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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEITH GILBERT, Defendant and Appellant.	D051755 (Super. Ct. No. SCS210341)

APPEAL from a judgment of the Superior Court of San Diego County, Edward P. Allard III, Judge. Affirmed.

A jury convicted Keith Gilbert of unlawfully driving a stolen vehicle (Veh. Code, § 10851, subd. (a), count 1) and receiving a stolen motor vehicle (Pen. Code, § 496d, count 2.)[1] In bifurcated proceedings, Gilbert admitted to two prior prison convictions for burglary (§§ 459; 667, subdivisions (b) through (i) and 1170.12.) The trial court sentenced him to six years in prison.

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

Gilbert contends the trial court abused its discretion in permitting the prosecutor to argue to the jury that Gilbert did not call a certain witness to testify at trial. We affirm.

FACTS

Jose Gonzalez testified that on April 18, 2007, he discovered his Honda Civic car was missing. He had not given anyone permission to use it.

Luis Ochoa testified that on April 19, 2007, at approximately 1:00 a.m., he was at his apartment in Chula Vista. He heard a car pull up and its door slam. He went downstairs and told Gilbert, who was the lone passenger in the car, to leave. Ochoa went back upstairs.

Hilda Rivera, a neighbor of Ochoa's, testified that Gilbert had parked in the spot next to her car. She and her daughter, Alma Melendez, went downstairs. Rivera told Gilbert she needed that parking spot. Gilbert eventually left. Melendez testified she called the police, and subsequently described for them the car Gilbert had driven. Approximately one hour later, Rivera and Melendez together, and Ochoa separately, made positive curbside identifications of Gilbert as the one who had driven the Honda Civic.

Chula Vista Police Department Officer Jimmy Faddis testified that he responded to a call at 358 Vance Street in Chula Vista. Faddis obtained a statement from Ochoa regarding Gilbert. Faddis interviewed Rivera, who pointed out a black Civic Honda vehicle and described Gilbert, who had just left the vehicle and was walking eastbound on 4th Avenue. A police computer check showed that Jose Gonzalez owned the Honda

Civic, which had been reported as stolen. Based on Rivera's description, Gilbert was detained.

Chula Vista Police Department Officer Juan Camacho testified that at approximately 1:30 that morning, based on a description radioed to him, he detained Gilbert, who was walking on Vance Street. Gilbert told the police he was returning from his girlfriend's house.

Chula Vista Police Department Officer John Delgado testified that he responded to a call to Vance Street. Except Gilbert, there was no pedestrian or vehicular traffic on that street. Delgado apprehended Gilbert and advised him of his rights under *Miranda v. Arizona* (l966) 384 U.S. 436, and interviewed him. Delgado testified regarding that interview as follows:

"[Prosecutor:] What did [Gilbert] say he was doing in the area?

"[Delgado:] He said that he was just leaving his girlfriend's house.

"[Prosecutor:] Well, where did he tell you his girlfriend lived?

"[Delgado:] He described the apartment complex of his girlfriend in the middle of 300 Vance.

"[Prosecutor:] Could he give you the address? [¶] . . . [¶] . . .

"[Delgado:] No, sir.

"[Prosecutor:] Could he give you her name?

"[Delgado:] No, sir.

"[Prosecutor:] Did you ask those things?

"[Delgado:] Yes, Sir."

At the close of testimony, the prosecutor moved the court for permission to argue to the jury Gilbert had failed to call his girlfriend as witness. The trial court granted the motion, ruling that the applicable case law made it "very clear . . . that the People are allowed to comment on the defense's failure to call logical witnesses."

During closing argument, the prosecutor referred to Gilbert's comment to Officer Delgado that he had been at his girlfriend's house. The prosecutor stated, "but [Gilbert] can't say the address of the girlfriend or even her name. [¶] Why not? Is it because he came from the stolen car? Where is the girlfriend? Where is the girlfriend? We just had a trial. Wouldn't you expect that girlfriend to be here? Wouldn't you have expected to hear evidence of that there was a girlfriend who lived there, that he was there that night? Wouldn't you have expected to hear that? But you didn't. He didn't know her name that night. That was a bold-face misleading statement; wasn't it? Because if it wasn't, she'd be right here yesterday; wouldn't she? She'd tell you that the defendant was with her. She, at a minimum, would tell you, 'I lived there.' [¶] Once you know that that's not true, you put that together with the three identifications of the defendant, and you put that together with Camacho and Delgado watching him walk by from where the stolen car was, I'd submit to you that we've proven our case; okay? There is no other explanation for those circumstances."

The prosecutor continued, "You've got three identifications; you've got [Gilbert] telling a bogus story; you've got the failure to call the girlfriend; consciousness of guilt with those statements; you got [the victim] saying, 'I didn't give him permission.' Folks,

that all lines up to a guilty verdict, and we are going to ask you convict him on both counts."

DISCUSSION

Gilbert contends the trial court abused its discretion by allowing the prosecutor to argue that he failed to call his girlfriend as a witness, although her testimony was immaterial. Moreover, he contends, the prosecutor's argument shifted the burden of proof to him or created the assumption that he was guilty if he could not prove he was telling the police the truth regarding his girlfriend.

A prosecutor's comment on a defendant's own failure to testify at trial is impermissible because it undercuts the privilege against self-incrimination. (*Griffin v. California* (1965) 380 U.S. 609, 614-615.) But as Gilbert concedes, the California Supreme Court has held that *Griffin's* prohibition does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 372.) "The failure of a defendant to call an available witness whom he could be expected to call if that witness testimony would be favorable is itself relevant evidence. The omission traditionally has been considered an admission by conduct — an admission that the witness's testimony would not be favorable." (*People v. Ford* (1988) 45 Cal.3d 431, 447.) The California Supreme Court has also held that, "a rule permitting comment on a defendant's failure to call witnesses is subject to criticism if applied when the reason for his failure to do so is ambiguous, or if the defendant is simply standing on his right to have the state prove his guilt. Therefore, the trial court must have discretion to determine

when the circumstances of the case are such that comment is not permissible." (*Id.*, at p. 447.)

Gilbert asserts, "During the four months that elapsed between the incident and the trial, [the girlfriend] may have, for example, moved to the east coast to be with her mother." This argument is speculative, and provides no basis for reversal of the verdict because Gilbert presented no trial evidence regarding the actual whereabouts of his girlfriend at the time of trial.[2] The argument also is waived because it was not timely made in the trial court. Objections not presented to the trial court cannot be raised for the first time on appeal. (*In re Michael L.* (1985) 39 Cal.3d 81, 88.)

At any rate, any error was harmless under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, because it was not reasonably probable the trial result would have been more favorable to Gilbert absent the prosecutor's argument regarding his failure to call his girlfriend to testify. There was overwhelming evidence of Gilbert's guilt: Jose Gonzalez testified he did not give Gilbert permission to use his vehicle. Rivera identified the Honda as the vehicle Gilbert had driven. Rivera, Ochoa and Melendez saw Gilbert up close and within one hour made positive curbside

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[2] The trial court's response to a similar defense counsel argument is equally applicable here: "[Y]our theory now is that, basically, 'Well, I'm not so sure I was really on notice, so therefore, is it logically anticipated?' [¶] Now, here's the real remedy for that. . . . [Y]ou [c]ould have said, 'This is the first time we knew about this, that he does have a girlfriend; we don't know if we can get in touch with her; we're going to subpoena her.' That was not done. So I don't buy the argument that now, basically . . . you were put on notice. . . . [Y]ou could have even asked the court for a continuance if it was so important . . . . But there's been no proffer to the [c]ourt that there's any need, basically, to go out and find this woman."

identifications of him. Accordingly, we conclude there was no prejudice to Gilbert, and the trial court did not abuse its discretion in permitting the prosecutor's closing argument.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.