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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT ALLEN DUBOIS,

Defendant and Appellant.

E053651

(Super.Ct.No. RIF136651)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Thomas D. Glasser, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Lilia E. Garcia and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Under the Sex Offender Registration Act (Pen. Code, § 290 et seq.)<sup>1</sup> (the Act), a person who has committed specified offenses must register as a sex offender as provided in the Act (§ 290, subs. (b), (c)). Such person must register with the applicable law enforcement agency “within five working days of coming into, or changing his or her residence within, any city [or] county . . .” (§ 290, subd. (b).) If a person who is required to register changes his or her residence to an address outside of California, the person must inform the law enforcement agency with which the person last registered of the new address within five working days. (§ 290.013.)

In this case, the People charged defendant with two counts of willfully and unlawfully failing to register as required under the Act. Count 1 was based on the failure to register on August 15, 2005 (former § 290, subd. (g)(2));<sup>2</sup> count 2 was based on the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> At the time of the alleged violation in August 2005, section 290, subdivision (g)(2), provided: “[A]ny person who is required to register under this section based on a felony conviction or juvenile adjudication for the offense of failing to register under this section and who subsequently and willfully violates any requirement of this section is guilty of a felony . . .” (Stats. 2004, ch. 761, § 1.3, p. 4524.)

Although not specified in the information, it appears from the record that the registration requirement that was allegedly violated is in former section 290, subdivision (f)(1), which provided: “If any person who is required to register pursuant to this section and who has a residence address changes his or her residence address, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state, the person shall inform, in writing within five working days, the law enforcement agency or agencies with which he or she last registered of the new address or transient location and any plans he or she has to return to California, if known. If the person does not know the new residence address or location, the registrant shall inform the last registering agency or agencies that he or she is moving within five working days

*[footnote continued on next page]*

failure to register on August 17, 2009 (§ 290, subd. (b)).<sup>3</sup> The People further alleged defendant had one prior strike conviction: a 1993 conviction for violating section 288.5 (committing three or more lewd and lascivious acts upon a child under 14 years of age). (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1).)

A jury found defendant guilty of both counts. In a bifurcated court trial on the strike prior, defendant admitted the allegations.

Defendant invited the court to exercise its discretion to dismiss the strike allegation pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) (*Romero* motion). The court declined to do so, and sentenced defendant to five years four months in prison.

On appeal, defendant contends that statements made by the prosecutor violated his constitutional rights by shifting the burden of proof and indirectly commenting on defendant's failure to testify. He further contends the court abused its discretion in denying his *Romero* motion. We reject these arguments and affirm the judgment.

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*[footnote continued from previous page]*

of the move, and shall later notify the agency or agencies of the new address or location within five working days of moving into the new residence address or location, whether temporary or permanent.” (Stats. 2004, ch. 761, § 1.3, pp. 4523-4524.)

<sup>3</sup> Section 290, subdivision (b), provides: “Every person described in subdivision (c), for the rest of his or her life while residing in California . . . shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department . . . , within five working days of coming into, or changing his or her residence within, any city, county, or city and county . . . , and shall be required to register thereafter in accordance with the Act.”

## II. FACTUAL SUMMARY

Defendant was required to register as a sex offender pursuant to the Act. Each year from 2000 through 2004, in the month of December, defendant registered an annual update as required.

In 2004 and 2005, defendant left and reentered the United States numerous times. Relevant here is his arrival in the United States on July 22, 2005, and his subsequent departure on August 8, 2005.

Following his arrival on July 22, 2005, defendant lived with his wife in Riverside. Five days later, on July 27, 2005, defendant registered with the Riverside Police Department in accordance with the Act.

On August 8, 2005, defendant left the United States and went to Thailand. He and his wife subsequently divorced.

Records maintained by the Riverside Police Department and the California Department of Justice do not indicate that defendant registered under the Act with respect to his August 2005 departure to Thailand. Nor do they indicate that defendant updated his registration as required in December 2005.

The Riverside Police Department's file concerning defendant contains a document indicating the receipt of a message sent through the Department of Justice's Megan's Law Web site. The message, purportedly sent by defendant on February 21, 2006, states: "I am no longer a resident anywhere in the USA and will not be returning to reside in the USA. If I am to return back to the USA I will inform the DOJ and local authorities of

such as to be in compliance with PC290. I ask to be removed from the web site and I have previously informed the Riverside.”

The file also includes a handwritten note from a Riverside Police Department employee dated April 5, 2006, stating: “Det Meyer called and said [defendant] ‘moved out of state’ a month ago unknown where.”

In February 2007, an investigator with the Riverside County District Attorney’s Office determined that defendant had not registered under the Act since July 27, 2005, and was not in compliance with the Act’s requirements. The investigator looked for defendant at the address he provided on his July 2005 registration form and at three other addresses, but was unable to find defendant. He spoke with defendant’s former wife, who told him she had not seen defendant since July 2005.

On March 6, 2007, defendant sent an e-mail to the Department of Justice in which he stated that his ex-wife informed him that someone from the Riverside County District Attorney’s Office was trying to get in touch with him. Defendant states: “I am no longer a resident of the US, nor do I ever have intentions to continue to be a resident of the US. . . . I had previously informed the Riverside Police Department and the DOJ of my moving out of the country and even spoke with counsel prior to moving, for legal reasons. I was informed that all was done on my part, so as to no longer have any ‘legal’ problems in the US. I was informed that if I ever did return to the US I would need to inform the local Police department, within 5 days, of which I would be residing to be in

compliance.” The e-mail includes a return e-mail address. It does not include any physical address.

Eleven days later, defendant wrote a letter to the Riverside County District Attorney’s Office in which he stated: “I had previously informed you (December 2005) via written correspondence from legal representation, of my moving out of California and the USA. I wanted to make sure that I was in compliance with PC 290 registration. I have no intention of relocating or setting up residence in California or the US for that matter. [¶] . . . [¶] I understand that if I do return to the US that I must inform local authorities of my residence (registration) within five (5) days upon arrival. I can assure you that I will comply with what is required from me as I always annually did without failure.” Defendant listed his return address as Box 215 at a “Mail Boxes Etc.” location in Bangkok, Thailand.

There was no record of the referenced December 2005 written correspondence in records obtained from the Riverside Police Department or the Department of Justice.

In September 2008, the Department of Justice received a message through its Megan’s Law Web site from an anonymous source stating that defendant was in Taipei, Taiwan.

Defendant returned to the United States on August 8, 2009. He stayed for about one month at the home of his girlfriend, Li Le. For purposes of the section 290 registration requirement, Le’s house is located within the jurisdiction of the Perris station of the Riverside County Sheriff’s Department.

Prior to defendant's arrival, defendant and Le communicated by e-mail and discussed getting married. Le paid his airfare from Thailand to California. The airplane ticket was for a round-trip with a return date in May 2010; however, the return date could be changed.

On August 10, 2009—two days after his arrival in the United States—defendant obtained a California driver's license. On the application for the license, he listed the Riverside address for Le's business as his address.

Defendant left the United States on September 7, 2009.

According to the records maintained by the Department of Justice, the Riverside Police Department, and the Perris branch of the Riverside County Sheriff's Department, defendant did not register under the Act in 2009. Indeed, defendant's last registration under the Act was his July 27, 2005, registration.

Defendant did not testify at trial.

### III. DISCUSSION

#### A. *Prosecutor's Comments During Closing Argument*

Defendant contends that statements by the prosecutor during her closing argument unduly prejudiced him and violated his federal constitutional rights because they constituted indirect comments on defendant's failure to testify and amounted to burden shifting. For the reasons set forth below, we reject this argument.

## 1. Factual Background

During the rebuttal argument, the prosecutor referred to a statement on a registration form signed by defendant in which defendant acknowledged: “I must inform in writing within five working days the law enforcement agency with which I last registered.” The prosecutor then said the following: “Five days. Is there any testimony or evidence that the defendant ever provided his new residence within five days? Absolutely not.”

Defense counsel objected to these statements as “improper burden shifting.” The court admonished the jury that “the statements of the attorneys are neither evidence nor are they the law. The law comes to you from the Court. With that, I’ll sustain the objection.”

At the prosecutor’s request, court and counsel then had a sidebar discussion in which the prosecutor stated: “My entire theory of the case has to do with the lack of records and that’s exactly what I was arguing. So I’d ask the Court to overrule the objection because I’m arguing as to the lack of records, I’m not trying to shift the burden to the defendant or say he didn’t take the stand.”

Defense counsel responded that the prosecutor “got no testimony from the defendant or evidence from him and I have no . . . burden to produce any evidence or produce any testimony.”

After further discussion among counsel and the court, the court stated: “Well, I think it’s proper to comment on absence of evidence, but you better stay away from the defendant’s 5th Amendment right. The ruling will stand.”

The prosecutor then continued with her rebuttal argument to the jury, stating: “You did not hear any testimony or see any exhibits during the course of the trial that showed that the defendant did what he was required to do.”

## 2. Analysis<sup>4</sup>

“A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable

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<sup>4</sup> The People contend that defendant forfeited the claim that the prosecutor committed *Griffin* error because he did not object on that particular ground below. (*Griffin v. California* (1965) 380 U.S. 609 (*Griffin*)). Defendant offers several arguments against finding a forfeiture, including the ineffective assistance of his trial counsel for failure to assert appropriate objections. A reviewing court may, in its discretion, decide to review a claim that has been or may be forfeited for failure to raise the issue below. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.) We exercise such discretion in this case and will address the merits of the claim.

fashion.” (*People v. Morales* (2001) 25 Cal.4th 34, 44; see also *People v. Smithey* (1999) 20 Cal.4th 936, 960.)

Here, defendant argues that the prosecutor’s comments suggested that defendant had a burden to produce evidence and prove he was innocent. He further argues that the prosecutor’s first comment amounted to an impermissible indirect comment on defendant’s failure to testify in violation of the Fifth Amendment as construed in *Griffin*.

In *Griffin*, the United States Supreme Court held that the prosecution may not comment on a defendant’s silence during trial. (*Griffin, supra*, 380 U.S. at p. 615.) The rule prohibits indirect, as well as direct, comments regarding the defendant’s failure to testify. (*People v. Hovey* (1988) 44 Cal.3d 543, 572.) However, “the rule prohibiting comment on defendant’s silence does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses.” (*People v. Medina* (1995) 11 Cal.4th 694, 755.) In *People v. Burns* (1969) 270 Cal.App.2d 238, for example, “the prosecutor noted a number of times that all of the evidence was given by witnesses for the prosecution, that the evidence had not been explained, and that no evidence had been produced which pointed to the innocence of defendants.” (*Id.* at p. 247.) The comments did not violate *Griffin* because they “reflect only on the state of the evidence.” (*People v. Burns, supra*, at p. 247.)

As for shifting the burden of proof, our state Supreme Court explained in *People v. Bradford* (1997) 15 Cal.4th 1229, that a “distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other

hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.” (*Id.* at p. 1340.) In *People v. Young* (2005) 34 Cal.4th 1149, for example, the prosecutor told the jury: ““What fact—what fact other than conjecture and insinuation do you have to say there is a reasonable interpretation of that evidence that leads to the defendant’s innocence? What? None. You don’t have any. There is none. [¶] Think of what set of circumstances that are reasonable that will hold water, that will hold together, that would say to you as a jury the defendant did not kill [the victim]. There is no evidence. The only evidence you have is that the defendant went into that place alone and left alone.”” (*Id.* at p. 1195.) The California Supreme Court held that “no misconduct occurred.” (*Ibid.*) Noting the distinction the court had drawn in *Bradford*, the court explained that “the prosecutor did not cross the critical line, as there is no reasonable likelihood the jurors would have understood the prosecutor’s argument as imposing any burden on defendant.” (*People v. Young, supra*, at pp. 1195-1196.)

Here, the prosecutor’s comments amount to assertions that there was no testimony or other evidence that defendant ever provided his new residence address to the relevant authority within the time required for doing so. The statements are properly categorized as comments on the state of the evidence and as the failure of the defense to introduce material evidence. Thus, they do not violate defendant’s Fifth Amendment rights under *Griffin*. Nor do they suggest that defendant had the burden of producing evidence or of proving his innocence; regarding the distinction drawn in *Bradford* and *Young*, the

comments fall easily on the side of “permissible comment that a defendant has not produced any evidence.” (*People v. Bradford, supra*, 15 Cal.4th at p. 1340.)

Defendant relies heavily on *People v. Vargas* (1973) 9 Cal.3d 470. In that case, there was evidence that the defendant and a codefendant had thrown the victim to the ground and robbed him. (*Id.* at p. 473.) During closing argument, the prosecutor told the jury: “[T]here is no evidence whatsoever to contradict the fact that [the witness] saw [the defendant] and [the codefendant] over [the victim]. *And there is no denial at all that they were there.*” (*Id.* at p. 474.) The California Supreme Court held that the comment constituted *Griffin* error. (*People v. Vargas, supra*, at pp. 476-477.) It explained: the prosecutor’s use of “the word ‘denial’ connotes a personal response by the accused himself. Any witness could ‘explain’ the facts, but only defendant himself could ‘deny’ his presence at the crime scene. Accordingly, the jury could have interpreted the prosecutor’s remarks as commenting upon defendant’s failure to take the stand and deny his guilt.” (*Id.* at p. 476.)

Here, defendant contends that when the prosecutor in this case asked, “Is there any testimony or evidence that the defendant ever provided his new residence within five days?,” the phrase, “provided his new residence,” had the same effect as the word “deny” in *Vargas*. He argues: “Just as only the *Vargas* defendant could deny his presence at the scene of the crime, [defendant] is the only one who could provide his new residence as he was the only one aware of the location of his new residence and [the] only one able to provide this information and to testify as to what he provided.”

Defendant misapplies *Vargas*. In *Vargas*, the problem with the prosecutor’s statement that “there is no denial” the defendants “were there” is that the statement clearly points to the defendants’ failure to testify at trial; that is, the missing “denial” is the denial that could have been made by the defendants’ taking the stand at trial and testifying they were not “there.” In the present case, by contrast, the prosecutor’s comment on the absence of evidence that defendant “ever provided his new residence within five days” refers not to the failure of defendant to testify at trial as to his new residence, but to the absence of evidence that he ever provided his new address *to the relevant authorities during the required time frame*. Indeed, defendant taking the stand at trial to provide his new residence address would seem to be irrelevant to the issue of his compliance under the Act—what mattered is whether he previously provided the new address (i.e., registered) when and where he was required to do so. The prosecutor’s statement, therefore, could not reasonably have been understood by the jury as a comment on the defendant’s failure to testify at trial.

Moreover, this is not a case in which a refutation of the prosecution’s evidence could be provided only by defendant at trial. As explained in *People v. Johnson* (1992) 3 Cal.4th 1183, “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.) Here, if defendant timely registered and “provided his new residence,” he could have offered evidence at trial of that fact through witnesses other than himself, such as the custodians of records of the agencies with which he registered.

For all the foregoing reasons, the prosecutor’s comment regarding the absence of evidence that defendant ever provided his new residence address did not constitute *Griffin* error, improper burden shifting, or prosecutorial misconduct.

*B. Denial of Defendant’s Romero Motion*

Defendant argues that the court’s denial of his *Romero* motion constitutes an abuse of discretion. We disagree.

The “Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Romero, supra*, 13 Cal.4th at p. 528.) The trial court’s discretion to strike a qualifying strike is therefore guided by “established stringent standards” designed to preserve the legislative intent behind the Three Strikes law. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) “[T]he court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A court's refusal to dismiss a prior strike conviction is reviewed for an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 374.) The court will abuse its discretion only if its refusal to dismiss the prior strike "is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) However, a reviewing court will find an abuse of discretion when the factual findings critical to the trial court's decision have no support in the evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) The defendant has the burden of demonstrating that the court's decision was irrational or arbitrary. (*People v. Carmony, supra*, at p. 376.)

The prior strike conviction was in 1993 for violating section 288.5: lewd and lascivious conduct against a child under 14 years of age. According to defendant's probation report, on several occasions defendant "put cream on his penis and inserted it into [the child's] private part which caused pain." Defendant also "placed his mouth on [the child's] private parts" and made the child "place her mouth on his penis." The child tested positive for anal Chlamydia.

Defendant was placed on probation for that offense. However, in January 1995, defendant violated the terms of his probation and was sentenced to six years in prison. He was paroled in 1997 and discharged in 2000.

Defendant also suffered convictions for contempt of court in 1987 (Code Civ. Proc., § 1209), carrying a loaded firearm in a public place in 1991 (Pen. Code, former § 12031), and a Vehicle Code violation in 2004 (Veh. Code, § 21703).

Although defendant concedes the nature and circumstances of the prior strike were serious, he points out that he has had no conviction for any sex offenses before or since his 1993 conviction. He “had been free in society for thirteen years” prior to his arrest on the current charges. The strike prior was thus, he asserts, “a clear aberration from his normal behavior that did not include sexual crimes or violent crimes or any crimes against persons.”

Defendant further argues that his present offenses were “non-violent, victimless, and regulatory”; evidence that defendant called the Riverside Police Department and followed up with written correspondence indicate that he “was at least attempting to comply with the registration requirements”; furthermore, he argues, the circumstances of his 2009 failure to register in 2009 were “minor,” because he was only in the country for about 30 days.

Defendant refers to his college degrees—an Associate of Arts degree in liberal arts, a Bachelor of Science degree in human services, and a Master of Science degree in educational administration—as evidence of his character. He also points out his employment as a certified dental technologist, jobs in educational administration and education finance, his ownership of an antiterrorism business in Thailand, and his honorable service in the United States Army.

In denying the *Romero* motion, the trial court stated: “[The prior offense] is an extremely serious underlying charge factually, and there’s substantial sexual conduct imposed upon a seven-year-old niece, I guess, to whom the defendant apparently gave a

venereal disease. He was given a tremendous break by receiving probation for that case, probation which he violated very quickly, and was given a six-year prison sentence.”

The court further stated that the “present offenses were very sophisticated and were far apart in time, not just a single period of aberrant conduct and not just one unfortunate lapse of memory. I do not believe that the defendant thought his contacts with law enforcement satisfied his registration requirements. Rather, those contacts were calculated attempts to subvert the registration laws while creating the illusion of substantial compliance. [¶] The present offenses, although not violent, indicate the defendant is a serious threat to the community.”

The court took into consideration “factors in mitigation,” such as the remoteness of the strike offense, defendant’s minimal criminal record, his education, family, and employment history. The court further noted that this was not a three strikes case in which defendant would be “looking at 25 years to life,” but was a two strikes case. Ultimately, the court concluded that defendant “does not fall outside the three strikes sentencing scheme.”

The trial court did not abuse its discretion in denying defendant’s *Romero* motion. The court considered the written motion and counsel’s argument and, though not required, gave the reasons for its decision. (See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 960 [court is not required to give reasons for declining a *Romero* motion].) Defendant’s prior offense is, as the trial court noted, “extremely serious,” involving repeated incidents of sexual conduct on a seven year old. Although defendant

characterizes the present offenses as mere “technical registration violations” and asserts he “was at least attempting to comply with the registration requirements,” the trial court found that defendant’s contacts with law enforcement were actually “calculated attempts to subvert the registration laws while creating the illusion of substantial compliance.” Defendant contends, however, that this finding is not supported by substantial evidence. He points out that he contacted law enforcement about his move to Thailand before the investigation of his registration violations began.

The evidence of his contacts outside the formal registration system, however, are subject to different interpretations. They could indicate, as defendant appears to contend, that he was attempting to communicate with the relevant authorities to make sure that he was not running afoul of the law; that is, that he was seeking to comply with the spirit, if not the letter, of the law. They could also be viewed, as the court perceived them, as an attempt to create a paper trail to create the impression of him as one who is trying to comply, when he is in fact intentionally ignoring the registration requirements.

Supporting the court’s view is the fact that defendant claimed in March 2007 that he informed the Riverside County District Attorney’s Office in December 2005 that he was moving out of the country. There was, however, no record of the purported December 2005 correspondence. The court could reasonably infer from this that defendant lied about such correspondence in order to support a false claim that he had informed authorities of his move in December 2005. In addition, in the March 17, 2007 letter and the March 6, 2007 e-mail, defendant expressly acknowledged his understanding

that he would need to inform local authorities of his residence if he returned to the United States. Nevertheless, defendant returned to California in August 2009 without registering. We conclude, therefore, that there is substantial evidence to support the court’s finding that defendant’s noncompliant communications were “calculated attempts to subvert the registration laws while creating the illusion of substantial compliance.”

While the remoteness in time between the strike offense and the present offenses, as well as defendant’s education, employment history, and other factors cited by defendant, are relevant mitigating considerations—all of which were noted by the trial court—the court could rationally conclude that defendant was within the ambit of the Three Strikes law. Accordingly, there was no abuse of discretion.

#### IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING  
J.

We concur:

RAMIREZ  
P. J.

HOLLENHORST  
J.