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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.

LEWIS ANDERSON,

Defendant and Appellant.

E062993

(Super.Ct.No. RIF1409726)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Lewis Anderson hit his girlfriend in the face, splitting her lip, after she laughed at him for falling in a swimming pool. The only issue defendant raises on appeal is *Griffin*¹ error and a related claim of ineffective assistance of counsel.

A jury convicted defendant of one count of inflicting corporal injury, in violation of Penal Code section 273.5, subdivision (a).² The information also alleged that defendant suffered two strike priors pursuant to sections 1170.12, subdivision (c)(2)(A), and 667, subdivisions (c) and (e)(2)(A), and two prior convictions and prison commitments within the meaning of section 667.5, subdivision (b). After defendant waived a jury trial, the court dismissed one of defendant's prison priors upon the prosecution's request and found the other priors true. The court sentenced defendant to the high term of four years for inflicting corporal injury, doubled pursuant to the three strikes law, plus one year for a prior conviction for a total sentence of nine years.

On appeal, defendant argues the prosecution committed *Griffin* error by impliedly commenting on defendant not testifying. Our review of the record finds no prejudicial error. We affirm the judgment.

¹ *Griffin v. California* (1965) 380 U.S. 609.

² All further statutory references are to the Penal Code unless otherwise indicated.

II

STATEMENT OF FACTS

On July 20, 2014, defendant and Danielle Taylor were living together in a romantic relationship. Defendant and Taylor were working in the yard, drinking beer, and eating when defendant accidentally tumbled into the pool. Taylor laughed at defendant and went inside the house for more beer. Defendant followed Taylor to the bedroom and struck her in the face, using an open hand. Taylor fell down crying and defendant walked away. Taylor testified she had been drinking that day but she was not intoxicated.

Taylor asked a roommate, Deborah, for the use of her phone, but Deborah refused. When defendant offered Taylor his telephone, she called 911 and said she had been hit five times—although at trial she remembered it as three times. Although Taylor suffered a split lip, she did not seek medical treatment.

Deputy Yesenia Hernandez responded to the 911 call. Hernandez could smell alcohol on Taylor's person but Taylor denied being drunk. Taylor explained that, after defendant fell in the pool, he hit her five times in the face with an open hand "to teach her." Hernandez noticed blood in Taylor's bedroom and that defendant's swim trunks were wet. Hernandez arrested defendant. As Hernandez escorted defendant to the patrol car, defendant yelled at Taylor to stop him from being arrested. Taylor asked Hernandez to let defendant go.

Taylor had previously been convicted of prostitution, petty theft, and sale and

transportation of narcotics. She was on probation for inflicting corporal injury on her children's father. Taylor asked Hernandez several times whether she was going to be arrested and go to jail. Hernandez was not aware of Taylor's criminal history at the time defendant was arrested.

While defendant was incarcerated, Taylor wrote him a letter stating, "Hello, honey. I really miss you. My world is upside down without you." Cortney Bell testified as an expert about the cycle of domestic violence and recantation by victims and explained why victims often refuse medical treatment.

Another woman, Rasheedah Blake, the mother of defendant's two children, testified that defendant had been violent and assaulted her in May 2000. He was subsequently convicted for that assault. Blake had previously been convicted of arson, vandalism, battery on a spouse, possession for sale of narcotics, and brandishing a weapon.

Defendant did not testify at trial.

III

PROSECUTORIAL ERROR

Defendant argues the prosecutor committed *Griffin* error by impliedly commenting about defendant not testifying.³ Defendant also argues that the prosecutor's

³ Defendant forfeited this issue by not objecting below but we address it because it has a bearing on defendant's related claim of ineffective assistance of counsel.

conduct was prejudicial and, by failing to object, defense counsel did not provide effective assistance of counsel. In response, the People argue that the prosecutor's comments were not improper or prejudicial, and it was not ineffective assistance by defense counsel not to object to the prosecutor's argument.

During closing argument the prosecutor discussed how Taylor's testimony was uncontradicted by defendant and also corroborated by other evidence. The prosecutor emphasized, "Defense has the same ability to call witnesses. In fact, you saw it. Same ability to call them, put them on the stand. [¶] Again, remember, it's my burden, it's not theirs. But they have the same ability." During rebuttal the prosecutor further remarked, "So now, now that all of the evidence is before you, now that you yourself had the ability to judge the one and only eyewitness that was brought before you in this case to tell you what happened, what has been proved? [¶] . . . [¶] . . . Was there any other evidence presented to you, direct-testimony-wise, that states something else happened?" The prosecutor repeated, "Defense doesn't have the burden, but they have the same ability to call witnesses and to present evidence." The prosecutor cautioned the jurors not to speculate, "Focus on the evidence that came before you. [¶] So, uncontradicted truths." He mentioned defense counsel's reliance on circumstantial evidence and stated, "Well, where's the innocence story? Where is it? It was never presented. It was never argued."

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.; see Cal. Const., art. I, § 15.) "We evaluate claims of *Griffin* error by inquiring whether there is 'a reasonable

likelihood that any of the [prosecutor's] comments could have been understood, within its context, to refer to defendant's failure to testify.' (*People v. Clair* (1992) 2 Cal.4th 629, 663.) The standard for evaluating claims of prosecutorial misconduct is well established and summarized as follows: '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 [California] 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 fashion.' (*People v. Morales* (2001) 25 Cal.4th 34, 44 [original italics].)" (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1523-1524.)

Although the *Griffin* case actually involved a direct reference to the defendant's failure to testify, the decision has been interpreted as prohibiting the prosecution from suggesting to the jury that it may view the defendant's silence as evidence of guilt. (*United States v. Robinson* (1988) 485 U.S. 25, 32, quoting *Baxter v. Palmigiano* (1976) 425 U.S. 308, 319.) Additionally, the California Supreme Court has declared, "Under the rule in *Griffin*, error is committed whenever the prosecutor . . . comments, either directly or indirectly, upon defendant's failure to testify in his defense." (*People v. Medina* (1995) 11 Cal.4th 694, 755.) The prosecutor may comment on the failure of the defense

to introduce material evidence or to call logical witnesses but a prosecutor is forbidden to comment either directly or indirectly on the defendant's failure to testify in his defense. (*People v. Cornwell* (2005) 37 Cal.4th 50, 90.) Thus, a prosecutor may commit *Griffin* error if he argues to the jury that certain testimony is uncontradicted and if such contradiction or denial could be provided only by the defendant, requiring him to take the witness stand. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

Defendant acknowledges that a prosecutor can comment on the failure of a defendant to call logical witnesses. (*People v. Cornwell, supra*, 37 Cal.4th at p. 90.) However, defendant contends the prosecutor's comments here related to defendant's election not to testify because defendant was the only other "logical witness" capable of contradicting Taylor. Therefore, the only logical inference from the prosecutor's comments that defendant did not call witnesses to contradict Taylor's story was that defendant did not testify.

We review defendant's claim in the context of the prosecutor's whole argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) For a number of reasons, we hold there was no *Griffin* error. First, we agree with the People it is not reasonably likely the jury interpreted the prosecutor's comments as being about defendant not testifying. (*People v. Williams* (2013) 56 Cal.4th 630, 671; *People v. Clair, supra*, 2 Cal.4th at p. 663; *People v. Sanchez, supra*, 228 Cal.App.4th at p. 1523.) The prosecutor confined his argument to highlighting the defendant's failure to call another witness or to offer evidence of another explanation for how Taylor was injured. The prosecutor did not suggest, directly or

indirectly that defendant should have testified.

Second, there was other contrary evidence, not only defendant's testimony, that could have been presented by the defense. (*People v. Bradford, supra*, 15 Cal.4th at p. 1339.) Notably, defense counsel could have called the roommate, Deborah, to testify about the incident and could have interrogated Deputy Hernandez about the photographs of Taylor's injuries. It was not error for the prosecutor to remark on the paucity of the defense's evidence, other than defendant's testimony. (*Ibid; People v. Sanchez, supra*, 228 Cal.App.4th at p. 1525.)

Finally, we also hold there was no prejudice to defendant beyond a reasonable doubt. (*People v. Cook* (2006) 39 Cal.4th 566, 608; *People v. Bradford, supra*, 228 Cal.App.4th at p. 1340.) This was not a close case; the evidence against defendant was overwhelming. The assault was amply proved by Taylor's testimony and corroborated by the 911 call and Deputy Hernandez's testimony about Taylor's injuries and blood in the house, as well as the evidence about a prior assault committed by defendant. The defense offered no plausible alternative explanation for Taylor's injuries. The jury was instructed the prosecution had the burden of proof and defendant had a constitutional right not to testify. We presume the jury followed its instructions and was not prejudicially swayed by the prosecutor's argument. (*People v. Harris* (1994) 9 Cal.4th 407, 426.) Any error was harmless beyond a reasonable doubt.

Under these circumstances, there was also no ineffective assistance of counsel. A criminal defendant is deprived of his Sixth Amendment right to counsel when: (1) trial

counsel’s representation falls below an objective standard of reasonableness; and (2) “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93; *In re Scott* (2003) 29 Cal.4th 783, 811; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) In the absence of prejudicial *Griffin* error, there was no reasonable probability the outcome of defendant’s trial would have been different. (*People v. Waidla* (2000) 22 Cal.4th 690, 719.) When there is no error and no prejudice, failure to object is not ineffective assistance of counsel. (*People v. Prieto* (2003) 30 Cal.4th 226, 261-262; *Scott*, at p. 830.)

IV

DISPOSITION

We hold there was no *Griffin* error and no ineffective assistance of counsel. We affirm the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.