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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SEAN ERNEST MCCLUSKEY, Defendant and Appellant.	B279775 (Los Angeles County Super. Ct. No. TA139425)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Remanded for resentencing.

Mark Alan Hart, 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, Senior Assistant Attorney General, Shawn McGahey Webb, Steven D. Matthews and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Sean Earnest McCluskey of second degree murder and found true the special allegation he had personally used a firearm in committing the offense. On appeal McCluskey contends the court erred in admitting his statements to law enforcement officers obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*). He also contends evidence he invoked his right to counsel was improperly presented to the jury to impeach his credibility in violation of *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91] (*Doyle*) and his counsel was constitutionally ineffective for failing to object to that evidence. We affirm McCluskey's conviction and remand for the trial court to consider whether to exercise its discretion under newly amended Penal Code section 12022.53, subdivision (h),[1] to strike the firearm enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information filed July 14, 2016 charged McCluskey with the murder of Calvin Watts (§ 187, subd. (a)). The information specially alleged McCluskey had personally used and intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c) & (d)) and had suffered a prior conviction for robbery, a serious felony within the meaning of section 667, subdivision (a), and the three strikes law (§§ 667, subds. (b)-(j), 1170.12). McCluskey pleaded not guilty and denied the special allegations.

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[1] Statutory references are to this code.

2. *The Evidence at Trial*

a. *The People's evidence*

Kamala Williams, Watts's intimate partner, testified McCluskey shot and killed Watts in the early morning hours of September 20, 2015 in front of the motorhome in which she and Watts lived. According to Williams, she and Watts had been drinking and quarreling during the evening of September 19, 2015, both inside their home and outside near neighboring residences. When dogs began barking inside Sara Cook's nearby motorhome, Cook complained that Williams and Watts had disturbed the animals. Watts responded, "Fuck your dogs." Shortly thereafter, McCluskey arrived in a green sports utility vehicle, entered Cook's home, came outside and retrieved something from his SUV.

When Williams saw McCluskey arrive, she picked up a baseball bat she kept for protection. As she walked out of her home, she threw the bat down; it rolled under her mobile home.[2] McCluskey confronted Williams, angrily asking, "Who in the fuck talked about killing my fucking dog?" While Williams and McCluskey argued about what had been said, Watts walked up behind Williams and asked, "What's going on?" McCluskey pulled out a handgun and shot Watts. McCluskey then got into his vehicle and drove away. A truck driver passing by called the police emergency number; Watts appeared to Williams to be dead by the time the police and an ambulance arrived.

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[2] A baseball bat was found by the investigating detective underneath Williams's motorhome. No blood was found on the bat. It was not tested for DNA.

The autopsy confirmed Watts had died from a single gunshot to the torso. Williams identified McCluskey as the shooter from a live lineup of six men. She also identified the cap taken from McCluskey's home when police executed a search warrant as the same as worn by the shooter.

A motion-activated surveillance camera recorded a portion of the evening's events and was played for the jury. The recording showed Williams and Watts arguing, McCluskey arriving at the scene and the aftermath of the shooting, with McCluskey leaving the area and Williams trying to apply pressure to Watts's wound to stop the bleeding. Because of technical problems with the video equipment, the actual shooting was not recorded.

McCluskey's SUV was taken to the same location as the SUV seen in the video recording and photographed, so the jury could compare the two vehicles. Both were dark colored and had dark rims, dark wheels, nontinted front windows, tinted rear windows and roof racks. Records from the Department of Motor Vehicles showed that McCluskey was the registered owner of a dark green GMC Yukon.

b. *Defense evidence*

Cook testified that McCluskey is her Narcotics Anonymous sponsor and the two had known each other for four or five years. According to Cook, Williams and Watts had been drinking and fighting throughout the night of September 19-20, 2015. At one point Watts pounded on the side of Cook's motorhome so hard he left dents. Watts had a gun and threatened to shoot Cook's dog and to burn her motorhome to the ground while she was sleeping inside. Cook was terrified and called McCluskey to tell him what was happening. McCluskey arrived, checked on Cook and then

went back to his vehicle. While McCluskey was outside, Williams yelled for someone to call 911; and McCluskey went toward her. As McCluskey approached her, however, Williams started cursing him. Watts appeared and waved a handgun in McCluskey's direction. According to Cook, Watts held the gun in his left hand. After Watts refused McCluskey's request to put the gun away, McCluskey disarmed him. Watts retrieved a baseball bat and attempted to hit McCluskey. McCluskey then shot Watts.

Testifying in his own defense McCluskey admitted he shot Watts, but insisted he did not know how the gun went off, "It was—it was so fast. . . . I didn't have time to aim. I pulled the trigger, and the trigger went off. I was just so scared."

On rebuttal Watts's sister testified that Watts was right-handed.

c. *McCluskey's interrogation and the use of his post-*Miranda *statements*

i. *The interview*

Following McCluskey's arrest, he was interrogated in an interview room at the county jail by Los Angeles County Sheriff's Detectives David Gunner and Frederick Morse. The detectives told McCluskey they were investigating a murder that took place on September 20, 2015 and that he had been identified by a witness as the shooter and was their main suspect.

The detectives read McCluskey the *Miranda* admonitions, which he stated he understood. Immediately after advising McCluskey of his rights, Detective Morse asked, "Real quick, could I see your right arm? Is that 'N' what (inaudible)" McCluskey responded, "That's all I'm going to say, ha, ha, ha."

Detective Morse commented that McCluskey seemed defensive, and McCluskey replied that his father had been

frightened by the sheriff's deputies who executed the search warrant. The two detectives and McCluskey discussed the search, with McCluskey complaining deputies had been unnecessarily aggressive. Detective Morse then said, "You seem like you're, you're a little pissed off; we get that. You know, we're not your friend. You look at us, you know, like we're, we're trying to screw you. We weren't there. That's all I can say. You're holding the cards. You know that. You want to say something and tell us exactly what went down, we'll listen all day long."

The following exchange then took place:

"[McCluskey]: I'm holding the cards?

"[Morse]: Yeah.

"[McCluskey]: I'm holding no cards.

"[Morse]: I think you are.

"[McCluskey]: Well, I say I'm not, you know.

"[Morse]: Well, you've been, you've been to prison before.

"[McCluskey]: And? Look how long it's been since I been in prison, you know, a long time.

"[Gunner]: Yeah.

"[Morse]: Right, you stayed clean.

"[McCluskey]; Yeah.

"[Morse]: My, my point is you're, you're not dumb, you know. You've been through the system once at least, right? So you're—

"[McCluskey]: Well, I want to go back to my cell. I think I'm done with this interview. I'm ready.

"[Gunner]: Okay.

"[Morse]: That's your privilege.

"[Gunner]: Yeah, turn it off [(apparently referring to the recording device)].

"[McCluskey]: I'd like my lawyer to be present (inaudible) get a better deal.

"[Gunner]: That's fine.

"[McCluskey]: Uh-huh.

"[Gunner]: Okay.

"[McCluskey]: Sorry to make you guys come all the way down here for—

"[Gunner]: Oh, hey, man. We get paid, though.

"[McCluskey]: I know you—

"[Gunner]: We get paid good money to do this stuff. It's not a big deal.

"[McCluskey]: Don't look so disappointed man. It's all right.

"[Gunner]: Definitely not; you've been identified. We have cell phone. We have video. What else do we have (inaudible).

"[Morse]: Witnesses.

"[Gunner]: Well, yeah, I.D. and—

"[McCluskey]: Well, then why did you guys even need to talk to me for?

"[Gunner]: I don't know. Maybe there was a reason you had, had to shoot that guy. Maybe he—

"[McCluskey]: I didn't shoot nobody.

"[Gunner]: Maybe you, uh, I don't know.

"[Morse]: That's our (inaudible) let's go back.

"[Gunner]: We like to give everybody the opportunity to give their side of the story, okay?

ii. *Cross-examination*

While cross-examining McCluskey, the prosecutor asked him if he had spoken to the police about the shooting. McCluskey said he had not. The prosecutor then asked, "Even though your argument really is that you were defending yourself, right?" McCluskey replied, "Yes." After a few questions concerning any post-shooting communications between McCluskey and Cook, the prosecutor asked, "At some point, did the police attempt to talk to you?" The following exchange occurred:

"A. Yeah, when they took me in custody.

"Q. But, again, you gave no statements to the police?

"A. Well, they said anything I said—anything I said would be used against me. [¶] . . . [¶]

"A. At that point, yes, they were reading me my *Miranda* rights. I heard him say, 'Anything you say can and will be used against you in a court of law,' not to help me. So at that point, I wanted to contact a lawyer."

McCluskey's cross-examination was interrupted at this point by a sidebar conference concerning an evidentiary issue unrelated to his testimony and the lunch recess. When cross-examination resumed, the prosecutor returned to McCluskey's interview with the sheriff's detectives:

"Q. Now, after you were arrested, but before you asked for your attorney—

"A. After I was arrested, but before I asked for my attorney.

"Q. Before you lawyer-up[ped].

"A. Okay.

"Q. There was a short conversation between you and the detective, correct?

"A. Yes.

"Q. And during that conversation, you told the police, 'I didn't shoot nobody'?

"A. I didn't say anything.

"Q. Well, do you remember the conversation?

"A. They read me my rights. And when they got to the part where it said, 'you have the right to remain silent. Anything you say can be used against you,' I told them that part right there, I wanted to stop the interview. I would like to speak with my lawyer."

McCluskey's counsel asked for a sidebar and complained he had not been provided with a transcript of the detectives' interview with his client. The prosecutor stated the audio recording had been turned over to defense counsel. She explained she had no obligation to provide a transcript unless she intended to use it at trial and she had only decided to do so at that moment, "I'm using it for impeachment."

McCluskey's counsel also questioned at sidebar whether the *Miranda* advisements had been given before McCluskey's statement that he had not shot anyone. The court read from the transcript, as quoted above, and indicated that McCluskey had been properly advised. The court then stated that McCluskey's comment was admissible because he had continued to engage with the detectives after stating he wanted a lawyer; the detectives were not interrogating him: "The deciding factor is they didn't continue to interrogate him. He continued to engage them with chit chat, with whatever."

Copies of the transcript were printed for the jurors to read as they heard the audio recording of the interview, and cross-examination on this point continued:

"Q. So after they read you your rights, you didn't immediately stop talking to them, right?

"A. No.

"Q. That's—that's correct, what I'm saying, right?

"A. Yes, that's correct.

"Q. And you hear there at the end, you say, 'I didn't shoot nobody'?

"A. Yes.

"Q. You just told us right before—right before lunch, I believe, that you never said that?

"A. I didn't remember saying that. It was nine—eight, nine months ago since my arrest. [¶] . . . [¶]

"Q. You were lying to them?

"A. Yes. Yes, I made that statement. Yes, I said I didn't shoot anybody.

"Q. Even though you did? [¶] . . . [¶]

"A. The gun was in my hand when it went off, yes. Did I intentionally aim and fire, no."

3. *Instructions, Verdict and Sentencing*

The court instructed the jury with CALCRIM Nos. 520 and 521, defining the elements of first degree premeditated murder and second degree murder, as well as CALCRIM Nos. 505, 506 and 510, explaining the requirements for a finding of self-defense as justifiable homicide and an accidental killing as excusable homicide. At the request of defense counsel "for tactical purposes," and with the express consent of McCluskey, the court did not instruct the jury on either imperfect self-defense or heat-of-passion voluntary manslaughter although the court was of the view there was sufficient evidence in the record to support those instructions. (See *People v. Barton* (1995) 12 Cal.4th 186, 198

["the trial court must instruct on a lesser included offense when the evidence would support a conviction for the offense, notwithstanding the defendant's objection to the instruction"; however, "when the trial court accedes to the defendant's wishes, the defendant may not argue on appeal that in doing so the court committed prejudicial error"]; see also *People v. Hardy* (2018) 5 Cal.5th 56, 99 ["'[a] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence'"].)

The jury convicted McCluskey of second degree murder and found true the special allegation he had personally used a firearm, but not true the special allegations he had personally and intentionally discharged a firearm causing Watts's death. In a bifurcated bench trial the court found the prior serious felony conviction allegations true, but dismissed McCluskey's prior strike conviction pursuant to section 1385.

The court sentenced McCluskey to an aggregate state prison term of 30 years to life: 15 years to life for second degree murder, plus a consecutive 10-year term for personal use of a firearm and a consecutive five-year term for the prior serious felony conviction under section 667, subdivision (a).

DISCUSSION

1. *The Trial Court Did Not Err in Permitting McCluskey To Be Impeached with His Statements to Law Enforcement Officers While in Custody*

a. *Governing law*

"As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (*People v. Martinez* (2010) 47 Cal.4th 911, 947 (*Martinez*), quoting *Miranda*, *supra*, 384 U.S. at p. 479.)

"In general, if a custodial suspect, having heard and understood a full explanation of his or her *Miranda* rights, then makes an uncompelled and uncoerced decision to talk, he or she has thereby knowingly, voluntarily, and intelligently waived them." (*People v. Cunningham* (2015) 61 Cal.4th 609, 642.) However, once a suspect invokes his or her right to remain silent or to counsel, law enforcement must "'scrupulously honor[]'" the invocation and immediately cease questioning him or her. (*Michigan v. Mosley* (1975) 423 U.S. 96, 103 [96 S.Ct. 321, 46 L.Ed.2d 313]; accord, *Berghuis v. Thompkins* (2010) 560 U.S. 370, 381 [130 S.Ct. 2250, 176 L.Ed.2d 1098]; see *People v. Hensley* (2014) 59 Cal.4th 788, 810 ["if after an admonition and waiver a defendant subsequently requests counsel, 'the interrogation generally must cease until an attorney is present'"].)

To be an effective invocation, the suspect's assertion of the right to remain silent or the right to counsel must be plain and unambiguous. (*Martinez, supra,* 47 Cal.4th at pp. 947-948 ["'[i]n order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect "must *unambiguously*" assert his right to silence'"]; *People v. Stitely* (2005) 35 Cal.4th 514, 535 [same]; see *Berghuis v. Thompkins*, *supra*, 560 U.S. at p. 381 ["there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel"].) The inquiry is an objective one: An assertion of the right to remain silent is ambiguous, and thus not effective, if a "reasonable officer could interpret [the] defendant's statement as" demonstrating an intent other than "terminat[ing] the interrogation." (*People v. Williams* (2010) 49 Cal.4th 405, 434; see *Stitely,* at p. 535 ["It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required . . . either to ask clarifying questions or to cease questioning altogether."].)

"Interrogation includes both express questioning and 'words or actions . . . the police should know are reasonably likely to elicit an incriminating response from the suspect.'" (*People v. Enraca* (2012) 53 Cal.4th 735, 752; accord, *People v. Elizalde* (2015) 61 Cal.4th 523, 531; see *Davis v. United States* (1994) 512 U.S. 452, 458 [114 S.Ct. 2350, 129 L.Ed.2d 362]; *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682, 64 L.Ed.2d 297].) Determining whether the words or actions of the police were likely to lead to an incriminating response focuses on the perception of the suspect, rather than the intent of the

officers involved. (*Innis,* at pp. 300-301; *People v. Huggins* (2006) 38 Cal.4th 175, 198.) Whether particular questioning or statements amount to interrogation or its functional equivalent depends on the "total situation," including the length, place and time of the questioning, the nature of the questions, the conduct of the police and all other relevant circumstances. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [101 S.Ct. 1880, 68 L.Ed.2d 378]; *People v. Stewart* (1965) 62 Cal.2d 571, 579.) If questioning has ceased but the suspect initiates a statement to police, "'nothing in the Fifth and Fourteenth Amendments . . . prohibit[s] the police from merely listening to his voluntary, volunteered statements and using them against him at trial.'" (*People v. Hensley*, *supra*, 59 Cal.4th at p. 810; accord, *People v. Bradford* (1997) 14 Cal.4th 1005, 1034.)

Even if obtained in violation of *Miranda*, statements that are otherwise voluntarily made may be used to impeach the defendant's trial testimony. (See *Harris v. New York* (1971) 401 U.S. 222, 225 [91 S.Ct. 643, 28 L.Ed.2d 1]; *People v. Case* (2018) 5 Cal.5th 1, 26.) "*Harris* noted that a defendant does not have 'the right to commit perjury' and said: 'Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.' [Citation.] 'The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1075.) The *Harris* rule applies to permit use of a statement obtained in violation of *Miranda* to impeach a defendant's trial testimony whether the suspect invoked his or her right to remain silent or

asked for an attorney (*Oregon v. Hass* (1975) 420 U.S. 714, 723 [95 S.Ct. 1215, 43 L.Ed.2d 570]) and even if the officer conducting a custodial interrogation deliberately failed to honor a suspect's request for counsel with the objective of securing evidence for impeachment purposes. (*Nguyen*, at pp. 1075-1076; *People v. Peevy* (1998) 17 Cal.4th 1184, 1188.)

b. *McCluskey's statement to detectives "I didn't shoot nobody" was properly admitted for impeachment purposes*

McCluskey contends the trial court erred in allowing him to be questioned by the prosecutor about his statement to Detectives Gunner and Morse that "I didn't shoot nobody." McCluskey argues that he twice invoked his rights and tried to stop his custodial interrogation by the detectives—at the outset when he said, "That's all I'm going to say, ha, ha, ha"; and later, after discussing the search of his home, when he said, "Well, I want to go back to my cell. I think I'm done with this interview. I'm ready. . . . I'd like my lawyer to be present (inaudible) get a better deal"—and that the court erred in ruling the statement was admissible because he volunteered it as part of "chit chat" with the detectives, not in response to interrogation or its functional equivalent.[3]

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[3] """In reviewing constitutional claims of this nature, it is well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.""" (*People v. Enraca*, *supra*, 53 Cal.4th at p. 753.)

Even assuming those statements were sufficiently unequivocal as to effectively invoke McCluskey's right to remain silent and to counsel, his argument is doubly flawed. First, although defense counsel questioned whether McCluskey had been given *Miranda* advisements before telling the detectives he had not shot anyone,[4] counsel at no time objected the statement violated *Miranda* and was therefore inadmissible because it had been made after McCluskey sought to terminate the interview. The failure to assert a *Miranda* violation in the trial court forfeits the issue on appeal. (*People v. Seaton* (2001) 26 Cal.4th 598, 656; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 ["unless a defendant asserts in the trial court a specific ground for suppression of his or statements to police under *Miranda*, that ground is forfeited on appeal, even if the defendant asserted other arguments under the same decision"]; see generally *People v. Demetrulias* (2006) 39 Cal.4th 1, 22 ["To satisfy Evidence Code section 353, subdivision (a), the objection or motion to strike must be both timely *and* specific as to its ground. An objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds (e.g., 'relevance') and revise the objection later in a motion to strike stating specific or different grounds."].)

Second, even if the trial court was mistaken in concluding McCluskey's statement was not the product of police

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[4] Defense counsel stated at sidebar, "We haven't established that he said this after his rights were read to him. He was clearly a suspect. He was in custody." As discussed, defense counsel also complained he had not been given a transcript of the recorded interview.

interrogation, the prosecutor clearly announced during the sidebar conference, "I'm using it for impeachment." That is precisely what she did. McCluskey's defense was that he shot Watts in some combination of an accident and self-defense when Watts swung a baseball bat at him. On cross-examination he denied telling the detectives that he had not shot anyone. Under the *Harris* rule the audio recording of McCluskey telling the detectives "I didn't shoot nobody" was properly admitted to impeach his trial testimony, even if it was obtained in violation of *Miranda*.

In his reply brief McCluskey argues the Attorney General's reliance upon *Harris v. New York*, *supra*, 401 U.S. 222 and *Oregon v. Hass*, *supra*, 420 U.S. 714 to justify use of McCluskey's statement solely for impeachment purposes "seeks to assert a ruling the trial court did not make." However, as a reviewing court we look at the result reached by the trial court, not its rationale: ""'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'"" (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)[5]

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[5] McCluskey also asserts the trial court's conclusion there was no *Miranda* violation because the statement "I didn't shoot nobody" was not in response to continued interrogation deprived him of the opportunity to challenge the admissibility of the statement for impeachment purposes on the ground it was coerced or involuntary. (See *New Jersey v. Portash* (1979)

2. *McCluskey's Claim of* Doyle *Error Lacks Merit*

a. *Governing law*

The use against a defendant of his or her silence after a postarrest invocation of rights following *Miranda* admonitions violates due process. (*Doyle*, *supra*, 426 U.S. at pp. 618-619 ["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"]; *People v. Thomas* (2012) 54 Cal.4th 908, 936; *People v. Clark* (2011) 52 Cal.4th 856, 959.) The two defendants in *Doyle* had made no postarrest statements to the police. When they testified at trial that they had been framed, the prosecutor asked on cross-examination why they had not told that story to the police when they were arrested. The trial court overruled defense objections to the prosecutor's questions. (*Doyle*, at pp. 612-614.) The Supreme Court reversed the convictions, holding that *Miranda* warnings implicitly assure suspects their silence will not be used against

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440 U.S. 450, 459 [99 S.Ct. 1292, 59 L.Ed.2d 501] [testimony before a grand jury compelled by a grant of immunity cannot be used to impeach defendant's trial testimony]; see generally *People v. DePriest* (2007) 42 Cal.4th 1, 34 ["[t]he due process clause of the Fourteenth Amendment precludes the admission of any involuntary statement obtained from a criminal suspect through state compulsion"].) But nothing prevented McCluskey from objecting to the statement as involuntary regardless of the trial court's evaluation of its status under *Miranda*. (See *People v. Carrington* (2009) 47 Cal.4th 145, 169 [even if a defendant has knowingly waived his or her rights under *Miranda*, statements to law enforcement officers are inadmissible for any purpose if involuntarily made].) Having failed to do so, the issue is forfeited on appeal.

them. (*Id*. at p. 618.) "*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 291 [106 S.Ct. 634, 88 L.Ed.2d 623]; see *People v. Crandell* (1988) 46 Cal.3d 833, 878 ["*Wainwright* and *Doyle* are founded on the notion that it is fundamentally unfair to use post-*Miranda* silence against the defendant at trial in view of the implicit assurance contained in the *Miranda* warnings that exercise of the right of silence will not be penalized"].)

The *Doyle* rule applies not only to a defendant's exercise of his or her right to remain silent, but also to his or her invocation of the right to counsel. (*People v. Crandell*, *supra*, 46 Cal.3d at p. 878 ["[a] similar process of reasoning supports the conclusion that comment which penalizes exercise of the right to counsel is also prohibited"]; accord, *People v. Huggins*, *supra*, 38 Cal.4th at p. 198.)

b. *McCluskey forfeited any claim of* Doyle *error*

A specific and timely objection is required to preserve a claim of *Doyle* error for appellate review. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1333; *People v. Collins* (2010) 49 Cal.4th 175, 202.) Defense counsel did not object as a *Doyle* violation to any of the prosecutor's references during cross-examination to McCluskey's request for counsel or his effort to terminate the interview with Detectives Gunner and Morse. Nor did he object during closing argument when the prosecutor again reviewed McCluskey's statements during that interview. Rather, as discussed, counsel objected only to the failure of the prosecutor to provide a transcript of the interview before trial and questioned

whether McCluskey's statement he had not shot anyone was made before he was given the *Miranda* advisements. Accordingly, the issue has been forfeited for appeal.

c. *There was no violation of the* Doyle *rule*

Even if the claim of *Doyle* error were not forfeited, McCluskey's contention lacks merit. "The *Doyle* rule is not violated when '"the evidence of defendant's invocation of the right to counsel was received without objection and the remarks of the prosecutor did not invite the jury to draw any adverse inference from either the *fact* or the *timing* of defendant's exercise of his constitutional right."'" (*People v. Thomas*, *supra*, 54 Cal.4th at p. 936.)

In *People v. Crandell*, *supra*, 46 Cal.3d 833 the prosecutor played a tape recording of a postarrest police interview with the defendant during which the defendant said he wanted an attorney. In closing argument the prosecutor invited the jury to play the recording during its deliberations and to listen to the defendant's tone of voice. (*Id*. at p. 878.) "The prosecutor mentioned the invocation of counsel primarily as a point of reference within the taped interview to assist the jury in locating an area where the prosecutor believed that the *tone* of defendant's statements, and particularly his references to the 'rights' to die and pay taxes, appeared to be inconsistent with defendant's statements about the events of the preceding night and about his relationships with the two decedents." (*Crandell*, at pp. 878-879.) The Supreme Court held there was no *Doyle* violation explaining, a prosecutor may inquire into and comment upon "purely demeanor or behavior evidence." (*Id*. at p. 879, internal quotation marks omitted.)

Similarly, in *People v. Huggins*, *supra*, 38 Cal.4th 175 the prosecutor attacked the defendant's credibility using his pretrial denial that he had entered the victim's house and killed the victim. "The prosecutor referred to the fact that defendant asked for an attorney only to show that the interview ended after defendant denied any involvement in the victim's death." (*Id.* at p. 199.) The Supreme Court rejected the defendant's argument that this violated *Doyle*. (*Huggins*, at p. 199; see *Greer v. Miller* (1987) 483 U.S. 756, 764 [107 S.Ct. 3102, 97 L.Ed. 2d 618] [no *Doyle* violation occurred because defendant's postarrest silence was not submitted to the jury as evidence from which it was allowed to draw an adverse inference]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 332, fn. 4 [no *Doyle* error if the evidence of defendant's assertion of his right to counsel was not offered to penalize defendant by illustrating consciousness of guilt but instead to demonstrate a plan to destroy evidence].)

The same analysis applies here. It was McCluskey, not the prosecutor, who first mentioned (without objection by defense counsel) that, in response to the *Miranda* advisements by the detectives, McCluskey said he wanted to contact a lawyer. The recording of the interview simply confirmed what McCluskey had already volunteered. Thereafter, McCluskey's request for counsel was used by the prosecutor to refer to the point during the interview when McCluskey said, "I didn't shoot nobody," the statement used to impeach him on cross-examination. Although the prosecutor vigorously asserted McCluskey's denial was a lie and undermined the credibility of his claim he shot Watts in self-defense, like the prosecutors in *Crandell* and *Huggins*, she did not invite the jury to draw any adverse inferences from the fact or

timing of McCluskey's invocation of his rights. There was no *Doyle* error.

d. *McCluskey has not shown his counsel was constitutionally ineffective*

Recognizing our likely finding any claim of *Doyle* error was forfeited based on defense counsel's failure to make a timely and specific objection on that ground, McCluskey contends counsel's failure to do so constituted ineffective assistance of counsel.[6] There could be no valid tactical reason to object to the prosecutor's use of McCluskey's interview statements on *Miranda* grounds, he argues,[7] and not also assert *Doyle* error. However, because there was no *Doyle* error, the decision not to object, necessarily did not constitute ineffective assistance. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 616 ["[b]ecause there was no sound legal basis for objection, counsel's failure to object to the

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[6] A defendant seeking relief on the basis of ineffective assistance must show both that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Rices* (2017) 4 Cal.5th 49, 80; *People v. Johnson* (2015) 60 Cal.4th 966, 979-980; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

[7] As discussed, contrary to McCluskey's argument on appeal, defense counsel did not object the statement "I didn't shoot nobody" was obtained in violation of *Miranda* because it was made after McCluskey had invoked his right to counsel or sought to terminate the interview. The sole, quasi-objection under *Miranda* was the question whether the statement had been made before or after the *Miranda* advisements were given.

admission of the evidence cannot establish ineffective assistance"]; *People v. Diaz* (1992) 3 Cal.4th 495, 562 [failure to object to the admission of evidence is not ineffective assistance where "any objection . . . would have been futile"]; *People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1193-1194 [same].)

3. *McCluskey Is Entitled to a New Sentencing Hearing*

On October 11, 2017, while this appeal was pending, the Governor signed Senate Bill No. 620, effective January 1, 2018 (Stats. 2017, ch. 682, § 2) amending section 12022.53 to give discretion to the trial court to strike a firearm enhancement in the interest of justice. (See § 12022.53, subd. (h) ["The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."].) McCluskey and the Attorney General agree remand is appropriate to permit the trial court, which previously exercised its discretion to dismiss McCluskey's prior strike conviction, to exercise its new sentencing discretion on the firearm enhancement. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425.)

DISPOSITION

McCluskey's conviction is affirmed, and the matter is remanded for the trial court to consider whether to impose or strike the firearm enhancement in accordance with newly amended section 12022.53, subdivision (h).

PERLUSS, P. J.

We concur:

ZELON, J.

WILEY, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.