Filed 12/12/17 P. v. Porras CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOHNNY PORRAS, Defendant and Appellant.	B277083 (Los Angeles County Super. Ct. No. GA092175)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cathryn F. Brougham, Judge. Affirmed.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Johnny Porras appeals the judgment following his conviction for assault with a deadly weapon and mayhem after he brutally attacked and seriously wounded victim Hector Valadez with a utility knife. Appellant contends the prosecutor committed misconduct by violating *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*) and improperly referencing matters outside the record when she commented on his postarrest silence during her rebuttal closing argument. We agree the prosecutor violated *Doyle* but find the error harmless beyond a reasonable doubt. We reject appellant's remaining contention the trial court abused its discretion in excluding evidence a prosecution witness was previously arrested but not prosecuted for grand theft auto. We therefore affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] mayhem (§ 203), criminal threats (§ 422, subd. (a)), and attempted robbery (§§ 664/211), along with deadly weapon enhancements (§ 12022, subd. (b)(1)). It was alleged he suffered a 2003 assault conviction that qualified as a strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a serious felony (§ 667, subd. (a)(1)), and a prior prison term (§ 667.5, subd. (b)).

A jury found appellant guilty of assault with a deadly weapon and mayhem and found the enhancements true, but acquitted him of criminal threats and attempted robbery. Appellant admitted his 2003 assault conviction and the court sentenced him to 21 years in state prison. He timely appealed.

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[1] All undesignated statutory citations are to the Penal Code unless noted otherwise.

FACTUAL BACKGROUND

1. Prosecution Case

Appellant and Angelica Pena had a child together named Little Johnny, who was about 11 years old at the time of the incident in this case. After appellant's relationship with Pena ended, Little Johnny lived with him but occasionally stayed with Pena and her boyfriend, victim Valadez.

On January 21, 2014, Pena dropped off Little Johnny at school. When she returned home, the school called to say Little Johnny did not have his backpack. Pena asked Valadez to get the backpack from appellant's house, which was two blocks away from the school. Valadez had never seen appellant before that day.

Valadez rode his bicycle to appellant's house to get the backpack. Once there, he saw appellant's cousin, Joseph Moreno, outside and told him he was there for the backpack. Moreno went inside and brought the backpack out to him. Valadez took it to the school, where he was told it was the wrong one. He went back to appellant's house for the correct backpack and knocked on the door. A woman answered. Valadez introduced himself as Pena's boyfriend and said he was there to get Little Johnny's backpack.

Moments later, appellant emerged and said, "You the one knocking on my door?" Valadez replied, "Yeah. I am here for the backpack." Moving face-to-face, appellant said a few more words, and Valadez said he did not want any problems; he was only there for the backpack. Appellant revealed a utility knife concealed in his right hand and slashed Valadez's face and mouth. Valadez felt blood pouring down his face and started to run away. Appellant chased him, saying, "Why are you running,

pussy?" According to Valadez, appellant also demanded his wallet and threatened to kill him. Still in pursuit, appellant tried to cut him again, missed, and then sliced him in the back of the head.

Appellant grabbed Valadez and threw him to the ground, tried to stab him, and—again according to Valadez—threatened to kill him. Valadez grabbed appellant's arms and held on, telling him to stop. Appellant continued to fight, and Valadez grabbed his neck and bit him in the chest. Appellant asked Valadez to let go, but Valadez refused until appellant dropped the knife, which he did after Valadez bit harder. Appellant tried to attack again, but his friend told him to leave Valadez alone.

Valadez took off on his bike and rode home, where his brother called 911. Valadez was bloody and had trouble speaking. His blood had gotten on his bicycle and the backyard of his home. Around 11:00 a.m., paramedics arrived, treated him, and rushed him to the hospital. He suffered a three-inch laceration from his left cheek to the left corner of his mouth, causing a portion of his lip to hang and requiring stitches, and a three-inch laceration to the back of his scalp that required 15 staples.

2. Defense Case

Appellant's defense was self-defense, and he testified to a different version of the incident. He denied stabbing Valadez or possessing a knife. Instead, he was sleeping on the couch when the sound of the door opening awakened him. He saw Valadez standing there; he did not know him or know what he was doing there. He asked Valadez what he was doing in his home, but Valadez ignored him. After he told Valadez to go outside,

Valadez pulled a knife and approached him, saying, "What are you gonna do, mother fucker?"

Fearing for his life, appellant tried to defend himself by grabbing Valadez's arm. A scuffle ensued that led them outside. They fell to the ground and grappled as appellant tried to stop Valadez from stabbing him. Appellant believed Valadez accidentally cut his own lip and the back of his head during the fight. When they eventually separated, Valadez left on his bicycle. Appellant denied trying to rob Valadez or threatening to kill him. He acknowledged he never called the police to report the altercation. He claimed to have a bite mark on his arm and scrapes on his knees and elbows.

An officer testified he spoke to Valadez at the hospital. Although Valadez said appellant slashed him, he did not mention anything about a robbery or death threat.

A gardener working across the street testified he did not see the fight. But during an interview with police, he said he saw a man punch another man on a bicycle several times. He did not see a knife or see anyone get stabbed, although he saw blood on the victim. He saw a third man separate the attacker from the victim and they went into a nearby house.

Appellant's friend Sean Huguez testified he drove to appellant's home the morning of the incident to give him a ride. When he pulled up, he saw appellant struggling with Valadez outside the house. He saw Valadez holding a knife as appellant tried to push it away. Appellant yelled that Valadez had broken into his house and asked Huguez for help. Once Huguez exited the car, Valadez rode away on his bike, threatening appellant he would come back and stab him. Huguez saw appellant bleeding and saw marks all over him.

Appellant's fiancée Ruby Perez testified she lived with appellant and did not answer the door for anyone. She went outside when she heard a commotion and saw Valadez riding away on his bicycle.

3. Rebuttal

A detective who interviewed Perez testified Perez said she did not hear or see anything and did not say whether she saw someone leave the scene.

A defense investigator who interviewed Huguez testified Huguez said he saw appellant and Valadez fighting in front of the house. Although Huguez thought he saw one of them with something in his hand, he did not say it was a knife. Huguez received a call from Perez, who told him that police said appellant stabbed Valadez.

DISCUSSION

1. *Doyle* Error

Appellant was arrested on February 7, 2014, approximately 17 days after his altercation with Valadez. On February 11, 2014, while he was in custody, he was advised of his *Miranda*[2] rights. According to a police report, he was willing to speak with police but asked for a lawyer to be present. Officers could not secure counsel for him, so they did not question him.

In her rebuttal closing argument, the prosecutor argued appellant's version of events was not believable. At one point she asked, "Why doesn't he tell the police that? That that is what happened? How is that believable?" Later, she argued: "Two years have passed since, almost two years have passed since the day of the incident. The defendant had over 700 days to come up

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

with this story and he had not told anyone, but yesterday in front of you—" Defense counsel interposed an objection that the argument was "[i]mproper," but the court immediately overruled it. The prosecutor moved on.

After the verdict, appellant moved for a new trial on the ground the prosecutor's "700 days" comment constituted misconduct because it commented on his right to remain silent after arrest in violation of *Doyle* and it was based on evidence not presented at trial. The trial court denied the motion, finding the argument was not a comment on appellant's postarrest silence and was not used to impeach him, but was an attempt to point out appellant's story did not make sense. The court also viewed closing argument as "different" from confronting a defendant with postarrest silence during testimony. Even if there was *Doyle* error, the court found there was no reasonable probability of a different outcome because the evidence against appellant was strong. The court also found the prosecutor's argument was not based on evidence outside the record, and even if it was, again there was no reasonable probability of a more favorable outcome.

On appeal, appellant again argues the prosecutor's "700 days" comment constituted misconduct because it violated *Doyle* and was based on evidence outside the record. For the first time on appeal, he asserts the same claims against the prosecutor's comment about him not reporting the incident to police.

Respondent contends appellant did not preserve his misconduct claim based on *Doyle* error. "As a prerequisite for advancing a claim of prosecutorial misconduct, the defendant is required to have objected to the alleged misconduct and requested an admonition 'unless an objection would have been futile or an admonition ineffective.' " (*People v. Jablonski* (2006)

37 Cal.4th 774, 835.) Also, a defendant preserves a misconduct claim "when the trial court promptly overrules an objection and the defendant has no opportunity to request an admonition." (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.)

Respondent is correct appellant forfeited any challenge to the prosecutor's comment, "Why doesn't he tell the police that? That that is what happened? How is that believable?" Defense counsel did not object to this comment during the prosecutor's argument or ask for an admonition, nor did defense counsel attack this comment in the new trial motion. On appeal, appellant has not suggested that an objection to this specific statement would have been futile.

Appellant preserved his challenge to the prosecutor's "700 days" comment, however. Although respondent complains defense counsel's "[i]mproper" objection did not reference *Doyle* error specifically, the court immediately overruled the objection, preventing defense counsel from elaborating or requesting an admonition. Further, in denying appellant's motion for a new trial, the court made clear it did not think the prosecutor's argument violated *Doyle* or rested on evidence outside the record, so any further argument or elaboration by defense counsel during the prosecutor's argument would have been futile.

On the merits, we conclude the prosecutor violated *Doyle* with her "700 days" comment.

In *Doyle*, the United States Supreme Court held a prosecutor violates due process by questioning a defendant on his or her postarrest silence after *Miranda* warnings have been given. "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what

the State is required to advise the person arrested." (*Doyle, supra*, 426 U.S. at p. 617.) This rule exists because " 'it is fundamentally unfair, and a deprivation of due process, to promise an arrested person that his silence will not be used against him, and then to breach that promise by using silence to impeach his trial testimony.' " (*People v. Clark* (2011) 52 Cal.4th 856, 959 (*Clark*).)

A *Doyle* error contains two components. "The first element is that the prosecution makes *use* of a defendant's postarrest silence for impeachment purposes. Use of a defendant's postarrest silence can occur either by questioning or by reference in closing argument. The second essential element is that the trial court *permits* that use," usually by overruling a defense objection, "thus conveying to the jury the unmistakable impression that what the prosecution is doing is legitimate." (*People v. Evans* (1994) 25 Cal.App.4th 358, 368, fn. omitted (*Evans*).) In assessing *Doyle* error, we consider the context of the prosecutor's argument, and if that argument is a "fair response to defendant's claim or a fair comment on the evidence," then it is permissible. (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448.) For example, the defendant's suggestion that he or she " 'did not have a fair opportunity to explain his innocence can open the door to evidence and comment on his silence.' " (*Ibid.*)

The *Doyle* components are met here. The prosecutor sought to use appellant's alleged 700 days of silence—which included his postarrest, post-*Miranda* silence—in order to impeach his version of events, the tactic *Doyle* prohibits. The prosecutor's comment was particularly improper given the police report suggested appellant was *willing* to talk to the police after he was given *Miranda* warnings, so long as counsel was present. The apparent

reason he did not speak with police was because counsel could not be secured. For the prosecutor to fault him for not telling his side of the story at that point was misleading. Further, when the trial court overruled defense counsel's objection, it tacitly endorsed the prosecutor's argument.

This case is similar to several cases finding *Doyle* error by referring to a defendant's post-*Miranda* silence. In *People v. Galloway* (1979) 100 Cal.App.3d 551, the prosecutor committed *Doyle* error by questioning the defendant and arguing in closing that the defendant had not told anyone his alibi until trial, even though he had received *Miranda* warnings. (*Galloway, supra,* at pp. 556, 558.) Similarly, in *People v. Lindsey* (1988) 205 Cal.App.3d 112, the prosecutor committed *Doyle* error by pointing out in rebuttal closing argument that defense counsel had not shared the defendant's alibi with the police or the district attorney's office before trial, again despite *Miranda* warnings. (*Lindsey, supra*, at pp. 116-117.) And in *Evans*, the prosecutor violated *Doyle* by questioning the defendant as to why he did not give his version of events to police " 'when given the opportunity' " after receiving *Miranda* warnings. (*Evans, supra*, 25 Cal.App.4th at pp. 368-369.)

Respondent contends there was no *Doyle* error because the prosecutor merely referred to appellant's failure to call the police immediately after the attack. Respondent is correct a prosecutor may comment on a defendant's failure to report a crime *before* he or she is arrested and given *Miranda* warnings. (See *People v. Tate* (2010) 49 Cal.4th 635, 692; see also *People v. Earp* (1999) 20 Cal.4th 826, 856-857.) But the prosecutor clearly did not limit her comment to the immediate aftermath of the incident or even the 17 days between the altercation and his arrest. She argued

he had not told *anyone* his version of the incident for *700 days*. That goes far beyond permissible argument based on pre-arrest and pre-*Miranda* silence. (See *Earp, supra*, at p. 857 [drawing distinction between permissible arguments based on pre-*Miranda* silence and improper arguments based on post-*Miranda* silence].)

Respondent also cites cases applying *Doyle* to arguments based on a defendant's failure to report details of a crime to private citizens as opposed to police. (See, e.g., *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520.) With private citizens, *Doyle* applies to a defendant's silence when it "results primarily from the conscious exercise of his constitutional rights." (*Ibid.*) In discussing these cases, respondent merely repeats the argument that the prosecutor's "700 days" comment referred only to appellant's *pre-arrest* silence to private individuals, an interpretation we have rejected.[3]

Although we have found the prosecutor's comment violated *Doyle*, we find the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The evidence of appellant's guilt was overwhelming and his version of the incident was implausible. There was no dispute the altercation occurred and Valadez was seriously injured. The only issue was who initiated the attack. Although appellant portrays the case as a credibility contest between Valadez and appellant, the physical evidence unquestionably supported Valadez's testimony. Valadez was slashed around his mouth, making his lower lip hang, and was deeply cut in the back of his head. Those wounds were

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[3] Given we have concluded the prosecutor violated *Doyle*, we need not address appellant's contention the prosecutor also relied on evidence outside the record.

consistent with appellant viciously attacking Valadez and then pursuing him when he fled. It was implausible those wounds—especially the wound to the back of his head that required 15 staples—were accidentally inflicted when, according to appellant, he and Valadez were struggling over the utility knife and appellant was simply trying to fend off the attack. In fact, appellant did not even testify he wrestled the knife away from Valadez and used it to defend himself; instead, he claimed Valadez cut *himself* during the struggle, making appellant's story that much more unbelievable.

While there was no independent eyewitness to the entire incident, the gardener across the street corroborated Valadez's testimony. He told police he had seen appellant punch Valadez on his bike and a third man separate appellant from Valadez. In contrast, Moreno and Perez, who supported a portion of appellant's version of events, had potential bias as his cousin and fiancée. There was also no evidence of a specific motive for Valadez to attack appellant, but appellant could have been motivated to attack Valadez after learning Valadez was Pena's boyfriend when Valadez came to the house the second time.

Further, the prosecutor's comment was only a tiny portion of the entire case against appellant. During trial, the prosecutor limited her cross-examination of appellant to his pre-arrest silence, and he admitted he did not call the police after the incident and before he was arrested. That testimony created a strong inference of guilt and undermined his claim he was simply acting in self-defense. The court also instructed the jury that attorney arguments, including opening and closing statements, are not evidence. Under these circumstances, the prosecutor's

comment during closing was harmless beyond a reasonable doubt.[4]

2. Exclusion of Evidence of Pena's Arrest

Before trial, the prosecutor sought to exclude evidence that Valadez's girlfriend and Little Johnny's mother Pena was arrested for grand theft auto in 2000. The prosecutor noted Pena was not prosecuted for the crime due to lack of evidence. Defense counsel wanted to use the arrest for impeachment, but offered no facts surrounding the arrest. The court denied the request on the understanding that *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*) "is for . . . misdemeanor convictions," but allowed defense counsel to provide "case law that supports your position that the arrest comes in." The court added, "But right now, my understanding of the law is it must be a conviction." Defense counsel responded, "Perfect." The court added, "So, then, no reference will be made" to the arrest. The court also noted the arrest was "fairly old," so the court would "most likely" exclude it under Evidence Code section 352. The parties and the court never revisited the issue, and Pena was not asked about the arrest during trial.

Appellant contends the trial court's exclusion of this evidence was erroneous under state law. Respondent contends appellant forfeited this claim because he did not pursue the issue or provide further authority for his position in the trial court.

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[4] Appellant also argues cumulative misconduct warrants reversal. As we have noted, he forfeited his challenge to the prosecutor's comment about him not telling the police his version of events. As for the prosecutor's "700 days" comment, for the reasons already discussed, we find no prejudice from that comment.

While the court left open the possibility of defense counsel revisiting the issue, defense counsel met the minimum requirements to preserve the issue—she requested the court admit the evidence and the court excluded it. (See *People v. Ramirez* (2006) 39 Cal.4th 398, 472-473 [to preserve issue defendant "must not only request the court to act, but must press for a ruling"].)

On the merits, we find no error. To the extent the court believed a conviction was necessary to admit prior conduct for impeachment, under *Wheeler*, "[a] witness may be impeached with any prior conduct involving moral turpitude *whether or not* it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (*Clark, supra*, 52 Cal.4th at p. 931, italics added, citing *Wheeler, supra,* 4 Cal.4th at pp. 290-296.) But defense counsel never offered any evidence of the conduct underlying the arrest to show it involved moral turpitude, and an *arrest* standing alone is not admissible to impeach a witness. (See *People v. Medina* (1995) 11 Cal.4th 694, 769 ["mere arrests are usually inadmissible, whether as proof of guilt or impeachment"]; *People v. Williams* (2009) 170 Cal.App.4th 587, 609 ["Generally, evidence of mere arrests that do not result in convictions is inadmissible because such evidence invariably suggests the defendant has a bad character."]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523 ["[I]t is established that evidence of mere arrests is inadmissible because it is more prejudicial than probative."].)

The court was also inclined to exclude the arrest under Evidence Code section 352 because it was 15 years old, which fell well within the court's broad discretion. (*Clark, supra*, 52 Cal.4th at p. 932 [reviewing court ordinarily upholds trial court's broad

discretion to exclude impeachment evidence].) Even beyond the age of the arrest, Pena also would have almost surely denied any wrongdoing, resulting in a time-consuming side-trial over a 15-year-old incident. (*Id.* at p. 933 ["[I]mpeachment evidence other than a felony conviction might entail problems of proof, require undue time, or create confusion."].) Thus, any probative value of the arrest was strongly outweighed by the risk of undue prejudice and wasting trial time.[5]

Appellant further argues the trial court exclusion of Pena's arrest violated his Sixth Amendment right to cross-examination. We reject respondent's argument that appellant forfeited his challenge by failing to object on this ground in the trial court. Appellant may raise this claim for the first time on appeal because it does not implicate different facts or legal standards from those presented below, and he merely asserts the trial court's erroneous exclusion of Pena's arrest had the added legal effect of unconstitutionally limiting his cross-examination rights. (*People v. Cowan* (2010) 50 Cal.4th 401, 464, fn. 20.)

On the merits, we reject his claim. Limitations on cross-examination do not violate the Sixth Amendment unless " 'a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' " (*People v. Williams* (2016) 1

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[5] Appellant points out the court permitted the prosecutor to introduce his 2003 felony conviction for assault with a knife causing great bodily injury. But unlike Pena's 2000 arrest, appellant's crime involved moral turpitude and resulted in a felony conviction. The court also sanitized the conviction, so the prosecutor was only permitted to tell the jury he was convicted of "felony assault."

Cal.5th 1166, 1192.) For the reasons already explained, the impeachment value of Pena's 15-year-old arrest was low and would not have given the jury a significantly different impression of her credibility had the court permitted appellant to cross-examine her on it. Thus, appellant's right to cross-examination was not violated.[6]

DISPOSITION

We affirm the judgment.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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[6] Appellant contends both the prosecutorial misconduct and the alleged erroneous exclusion of Pena's prior arrest created cumulative prejudice warranting reversal. Because we found no error in excluding Pena's arrest and found no prejudice from the prosecutor's rebuttal closing argument, we reject his contention.