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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.

JERMAINE BRUCE BILLINGSLEY,

Defendant and Appellant.

E057065

(Super.Ct.No. RIF1104508)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge.

Affirmed with directions.

Thomas K. Macomber, 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, Steve Oetting and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Jermaine Billingsley, of inflicting corporal injury on a cohabitant. (Pen. Code, § 273.5, subd. (a).)¹ In bifurcated proceedings, defendant admitted suffering two prior convictions for which he served prison terms (§ 667.5, subd. (b)) and one strike prior (§ 667, subds. (c) & (e)(1)). He was sentenced to prison for eight years and appeals, claiming the prosecutor violated his constitutional rights and committed misconduct during her closing argument. We reject his contention and affirm.

FACTS

The facts concerning this crime are not pertinent to this appeal. However, the evidence of defendant's guilt was very strong. As is often happens in domestic violence situations, by the time trial occurred, the victim, who had, by then, had defendant's child, had changed her mind about testifying against him and, on the stand, contradicted just about every incriminating statement she had made about him at the time of the crime.

ISSUE AND DISCUSSION

During argument, defense counsel said to the jurors, "At the beginning of this jury trial, I asked you how you felt about not hearing [defendant] speak. . . . Some of you said, . . . If he didn't do it, why not say it? Why . . . not tell your side of the story?' . . . [A]ctually it's his decision whether he wanted to testify or not. [(After asserting that defendant had difficulty expressing himself due to a stuttering problem, defense counsel continued.)] But he took the stand. . . . [H]is testimony was really simple,

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

unsophisticated, brutally forthright. He told you everything. He did not have to testify. And if . . . he [had]n't . . . testif[ied], we would have to submit a jury instruction that you couldn't use that against him. But he did. . . . He told you everything . . . He wanted to tell you his story.”

In response, the prosecutor, during closing argument, stated that the only evidence presented by the defense that defendant hit the victim in self-defense was the defendant's own testimony, and she pointed out what she asserted were the deficiencies in that testimony. She then said, “[Defendant] was making it up as he went along. He had 10 months to think about what he [was] going to say. He had the opportunity to look at police reports, the audios [of the 911 call and the jail calls between him and the victim], the photographs [of the victim's injuries], and listen to every witness [that] c[a]me in here and testif[ied]. I disagree with [defense] counsel when he says [that defendant] didn't have to testify. [¶] *Now, under the law he doesn't have to testify, but in this case, he had to because the evidence [of guilt] was so strong—*” At this point, the prosecutor was interrupted by defense counsel's objection that her argument was improper, to which the trial court responded, saying, “Overruled . . . because of your argument. I think she can respond to it.” The prosecutor then continued, “*The evidence is so strong that the defendant is guilty that he had to come up with something and try to rebut it. He had to.*”

The prosecutor then asserted that it was not reasonable for the jury to believe, as defendant had testified, that the victim hit herself in the eye with the remote control. She pointed out inconsistencies in defendant's testimony. She asserted that defendant was the

witness with the most motive to lie. In response to defense counsel's assertion that defendant was "brutally honest" on the stand, the prosecutor pointed to conflicts between defendant's testimony and the responding officer's. She also pointed out that despite the victim's obvious wish to testify to whatever would help defendant, she denied hitting him first, which was what defendant claimed on the stand she had done. The prosecutor addressed defendant's attempts to get the victim to not testify, and added, "[w]hen none of that worked, he had to come in here 10 months later and make up a story, because the evidence is so overwhelming that the defendant is guilty. ¶ . . . ¶ The evidence does not support what the defendant testified to. That shows us that he lied. *And if the truth were on his side, he wouldn't have had to take that stand and lie to you.*" After defense counsel's improper argument objection was overruled by the trial court, and it instructed the prosecutor to "move on" she continued, "He wouldn't have lied if he wasn't guilty."

Defendant contends that the above-italicized portions of the prosecutor's argument constituted an improper commentary on his exercise of his constitutional right to testify, citing *Griffin v. California* (1965) 380 U.S. 609, 612-614, and was an inference she knew to be false or had a very strong reason to doubt and, therefore, was prosecutorial misconduct. However, *Griffin* addressed only the constitutional right *not* to incriminate oneself, and prohibits instruction and argument by counsel that invites or allows the jury to infer guilt from defendant's refusal to testify. (*Ibid.*) It is not until his reply brief when defendant first cites authority for the proposition that one has a constitutional right to testify which is implicit in the Fifth, Sixth and Fourteenth Amendments. Notably

missing from his reply brief, however, is any authority that commentary on a defendant's choice to exercise that right for tactical reasons is a violation of the right. Unlike in *Griffin*, the prosecutor here did not argue that the fact, alone, that defendant took the stand suggested that he was guilty. What she argued was that defendant was forced to give his version of the events because of the weight of the evidence against him.

Next, defendant misstates what the prosecutor asserted by saying that she argued that “only guilty people testify” which is what defendant now asserts was the inference that she knew to be false or had very strong reason to doubt. The prosecutor's initial reference was, as the trial court concluded, in response to defense counsel's assertion that defendant did not have to testify. The prosecutor said that while, legally speaking, defendant had a right not to testify, the weight of the evidence against him made not testifying untenable from a tactical point of view. There is nothing improper about this. This leaves the second comment, that if the truth was on defendant's side, he would not have to take the stand and lie. While defendant wants us to interpret this as the prosecutor saying that if the truth was on defendant's side, he would not have to testify,²

² Defendant otherwise interprets this as the prosecutor saying that defendant “only testified because he was guilty.”

The error of defendant's interpretation of the record is demonstrated in his opening brief when he cites only a portion of what the prosecutor actually said in his attempt to prove that the prosecutor was saying that if the truth was on defendant's side, he would not have to testify. Defendant states, “Thus, by arguing, ‘if the truth were [*sic*] on his side, he wouldn't have to take that stand’, the prosecutor deprived [defendant] of due process of law . . . as well as his . . . right to counsel and his right to a reliable determination of guilt” In fact, what the prosecutor said was, “[I]f the truth were [*sic*] on his side, he wouldn't have to take that stand *and lie to you*.” Defendant omitted

[footnote continued on next page]

the inference was actually that if the truth was on his side, he would not have had to *lie* on the stand. (And, of course, no one *has* to testify.) This was not an inference that the prosecutor knew to be untrue or for which she had strong reason to doubt. It is absolutely true.

DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect the fact that this was a jury verdict, not a plea. In all other respects, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.

[footnote continued from previous page]

the “and lie to you” from his argument. The next comment the prosecutor made reinforces our interpretation of her remarks and undermines defendant’s interpretation, i.e., “He wouldn’t have lied if he wasn’t guilty.”