response. Perry did not testify, as Scott writes in the opening brief, that "he 'didn't have that in me' to carry out his threats"—the language about what Perry had in him was taken from counsel's question, not Perry's response. Perry denied having taken action on the threats; he did not assert that as a matter of character he could

not do so. Accordingly, the record does not support Scott's claim that Perry opened the door to examination on his character traits, and the trial court properly concluded that the evidence Scott sought to introduce about long-ago armed robberies and Perry's dog-training were more prejudicial than probative and should be excluded.

IV. Prosecutorial Misconduct

When the parties stipulated during trial to the limited use of polygraph evidence as discussed above, special arrangements were made with respect to an anticipated witness and early suspect named Joe French. The parties agreed that with respect to French, the attorneys would not only be able to use the evidence of the offering of a polygraph test for state of mind, but also that they could "ask about the results of the polygraph as it pertains to Mr. French only. And that the results were inconclusive as to him." French failed to appear for trial and did not testify. During closing argument, the prosecutor argued, that the defense had made much of French at the start of trial, but there had been no evidence. "And then there was nothing about that. Nothing through the whole trial. All we heard about Mr. French was that he was an early suspect. He had made some joking comments about having done it. The detectives went and interviewed him. They put him on a polygraph. They searched his house. And it turned out it wasn't him. [¶] It went no place. He was never arrested. They never filed charges against him for the murder. Nothing. He had nothing to do with it. That's all that Joe French is." Later, the prosecutor said, "There's no Joe French. There's no some other person we have never heard of. It's one of these two guys. And all of the evidence points to Scott."

On appeal, Scott contends that the prosecutor committed prosecutorial misconduct by inviting the jury to speculate negatively on the reasons for French's failure to testify and by arguing facts outside the record when he insinuated to the jury that French was not called because his testimony would not have been favorable to the defense and when he implied that the polygraph examination cleared French when in fact the results were inconclusive.

Scott, however, did not object to these statements at trial. To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection, make known the basis of the objection, and ask the trial court to admonish the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Unless the prosecutor's misconduct could not be cured by an admonition or an objection would have been futile, the defendant must object to the alleged misconduct at trial. (*Ibid*.) The evidence here does not establish that an admonition would have been insufficient to remedy any misconduct, and Scott has not offered any argument to support his bare assertion that an admonition would have been inadequate.~(AOB 63)~ Scott has therefore waived this argument by failing to object at trial. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

Scott further asserts that if an admonishment would have been effective to cure the prejudice arising from the alleged misconduct, then his counsel rendered ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668 when he failed to object to these portions of closing argument. To establish ineffective assistance of counsel, Sandoval must demonstrate that "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Neely* (1993) 6 Cal.4th 901, 908.)

As a general rule, ineffective assistance of counsel claims are more suited to petitions for habeas corpus than direct appeals. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [a claim of ineffective assistance of counsel relating to "why counsel acted or failed to act in the manner challenged . . . is more appropriately decided in a habeas corpus proceeding"].) This case is no exception. Here, the record before us does not demonstrate that the failure to object to the brief comments about French was objectively unreasonable or deficient conduct rather than a reasonable tactical decision based on the defense position that Perry, not French or Scott, had committed the murder. If additional facts exist that demonstrate that counsel's failure to object was objectively

unreasonable or deficient, proof of such matters requires a showing beyond the scope of the record on appeal and may be presented in a petition for habeas corpus. (*People v. Jones* (2003) 29 Cal.4th 1229, 1263 [issues requiring review of matters outside the record are better raised on habeas corpus rather than on direct appeal].)

V. Remaining Contentions

Scott argues that if we conclude that any of the claimed errors were not preserved for appeal, that his counsel provided ineffective assistance by failing to preserve them. We have already addressed ineffective assistance in the context of the prosecutorial misconduct argument, the sole issue we have concluded was not preserved for appeal. As we did not resolve any of the other claims on the basis of forfeiture, there is no need to consider whether counsel was ineffective with respect to those matters.

We reject Scott's final contention that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Because Scott has not established any errors cognizable on direct appeal, "they cannot constitute cumulative error[] . . . ." (*People v. Beeler* (1995) 9 Cal.4th 953, 994.)

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.