

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Appellant,

v.

DANIEL ALLAN GORDON,

Defendant and Respondent.

C061813

(Super. Ct. No.
MF030251A)

THE PEOPLE,

Plaintiff and Appellant,

v.

DOREEN MARSHA GORDON,

Defendant and Respondent.

C061814

(Super. Ct. No.
MF030668A)

An unexpected visit by family members devolved into a melee involving a swinging flashlight and resulting in bloody injuries. Defendants Daniel Allan Gordon and Doreen Marsha Gordon were charged with residential burglary, conspiracy to

commit murder, attempted murder, and assault with a deadly weapon. (Pen. Code, §§ 459, 182, subd. (a)(1), 664/187, 245, subd. (a)(1).)¹ Daniel was also charged with aggravated mayhem. (§ 205.)

The trial court granted defense motions for acquittal of the burglary, conspiracy, attempted murder, and mayhem charges. The jury found Daniel guilty of assault with a deadly weapon with personal infliction of great bodily injury, and Doreen guilty of assault with a deadly weapon.

Defendants filed a motion for a new trial, arguing the prosecution's argument constituted impermissible comment on defendants' failure to testify in their own defense. The trial court granted the motion. The People appeal. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

As accustomed as we have become to accounts of senseless violence, the present case is even more puzzling than most. While the aftermath is clear, as attested to by investigators and medical personnel, the motive and method are mystifying. What is known about the crime itself comes from the testimony of the two victims, Cheryl and Samuel Vincent; Cheryl's sister and brother-in-law, defendants, did not testify. According to Cheryl and Sam, defendants arrived unexpectedly at the Vincents' home. Out of the blue, Daniel struck Sam repeatedly with a

¹ All further statutory references are to the Penal Code unless otherwise designated.

metal flashlight. Doreen's sister Cheryl believed it might have been a conspiracy by the couple to kill her and her husband and steal their baby.

An information charged defendants with residential burglary, conspiracy to commit murder, attempted premeditated murder of Sam, and assault with a deadly weapon likely to produce great bodily injury. The information charged Daniel with aggravated mayhem, and alleged personal infliction of great bodily injury and the personal use of a deadly weapon.

(§§ 12022.7, subd. (a), 12022, subd. (b)(1).)

The following evidence was produced at trial.

Sam Vincent's Testimony

Sam, Cheryl, and their 11-month-old son lived in the family home in Lathrop. In December 2006 Sam learned he was to be laid off at the end of the month. Sam had not told Doreen or Daniel about the impending layoff.

That evening, Sam and Cheryl planned to attend a Hanukkah celebration at Cheryl's parents' house. Doreen and Daniel arrived unexpectedly at the Vincents' home, saying they needed to use the bathroom.

Sam went outside to his car to retrieve a Hanukkah gift for Cheryl. When he returned, Daniel told him Cheryl was upstairs with the baby. Daniel asked for a glass of water. Sam complied.

Daniel told Sam there was a leak next to the refrigerator. As Sam looked down, he was hit on the head and blacked out for a few seconds. When Sam came to, Daniel began striking him in the

head with a metal flashlight about 10 inches long. Daniel held the flashlight by its head and hit Sam with the tail end.

Sam fell to the floor and tried to protect himself with his hands. Sam asked Daniel why he was doing this, but Daniel screamed and hit him harder. Sam started yelling for Cheryl to call 911. He began crawling to the dining room as Daniel continued to hit him on his head, shoulders, and back.

Sam got up and ran for the door and Daniel screamed, "He's trying to escape." Daniel pushed the door shut and hit Sam harder. Daniel came at Sam with the flashlight, saying, "He's hurting me. He's hurting me."

At some point, Sam grabbed the flashlight, but Daniel was able to pull it away and hit Sam even harder. Sam sought refuge between the couch and the wall, shielding himself with his hands. Daniel continued to hit him with the flashlight. Sam never struck Daniel.

Sam heard Cheryl screaming at Daniel to stop; he also heard Doreen yelling. Daniel stopped hitting Sam, who went into the entryway. Sam saw Cheryl and Doreen. The women were in the kitchen talking. Daniel said, "Doreen this is your plan. Why aren't you helping?"² Doreen whispered something in Daniel's ear and he calmed down.

Cheryl and Doreen continued to talk, including talk about calling 911. Daniel lifted the flashlight toward Doreen, who

² On cross-examination, Sam admitted he failed to report this statement until six months after the incident.

was holding the baby. Sam stood up and Daniel moved toward him. Sam sat back down and Daniel moved back toward Cheryl.

Sam called 911. During the call, Doreen began dabbing Sam's chest with a towel. Sam said, "Please don't touch me, please." Sam asked for an ambulance and Cheryl locked herself in the bathroom with the baby and the phone. Daniel told Doreen, "She's got a phone."

Neighbors came to the front door, and Cheryl came out and asked them to take the baby somewhere safe. Officers arrived soon after.

Cheryl Vincent's Testimony

The day of the incident, Cheryl exchanged telephone messages with Doreen several times but was not sure if her sister would be coming over that evening. They finally spoke, and shortly after that telephone conversation, the doorbell rang. When Cheryl answered the door, Doreen said, "Surprise."

Doreen told Cheryl she needed to tell her a secret, so the pair went to the upstairs bedroom. Doreen turned on the television and turned the volume up. The baby was crying, so Cheryl asked Doreen to turn off the television. Doreen complied, but turned on the radio instead. Doreen and Cheryl discussed the living situation of their sister.

Cheryl heard screaming and crashing from downstairs. Doreen went downstairs to find out what was happening. As Cheryl called 911, Doreen returned and said Sam was startled when Daniel came out of the bathroom. According to Doreen, "Sam

flipped out and got in a fight with Danny but everything is okay and -- but Sam is on the floor, he fell."

Doreen told Cheryl she would finish the 911 call. Cheryl went downstairs and Doreen told the 911 operator that someone had fallen down the stairs but seemed to be all right. Doreen told the operator they did not need an ambulance.

Cheryl, walking down the stairs, saw Daniel hitting Sam, who was covered in blood, with a flashlight. Cheryl screamed for Daniel to stop, but Daniel continued. As he struck Sam, Daniel looked up at Cheryl and said, "He's hurting me." Sam grabbed the flashlight, but Cheryl never saw Sam hit Daniel.

Doreen stood near the bottom of the stairs but did nothing to help as Daniel continued to hit Sam. Doreen said, "Why is this happening? What do you think is going on?" and calmly asked Cheryl to go into the kitchen to talk about it.

Cheryl told Doreen they needed to stop Daniel. Doreen moved toward Cheryl and said, "Just give me the baby, and everything will be okay. Just give me the baby." Cheryl yelled at Doreen not to touch the baby.

Cheryl saw Daniel close the front door as he continued to strike Sam. Daniel screamed, "He's trying to get away. He's going to kill me." Sam crawled into a small space between the couch and a wall. Doreen, in a dazed voice, said, "Oh, why is this happening, why is this happening."

Cheryl put the baby in a playpen and jumped on Daniel, pulling the flashlight out of his hand. She did not recall hitting Daniel. As Cheryl saw Doreen approaching the baby,

Daniel grabbed the flashlight back. Cheryl picked up the baby as Daniel came toward them with the flashlight raised. Sam tried to stand up, and Daniel turned back to him. Daniel went back and forth between Sam and Cheryl.

Sam and Cheryl told Daniel they loved him and that everything would be all right. Doreen also told Daniel to stop. Doreen and Cheryl told Daniel to sit down, but he kept getting back up.

Cheryl screamed that Sam needed medical help and she wanted to call 911. Doreen said there was no need to call, since help was on the way. Cheryl said it was taking too long and wanted to call again. Cheryl told Daniel to leave, but neither he nor Doreen did so.

Doreen said she would call 911. Daniel asked Doreen, "Why aren't you helping me?" Cheryl did not hear Daniel say it was Doreen's plan.

Doreen called 911 and asked for an ambulance, saying her sister's husband was bleeding. Doreen told the operator he was not in a fight but tripped when he entered the house: "We thought he was asleep, but now he's bleeding a lot more and he's not okay."

Cheryl took the phone and went into the garage. Daniel yelled, "She's got a phone." Cheryl called her parents. When she went back into the house, Daniel and Doreen were "very deep in conversation."

Cheryl grabbed her camera from the dining room table and took the baby into the bathroom. Daniel yelled, "She's got a

camera." At that point, Sam was on the phone with a 911 operator. He motioned for Cheryl to come get the phone; she went to him, grabbed the phone, and ran back into the bathroom. Cheryl finished Sam's 911 call, telling the operator, "my baby will die if I answer questions." When the doorbell rang, she answered it, saw her neighbors, and asked them to take the baby.

At the hospital, Cheryl sought treatment for an injured wrist. She believed it happened when Daniel grabbed the flashlight.

Sheriff's Testimony

Sheriff's Deputy Marcus Smith was the first officer to arrive on the scene shortly after the second 911 call. Smith found Sam lying in the front entry with a bloody forehead. Cheryl said Daniel was inside and had a metal flashlight.

Smith found Daniel in the kitchen, walking in circles and appearing confused. Smith pointed his gun at Daniel, told him to lie on the floor, and handcuffed him. Smith noticed blood splatter on the floor, the couch, and a wall. Daniel said his head was injured. Smith noticed "slight abrasions" to Daniel's head, but no bleeding.

Doreen walked in from the garage and Smith directed her to another deputy, who secured her. A few minutes later, Smith found a black flashlight with what appeared to be blood on it under some boxes in the garage. An evidence technician photographed and recovered the flashlight later. The flashlight was covered in human blood "pretty much from one end of the flashlight to the other."

After being given a medical clearance at the hospital, Smith booked Daniel into jail. Smith did not examine Daniel's hands.

Paramedic Testimony

Paramedic Reynaldo Gonzales arrived at the scene shortly after Smith arrived. Gonzales found Sam being held in place to protect his spine. Gonzales noted injuries including a five-inch laceration to the top of Sam's skull, injuries to the back of his head, and swelling in the right eye. According to Gonzales, it appeared Sam had been struck by a large blunt object.

During the neurological check, Sam was alert and showed no neurological abnormalities. Sam said his brother-in-law told him there was water on the floor. He was hit on the back of the head with a metal flashlight when he bent over to look at it. He was struck many times and blacked out for a few seconds. He also said there was tension between him and Daniel.

Emergency Room Testimony

Max Miller, an emergency room physician, treated Sam. Scans revealed no brain damage or bleeding, but Sam's nose was broken. Miller observed five lacerations, four of which required stitches. The right side of Sam's face and his nose were swollen; he had bruises on his right shoulder and all over his scalp. There was a significant hematoma under each laceration.

Miller determined significant force caused Sam's injuries. Sam's eye was injured by a blow to the eye; his pupil did not react, and there was bleeding in the white of the eye.

Miller concluded Sam suffered a grade 2 concussion, based on Sam's loss of consciousness. There were injuries to Sam's hand that were consistent with using his fist to strike another person. Sam's injuries were moderate.

Field Evidence Technician Testimony

Field evidence technician Julianne Morgan photographed the injuries to Sam's face, head, ear, back, shoulder, arms, abdomen, and knees. Morgan observed bruises on Sam's right shoulder and the back of his head, and numerous lacerations to Sam's head and face.

Other Medical Testimony

An ophthalmologist examined Sam the morning after the incident. He found blood in Sam's right eye, which would have resulted from direct force. Two months later, an optometrist observed a tear in Sam's right iris caused by traumatic injury.

A neurologist saw Sam a month after the incident. Sam complained of headaches, dizziness, anxiety, and other symptoms. These symptoms were consistent with a head injury. The neurologist prescribed two months' leave from work, pain medication, and a psychiatric evaluation for posttraumatic and emotional changes.

Criminalist Testimony

Elizabeth Schreiber, a criminalist, performed a limited reconstruction of the incident largely through photographs taken

by evidence technicians. The reconstruction was limited because Schreiber had not responded to the crime scene and had to rely on photographs taken by someone else.

Photographs taken of the kitchen revealed "rounder, circular drops" of blood on the tile and carpet, indicating the individual was bleeding while standing. Photographs of a bloody pair of glasses revealed the victim was wearing them when he was hit, and the glasses subsequently fell onto the floor. Schreiber determined the attack began in the kitchen.

Based on the photographs, Schreiber believed the victim began bleeding in the kitchen and then moved to a nearby partial wall. Blood spatters on the wall showed low to medium velocity impacts. The dripping blood revealed significant blood loss.

The victim moved from the partial wall to the couch. There was blood on the arm and seat back of the couch. Blood drips on the blinds, wall, and floor indicated the victim was hit more than once in the corner by the couch.

In Schreiber's estimation, the photographs showed the most blood in the entryway. Significant blood stained the tiles, and there was a heavy transfer of blood on the wall. Blood drops in the entryway indicated the victim was on or near the ground during that portion of the altercation, while blood drops on the adjacent carpet indicated the victim was leaning over. There was blood inside and outside the door.

Schreiber determined the incident began in the kitchen, moved to the wall, then to the couch area, and concluded in the

entryway. Photographs of Sam's forehead revealed marks consistent with the pattern on the flashlight handle.

Evidence of Motive

On the night of the incident, Cheryl did not know what caused Daniel to attack her husband. She later postulated two motives: Doreen's jealousy, or Doreen and Daniel planned to kill her and Sam and kidnap her baby. After the attack, Cheryl found three pairs of gloves left in a bin outside the bathroom.

About a year before the attack, the relationship between Cheryl and her sister started getting stranger and stranger. Doreen and Daniel were "acting suspicious" about a month before the attack. Doreen began making comments suggesting she was jealous of Cheryl, disinviting Cheryl and Sam to her wedding, and suggesting she would not invite them to a Hanukkah party.

Daniel would stare at Cheryl while she nursed her baby. Sam suggested she not breast-feed when Daniel was present if it made her uncomfortable.

Sam testified that, although he was not close to Daniel, he had no conflicts with him. He knew Daniel stared at Cheryl when she breast-fed, but he "didn't think much of it."

A detective, Linda Jimenez, testified there was no obvious motive. She believed motive was unnecessary because it was a simple case, since Sam was hit from behind. Jimenez noted there "can be years of underlying issues" in cases involving families.

Defense Case

Daniel's Injuries

Following the incident, paramedic Joshua Huffman treated a "John Doe," later identified as Daniel, at the scene. Daniel had a large hematoma, a swelling with blood in it, on his forehead; a headache; blurry vision; weakness in his arms; and pain. Daniel reported being dizzy and nauseated.

A sheriff's deputy, Armando Sapata, who met with Daniel at the hospital, noticed slightly red areas on his hands and forehead. A registered nurse in the emergency room testified Daniel complained of headache and nausea, and stated he had possibly lost consciousness. Daniel reported head and neck pain, which he rated at 10 on a scale of one to 10, 10 being the highest. The nurse noted bruises on the left and right sides of his face.

The physician who examined Daniel described him as depressed and quiet. Daniel had multiple contusions and areas of redness on his scalp. On his forehead, Daniel had a swollen red mark in a pattern consistent with the flashlight. A CT scan revealed a blood clot under the skin of Daniel's right scalp.

At trial, the physician examined a photograph of Daniel's hand. The injuries to the hand could have been offensive or defensive. The injury could have been caused by a flashlight or could have been caused by hitting a door.

Daniel's mother testified that a few days after the incident she saw black and blue bumps on her son's forehead.

Daniel also had a swollen nose, bruises on his arm and back, and injuries to his finger.

Evidence of Motive

The night of the attack, Sam told Deputy Smith that he was hit on the top of the head after Daniel told him there was some water on the floor by the refrigerator. Approximately six months later, a detective spoke with Sam on the telephone. Sam told the detective that while waiting for help to arrive, he overheard Daniel tell Doreen, "This was your plan. Why won't you help me?"

Deputy Smith testified that in her initial interview, Cheryl told him she took Doreen upstairs because Doreen wanted to tell Cheryl a secret. Cheryl later heard Sam screaming and when she went downstairs, she saw Daniel hitting Sam with a flashlight. Daniel hit Sam 15 or 20 times. Every time Cheryl tried to stop him, Daniel charged her as if he was going to hit her with the flashlight. There were times Smith could not follow Cheryl's version of events and he "had to redirect her."

Two days later, Cheryl spoke with another deputy by phone. Cheryl wanted to clarify her prior statement. Cheryl said Doreen asked her to go upstairs to tell her a secret. Doreen turned on the television, upsetting the baby, and later turned on the radio. Doreen did not tell her the secret.

A nurse testified Cheryl told her she was hurt trying to break up an assault between her husband and her brother-in-law and was hit with a flashlight. Cheryl had no visible injury on her wrist.

A district attorney investigator interviewed Cheryl about six months after the incident. In the interview, Cheryl stated the couple had "huge credit card bills." Cheryl said that, contrary to Doreen's statements, her parents did not pay her credit card bills. At trial, Cheryl denied having large bills and stated the couple paid the bills in full every month.³

An emergency room physician who examined Cheryl found she had mild wrist strain, which could have been caused by pulling. Cheryl reported a history of tendonitis.

Doreen and Cheryl's younger sister, Elizabeth, testified that after the attack she was with her parents at a store where Daniel and Doreen shop to see what the flashlight involved in the incident looked like. Cheryl had told Elizabeth she did not own the flashlight used in the attack. Sam told her their flashlight was still in the house.

Sam was treated for Valley Fever pneumonia two months before the attack. Sam reported symptoms including fatigue, irritability, and depression. According to the doctor, Valley Fever would not cause Sam's depression. Sam was referred to a psychiatric professional. None of the medicine Sam was taking for Valley Fever would cause a patient to act violently.

A long-time friend and former boyfriend of Doreen testified. When he attended Doreen's wedding, she asked him to

³ Defendants introduced evidence of credit card debt to undermine Sam's claim that he was not upset about being laid off the day of the incident. Sam's former employer testified Sam was unhappy and a little bit anxious about being laid off.

find Sam for the wedding photo. Sam seemed uninterested and told the friend the marriage would not last.

A private investigator testified he encountered difficulty in serving subpoenas on Cheryl and Sam.

Motions for Acquittal and Verdict

During the trial, the court granted motions for acquittal as to the charges of burglary, conspiracy, attempted murder, and mayhem. Only the charges of assault with a deadly weapon remained. The jury returned verdicts finding Daniel guilty of assault with a deadly weapon with the personal infliction of great bodily injury, and Doreen guilty of assault with a deadly weapon.

Motion for a New Trial

Daniel filed a motion for a new trial, which Doreen joined. The court granted the motion. The People filed a timely notice of appeal.

DISCUSSION

Motion for a New Trial

The People contend the trial court erred in finding the prosecution's argument commented on defendants' failure to testify, constituting error under *Griffin v. California* (1965) 380 U.S. 609, 613 [14 L.Ed.2d 106] (*Griffin*.) Instead, the People argue, the prosecution merely made permissible comments on the state of the evidence.

Background

In moving for a new trial, defendants alleged a number of instances of *Griffin* error in the prosecutor's statements during

his closing and rebuttal remarks. During his closing comments, the prosecutor argued there was undisputed evidence defendants brought the flashlight into the house. The prosecutor argued it was undisputed that after Daniel told Sam there was a leak, Sam bent down and was struck from behind. In addition, the prosecutor stated he had expected a challenge to the evidence that Daniel said, "'Help me, Doreen, this is your plan.'"

During rebuttal, the prosecutor stated, "the only people that we have to be able to ask" could not provide a motive for the attack. Also during rebuttal, the prosecution argued the defense "could not provide any direct evidence that [Sam] actually struck Daniel Gordon. So they're trying to back-door it." Finally, during rebuttal, the prosecution claimed the jury had "not heard a single piece of direct evidence" that Daniel suffered a head injury, and that the opinion of Daniel's doctor was "by inference and based on the self-serving statements of Mr. Gordon."

The prosecution opposed the motion. The trial court granted the motion, noting: "The unique circumstances [*sic*] of this case was only four people were at the scene -- the two victims and the two defendants. [¶] And your rebuttal argument was replete with references to the defense not proving anything about self-defense, and the only persons that could have proved that would be the defendants. I thought you were going to argue in your rebuttal argument that the judge isn't even going to instruct you on self-defense. That would be proper argument, but by commenting on the failure to produce any evidence of

self-defense -- and it's obvious with the limited circumstances of this case, there are only four people inside the house. It wasn't in public. All these other cases were open to the public. They're either robberies or murders that occurred in public. [¶] The Court finds that your comments were Griffin error."

The prosecutor suggested he might have been referring to the accident reconstruction witness and argued Cheryl was not a victim, but a witness. The court replied: "This isn't your failure to call other witnesses at all. It's your comments on the defendant's lack of any evidence that only the defendants themselves could produce. That is per se Griffin and the Court can't say beyond a reasonable doubt it didn't affect the jury."

The prosecution argued: "It is fair comment based on the Court's own determination that there was no evidence to substantiate self-defense" and that he could comment on the state of the evidence. He also argued he had only commented on the defense's failure to call "logical witnesses," and invited the court to specify an improper comment he had made.

The court replied: "I read the transcript that was attached to [the] motion. I don't have that immediately in front of me. I'm convinced it was Griffin error, and so the Court's going to grant the motion for the new trial."

Discussion

We review a trial court's ruling on a motion for a new trial for an abuse of discretion. The court's discretion to grant a new trial, while broad, is not unlimited. Before

ordering a case retried, the trial court must make an independent determination both that the error occurred, and that the error prevented the complaining party from receiving a fair trial. (*People v. Ault* (2004) 33 Cal.4th 1250, 1262-1263.)

The prosecution enjoys wide latitude to comment on the evidence presented at trial and to draw inferences from such evidence. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "We apply a 'reasonable likelihood' standard for reviewing prosecutorial remarks, inquiring whether there is a reasonable likelihood that the jurors misconstrued or misapplied the words in question." (*People v. Roybal* (1998) 19 Cal.4th 481, 514.)

The Fifth Amendment to the United States Constitution prohibits a prosecutor from commenting, directly or indirectly, on a defendant's decision not to testify on his or her own behalf. (*Griffin, supra*, 380 U.S. at pp. 612-613 [14 L.Ed.2d at pp. 108-109].) However, an indirect or brief reference to a defendant's failure to testify, without any suggestion that the jury should infer guilt from the defendant's silence, constitutes harmless error. (*People v. Boyette* (2002) 29 Cal.4th 381, 455-456.)

The People contend the most important consideration in determining *Griffin* error is "whether the prosecutor asked the jury to draw inferences based on *proper evidence*, i.e., the evidence received at the trial, or whether he asked the jury to draw inferences based on an improper consideration, the fact that defendant did not testify." The People contend the

prosecution in the present case invoked only proper evidence during argument, avoiding *Griffin* error.

Perhaps the most striking aspect of this case was summed up by the trial court in granting the new trial motion: the unique circumstance that only four people were at the scene -- the two victims and the two defendants. The court noted the prosecution made numerous references to the defense's failing to prove self-defense, when the only persons who could have provided such evidence were defendants.

The court's comments are supported by the record. We shall briefly consider the instances of alleged misconduct.

Closing Argument

During closing argument, the prosecutor noted that Sam and Cheryl heard Danny tell Doreen: "'Help me, Doreen, this is your plan. Help me.'" The prosecution went on: "The interesting thing about this case, and I'll admit to you, ladies and gentlemen, I expected that piece of evidence to be challenged, but it wasn't. I expected that piece of evidence that we would have some type of evidence to dispute that particular piece of evidence, the two statements, 'Doreen, help me. Doreen, help me.' The later statements, 'He's trying to escape. She's getting the phone.' [¶] The statement, 'Doreen, help me. This is your plan,' . . . that's evidence of a conspiracy. That's evidence of a plan. That's evidence of premeditation. That's an individual looking at another individual who is involved in the particular plan with them and asking them, why aren't you

helping me? . . . Again, that piece of evidence is undisputed by any type of testimony, by any type of exhibits."

The prosecutor also stated: "When [Daniel] bent to look, he was struck repeatedly with this object. And again, that testimony, that piece of evidence is undisputed." The prosecutor then quoted Daniel's remarks, allegedly overheard by Cheryl: "'Help me, Doreen, this is your plan. Help me.'" He then stated: ". . . I expected that piece of evidence to be challenged, but it wasn't. I expected that piece of evidence that we would have some type of evidence to dispute that particular piece of evidence, the two statements"

During his closing argument, the prosecutor noted the defense attempted to cast doubt on the ownership of the metal flashlight. He pointed out that Cheryl testified the metal flashlight was "never in their home and did not come into their home until they noticed it being used by Daniel Gordon. . . . [¶] So what do we have? Again, we have undisputed, uncontroverted evidence that People's Exhibit No. 10 was brought into the Vincent home by either Danny Gordon or by Doreen Gordon. That, ladies and gentlemen, is evidence of premeditation."

In presenting these remarks, the prosecution led the jury to expect some sort of testimony refuting Cheryl and Sam's version of events. Only four people stood in the room when the statements were allegedly made, two of them defendants. Only defendants could have provided testimony about whether or not Daniel asked for Doreen's help and stated, "this is your plan."

The People argue the defense in its opening statement stated it would prove that Daniel never made the statement. The defense presented testimony by the detective who interviewed Cheryl and Sam the night of the incident, and testified neither mentioned the comments. However, Detective Lenzi testified Sam called him over six months later and stated he heard Daniel make the comments in question.

According to the People, "Under the circumstances, it would be obvious to a reasonable jury that the focus of the prosecutor's comment was whether the various items of evidence that were presented to the jury adequately performed the function promised in the opening statement." We think not.

In making his comments, the prosecutor did not ask the jury to consider "the various items of evidence that were presented," or even Sam's belated recollection. Instead, the remarks focused the jury's attention on the prosecution's claim that the defense failed to challenge the evidence, a challenge only possible through the testimony of Daniel or Doreen.

As for the provenance of the flashlight, again, only Daniel or Doreen could have disputed the claim that they brought the flashlight with them. Again, the prosecution's focus underscored the fact that neither Doreen nor Daniel testified to refute the claims.

However, the People argue the prosecutor's comment was "clearly limited to contrasting unsupported innuendo by the defense with the circumstantial evidence that [defendants] brought the flashlight used to attack Sam into the house." No

such limitation appears in the prosecutor's comments. Instead, the prosecution highlighted the "undisputed, uncontroverted evidence," a phrase which reminded the jury that defendants failed to testify to dispute the evidence.

At the conclusion of the prosecutor's closing argument, defense counsel moved for a mistrial. The court denied the motion, stating: "It bothers me a little bit about the comments about evidence, but there were other witnesses that you did call, and I don't think it was a direct comment on the Defendants' failure to testify, but I agree it's kind of close, but I'm going to deny the motion for a new trial."

Rebuttal Argument

During his rebuttal, the prosecutor discussed Daniel's injuries, noting, "When Deputy Smith first got into the house, he found [Daniel] pacing back and forth behind the kitchen. He subsequently brought him out from behind the kitchen, put him in handcuffs. When did [Daniel] start complaining of injury? I thought this was a pivotal moment during Officer Smith's testimony. [¶] Officer Smith said [Daniel] did not complain of any injury to his head or any injury otherwise until [Daniel] was put on the gurney and was being treated by the medics after he had been handcuffed. On his way to the hospital, then there's, oh, I'm dazed, oh, I'm confused, oh, my hands don't work properly, I don't know what's going on. [¶] The reality is, ladies and gentlemen, you have not heard a single piece of direct evidence that that is the truth. Everything that you've

heard is by inference and based on the self-serving statements of [Daniel]."

In conjunction with Daniel's injuries, the prosecution discussed the medical workers' testimony that Daniel's injuries were consistent with an assault. According to the prosecution, a medical professional's use of the word "consistent" means there is a possibility the injuries resulted from a physical assault.

The prosecutor stated: "But the defense is relying on that to create an inference in regards to something which is not provided by the evidence. The reason that [the defense] provided a motive to you, ladies and gentlemen, was because they could not provide any direct evidence that Samuel Vincent actually struck Daniel Gordon. So they're trying to back-door it. [¶] One plus one equals two. One does not equal two. If you don't have any evidence of actual striking, you cannot try to create evidence of actual striking when the only evidence that is before you directly contradicts that particular piece of evidence. And that's what the defense is trying to do in this particular case. It's not based on the evidence. It's based on what if, what if, what if, what if. Well, this is not a what if situation, ladies and gentlemen. It's is there evidence of it?"

Finally, the prosecutor discussed Daniel's motivation in assaulting Sam: "In this case, the defense has relied on the claim that there is no possible motive. That has been the litany throughout this particular case. It was the litany in voir dire. It was the litany in opening statement. It's been

the litany throughout the presentation of this case. Why weren't you able to come to a conclusion as to what the motive was? [¶] Detective Jimenez was honest with you, ladies and gentlemen. We don't need a motive in this case. It's human nature to want to understand. [¶] We look at a situation like that, and we believe this is so brutal, this is such a betrayal. Why? *And in asking why, the only people that we have to be able to ask why cannot answer that question for us. And that's the reality.*" (Italics added.)

The prosecutor continued: "We all know that family relationships are complex. Anything can set another person off. If we have two sisters who have a contentious relationship, do we ever know what the final straw was? Was it the fact that Danny was not going to be invited to the Hanukkah party? Was it the fact that Cheryl's family liked Sam so much? Was it the fact that Sam was so cool about the fact that he wasn't [sic] being fired? Were there some kind of jokes or animosity or ridicule of Danny Gordon based on the fact that he was working as Santa Claus? Who knows. The reality is we cannot blame the victims for that."

In his initial remarks, the prosecutor decried the dearth of "direct evidence" of the reality of Daniel's injuries. The only "direct evidence" of such injuries would be Daniel's own testimony.

Faced with the conundrum of the prosecutor's use of the phrase "direct evidence," the People argue direct evidence referred to "evidence that was narrowly focused on a disputed

fact and could therefore either support or rebut it unequivocally." Such direct evidence, the People contend, would be the photographs of Daniel's injuries. It is almost impossible to believe a reasonable jury would understand "direct evidence" touted by the prosecution in this manner. However, it is far more likely that the jury understood the phrase to mean evidence from the source, i.e., the injured party. There would be no reason to describe the lack of medical evidence so cryptically.

In conjunction with the prosecutor's comments about Daniel's injuries, the People contend these remarks suggested the evidence the defense failed to provide was "corroborating *medical* testimony that would account for the reported symptoms." Again, we are not convinced any reasonable jury would construe "direct evidence" of Sam striking Daniel as anything other than Daniel's missing testimony of exactly what took place during the incident.

The People contend that, when taken in context, the prosecutor's final comments about Daniel's motivation for the assault referred to Detective Jimenez, Cheryl, and other family members as possible witnesses as to motive. According to the People: "A reasonable jury would not interpret the prosecutor's comment as referring to the defendants' [*sic*] to address their motive for attacking Sam when the defense position was that they had not committed the crime in the first place."

We disagree. A reasonable jury would not construe the comment that, when it comes to motive, "the only people that we

have to be able to ask why cannot answer that question for us" would refer to anyone other than the two main players who did not testify: Doreen and Daniel.

The People cite several cases in support of their assertion that the prosecution was merely commenting on the state of the evidence, not impugning defendants' decision not to testify. However, in *People v. Johnson* (1992) 3 Cal.4th 1183 (*Johnson*), cited by the People, the Supreme Court noted: "It is true, as defendant asserts, that a prosecutor errs by referring to evidence as 'uncontradicted' when the defendant, who elects not to testify, is the only person who could have refuted it. [Citation.] If, however, the evidence could have been contradicted by witnesses other than the defendant, the prosecutor may without violating defendant's privilege against self-incrimination describe the evidence as 'unrefuted' or 'uncontradicted.'" (*Id.* at p. 1229.)

The latter situation was present in *Johnson*, in which the defendant failed to present alibi evidence, evidence which could have been presented by a third party. (*Johnson, supra*, 3 Cal.4th at p. 1229.) In the other cases cited by the People, the "uncontradicted" evidence could have been supplied by someone other than the defendants. (*People v. Taylor* (2010) 48 Cal.4th 574, 633; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1051; *People v. Hughes* (2002) 27 Cal.4th 287, 373-375.) Here, the prosecution explicitly referred to the dearth of direct evidence, evidence only defendants could provide. Such comments run afoul of *Griffin*.

Additional Arguments

The People offer several arguments to counter the trial court's finding of *Griffin* error. The People contend the trial court used the wrong standard in granting the motion and initially denied the motion for a mistrial. The People also point out that the prosecution repeatedly emphasized that the jury was limited to the evidence admitted at trial.

According to the People, certain comments by the trial court reveal its erroneous judgment "that indirect comments by the prosecutor that could have reflected on the defendant's failure to testify [were] 'per se *Griffin* [error].'" The People contend the proper standard is whether it was reasonably likely the jury construed the prosecutor's comments to infer guilt out of defendants' silence, and that the trial court's use of the wrong standard was an abuse of discretion.

We disagree that the trial court applied the wrong standard or abused its discretion. During oral argument on the motion, the prosecutor suggested his comments referred to witnesses other than defendants. The court responded: "This isn't your failure to call other witnesses at all. It's your comments on the defendant's [*sic*] lack of any evidence that only the defendants themselves could produce. That is per se *Griffin* and the Court can't say beyond a reasonable doubt it didn't affect the jury."

When taken in context, the court's remarks did not reflect its intention to impose a "per se" standard on the evidence before it. Instead, the court pointed out the prosecution's

problematic comments and noted they were "per se Griffin," in effect the essence of what constitutes *Griffin* error.

The People also contend that since the court denied defendants' motion for a mistrial following the prosecutor's closing argument, it "appears that the court granted the [new trial] motion based on the" rebuttal argument. The People also claim that the trial court "refused to find *Griffin* error" based on the prosecution's comments about Daniel's statement to Doreen: "Doreen, help me. This is your plan."

What the People overlook in making this argument is that the trial court may have determined that the *cumulative* impact of the prosecution's arguments, both during closing and rebuttal arguments, amounted to *Griffin* error. In effect, one comment in isolation may not have raised the reasonable likelihood that the jury construed a comment as raising an inference of guilt based on defendants' failure to testify, but the volume of comments regarding an evidentiary lacuna that only defendants' testimony could fill ultimately amounted to *Griffin* error.

Finally, the People point out the prosecutor emphasized at the beginning of his closing argument and reiterated at the end of rebuttal that he was criticizing the defense tactic of relying on speculation rather than evidence. The prosecution also reminded the jury that it must focus on the evidence presented at trial, which the People contend "would logically be understood to mean the jury should disregard the defendants' failure to testify."

However, the prosecutor's general comments regarding evidence cannot immunize or undo the impact of his very specific comments implicating defendants' failure to provide evidence that only they were privy to. Even considering the prosecutor's arguments as a whole, the prosecutor's numerous references to the lack of direct evidence severely undercut the prosecutor's admonitions that the jury consider only the evidence presented at trial.

Prejudice

The People's most compelling argument is that even assuming the prosecutor's comments constituted *Griffin* error, the jury instructions precluded any harm and the evidence of guilt was overwhelming. We are not persuaded.

Ultimately, the trial court was in the best position to evaluate the impact of the prosecutor's comments on the jury. The court observed the witnesses who did testify, including Cheryl and Samuel, and also observed the force and impact of the prosecutor's comments regarding defendants' silence. Based on these observations, the trial court concluded it "can't say beyond a reasonable doubt it didn't affect the jury."

This case involves four people. Two of them, Cheryl and Sam, testified. Two of them, Doreen and Daniel, did not. The prosecutor's comments, which ran afoul of *Griffin*, severely undercut the credibility of Doreen and Daniel's version of events. Given the murky motive for the assault, the question of injuries to Daniel, and Sam's failure for six months to report Daniel's comments about a "plan," the case against defendants,

while convincing, was not overwhelming. The People's claim that *Griffin* error was harmless, based on the failure of the nontestifying defendants who were eyewitnesses to provide "persuasive" reasons to reject the testimony of the only other eyewitnesses, is not itself persuasive.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

MAURO, J.