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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KENNETH NAZARIO, Defendant and Appellant.	B231744 (Los Angeles County Super. Ct. No. KA092273)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia G. Fisher, Judge. Affirmed.

Jasmine Patel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Kenneth Nazario appeals from a judgment of conviction entered after a jury found him guilty of possession of a controlled substance (Health and Saf. Code, § 11377, subd. (a)). The trial court found true the allegations defendant had a prior conviction of a serious or violent felony (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and had served three prior prison terms (§ 667.5, subd. (b)).[1] The court sentenced defendant to a total of five years in state prison.

On appeal, defendant contends that his Fifth Amendment right against self-incrimination was violated by admission into evidence of his silence in response to a question whether the methamphetamine belonged to him. We affirm.

FACTUAL BACKGROUND

Prosecution

On October 17, 2010, at approximately 11:00 p.m., Los Angeles County Sheriff Deputy Tim Nakamura and his partner Deputy Nshanian conducted a traffic stop of a 1997 BMW that defendant was driving. Defendant's girlfriend was in the front passenger seat and his brother, Michael, was in the back seat.

At the traffic stop, Deputy Nakamura asked defendant to exit the BMW. Eventually, the three occupants got out of the car. Deputy Nakamura placed defendant and Michael in the back seat of the patrol car. He asked defendant and Michael whose car it was. Defendant said it was his car. He also stated that the car was owned by both brothers. Deputy Nakamura also asked if everything in the car was his and he responded in the affirmative.

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[1] Prior to trial, the trial court dismissed one strike allegation. It also struck two of the prior prison term enhancements.

While Deputy Nakamura spoke to defendant, Deputy Nshanian searched the BMW and found a bag of marijuana on the driver's seat. When Deputy Nakamura returned to the car, he observed a keychain attached to the key in the car's ignition. The keychain had two blue containers. The deputies opened one of the containers and found methamphetamine. Deputy Nakamura returned to defendant and his brother and asked whose methamphetamine it was. Neither brother answered. Deputy Nakamura opined that the methamphetamine found in the container was a usable amount.

Defense

Michael testified and claimed ownership of the keychain and the methamphetamine. Each brother had his own set of keys. Michael had been driving earlier in the day and had picked up defendant and his girlfriend. Michael had given defendant his keys to drive the car after Michael purchased some liquor.

On the night of the traffic stop, Michael did not tell the deputies that the methamphetamine was his because he "didn't think it was going to escalate." Michael identified the keys as his from a photograph. The photograph showed a Los Angeles Lakers emblem attached to the keychain. On cross-examination, Michael denied that he put any sports emblems on his keychain. On redirect, he said that he put the emblem on the keychain, but he did not remember whether the emblem was on the keychain on the night of the traffic stop.

Michael also testified that the methamphetamine was in a plastic bag in the container.

Prosecution Rebuttal

Deputy Nakamura recovered marijuana from the driver's seat of the BMW. No keys were found in defendant's possession when he was searched. The methamphetamine was not in a plastic bag but was loose in the container.

DISCUSSION

Defendant contends that his Fifth Amendment right against self-incrimination was violated by admission into evidence of his silence in response to Deputy Nakamura's question whether the methamphetamine belonged to him. He also contends the trial court's instruction on adoptive admissions was error, and the prosecutor committed misconduct in arguing adoptive admission. We disagree.

Forfeiture of Claims

Initially, the People claim that defendant forfeited his Fifth Amendment, instructional error, and prosecutorial misconduct claims by failing to object at trial.

Prior to trial, defendant moved to suppress his statements made during the traffic stop, as well as his lack of response to Deputy Nakamura's question about ownership of the methamphetamine, as having been obtained in violation of his rights under the Fifth Amendment.

While Deputy Nakamura's police report indicated that defendant stated during the traffic stop that the methamphetamine belonged to him, during the hearing on defendant's motion, Deputy Nakamura testified that defendant did not affirmatively make that admission. Instead, defendant was silent when asked if the methamphetamine belonged to him.

After defendant's counsel heard Deputy Nakamura's comment that defendant did not affirmatively indicate ownership of the methamphetamine, but only remained silent when asked about it, he withdrew his motion. He stated, "I think at this point, your honor, if I may, I'm satisfied with the information that was learned. My concern, as you noted, was whether or not there was a specific statement regarding the key chain. That statement was never made. It doesn't exist. I would withdraw my motion at this point altogether and leave it as is."

The jury was given an instruction on adoptive admissions prior to closing argument, without any objection from defendant's counsel, as follows:

"If you conclude that someone made a statement—let me just take a moment. If you conclude that someone made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true.

"1. The statement was made to the defendant or made in his presence.

"2. The defendant heard and understood the statement.

"3. The defendant would under all of the circumstances naturally have denied the statement if he thought it was not true.

"4. The defendant could have denied it but did not.

"If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

The prosecutor discussed an adoptive admission by silence during his argument. The prosecutor argued: "And when asked directly by the deputy whose meth is this? What does he do? He makes what's called an adoptive admission. He's silent. Well, when someone is confronted with an evidence—with an item of evidence like that, if it wasn't yours, wouldn't you be shouting hey, that meth isn't mine. I didn't know anything about it. I didn't know how it got there. It isn't mine. The keychain isn't mine. But he didn't make any of those statements. He didn't say any of that. That's what we call an adoptive admission by silence."

Defendant's counsel did not object to the prosecutor's argument on adoptive admission. As a general rule, the failure to raise a claim of a constitutional violation in the admission of evidence at trial forfeits the claim on appeal. "'[A] defendant must make a specific objection on [constitutional] grounds at the trial level in order to raise a [constitutional] claim on appeal.' [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 854; *People v. Tom* (2012) 204 Cal.App.4th 480, 491-492.) As defendant notes, however, a reviewing court may still consider the issue; the forfeiture rule is not automatic. (See *Mattson*, *supra*, at p. 854 ["Notwithstanding defendant's failure to

identify in the trial court self-incrimination theories . . . we consider them here."]; *Tom*, *supra*, at p. 492.)

Similarly, the failure to object to an instruction given forfeits any objection thereto. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) An exception to this rule arises, however, if the instruction affected the defendant's substantial rights. (Pen. Code, § 1259; *Rivera*, *supra*, at p. 146.)

The People also assert that the claim of prosecutorial misconduct, in commenting on defendant's silence in response to Deputy Nakamura's question, during argument was forfeited on appeal because there was no objection at trial and a request for admonition. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1303; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) Defendant claims that the trial court made it clear during the suppression hearing that it would allow defendant's silence as an adoptive admission, and objection to an instruction and a request for an admonition as to the prosecutor's comment would have been futile. While we do not necessarily agree that any objection to an instruction or request to limit the prosecutor's comments during closing argument would have been futile, we elect to review defendant's claims on the merits.

Admission of Evidence of Silence

The United States Supreme Court has not ruled on the constitutionality of using a defendant's prearrest, pre-*Miranda*[2] silence as substantive evidence of guilt. In *Jenkins v. Anderson* (1980) 447 U.S. 231, 238 [100 S.Ct. 2124, 65 L.Ed.2d 86], the court held that evidence of prearrest silence is admissible for impeachment, but the court did not discuss whether the evidence is admissible in the prosecution's case-in-chief. The federal circuit courts are split on whether evidence of postarrest pre-*Miranda* silence in the face of police questions is admissible.[3] (See *United States v. Whitehead* (9th Cir. 2000) 200

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

[3] Although lower federal court decisions on federal questions are persuasive and entitled to great weight, they are not binding on state courts. (*Flynt v. California*

F.3d 634, 639; *United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1109-1111 [evidence is admissible]; see *Fletcher v. Weir* (1982) 455 U.S. 603, 607 [102 S.Ct. 1309, 71 L.Ed.2d 490] [postarrest pre-*Miranda* silence admissible for impeachment].)

Defendant relies on the case of *People v. Waldie* (2009) 173 Cal.App.4th 358, 366 to support his contention that his silence should not have been used as an adoptive admission because his lack of response to police questioning was an exercise of his Fifth Amendment privilege against self-incrimination. However, the facts in *Waldie* are distinguishable. In *Waldie*, the defendant was convicted of two counts of lewd and lascivious conduct against a child under the age of 14 years. (*Id*. at p. 360.) A detective was allowed to testify of repeated attempts to contact the defendant more than a dozen times, making it appear that he was evading the police. The detective was also allowed to testify that the defendant promised to call back to talk to law enforcement, but never did so. (*Id*. at p. 366.) The court instructed the jury that the defendant's statement promising that he would call back tended to show consciousness of guilt (CALJIC No. 2.03). The prosecutor commented during closing argument that the defendant did not cooperate with the police investigation. (*Waldie*, *supra*, at p. 364.)

In *Waldie*, the court correctly noted that "[i]f the police are allowed to call a suspect persistently and then offer his unwillingness to respond as evidence of guilt, a defendant would never be able to claim the protection of freedom from incrimination." The court went on to say that "[a] different result might be indicated if the detective had called [the] defendant only one time or a few times." The court found that the testimony of "repeated phone calls and apparent evasiveness by [the] defendant [was] constitutionally infirm." (*People v. Waldie*, *supra*, 173 Cal.App.4th at p. 366.)

The focus in *Waldie* was the "emphasis on defendant's continuing failure to call the police," "making it appear that defendant was evading the police." (*People v. Waldie*, *supra*, 173 Cal.App.4th at p. 366.) Here, by contrast, the focus was on defendant's

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Gambling Control Com. (2002) 104 Cal.App.4th 1125, 1132; *Smith v. County of Los Angeles* (1994) 24 Cal.App.4th 990, 997, fn.2.)

failure to answer Deputy Nakamura's question whether the methamphetamine was his after willingly answering the deputy's previous questions. *Waldie* does not support defendant's claim that his silence in response to this particular question was not admissible as an adoptive admission.

Defendant also cites *People v. Tom*, *supra*, 204 Cal.App.4th 480 and *People v. Bejasa* (April 19, 2012, E051308) ___ Cal.App.4th ___ [2012 WL 1353122] in support of his position. In both cases, there was a question whether the defendant's detention following a traffic accident was the functional equivalent of a formal arrest, triggering the need for *Miranda* warnings. (*Bejasa*, *supra*, at pp. ___-___; *Tom*, *supra*, at pp. 495-496.) Having determined that *Miranda* warnings were required, the question then became whether evidence of the defendant's postarrest, pre-*Miranda* silence was admissible. (*Bejasa*, *supra*, at p. ___; *Tom*, *supra*, at p. 496.) That is not the issue here.

Even assuming error in the admission of defendant's silence and the prosecutor's comment on his silence, we find the error to be harmless. Claims that a defendant's right against self-incrimination was violated is reviewed under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See *People v. Earp* (1999) 20 Cal.4th 826, 856-858; *People v. Hardy* (1992) 2 Cal.4th 86, 157.)

The evidence adduced at trial showed that defendant admitted being one of the owners of the BMW, and he admitted that everything in the car belonged to him. There were no other keys in his possession at the time of the traffic stop.

Michael's testimony concerning the keychain was lacking in credibility. He testified that the keys in the ignition on the night of the stop were his. He identified a photograph of the keys for the BMW. The photograph showed a Los Angeles Lakers emblem attached to the keychain. On cross-examination, he denied that he had put any sports emblems on his keychain. On redirect, he changes his testimony and stated that he put the emblem on the keychain, but he did not remember whether the emblem was on the keychain on the night of the traffic stop.

Michael testified that on the night of the traffic stop, he did not tell the deputies that the methamphetamine was his because he "didn't think it was going to escalate." Michael also testified that he put the methamphetamine into a bag and then into the keychain container. This testimony was impeached by Deputy Nakamura's testimony that no bag was found.

The jury clearly rejected Michael's testimony and his after-the-fact admission that the methamphetamine was his. All the evidence pointed to defendant as the possessor of the methamphetamine. Even if the adoptive admission evidence was not admitted, the result would have been the same. Any error in its admission thus was harmless beyond a reasonable doubt.

Ineffective Assistance of Counsel

Defendant contends that if his claims have been forfeited, his trial counsel was ineffective for failing to make objections to the evidence presented for appellate review.

When a defendant raises a claim of ineffectiveness of counsel, he must establish both that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) Here, as discussed above, there is no reasonable probability that, had the adoptive admission evidence been excluded, defendant would have been acquitted. Hence, he cannot establish ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.