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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY ORANTE,

Defendant and Appellant.

B237182

(Los Angeles County
Super. Ct. No. BA377335)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald H. Rose, Judge. Affirmed.

Jeralyn Keller, 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, Assistant Attorney General, Stephanie A. Miyoshi and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

An information, filed January 10, 2011, charged Kelly Orante with one count of murder (Pen. Code, § 187, subd. (a))¹, along with a special allegation that he used a deadly or dangerous weapon, a knife, in committing the offense (§ 12022, subd. (b)(1)). Prosecution evidence showed that Orante killed a post-operative transgender prostitute after having a sexual encounter with her. Orante did not present any evidence in his defense. The jury convicted him of first degree murder and found the special allegation true. The trial court sentenced Orante to 26 years to life in state prison, consisting of 25 years to life for the murder plus one year for the use of a deadly or dangerous weapon.

On appeal, Orante contends that he received ineffective assistance from counsel, who should have, but did not, object on grounds of violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) to the admission of Orante's post-arrest interview with police detectives. (See *People v. Mattson* (1990) 50 Cal.3d 826, 854 [“‘a defendant must make a specific objection on *Miranda* grounds at the trial level in order to raise a *Miranda* claim on appeal’”].) We affirm the judgment.

““‘[T]he right to counsel is the right to the effective assistance of counsel.’” [Citation.] ‘The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ [Citation.] ‘A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted

¹ Statutory references are to the Penal Code.

from a breakdown in the adversary process that renders the result unreliable.’

[Citation.]” (*In re Valdez* (2010) 49 Cal.4th 715, 729.)

“‘Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” [Citation.]’ [Citation.]” (*In re Valdez, supra*, 49 Cal.4th at pp. 729-730; see also *People v. Lucas* (1995) 12 Cal.4th 415, 443 [appellate court “presume[s] counsel’s decision not to raise the claim was a reasonable, tactical one unless the record affirmatively demonstrates otherwise”].) “[T]he mere fact that counsel, had he [or she] chosen another path, “might” have convinced the [trial] court to issue a favorable evidentiary ruling, is not enough to carry defendant’s burden of demonstrating [incompetence]. . . .’ [Citation.]” (*Lucas*, at p. 445.) In other words, “[t]he decision whether to object to the admission of evidence is ‘inherently tactical,’ and a failure to object will rarely reflect deficient performance by counsel. [Citation.]” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.)

Based on the record, counsel’s failure to object on *Miranda* grounds to the admission of Orante’s post-arrest interview with police detectives appears purely tactical. Orante defended the murder charge on the theory that the evidence supported a conviction for voluntary manslaughter, based on imperfect self-defense, but not a murder conviction. Orante’s post-arrest interview with police detectives provided the only evidentiary support for that defense.

During the interview, Orante stated that the killing was in “self-defense” because the victim was “[a]ttacking” him. According to Orante, the victim grabbed him by his pants pockets, reaching into them as though she were trying to take more money from him. The two ended up on the floor struggling, while the victim screamed at Orante, and he pushed her. Orante said that he stabbed the victim “[t]o get away from her” and that she threw him “on the wall.” Counsel used this evidence to argue to the jury, “My client engaged in a struggle with the victim wherein he ended up killing her. . . . We are not here standing here today telling you that this was a lawful killing. There was a killing done in self-defense because Mr. Orante exceeded what he should have done. Mr. Orante believed that he had to protect himself, and he ended up exceeding his right to do so. The victim didn’t have a weapon. Mr. Orante believed he was about to be robbed. And you’ll have a jury instruction that tells you that any person who believes that they’re about to be robbed has a right to defend themselves. However, that person cannot exceed the amount of force that a reasonable person believes that they could do. That’s what’s called imperfect self-defense because the law recognizes that all of us may overreact in times when we’re confronted with a situation and we’ll do more than what somebody else might do. We may be so either fearful or angered by what someone else does to us that we will exceed what happens. But that means the person is guilty of voluntary manslaughter, not murder. It’s still against the law. It’s still . . . a crime, but it’s the correct and appropriate crime.”

Because counsel used Orante’s post-arrest interview for the defense theory of imperfect self-defense, and Orante’s statements during that interview were the only evidence supporting the theory, the presumption that the failure to object to admission of the interview on *Miranda* grounds was a reasonable, tactical decision controls. No basis thus exists to reverse the judgment on grounds of ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.