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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD GRIEGO et al., Defendants and Appellants.	B283947 (Los Angeles County Super. Ct. No. KA113798)

APPEAL from judgments of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed in part and reversed in part.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant Jesse Alderete.

Sunnie L. Daniels, under appointment by the Court of Appeal, for Defendant and Appellant Richard Griego.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Jesse Alderete of possession of a controlled substance while armed, possession of a firearm by a felon, and unlawful possession of ammunition. The same jury convicted defendant and appellant Richard Griego of possession for sale of a controlled substance. Alderete contends the prosecutor committed *Doyle*[1] error and the trial court erred in failing to sua sponte give an instruction on unanimity. Griego contends he received ineffective assistance of counsel and improper gang evidence was presented to the jury. He also urges us to strike an enhancement for a prior drug conviction. We affirm Alderete's judgment. However, we agree Griego received ineffective assistance of counsel and reverse the judgment on that basis.

FACTUAL AND PROCEDURAL BACKGROUND

Investigation

On October 19, 2016, Pomona Police Department officer Francesco Sacca and several other officers executed a warrant to search a residence located on Gordon Street in Pomona. Alderete was in the front yard of the residence when the officers arrived. Inside the house, the officers found a pipe under the living room couch and two nearly identical pipes on the kitchen table, all of which contained methamphetamine.

On a shelf in one of the bedrooms, the officers discovered three firearms wrapped in a shirt. All three guns appeared to be in working condition, and two were loaded. The officers also found in the bedroom several documents bearing Alderete's name and listing the Gordon Street address as his residence. There were no indications that anyone other than Alderete lived in the house.

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

The residence's detached garage had been converted to living space. There, the officers found 1.25 grams of powder cocaine, unused plastic baggies, $900 in cash rolled up and tied with a rubber band, a digital scale, a knife, and a mirror with a non-adhesive surface. A portion of the cash consisted of $100 bills. The officers also discovered a prescription pill bottle, a booking sheet, and other paperwork, all bearing Griego's name and the Gordon Street address. In addition, the officers found men's clothing in the closet. They did not find any women's clothing or items.

Trial

Alderete and Griego were jointly tried before a jury. The prosecutor presented evidence establishing the facts summarized above. In addition, the prosecutor presented expert testimony from Officer Sacca, who opined that the cocaine found in the garage was intended for sale. Officer Sacca explained that, although the quantity of cocaine was small, the digital scale, unused plastic baggies, cash, and knife were all indicative of drug sales. Officer Sacca also based his opinion on the lack of items one would typically expect to find if an individual is using cocaine, such as a surface to snort the drugs, straws, broken pens, or rolled-up dollar bills.

Neither defendant testified. Alderete presented testimony from a private investigator who visited his house the day before trial. According to the investigator, Alderete's room did not contain a tall shelving unit, but there was a shelving unit in an unoccupied bedroom.

Griego presented testimony from his girlfriend of three years, Denise Gonzales, and his employer. Griego's employer testified that both Griego and Gonzales worked for him at an auto-body shop, and he paid them in cash.

Gonzales testified that she rented the detached garage from Alderete, and Griego would occasionally stay with her. Gonzales believed the clothes the police found in the closet belonged to Alderete. She pointed out that Griego has a 48-inch waist, but the pants in the closet had waist sizes of 50 and 52 inches. Gonzales acknowledged that Griego used cocaine, but she did not believe the cocaine found in the garage was his. Gonzales did not know to whom the cocaine belonged. She explained that a lot of people went in the garage and it contained "other people's stuff." Gonzales stated she used the scale and plastic baggies for craft supplies to create piñatas for her family.

Verdict and Sentencing

The jury found Alderete guilty of possession of a controlled substance while armed (Health and Saf. Code, § 11370.1, subd. (a); count 1),[2] possession of a firearm by a felon, (Pen. Code, § 29800, subd. (a)(1); count 2), and unlawful possession of ammunition (Pen. Code, § 30305, subd. (a)(1); count 3). Alderete admitted suffering three prior felony convictions.

The court sentenced Alderete to the upper term of four years on count 1. The court imposed the upper term of three years on counts 2 and 3 and stayed the sentences under section 654. It also imposed a two-year enhancement under Penal Code section 12022.1, which it stayed pending resolution of Alderete's

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[2] All undesignated statutory citations are to the Health and Safety Code unless noted otherwise.

other criminal case (see Pen. Code, § 12022.1, subd. (d)). The court awarded Alderete 66 days of custody credit and imposed various fines and fees.

The jury found Griego guilty of possession for sale of a controlled substance (Pen. Code, § 11351; count 4). Griego admitted suffering two prior strike convictions and a prior drug sales conviction under section 11351. The trial court sentenced Griego to an aggregate term of nine years, comprised of the midterm of three years doubled under the Three Strikes Law, plus a three-year enhancement for the prior drug conviction pursuant to former section 11370.2, subdivision (a). The court awarded Griego 144 days of custody credit and imposed various fines and fees.

Defendants timely appealed.

DISCUSSION

I. Though the Prosecutor Clearly Committed *Doyle* Error, We Find the Error Harmless

Alderete argues the prosecutor improperly presented evidence of, and commented on, the invocation of his right to remain silent, in violation of *Doyle, supra*, 426 U.S. 610. We agree but do not find it warrants reversal.

A. Background

During her opening statement, the prosecutor described the items found in Alderete's house and then stated the following: "After the search of the main portion of the house was completed, [the police officers] placed Mr. Alderete under arrest. After advising him of *Miranda* rights, they asked him if he wished to give a statement regarding the search and regarding his arrest. At that time, Mr. Alderete replied, 'No. It is what it is, man.' "

Alderete did not object during the prosecutor's opening statement. However, after a recess for lunch, counsel argued it was improper to refer to Alderete's statement, "No. It is what it is, man," because it constituted an invocation of his right to remain silent. He explained that the phrase, "[i]t is what it is, man," could be interpreted as an explanation for Alderete's refusal to speak to police.

Although never requested by counsel, the court stated it would not grant a mistrial. It then asked Alderete's counsel whether he wanted the court to admonish the jury and strike the prosecutor's statement. Counsel responded that the court should do nothing because he would inform the jury in closing argument that the prosecutor's statements are not evidence.

Thereafter, the prosecutor informed the court she intended to elicit from Officer Sacca testimony regarding Alderete's statement. The court determined that Alderete's statement, "no," was an invocation of his right to remain silent and inadmissible. The court further determined the portion of his statement, "[i]t is what it is, man," was not part of the invocation, but nevertheless ruled the entire statement should be excluded because of the potential for misuse by the jury.

During the cross-examination of Officer Sacca, Alderete's counsel elicited testimony suggesting it was possible the pipes found in Alderete's house belonged to visitors. Subsequently, the prosecutor asked the court to reconsider allowing her to elicit testimony from Officer Sacca regarding only Alderete's statement, "[i]t is what it is, man." Alderete again objected on the basis that the statement was part of the invocation of his right to remain silent. The court then changed its ruling and

permitted the testimony. The prosecutor proceeded to question Officer Sacca as follows:

"Q: Did you, after completing the search, tell Mr. Alderete that you found those firearms in his bedroom?

A: I did.

Q: And at the time that you told him that, did he make any statements to you?

A: No.

Q: Okay. Did he, at any time, make any statements regarding any of the contraband that was found inside the home?

A: No.

Q: You didn't ask—okay. So not at the location but after placing him under arrest, did you have a conversation with him at the—at the station?

A: I did.

Q: And at that time, did he make any comments to you regarding the items that were found inside the home?

A: He just said, 'It is what it is, man.'

Q: Did he, at any time, indicate to you that the contraband found inside his home did not belong to him?

A: No."

In her closing argument, the prosecutor commented on Alderete's statement as follows: "[W]e know that [Alderete] also knew about [the methamphetamine's] presence for the same reasons he knew about the guns. Because when told about all of the contraband found inside his home, he did not say, 'Oh, that's not mine,' 'Oh, I can't believe you guys found that there.' He says, 'It is what it is.' "

In closing, Alderete's counsel argued the methamphetamine pipes may have been left in his house by people who were there to use or buy drugs. He also implied that because Alderete is a drug user himself, he might not have been aware of all the items in his house, stating: "So if you've got a bunch of dopers that are coming to his house on a regular basis . . . do you think that there might be some activity going on there, that . . . if you're loaded, that you might not know what's going on? [¶] Let me put it a different way: If you're using drugs, are you one hundred percent on top of your game in terms of . . . you know exactly what's in your room; you know, what's in your house."

The prosecutor responded to this argument on rebuttal: "The defense argued that because there are a lot of drug dealers coming and going there's no way that he could have known that these items were in his home. Well, if that were the case when officers told him that they found these contraband items in his home, the reaction should have been I didn't know they were there. Where did you find them? Or that's not mine. Someone must have left them there. But if you recall, his one statement was, it is what it is. That's an admission. No surprise there. He knew they were there. He knew because he possessed them. And the only thing he had to say about that was an admission where he basically said, it is what it is."

B. Analysis

1. The Prosecutor Committed *Doyle* Error

In *Doyle, supra*, 426 U.S. 610, the U.S. Supreme Court held it is a violation of due process for a prosecutor to impeach a defendant at trial using his post-arrest silence after receiving

Miranda[3] warnings. (*Doyle,* at p. 619; see also *Wainwright v. Greenfield* (1986) 474 U.S. 284, 295, fn. 13 (*Wainwright*) ["silence does not mean only muteness; it includes the statement of a desire to remain silent"].) The court explained that such silence is "insolubly ambiguous" because it may signal nothing more than the arrestee's exercise of his *Miranda* rights. (*Doyle,* at pp. 617–619.) Moreover, because the *Miranda* warnings imply that silence will not be used against the arrestee, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Doyle,* at p. 618, fn. omitted.) The California Supreme Court has since expanded the *Doyle* rule to preclude the use of a defendant's silence as part of the prosecutor's case-in-chief. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118 ["No less unfair is using that silence against a defendant by means of the prosecutor's examination of an interrogating detective even before the defendant has had the opportunity to take the stand."].)

We agree with Alderete that the prosecutor committed misconduct when she told the jury he invoked his right to remain silent when asked if he wished to provide a statement to Officer Sacca.[4] We are at a loss to understand why a prosecutor, who

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

[4] The Attorney General contends Alderete forfeited his claims regarding the prosecutor's opening statement by failing to request a limiting instruction, and forfeited his claims regarding the prosecutor's closing argument by failing to assert an objection. (See *People v. Clark* (2011) 52 Cal.4th 856, 959 ["[A] *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant's postarrest silence against him at trial, and

was certainly aware of the seminal decisions in *Miranda* and *Doyle* which have been the law for 40–50 years, would so blatantly ignore their principles to gain a tactical advantage in trial. Nothing further need be said on the merits of this point; it was clearly wrong. We consider whether the error was harmless after addressing Alderete's other similar allegations.

Alderete next contends that the remainder of the statement, i.e., "[i]t is what it is man," was part and parcel of an unambiguous and unequivocal invocation of his right to remain silent. In addition, he faults the prosecutor for certain statements she made during closing argument, which pointed out that Alderete did not tell Officer Sacca the pipes were not his or that he was unaware they were in his house. We find these claims unpersuasive.

Before we proceed to our analysis, however, we pause to state that when a prosecutor seeks to introduce a defendant's statements at trial, the wise and prudent course of action is to first bring the issue to the attention of the trial judge for a determination of their admissibility. Here, the prosecutor should not have short circuited the trial court's opportunity to consider the evidentiary question by forging ahead with presenting

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an objection and appropriate instruction to the jury ordinarily ensures that the defendant's silence will not be used for an impermissible purpose."]; *People v. Tate* (2010) 49 Cal.4th 635, 691–692 [failure to object on *Doyle* grounds forfeits claim on appeal].) We need not decide these issues because, even if there was a forfeiture, we would exercise our discretion to consider the merits of Alderete's claims in order to forestall a subsequent claim of ineffectiveness of counsel. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Alderete's comments in her opening statement; the issue was not so clear.

That said, we do not agree that it was improper for the prosecutor to introduce evidence of, and comment on, Alderete's statement, "[i]t is what it is, man." We find the statement was not an invocation of Alderete's right to remain silent, nor was it inextricable from his prior invocation. To the contrary, it was a separate spontaneous statement, which a reasonable juror could have interpreted as an implicit admission that Alderete was aware of the contraband found in his house.[5] *Doyle* does not prohibit a prosecutor from using a defendant's incriminating statement against him at trial, even if the statement is made in close proximity to an invocation of a *Miranda* right. Moreover, because Alderete's statement was not in response to additional questioning by Officer Sacca, it does not matter that it came after he initially invoked his right to remain silent. (See *People v. McDaniel* (1976) 16 Cal.3d 156, 172 ["[s]tatements volunteered when not in response to an interrogation are admissible against a defendant, even after an initial assertion of the right to remain silent"].)

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[5] Although we have not found any California cases interpreting the phrase "it is what it is," a Tennessee appellate court examined the phrase in the context of a case with similar facts. (See *State v. Welch* (Tenn. Crim. App., Oct. 13, 2016, No. M201500361CCAR3CD) 2016 WL 5944999.) In that case, the defendant was asked during a police interrogation about suspected drug paraphernalia found in his home, to which he responded, " 'it is what it is.' " The Tennessee appellate court noted that a reasonable juror could conclude this statement was an implicit admission that the items were, in fact, drug paraphernalia. (*Id*. at p. *15.)

Alderete relies on several Ninth Circuit cases in support of his argument that "No. It is what it is, man," was a single, unparsable invocation of his right to remain silent.[6] We are not bound by decisions of lower federal courts, although they may be persuasive and entitled to great weight. (*People v. Williams* (1997) 16 Cal.4th 153, 190; *Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034.) Here, we are not persuaded that the cases upon which Alderete relies compel a conclusion that his statement, "[i]t is what it is, man," was part of the invocation of his right to remain silent.

Several of the cases Alderete relies on are simply inapposite. *Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859 (*Arnold*), for example, concerned whether a defendant's statement that he did not want to talk on tape was an unambiguous and unequivocal invocation of his right to remain silent. (*Id.* at p. 866.) *Garcia v. Long* (9th Cir. 2015) 808 F.3d 771 (*Garcia*) and *Jones v. Harrington* (9th Cir. 2016) 829 F.3d 1128 (*Jones*), concerned whether the defendants' unambiguous invocations of their rights to remain silent were rendered ambiguous by virtue of their other comments. Here, in contrast,

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[6] The day before oral argument, Alderette submitted a letter brief citing to *People v. Case* (2018) 5 Cal.5th 1, in support of this argument. We do not find the case dispositive. There, the California Supreme Court considered, but did not resolve, the issue of whether Case's statement – " 'No, not about a robbery/ murder. Jesus Christ,' " (*id.* at p. 17) after being informed of his *Miranda* rights, and being asked if he wished to talk to officers, was an ambiguous invocation of the right to silence which applied only to selective issues and whether Case's statements thereafter to officers were admissible. It did not address the issue presented here – whether such a statement was a single, inseparable invocation of the right to remain silent on all issues.

we agree with Alderete that he unambiguously invoked his right to remain silent when he responded "no" to the officer's question. We also agree that his subsequent statement, "[i]t is what it is, man," did not render the earlier invocation ambiguous. We disagree with Alderete only to the extent we conclude his statement, "[i]t is what it is, man," is separate from the invocation of his right to remain silent. *Arnold*, *Jones*, and *Garcia* do not address that issue.

Although *Hurd v. Terhune* (9th Cir. 2010) 619 F.3d 1080 (*Hurd*), is more on point, we do not find it persuasive and decline to follow it. In that case, a police officer pressed the defendant to reenact a shooting, to which the defendant responded, " 'I don't want to do that,' 'No,' 'I can't,' and 'I don't want to act it out because that—it's not that clear.' " (*Id*. at pp. 1088–1089.) The Ninth Circuit held it was *Doyle* error for the prosecutor to use those statements against the defendant, and rejected the government's argument that the statements were admissible because the defendant "offered explanations instead of simply saying 'no.' " (*Hurd,* at p. 1089.) In rejecting the government's argument, the court explained that "clearly established law allows a suspect to invoke his right to silence through an explanatory refusal." (*Ibid*.)

The Ninth Circuit pushed the *Hurd* court's "explanatory refusal" rule to its logical extreme in *United States v. Gomez* (9th Cir. 2013) 725 F.3d 1121 (*Gomez*). In that case, the court proposed a hypothetical situation where, after being advised of his *Miranda* rights, a defendant states, " 'I don't want to talk because I committed the murder.' " (*Gomez,* at p. 1128.) The court explained that, consistent with *Hurd*, the prosecution could not use any part of the statement—including " 'I committed

the murder' "—as evidence of the defendant's guilt in its case-in-chief because it constituted an " 'explanatory refusal.' " (*Gomez,* at pp. 1127–1128.)

We acknowledge it is possible that Alderete's statement, "[i]t is what it is, man," was intended as an explanation for his refusal to provide a statement to Officer Sacca. However, we disagree with *Hurd* and *Gomez* to the extent they suggest the constitutional protections elucidated in *Doyle* extend to a defendant's incriminating explanation for the invocation of a *Miranda* right.

Initially, the Ninth Circuit's "explanatory refusal" rule lacks a solid precedential footing. Despite the *Hurd* court's insistence that the restrictions on the use of "explanatory refusals" is "clearly established law," it cited only a single Ninth Circuit case, *U.S. v. Bushyhead* (9th Cir. 2001) 270 F.3d 905 (*Bushyhead*), in support. In *Bushyhead,* the court held it was *Doyle* error to admit the defendant's entire statement, " 'I have nothing to say, I'm going to get the death penalty anyway.' " (*Bushyhead,* at p. 912.) The court reasoned that the "privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence—not merely the silence itself, but the circumstances of that silence as well. The entirety of [the defendant's] statement was an invocation of his right to silence and is therefore protected by the Fifth Amendment privilege against self-incrimination." (*Id.* at p. 913.)

The court in *Bushyhead* relied on three cases to support its assertion that the government may not use the "circumstances of . . . silence" against a defendant. (*Bushyhead, supra*, 270 F.3d at p. 913, citing *Wainwright, supra*, 474 U.S. 284, *U.S. v. Whitehead* (9th Cir. 2000) 200 F.3d 634 (*Whitehead*), and *U.S. v.*

Velarde-Gomez (9th Cir. 2001) 269 F.3d 1023 (*Velarde-Gomez*).) None of those cases, however, involved statements analogous to an "explanatory refusal." *Wainwright*, for example, concerned a defendant's repeated statements that he wanted to wait for an attorney before speaking to police, (*Wainwright,* at p. 286), *Whitehead* involved a defendant's silence during a pre-*Miranda* search, (*Whitehead,* at p. 639), and *Velarde-Gomez* concerned evidence that a defendant " 'just sat there' " when confronted with incriminating evidence (*Velarde-Gomez*, at pp. 1031–1032). We do not read any of these cases as even suggesting that the *Doyle* rule extends to an arrestee's incriminating explanation for invoking his right to remain silent.

Moreover, in our view, extending constitutional protections to an incriminating explanation for an invocation of the right to remain silent does not serve the purposes underlying the restrictions on the use of the silence itself. In *Doyle*, the court provided two reasons for restricting the use of a defendant's silence: (1) silence is insolubly ambiguous and (2) it is unfair to use a defendant's silence against him after implying it would not be used for that purpose. (*Doyle, supra*, 426 U.S. at pp. 617–619.) Restricting the use of a defendant's incriminating explanation does not serve either of these purposes.

As the *Doyle* court explained, silence is "insolubly ambiguous" in the wake of a *Miranda* warning because it is impossible to determine whether it is probative of the arrestee's guilt or simply an exercise of his constitutional right. (*Doyle, supra*, 426 U.S. at p. 617; see *United States v. Hale* (1975) 422 U.S. 171, 177.) The same concern, however, does not apply to an arrestee's explanation for his silence. This is because implicit in *Miranda* warnings is that the arrestee may invoke his rights

without providing a reason. Indeed, this is precisely what makes post-*Miranda* silence inherently ambiguous. Because an explanation is not required in order to invoke the right to remain silent, when an arrestee does provide one, it is clear he is not simply exercising a constitutional right.

We also do not think it is unfair to use the explanation against the arrestee. As noted above, an arrestee is under no obligation to provide a reason for invoking his *Miranda* rights. Moreover, one of the fundamental *Miranda* warnings is that anything the arrestee says may be used against him in court. Consequently, we think an arrestee given *Miranda* warnings would understand that he need not provide an explanation to invoke his right to remain silent, and any explanation he does provide may be used against him in court. It is not unfair to use the arrestee's explanatory statement against him after explicitly warning him of such a possibility. For these reasons, even if Alderete's statement, "[i]t is what it is, man," was an explanation for the invocation of his right to remain silent, we do not think it was improper for the prosecutor to use it as evidence of his guilt.

Finally, we reject Alderete's assertion that the prosecutor's rhetorical questions in her closing argument constituted *Doyle* error. A deliberate omission in a voluntary statement to police is not tantamount to an exercise of the right to remain silent. (*People v. Clem* (1980) 104 Cal.App.3d 337, 344 (*Clem*).) Accordingly, a prosecutor may inquire into discrepancies between a defendant's defense at trial and his statements to police. (*Anderson v. Charles* (1980) 447 U.S. 404, 408 (*Anderson*).) This includes questions eliciting testimony that the defendant did not tell police specific information relevant to his defense. (See, e.g., *Anderson*, at p. 408; *People v. Barker* (1979) 94 Cal.App.3d 321,

329–330; *Clem, supra*, 104 Cal.App.3d at pp. 341–344; *People v. Farris* (1977) 66 Cal.App.3d 376, 388–390.)

In *Anderson, supra*, 447 U.S. 404, the defendant told police he stole a car from one location, but testified at trial that he stole the car from a different location. An appellate court held the prosecutor improperly commented on the defendant's silence when he asked the defendant, " 'Don't you think it's rather odd that if [you're telling the truth now] that you didn't come forward and tell anybody at the time you were arrested, where you got that car?' " (*Id*. at pp. 406, 408.) The U.S. Supreme Court reversed, noting the prosecutor's questions "were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." (*Id*. at p. 409.) The court explained, "inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case." (*Anderson,* at p. 409.)

Here, too, the prosecutor was not commenting on Alderete's post-arrest silence. Rather she was properly highlighting the inconsistencies between his statement to police—"[i]t is what it is, man"—and his defense at trial. As we noted above, a reasonable juror could have interpreted Alderete's statement as an admission that he was aware there was contraband in his house. As such, it directly contradicted his defense at trial that the contraband belonged to someone else and he was not aware of it. The prosecutor was permitted to comment on this inconsistency, which she did by pointing out the omissions in Alderete's voluntary statement to police. To conclude her argument violated due process would require the sort of

formalistic construction of "silence" that was rejected by the U.S. Supreme Court in *Anderson*.

2. Any Error Was Harmless Beyond a Reasonable Doubt

Although the prosecutor improperly remarked in her opening statement on Alderete's invocation of his right to remain silent, the error was harmless. A *Doyle* error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); see *People v. Galloway* (1979) 100 Cal.App.3d 551, 559.) Alderete insists the *Doyle* error was prejudicial because it fatally undermined his defense to the allegation that he possessed methamphetamine.[7] We disagree.

Alderete's claim of prejudice is severely undermined by the fact that his trial counsel refused the court's offer to strike the prosecutor's comments and admonish the jury. The court also specifically instructed the jury that "nothing that the attorneys say is evidence," and we presume the jury followed this instruction. (See *People v. Doolin* (2009) 45 Cal.4th 390, 443.)

Moreover, the evidence that Alderete possessed methamphetamine was overwhelming, even in the absence of his statement to Officer Sacca. The uncontroverted evidence showed there were two pipes containing methamphetamine on Alderete's

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[7] Alderete does not assert the *Doyle* error undermined his defense to the allegations that he possessed a firearm and ammunition. Nonetheless, we note the evidence of guilt was overwhelming as to those allegations. The firearms and ammunition were found on a shelf in Alderete's room, and the evidence indicated Alderete was the only person living in the house.

kitchen table, and a third pipe containing methamphetamine under his couch. Further, all of the evidence indicated Alderete was the only person living in the house at the time. This was sufficient to find Alderete possessed the methamphetamine. (See *People v. Williams* (1971) 5 Cal.3d 211, 215 ["The elements of possession of narcotics are physical or constructive possession thereof coupled with knowledge of the presence and narcotic character of the drug."].)

Alderete offered no explanation for how the contraband ended up in his house, other than a vague suggestion that it may have been left there by some unnamed person. His defense was simply that he had no knowledge of the pipes. Specifically, he argued the pipes could have belonged to someone else and, because he is a drug user, he had a limited awareness of the items in his house. Although this defense could conceivably have convinced some jurors that Alderete was not aware of the pipe under the couch, it did not effectively address the two pipes in plain sight on the kitchen table. Accordingly, we have no doubt the jury would have found Alderete guilty, even if the prosecutor had not referred to his invocation of *Miranda* rights. As a result, any error was harmless beyond a reasonable doubt.[8]

II. The Trial Court Was Not Required to Give a Unanimity Instruction Related to the Methamphetamine

At Alderete's request, the court gave the jury a unanimity instruction specific to the firearms found in his house. Alderete

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[8] Given the overwhelming evidence of guilt, we would conclude any error was harmless even if we agreed with Alderete that the use of his statement, "it is what it is, man," and the prosecutor's closing argument were improper.

did not request, and the court did not give, a unanimity instruction specific to the methamphetamine. Alderete contends this was error. We disagree.

"In a criminal case, a jury verdict must be unanimous." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Accordingly, when the evidence at trial suggests a defendant committed more than one discrete act upon which a single count could be based and the prosecutor does not elect one of the acts, the court generally must instruct the jurors that they are required to agree on the same act. (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*); *People v. Russo, supra*, 25 Cal.4th at p. 1132.) In the context of an unlawful possession charge, a unanimity instruction is required "where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant." (*People v. King* (1991) 231 Cal.App.3d 493, 501.)

"There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises 'when the acts are so closely connected in time as to form part of one transaction' [citation], or 'when the statute contemplates a continuous course of conduct or a series of acts over a period of time.' [Citation.] There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime." (*Jennings, supra*, 50 Cal.4th at p. 679; see *People v. Carrera* (1989) 49 Cal.3d 291, 311–312.) We review assertions of instructional error de

novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568 (*Hernandez*).)

Alderete relies on two cases, *People v. Crawford* (1982) 131 Cal.App.3d 591 (*Crawford*) and *Hernandez, supra*, 217 Cal.App.4th 559, to support his argument that the trial court was required to give a unanimity instruction specific to the methamphetamine. In *Crawford*, the defendant was charged with a single count of unlawful possession of a firearm. The prosecutor introduced evidence of two handguns found in the defendant's bedroom and two handguns found in a housemate's bedroom. (*Crawford, supra*, 131 Cal.App.3d at p. 595.) As to the guns in his bedroom, the defendant presented evidence that he was not aware of one of the guns and the other belonged to his girlfriend. (*Ibid*.) The court determined a unanimity instruction was necessary because the possession of the guns was "fragmented as to space. Guns were in different parts of the house [and] the evidence showed unique facts surrounding the possess[ion] aspect of each weapon." (*Id*. at p. 599.)

In *Hernandez*, *supra*, 217 Cal.App.4th 559, the defendant was charged with a single count of unlawful possession of a firearm. The prosecutor presented evidence that the defendant fired a gun outside a residence and, later that night, the police found a gun in a car the defendant was driving. (*Id.* at p. 565.) The defendant argued he never had a gun outside the residence and he lacked dominion or control over the gun found in the car. (*Id*. at p. 567.) The court determined a unanimity instruction was necessary because the evidence indicated a possibility of two distinct possessions separated by time and space, and the defendant tendered different defenses to each alleged possession. (*Id*. at p. 574.)

In contrast to *Crawford* and *Hernandez*, the possession giving rise to Alderete's conviction was not based on individual acts reasonably distinguishable by separation in time or space. Each pipe containing methamphetamine was found during the same search of Alderete's home. Although two of the pipes were found in the kitchen and one under a couch, the evidence indicated Alderete was the only person living in the house and had exclusive dominion and control over everything within it.

Moreover, unlike the defendants in *Crawford* and *Hernandez*, Alderete offered the same general defense to each quantity of methamphetamine found in his house. Specifically, he argued the pipes containing the methamphetamine did not belong to him and he was not aware they were in his house. Alderete did not, however, present evidence or argument to differentiate in any way the circumstances under which each pipe ended up in his house. Nor did he present evidence or argument that the pipes belonged to different individuals. Consequently, Alderete provided no reasonable basis upon which the jurors could split as to which quantity of methamphetamine he possessed. Under these circumstances, a unanimity instruction was not required. (Cf. *People v. Castaneda* (1997) 55 Cal.App.4th 1067 [unanimity instruction required where defendant argued one quantity of heroin was planted by police and the other quantity belonged to someone else]; *People v. King, supra*, 231 Cal.App.3d 493 [unanimity instruction required where defendant argued two quantities of methamphetamine were possessed by two different individuals].)

Alderete maintains he offered different defenses to each quantity of methamphetamine when he posited in closing argument: "Why would somebody who's already got two of these

pipes out there in the open in the kitchen have this other pipe underneath the couch?" and "But does it make sense that if, in fact, Mr. Alderete was using that pipe that he would stick it underneath the couch of his own residence?" Although these statements could conceivably cast doubt as to his knowledge of the pipe under the couch, Alderete did not make any comparable arguments with respect to the pipes in the kitchen. As such, we read these statements as part of a broader argument that the People's theory of the case was implausible and the jury should reject it as a whole. It was not a separate defense to the methamphetamine under the couch, as Alderete contends.

Finally, even if a unanimity instruction was required, the error was harmless under either a federal constitutional test or state law test.[9] (Compare *Chapman, supra,* 386 U.S. at p. 24 with *People v. Watson* (1956) 46 Cal.2d 818, 836.) The only issue legitimately in dispute at trial was whether Alderete was aware of the pipes containing methamphetamine found in his house. Given the evidence that the pipe under the couch was hidden, a juror could have reasonably concluded Alderete was aware only of the pipes in the kitchen and convicted him on that basis. The converse, however, is not true. Indeed, based on the evidence and argument presented at trial, we can conceive no reasonable basis upon which a juror could conclude Alderete was aware of the pipe hidden under the couch, but not the pipes found in plain sight on his kitchen table. As a result, there is no

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[9] There is a split of authority as to the proper harmless error standard to apply when a trial court erroneously failed to give a unanimity instruction. (See *Hernandez, supra*, 217 Cal.App.4th at p. 576 [discussing the split of authority].)

reasonable doubt that all jurors agreed Alderete possessed the methamphetamine contained in the pipes found in the kitchen, which was sufficient to convict him. Under such circumstances, any error in failing to give a unanimity instruction was harmless.

III. Griego Received Ineffective Assistance of Counsel

Griego contends his trial counsel provided ineffective assistance by failing to object to Officer Sacca's testimony regarding prior investigations and arrests at the Gordon Street residence, and that a judge signed a search warrant after finding probable cause that a crime had been committed at the residence. We agree.

A. Background

In her opening statement, the prosecutor informed the jury it would hear testimony from Officer Sacca that "[he] has been to [the Gordon Street residence] before, and he's contacted people leaving that location. And what he will tell you, that the one thing that these people had in common was that they had drugs, either on their person or inside their cars. Having had contact with people leaving the location with drugs in their possession, he had a suspicion about what might be going on there. [¶] As a result of that, he was able to . . . prepare a search warrant, which was then signed by a judge."

During the prosecutor's case-in-chief, Officer Sacca testified that he conducted three previous investigations at the Gordon Street address, which resulted in him arresting three people for either possession or sales of narcotics. Officer Sacca did not specify the types or quantities of narcotics involved. Based on those investigations and arrests, Officer Sacca suspected there was narcotics sales activity occurring at the location. In response, he drafted a warrant to search the residence, which a

judge signed. Officer Sacca explained that prior to signing a search warrant, a judge must determine whether there is probable cause to believe a crime was committed at the location. Griego's trial counsel did not object to Officer Sacca's testimony.

During her closing argument, the prosecutor recounted Officer Sacca's testimony regarding the prior investigations and arrests. She explained that Officer Sacca then sought a warrant to search the residence because "when you see numerous people leaving a house with drugs . . . , you suspect that there may be narcotics sales activity happening inside the home." Griego's counsel addressed Officer Sacca's testimony in his closing argument by stressing that the individuals were arrested as they left the house, rather than the garage.

On rebuttal, while discussing evidence showing Griego intended to sell the cocaine, the prosecutor stated the following: "You would expect some kind of sales activity to happen in a location where people leave a location with certain items. Just as you expect people leaving a grocery store to be carrying baggies with them, with certain items, the same thing works with people who sell drugs. In this case, you heard that people who are leaving a location had drugs in their possession; and that's no different from when people leave a grocery store with new items in their possession."

B. Analysis

To prevail on a claim of ineffective assistance of counsel a defendant must establish two elements: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors or omissions, a determination more favorable to the defendant would have resulted. (*Strickland v. Washington* (1984)

466 U.S. 668, 690, 694 (*Strickland*); see *People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*).) In our review on direct appeal, we presume counsel rendered adequate assistance and exercised reasonable professional judgment in making trial decisions. (*Holt,* at p. 703.) The record must demonstrate the lack of a rational tactical purpose for a challenged act or omission. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) "Whether to object to arguably inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference, failure to object seldom establishes counsel's incompetence." (*People v. Maury* (2003) 30 Cal.4th 342, 415–416.) If the record fails to disclose why trial counsel acted or failed to act in the manner challenged, the ineffective assistance of counsel claim must be rejected unless counsel was asked for, and failed to provide, an explanation or there could be no plausible explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

As we have noted, Griego contends his counsel provided ineffective assistance by failing to object to Officer Sacca's testimony regarding prior investigations and arrests outside the Gordon Street residence, which led to a judge finding probable cause to believe a crime had been committed and signing a warrant allowing officers to search the residence. Griego asserts the testimony constituted improper character evidence because it implied he sold narcotics in the past. Griego further contends that, to the extent the testimony was introduced for some other purpose, it should have been excluded as unduly prejudicial under Evidence Code section 352. He argues the same provision

of the Evidence Code would have resulted in exclusion of the testimony regarding the judge finding probable cause of a crime.

"Evidence of crimes committed by a defendant other than those charged is inadmissible to prove criminal disposition or a poor character." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123 (*Lenart*); see Evid. Code, § 1101, subd. (a).) Nonetheless, the trial court has discretion to admit evidence of uncharged crimes if relevant to prove, " 'among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. . . .' [Citations.]" (*Lenart, supra*, 32 Cal.4th at p. 1123; see *People v. Lewis* (2001) 25 Cal.4th 610, 636–637; *People v. Kelly* (2007) 42 Cal.4th 763, 783.) When used to show intent, the uncharged crimes must be sufficiently similar to the charged offense to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Lewis, supra*, 25 Cal.4th at pp. 636–637.) In addition, "for uncharged crime evidence to be admissible, it must have substantial probative value that is not greatly outweighed by the potential that undue prejudice will result from admitting the evidence." (*Lenart, supra*, 32 Cal.4th at p. 1123.)

We pause, *again,* to reiterate that the prosecutor should have presented this issue to the trial judge for its consideration before presenting the evidence in trial. The question of whether other crimes evidence is admissible in trial is a complex evidentiary question. Such evidence is considered " 'highly inflammatory and [can have a] prejudicial effect' on the trier of fact. [The California Supreme Court] has repeatedly warned that the admissibility of this type of evidence must be 'scrutinized

with great care.' " (*People v. Thompson* (1980) 27 Cal.3d 305, 314, fns. omitted (*Thompson*).)

That said, we also agree with Griego that any reasonably competent attorney would have objected to Officer Sacca's testimony when the evidence was sought to be admitted by the prosecutor without prior court approval, on the basis that it constituted improper evidence of uncharged crimes. The prosecutor clearly introduced Officer Sacca's testimony to imply that Griego sold narcotics to the three individuals who were arrested after leaving the Gordon Street residence. Indeed, she urged the jurors to draw precisely this inference when she stated in her rebuttal, "You would expect some kind of sales activity to happen in a location where people leave a location with certain items. . . . In this case, you heard that people who are leaving a location had drugs in their possession; and that's no different from when people leave a grocery store with new items in their possession."

Although it appears the prosecutor may have had a proper purpose for admitting evidence that Griego previously sold narcotics—to show Griego intended to sell the cocaine found in the garage—there was insufficient evidence connecting the prior arrests to sales made by Griego. While the search warrant may have had more to say on the point, at trial there was no evidence presented that officers observed sales taking place, only that persons were arrested outside the home carrying useable or saleable amounts of drugs. As such, the evidence only amounted to direct proof that the home was a place where people who possessed drugs congregated. Even if the arrests were circumstantial evidence of drug sales at the Gordon Street address, the sales might equally have been made *by Alderete,* and

thus entirely irrelevant and highly prejudicial when used—as they were—to convict Griego. Indeed, as defense counsel pointed out, the persons arrested with drugs outside the residence left the main house, not the garage where Griego lived. Absent some showing that the individuals arrested went into the garage or that Griego regularly went into the main house where the later-arrested individuals were seen leaving, there was no connection between the circumstantial evidence of drug sales and Griego. Nonetheless, Officer Sacca's testimony that a judge found probable cause for the warrant, coupled with the prosecutor's closing argument, gave a strong impression that there was such a connection. Officer Sacca's testimony was inadmissible under Evidence Code section 1101, and any reasonably competent attorney would have objected to it.

The Attorney General does not dispute that the testimony was inadmissible to the extent it was used to show Griego sold narcotics in the past. Nonetheless, the Attorney General insists an objection would have been futile because the testimony was admissible to explain why the police investigated the Gordon Street residence and why Officer Sacca succeeded in obtaining a search warrant. That the evidence was introduced for such purposes, however, is belied by the prosecutor's argument on rebuttal.

We acknowledge that the standard minimal questions and answers about the search being conducted pursuant to a warrant would have been appropriate for the purposes the Attorney General asserts. Still, because the lawfulness of the investigation and search were not at issue, there was no reason for the jury to learn the unduly prejudicial and inflammatory details about the investigation being premised on drug arrests outside the home.

There was especially no reason for the jury to learn that a warrant was issued after a judge determined there was probable cause to believe crimes had been committed at the residence. That was precisely the issue the jury was selected to determine; they should not have heard that a judge found that a crime occurred, even if the standard of evidence was less than beyond a reasonable doubt. As such, the evidence was irrelevant, and therefore inadmissible, if offered as background information for the investigation and warrant. (See Evid. Code, § 210 [evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].)

Even if the evidence had some relevance for these purposes, it should have been excluded under Evidence Code section 352. Evidence Code section 352 affords the court discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352.) Here, the probative value of Officer Sacca's testimony as background information was minimal, at best. In contrast, the risk of undue prejudice from such evidence was high, as it implied Griego engaged in numerous uncharged criminal acts. (See *Thompson, supra,* 27 Cal.3d at p. 318 [evidence of uncharged crimes is inherently and substantially prejudicial]; *People v. Holt* (1984) 37 Cal.3d 436, 450 [" 'The admission of any evidence that involves crimes other than those for which a defendant is being tried has a "highly inflammatory and prejudicial effect" on the trier of fact.' "].) Accordingly, we are confident the court would have excluded the evidence under Evidence Code section 352 had

counsel objected to it on that basis. Indeed, if there is any doubt as to the admissibility of uncharged offenses, "the evidence should be excluded." (*Thompson, supra*, at p. 318.)

We also find no merit to the Attorney General's proposed tactical reason for counsel's failure to object to Officer Sacca's testimony. The Attorney General posits that counsel "may have wanted the jury to know that numerous drug users had been seen coming and going from Griego's house to support the defense theory that someone else may have left the methamphetamine pipes there." In making this argument, the Attorney General has confused the defendants. Griego's charge was unrelated to the methamphetamine pipes found in Alderete's house. In any event, during his closing argument, Griego's counsel attempted to diminish the effect of Officer Sacca's testimony by emphasizing that the individuals were arrested coming out of the house, rather than the garage. This strongly suggests that counsel understood the evidence was harmful to his client and his failure to object to it had no tactical purpose.

With respect to the second *Strickland* factor, we think it is reasonably probable that a determination more favorable to Griego would have resulted had his counsel objected to Officer Sacca's improper testimony. The evidence that Griego possessed the cocaine for sale, rather than for personal use, was not overwhelming. As Officer Sacca readily admitted, the quantity of cocaine found in the garage was quite small. As a result, in forming his opinion that the cocaine was intended for sale, Officer Sacca relied heavily on the presence in the garage of other items indicative of narcotics sales, including $900 in cash, a digital scale, unused plastic baggies, and a knife. Griego, however, presented plausible explanations for most of these items.

Griego's employer, for example, testified that he paid Griego and Gonzales in cash. There was also evidence that a portion of the cash consisted of $100 bills, which would be inconsistent with small drug transactions. Further, Gonzales explained that the scale and baggies belonged to her, and she used them for crafting projects. Moreover, although Officer Sacca testified that the garage lacked items one would typically expect to find if an individual is using cocaine—such as a surface to snort the drugs—there was evidence that a mirror with a non-adhesive surface was located on the couch.

Perhaps because the prosecutor recognized her case was not particularly strong, she repeatedly referred to Officer Sacca's improper testimony throughout the trial. During her rebuttal in particular, the prosecutor strongly suggested the testimony showed that Griego sold narcotics in the past. Making matters worse, because the prosecutor waited until rebuttal to explicitly draw this connection, she ensured Griego had no opportunity to respond to the highly prejudicial argument.

Under these circumstances, we think there is a significant risk the jury convicted Griego based on alleged prior misconduct, rather than the charged crime. Indeed, as our Supreme Court has explained, " '[i]t cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent.' [Citation.]" (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) The prosecutor's substantial reliance on evidence of the prior investigations and arrests, combined with her presentation of evidence that a trial judge had already found probable cause that a crime had been committed at the residence, lead us to find it reasonably probable

a determination more favorable to Griego would have resulted had defense counsel objected to Officer Sacca's improper testimony.[10]

DISPOSITION

We affirm the judgment against Alderete. We reverse the judgment against Griego.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.

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[10] Because we reverse the judgment on this basis, we need not consider Griego's remaining claims of error.