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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FREEMAN P. GRIFFIN,

Defendant and Appellant.

A104979

(Alameda County  
Super. Ct. No. 145299)

On Monday, March 24, 2003, Arthur Lowery was robbed in front of his home. In a photo lineup, he identified defendant Freeman P. Griffin as the perpetrator. A jury found defendant guilty of committing the robbery, but rejected the allegation that he had used a gun in committing the crime and found him not guilty of being a felon in possession of a firearm. Defendant alleges several errors on appeal. With one qualification, we affirm the judgment.

**BACKGROUND**

At the preliminary hearing, Lowery testified as follows: He was in front of his house in Oakland around 9:20 on the evening of March 24, 2003, when defendant, whom he recognized from the neighborhood and knew as “Freeway,” entered the gate, walked up to him and told him that he had “disrespected [defendant’s] sister.” Lowery said, “I don’t know what you’re talking about,” and defendant pulled out what appeared to be a black semi-automatic revolver and put it to Lowery’s head. Defendant took Lowery’s wallet from his back pocket, then took a pack of cigarettes and a lighter from his front

pocket. Lowery did not resist because he feared for his life. Defendant left the yard and drove away in a car that Lowery believed to be a 2000 or 2001 Dodge Stratus, or “that type of car.”

Lowery did not report the crime until March 27. He explained this lapse of time was due to “disbelief in what had happened,” and “it could have been a chance that I had gotten my wallet back because I didn’t think this would happen because we see each other where we live. And after thinking of that possibility just out of anger of losing things that I can’t replace like pictures of my mother who’s passed, my daughter, nieces, nephew, stuff like that. And then it became anger. And I couldn’t take any chances and reported it.” Lowery also testified he did not drink alcohol and had not been drinking on the night he was robbed.

The district attorney filed an information charging defendant with one count of second degree robbery (Pen. Code, § 211)<sup>1</sup> and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)), and alleging six prior felony convictions (§ 667.5, subd. (b)) and that defendant personally used a firearm (§§ 120225, subd. (a)(1), 12022.53).

At the jury trial Lowery testified he had previously seen defendant around the neighborhood more than five times, but fewer than ten. Contradicting his testimony at the preliminary hearing, he also testified he drank two beers that night and that he was drinking while he was standing outside smoking, but he asserted he did not feel any effects from the beer. He stated the area outside of his apartment is well lit by street lights and testified he selected a photograph of Griffin in a photo lineup on April 10.

At the preliminary hearing Lowery had testified he did not mention the robbery to anyone until he reported it to the police three days later, on the Thursday following the robbery. However, at trial he stated that the following day he told his supervisor at work about it. He testified he made his police report on April 10, though this date cannot be

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

squared with his consistent testimony that the robbery occurred on March 24 and that he reported it to the police three days later.

On cross-examination, defendant's attorney impeached Lowery's testimony by pointing out numerous inconsistencies between the police report, his testimony at the preliminary hearing, and his testimony at trial. She brought out the fact that at the preliminary hearing, Lowery described the robber's jacket as a "club" jacket, but that at trial he described it as a "black puff jacket" although he had never previously described it as puffy or down-filled. She also brought out that when Lowery initially reported the loss to the police and at the preliminary hearing, he reported only that his wallet, \$50 in cash, and a pack of cigarettes had been taken. At trial he testified the wallet also contained his driver's license and an ATM card. At the preliminary hearing, Lowery testified he could not tell if the gun was made of "metal or plastic or rubber," but at trial he said the gun was metal. Defense counsel pointed to numerous other minor inconsistencies regarding facts such as how far from the house he was standing and how dark the street was when the car drove by.

The officer who arrested defendant testified he found no gun or wallet at the time of the arrest. Lowery and the police officer were the only witnesses at the trial.

The jury found defendant guilty of the robbery, but not guilty of being a felon in possession of a firearm. The jury also found he did not use a firearm in the commission of the robbery. Defendant waived a jury trial on the prior conviction allegations and the trial court found three of the prior conviction allegations to be true. The court sentenced defendant to the middle term of three years for the robbery, plus one year for each of the prior convictions, to be served consecutively. The court also ordered Griffin to submit blood and saliva samples.

Defendant has timely appealed.

## **DISCUSSION**

### *Griffin error*

Defendant first argues that the prosecutor committed misconduct by commenting on his failure to testify as prohibited by *Griffin v. California* (1965) 380 U.S. 609

(*Griffin*). In closing, defendant's attorney argued that "Judge Burr told you at the beginning that my client has entered a plea of not guilty, and has as such, denied all charges. It's as good as saying I didn't do it." In rebuttal, the prosecutor responded: "The second error is to assume that . . . defendant has in any way told you he didn't do it. He didn't testify in this case. There's no evidence he didn't do it." Defense counsel objected, and the court stated, "It is not *Griffin* error. The entry of the plea of not guilty is a denial of the truth of the charges, as I've indicated." The prosecutor continued, "She [defense counsel] would have you speculate, but of course, there's many reasons why a defendant might go to trial. He says I can't prove it. Or he says I'm not going out like that. Whatever the reason, a defendant takes it to trial. In this case you have no evidence that he didn't do it. All the evidence is that he did do it."

In *Griffin*, " 'the United States Supreme Court declared that the Fifth Amendment prohibits the prosecutor from commenting, either directly or indirectly, on the defendant's failure to testify in his defense.' [Citation.] This prohibition does not, however, '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.' [Citation.] Moreover, 'brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.' " (*People v. Turner* (2004) 34 Cal.4th 406, 419-420.) In *People v. Fierro* (1991) 1 Cal.4th 173, 213, the prosecutor's comment was similar to the comment made in this case: " 'Again, the defense is asking you to do something; and that is, find that particular charge is not true. *But they're giving you no evidence on which to do that.*' " (*Ibid.*) There the court held *Griffin* did not apply because the comment was merely " 'on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.' " (*Ibid.*)

The prosecutor engaged in no misconduct here by remarking that no evidence had been presented that tended to exculpate defendant. Defendant presented no witnesses on his behalf. His defense relied on impeaching Lowery's testimony. Defense counsel argued in closing, "this whole case is about the uncorroborated eyewitness testimony of

one unreliable man who didn't report it until three days later." The prosecutor's remarks were made in response to the defense argument that entering a plea of not guilty was "as good as saying I didn't do it." "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.) In this case, the prosecutor said nothing more touching upon defendant's failure to testify than what is quoted above. There was no insinuation that the jury should draw adverse inferences from defendant's failure to testify. The prosecutor merely made the legitimate point that defendant's plea was not evidence and that there was no evidence he had not committed the robbery. There was no reasonable likelihood that the jurors misconstrued the prosecutor's remarks as an improper comment on Griffin's failure to testify.

#### Evidence of prior convictions

Griffin received an additional one year prison term for each of three prior felony convictions, one in 1988, one in 1990, and one in 1993.

Section 667.5, subdivision (b) contains what is known as the "washout" rule, that "if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply. [Citations.] Both prongs of the rule, lack of prison time *and* no commission of a crime leading to a felony conviction for a five-year period, are needed for the 'washout' rule to apply. This means that for the prosecution to prevent application of the 'washout' rule, it must show a defendant *either* served time in prison *or* committed a crime leading to a felony conviction within the pertinent five-year period." (*People v. v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.)<sup>2</sup> "[A] defendant will gain the

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<sup>2</sup> Section 667.5, subdivision (b) provides that "where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained

benefit of the ‘washout’ period *if for any five-year period following discharge from prison custody or release on parole*, he remains free of both prison custody and the commission of an offense resulting in a felony conviction.” (*Id.* at p. 1233.) The prosecution bears the burden of showing that the washout rule does not apply. (*Id.* at p. 1229.)

To prove prior convictions, the prosecutor may introduce prison records pursuant to section 969b, which provides, “For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime . . . has been convicted of an act punishable by imprisonment . . . , and has served a term therefor in any penal institution, . . . the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence.” This section “is permissive and not mandatory, and it does not restrict the People from other forms of proof to establish the fact of imprisonment for a prior conviction.” (*People v. Bradley* (1970) 3 Cal.App.3d 273, 276.)

The evidence of defendant’s prior convictions consisted of a packet of copies of prison records, an exemplar of defendant’s fingerprints, and the testimony of an inspector for the Alameda County District Attorney. The inspector took a sample of defendant’s fingerprints and compared them to those in the prison records. The prison records established that defendant was released from custody on December 12, 1996. The record also contained evidence of two subsequent felony convictions and defendant stipulated that in 1999 he sustained a felony conviction for possession of narcotics (Health & Saf. Code, § 11350). The probation report reflects he was arrested for this offense on August 7, 1999, and convicted on December 6, 1999. The probation report also states that on September 4, 1998, he was convicted of one additional felony (theft with a prior theft conviction, sections 484 and 666). Defendant argues this evidence does not satisfy the

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free of both prison custody and the commission of an offense which results in a felony conviction.”

prosecution’s burden of proving that he was not felony-free for five years because it establishes only the dates of the convictions and not the dates on which the offenses were committed. (Cf. *People v. Epperson* (1985) 168 Cal.App.3d 856, 864-865 [defendant’s admission that he had suffered prior felony convictions was insufficient to establish that washout period had not elapsed].)

Defendant failed to raise this objection in the trial court. To the contrary, he conceded the washout period did not apply. In arguing about the sentence defendant should receive, his attorney stated, “with respect to the prior convictions which the court has just found, I would . . . invite the court to either strike some or all of the priors; or in the alternative, sentence concurrently on the priors. The priors are quite old dating from 1988, 1990, and 1993. And but for the 11350 possession . . . [and the] petty theft with a prior . . . in 1998 [and] [b]ut for those two felony convictions, all of the three priors which the court has just found would have washed out under the five-year washout because they are so old. [¶] Given that from 1993 which is the most recent of the three priors, subsequent to that Mr. Griffin was not incarcerated after he [was] discharged in 1996 from parole, the only two intervening factors which bar the washout are the ’98 petty theft prior . . . and in 1999, 11350 possession . . . . Those are two felonies that, while they are felonies, on the felony spectrum are less serious felonies, really. . . . [¶] So given the age of the priors, given the unfortunate for Mr. Griffin’s circumstance that they don’t wash out because of two relatively minor felonies, I would ask that the court not sentence him on all three of the prior convictions.”

In *People v. Scott* (1994) 9 Cal.4th 331, the Supreme Court addressed the cognizability on appeal of sentencing decisions to which no objection was made in the trial court. “[T]he court distinguished between unauthorized sentences—those that ‘could not lawfully be imposed under any circumstances in the particular case’ (*Scott*, at p. 354)—and discretionary sentencing choices—those ‘which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.’ (*Ibid.*) As to the former, lack of objection does not foreclose review: ‘We deemed appellate intervention appropriate in these cases because the errors presented “pure questions of

law” [citation] and were “ ‘clear and correctable’ independent of any factual issues presented by the record at sentencing.” [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.’ [Citation.] With respect to the latter, however, the general forfeiture doctrine applies and failure to timely object forfeits review. Such ‘[r]outine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.’ ” (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.)

Whether the washout period applies is not a pure question of law, nor is it “clear and correctable” on appeal. The matter could have been addressed and the factual predicate for the sentences clarified had defendant brought the question to the attention of the trial court. Instead, he argued for leniency because “but for” the two intervening felony convictions the washout period would have applied. His failure to raise the issue and, indeed, apparent agreement that he was not eligible for the exception to the enhancement statute, waived the issue for appeal. (*People v. Scott, supra*, 9 Cal.4th 331.) Moreover, defendant does not assert that he was prejudiced by his failure to object or suggest that the prosecution could not have met its burden of proving the inapplicability of the washout period. On the face of the record it is highly improbable that the exception applies since it could apply only if defendant committed the offenses for which he was convicted after his release from custody in December 1996 prior to the commencement of that prison term. Since the washout rule is entirely statutory, we apply the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, and see no reasonable probability that a result more favorable to defendant would have resulted if the dates of the prior offenses were reflected in the record.

#### Waiver of jury trial on prior convictions

Defendant next argues that he did not waive his right to a jury trial on the prior conviction allegations because the trial court misstated the right that he was waiving. Prior to accepting his waiver, the court told him, “You know you have a right to a jury

trial with regard to the determination as to whether you're the person who was convicted on these priors.”

The right to a jury trial on the issue of prior convictions is entirely statutory, deriving from sections 1025 and 1158. (*People v. Epps* (2001) 25 Cal.4th 19, 23.) It is limited to whether the defendant suffered the convictions. This issue “subsumes the question of identity—that is, whether the defendant is the person described in the records of the prior conviction—but also may include the question whether the alleged prior conviction *ever even occurred*. For example, in a rare case, the records of the prior conviction may have been fabricated, or they may be in error, or they may otherwise be insufficient to establish the existence of the prior conviction. Though subdivision (c) of section 1025 gives the question of identity to the court, the question whether the alleged prior conviction ever occurred, when *legitimately* at issue, remains for jury determination under subdivision (b).” (*Id.* at p. 25, second italics added.)

This last point is fatal to defendant’s argument. He does not suggest there is any legitimate question whether he suffered the prior convictions. The record contains the evidence on which the court determined that he suffered the prior convictions, and he casts no aspersions on the authenticity of that evidence. As the *Epps* court noted, the question of identity is subsumed in the question of whether one suffered the prior convictions. Therefore the trial court’s statement was not entirely incorrect. To the extent the court’s statement did not clarify the subtle distinction between these issues, we need decide only whether it is “ ‘reasonably probable that a result more favorable to [the defendant] would have been reached’ ” if the court had stated the matter more precisely. (*People v. Epps, supra*, 25 Cal.4th at p. 29, quoting *People v. Watson, supra*, 46 Cal.2d at p. 836.) There is no reason to believe that a fuller explanation would have affected defendant’s waiver, nor is there any basis to believe that defendant’s sentence would have differed if he had withheld his waiver and the issue had been submitted to the jury.

#### *Blood and saliva samples*

Finally, defendant argues that the court erred in ordering him to submit to blood and saliva samples because, at the time he was sentenced, he was not subject to such a

requirement. When defendant was sentenced, section 296 provided that “Any person who is convicted of any of the following crimes . . . shall . . . be required to provide two specimens of blood, [and] a saliva sample . . . for law enforcement identification analysis . . . .” The statute went on to list specific crimes to which the statute applied and second degree robbery, for which defendant was convicted, was not among the crimes listed.

In November 2004, approximately a year after defendant was sentenced, the voters passed Proposition 69, which amended sections 296 and 296.1 so that the sampling requirements now apply broadly to any person convicted of *any* felony offense. Initially we note that defendant did not object to the imposition of this order at the time he was sentenced, but the issue is nevertheless cognizable on appeal because it presents purely a question of law. (See, e.g., *People v. Stowell, supra*, 31 Cal.4th at p. 1113.)

Section 296.1, defining “Who must give samples; [and] when samples must be collected,” provides that samples shall be collected from “Each adult person arrested for a felony offense,” and also from any “person subject to this chapter [who] did not have specimens, samples, and print impressions taken immediately following arrest or during booking or intake procedures.” (§ 296.1, subds. (a)(1)(A) & (a)(1)(B).)<sup>3</sup> Section 296.1, subdivision (b) explicitly provides that “Subdivision (a) and all of its paragraphs shall have retroactive application. Collection shall occur . . . regardless of when the crime charged or committed became a qualifying offense pursuant to this chapter, and regardless of when the person was convicted of the qualifying offense.” The validity of this retroactive provision as to persons who have not been convicted of a crime or who have completed their sentence is currently being challenged in other litigation. (*Weber v. Lockyer* (N.D. Cal.) No. CV-04-5161-BZ.) Defendant argues that if the provision is

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<sup>3</sup> Section 296.1, subdivision (a)(2)(A) provides that “Any person . . . who is imprisoned or confined or placed in a state correctional institution . . . after a conviction of any felony or misdemeanor offense . . . shall provide buccal swab samples and thumb and palm print impressions and any blood or other specimens required pursuant to this chapter, immediately at intake, or during the prison reception center process, or as soon as administratively practicable at the appropriate custodial or receiving institution . . . .”

nullified he should not be subject to an order directing him to submit for which there was no authority when entered. Although defendant is not within the class of persons on whose behalf the statute is currently being challenged, we perceive no harm in accepting his position. The provision should not have been included in the judgment when entered. Although we shall order that the offending provision be stricken from the judgment, defendant will nevertheless be required to submit samples under section 296.1, subdivision (a)(2) absent a judicial determination of the invalidity of that provision.

### **DISPOSITION**

The order directing defendant to submit blood and saliva samples shall be stricken from the judgment, without prejudice to the right of the People to compel the submission of such samples pursuant to section 296.1, and in all other respects the judgment is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Parrilli, J.