Filed 10/23/17 P. v. Talian CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. STEVEN TALIAN, Defendant and Appellant.	B271653 (Los Angeles County Super. Ct. No. BA407892)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Steven Talian of second degree murder after the body of Richard Michael Ramirez was found where Talian had placed it in a garbage container outside the apartment building where he lived. Talian argues the trial court erred by refusing to instruct the jury on self-defense theories, and the prosecutor committed misconduct in her closing arguments. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Who Lived in the Apartment Building Where the Crime Occurred*

Gregoria Martinez lived on the first floor of an apartment building at 1006 North Mariposa Avenue. Talian lived on the second floor. Carolina Lopez also lived on the second floor across the hall from Talian, and she was the building manager. Lopez thought Talian was a good tenant. The only problem she ever had with him was that he used too much water bathing his children when they and Talian's "common law wife" came to visit.

Pedro Hernandez was the manager of the building next door. Dora Lyons was Lopez's and Hernandez's supervisor.

Ramirez, whom the residents referred to as "Slow" or the "Cholo with the earrings," was not a stranger to the Mariposa apartment building or to Talian. Martinez saw Ramirez a number of times near the apartment building, and she saw Talian and Ramirez standing and talking in the building and in Talian's car. Martinez thought Ramirez and Talian were friends, and she saw them hanging "around on the street." Lopez, the

building manager, saw Ramirez "almost every day." Lyons, the building supervisor, said she also saw Ramirez in or near the apartment building and occasionally spoke with him.

At some point, Ramirez was banned from the building. Lopez had two conversations with Talian about not letting Ramirez into the building, and she told Talian Ramirez was a bad person and had a gun. Talian said Ramirez had been at his apartment but left. Lopez often called the police about Ramirez.

B. *What the Neighbors Found in the Trash Container*

One day in February 2013, after Talian had been living in the apartment for five months, Martinez saw Talian in the apartment building, "coming down the stairs and on his way out," carrying a large black garbage bag in a bear hug. Talian "was wearing no shirt and his pants were down" or "loose." Talian walked outside with the garbage bag to a rolling, city-provided trash container.

Lyons was outside a nearby building and saw Talian, who was "almost half naked" because his pants "were way down and he had no shirt on." Lyons saw Talian pushing down on some items inside the trash container and putting "stuff on top of the trash." Lyons approached and asked Lopez, who was walking a neighbor's dog, "What's going on with this person?" Lopez said he was a tenant.

Hernandez was also outside and saw Talian struggling with the trash container. Hernandez approached Talian and noticed he had a cut and blood on his finger. Lopez walked up and asked Talian what he was doing and what he had "in there." Talian did not respond, but he asked her what time the trash

collectors came to pick up the trash. Lopez also saw Talian had blood on his hand.

Lopez went with Talian upstairs to the front door of Talian's apartment, which was locked. Lyons followed them "to see what was going on." Lopez asked Talian to open the door, and Talian said he did not have the keys, although Lopez could hear the sound of keys in his pocket. Lopez opened the door with her key, walked into the living room of the apartment, and saw it was in disarray. She and Lyons saw a mattress on the floor and "feathers all over the place." It appeared to Lyons as if someone had broken into the apartment, although she said she was just guessing about that.

Talian looked nervous. Lyons, who had experience with individuals who were under the influence of drugs (including her son) and could recognize the symptoms, believed Talian was under the influence of drugs because of the size of his pupils and the way he was acting. Lyons told Lopez to leave and told Talian to call the police. Talian walked toward the kitchen, picked up a gun from the counter, put it in his pocket, and walked quickly out of the apartment. Lyons called the police after Talian left.

Meanwhile, Hernandez went to check the back of the building, where there was a door with a screen that opened to stairs that lead to the back doors of the apartments of Talian and his next door neighbor. Hernandez testified that, while there was no damage to the screen door, there was a tear in the screen. Hernandez explained there was a hole in the screen door that had been "covered with a piece of metal," which someone had "pulled" off. The door, however, was locked.

Lopez went downstairs and approached the trash container, where Hernandez and Lyons joined her. Hernandez

looked into the trash container, moved some plastic out of the way, saw the soles of Ramirez's feet, and said there was a dead body inside. Lopez did not believe him, so she looked inside and also saw the two feet. Ramirez's body was naked below the waist.

C. *How Talian Was Apprehended*

The police received a call about a murder at the Mariposa apartment building and eventually found Talian running on a nearby street. Officers caught up with Talian, who put his hands up, slowly went down to his knees, and then lay on his stomach. Talian "was wearing minimal clothing."

D. *What the Investigation Found*

The coroner arrived and found Ramirez's body head down in the trash container. A field training officer and a coroner criminalist arrived on the scene, and they discussed how best to remove the body. They decided to turn the trash container on its side and pull the body out "as someone pulled the trash can away from the body." They found the body was loosely wrapped in a white comforter and a large piece of black plastic, "much larger than a trash bag." The body "was kind of folded into" the plastic and comforter, so that when the investigators lifted the material off the body "it was kind of like opening a clamshell or something." Ramirez was wearing a gray hooded sweatshirt and a purple and gold jersey of a Los Angeles professional basketball team.

Police investigators and criminologists went into Talian's apartment and observed bloodstains throughout the unit, including on the front door, the living room wall, the kitchen, the interior door to the bedroom, the bathroom, the living room

carpet, a couch, a mattress, a pair of shorts, a shirt, and a piece of paper. There were "blood spatter, blood droplets, and bloodstains on the walls of the living room." Underneath the cushion on the couch, investigators found "a large dark stain on the bottom of the cushion and a significant pool of what appeared to be blood on a piece of fabric that lined the bottom of the couch." They also found a portion of a broken lamp (police found the other part of the lamp outside, next to the trash container), feathers, and 10-pound exercise weights from a well-known commercial gym. The DNA profile obtained from the bloodstains on the couch cushion and the bathtub matched Ramirez's DNA profile. The DNA profile obtained from the bloodstains on the door and the floor matched Talian's DNA profile. There was also evidence of methamphetamine and marijuana in Ramirez's blood.

One of the detectives checked the back door and found it locked. He found no damage to the doors, the door locks, or windows of the apartment. The detective was looking for signs of a break-in but did not find any.

The forensic pathologist who performed the autopsy concluded Ramirez died of "multiple traumatic injuries" to the head caused by "some type of hard instrument," like a bat, pipe, lamp, or other hard instrument. He found four lacerations on the left side of the head and six on the back of the head, ranging from one to three inches. Some of the tears in the skin were "complex tears, sort of having a triangular shape or stellate shape," some had "length and width" while "others were just a curvy line," and some had adjacent abrasions where the skin had been scraped or sloughed off. "Several of the lacerations were gaping wounds" in which the pathologist could see "the internal structures, including the bone underneath the laceration and fracturing of

that bone" and, in one instance, "the brain material through the opening." X-rays showed "several fractures to the skull" and "a loose plate of bone that was mobile or loose within the head." There were also tears in the membrane surrounding the brain and evidence of hemorrhaging within the skull. The autopsy revealed no defensive wounds.

Based on "very little rigor mortis" and the presence of "areas of discoloration and slipping of the skin postmortem," the forensic pathologist estimated Ramirez had died up to one to two days before he was discovered. The pathologist testified Ramirez "most likely did not die instantaneously or right after he had the blows," and the pathologist could not state definitively if Ramirez was alive when Talian put him in the trash container. The pathologist opined that, if Ramirez "was still alive when he was put in the trash can, then being placed facedown, having his head bent in some way to obstruct his breathing, possibly releasing fluids from his mouth or blood from the wound and inhaling it, . . . may have also contributed" to Ramirez's death.

E. *What the Jury Found*

The People charged Talian with the murder of Ramirez. (Pen. Code, § 187, subd. (a).)[1] At the conclusion of the trial, at which Talian did not testify, the jury found him guilty. The trial court sentenced Talian to a prison term of 15 years to life.

---

1 Statutory references are to the Penal Code.

DISCUSSION

A. *The Trial Court Did Not Err in Denying Talian's Request for an Instruction on Justifiable Homicide in Defense of Home or on Imperfect Self-defense*

At trial, counsel for Talian asked the court to instruct the jury with CALCRIM No. 506, Justifiable Homicide: Defending Against Harm to Person Within Home or on Property, and CALCRIM No. 571, Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another. The court refused, ruling there was no substantial evidence to support giving the instructions. The court stated there was no evidence Talian "reasonably believed he was defending his home against a person who tried to commit a forcible and atrocious crime, who tried to enter the home intending to commit an act of violence. . . . Even if you could somehow say this damage to the back door screen downstairs shows that Mr. Ramirez broke in—and I think that's a pretty big leap—there's no evidence that he was trying to commit a forcible and atrocious crime as opposed to coming in and stealing somebody's cell phone." The court also stated there was no evidence of a break-in, a struggle, or provocation by Ramirez to support an instruction on voluntary manslaughter. Talian argues the trial court erred in refusing to give instructions on justifiable and imperfect "self-defense of his person in his home" because, contrary to the trial court's ruling, there was substantial evidence Ramirez "forcibly entered Mr. Talian's apartment while Mr. Talian was present."

The trial court must instruct on perfect self-defense or defense of habitation, which is a complete defense to murder (*People v. Moye* (2009) 47 Cal.4th 537, 550; *People v. Humphrey*

(1996) 13 Cal.4th 1073, 1082; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744), or imperfect self-defense, which reduces murder to voluntary manslaughter "when a defendant acts in the actual but unreasonable belief that he is in imminent danger of death or great bodily injury" (*People v. Duff* (2014) 58 Cal.4th 527, 561-562; see *People v. Simon* (2016) 1 Cal.5th 98, 132), only if there is substantial evidence to support giving such an instruction. (*People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1049; *People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.'" (*People v. Simon*, at p. 132.) It is not speculation. (See *People v. Waidla* (2000) 22 Cal.4th 690, 735 ["'speculation is not evidence, less still substantial evidence'"]; *People v. McCloud* (2012) 211 Cal.App.4th 788, 807 ["'[s]peculation is not substantial evidence'"].) Nor is it """"whenever *any* evidence is presented, no matter how weak."""" (*People v. Wilson* (2005) 36 Cal.4th 309, 331; accord*, People v. Simon*, at p. 132; *People v. Larsen* (2012) 205 Cal.App.4th 810, 823.)

CALCRIM No. 506 is based on section 197, which provides that homicide is justifiable "[w]hen committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein." Although the statute refers to one who commits a felony, the Supreme Court in *People v. Ceballos* (1974) 12 Cal.3d 470 held the felony must be a "forcible and atrocious crime" that

endangers human life, like murder, mayhem, rape, or robbery (but not, "under all circumstances," burglary). (*Id.* at pp. 477-479; see *People v. Jones* (1961) 191 Cal.App.2d 478, 481.) CALCRIM No. 571 states the law of imperfect self-defense. (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305-1306, 1307.)

Substantial evidence did not support giving either instruction because there was no evidence Talian acted, reasonably or unreasonably, to defend his home or himself from Ramirez. The only evidence concerning the two men's relationship and interaction was that they knew each other, were seen together in and around the apartment building, and appeared to be on friendly terms. And there was no evidence Ramirez broke into Talian's apartment. There was testimony about damage to the door leading to the back stairs, but even if an intruder were to get past that door, he or she would still have to go up the stairs and break in through the back door of Talian's apartment, and the detective found that door locked and undamaged. Indeed, the detective found no damage to any of the doors, windows, or locks of the apartment, or any other sign of a break-in.[2]

Moreover, even if there were evidence Ramirez broke into Talian's apartment, there was no evidence Ramirez intended or endeavored to commit an atrocious crime by force, as required by section 197. (See *People v. Ceballos*, *supra*, 12 Cal.3d at p. 483 [use of deadly force under section 197 is "justified only if the

---

[2] Talian points to Lyons's statement that from the condition of Talian's apartment she guessed or "figured somebody broke in." Lyons, however, was describing the appearance of the apartment; she was not making a statement about an actual break-in.

offense was a forcible and atrocious crime"].) For example, there was no evidence Ramirez tried to rob or murder Talian, or that he had a weapon when he was in the apartment. Lopez told Talian that Ramirez was a bad person and owned a gun, but there was no evidence Ramirez had or used a gun in Talian's apartment the day Ramirez was killed. (Cf. *People v. Vezerian* (1948) 85 Cal.App.2d 708, 720-721 [defendant was entitled to an instruction stating he had a right to protect himself, his family, and his property from intruders to his liquor store, and to "take the life of the intruder," where multiple witnesses saw the intruders fighting with the defendant and his brother and heard one of the intruders say he had a gun].)

Talian argues "Ramirez could have forced his way into the stairway that [led] to the back door of Mr. Talian's apartment, as evidenced by the damage to the lock and screen of the entrance to inside the stairway, and then . . . entered Mr. Talian's apartment by the back door that was unlocked at that time," and, "[a]fter Ramirez was dead, Mr. Talian, who just had killed a man, locked the back door while figuring out how to get rid of him." Yes, it might have happened that way. But there was no evidence it did. Talian's theory consists entirely of unsupported speculation; it does not qualify as substantial evidence. "'By definition, "substantial evidence" requires *evidence* and not mere speculation. In any given case, one "may *speculate* about any number of scenarios that may have occurred. . . . A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work."'" (*People v. Perez* (1992) 2 Cal.4th 1117, 1133; accord, *People v. Wallace* (2017) 15 Cal.App.5th 82, 93; see *People v. Wilson* (1992) 3 Cal.4th 926, 940 [trial court properly refused

an instruction on a lesser offense where "[t]he evidence did not support the factual scenarios now advanced by defendant" and there was "only bare speculation, not substantial evidence, to support the theory presently advanced by defendant"].)

Citing section 198.5, Talian argues he "was '*presumed* to have held a reasonable fear of imminent peril of death or great bodily injury' to himself because he had used force 'against another person, not a member of the family or household' who had unlawfully entered or forcibly entered, and Mr. Talian knew or had reason to believe that a forcible entry had occurred." Talian contends this presumption applied because he was "the lawful tenant and resident" of the apartment and he had to use force against Ramirez, "who had unlawfully entered or forcibly entered" the apartment.

Section 198.5, enacted as the Home Protection Bill of Rights (*People v. Hardin* (2000) 85 Cal.App.4th 625, 633), provides: "Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred."[3] "'For section 198.5 to

---

[3] Section 198.5 "'was intended to give residential occupants additional protection in situations where they are confronted in their own homes by unlawful intruders such as burglars.'" (*People v. Grays* (2016) 246 Cal.App.4th 679, 686; see *People v. Owen* (1991) 226 Cal.App.3d 996, 1005 ["[t]he legislative history

apply, four elements must be met. There must be an unlawful and forcible entry into a residence; the entry must be by someone who is not a member of the family or the household; the residential occupant must have used "deadly" force (as defined in § 198.5) against the victim within the residence; and, finally, the residential occupant must have had knowledge of the unlawful and forcible entry.'" (*People v. Hardin*, at p. 633, fn. 5; see *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494-1495.)

The presumption of section 198.5 did not apply because the first element was not present. As noted, there was no substantial evidence Ramirez unlawfully or forcibly entered Talian's apartment. (Cf. *People v. Brown*, *supra*, 6 Cal.App.4th at p. 1495 ["[i]t is undisputed there was evidence showing that [the victim's] entry onto the porch was unlawful and forcible" where the victim approached the defendant "menacingly with a hammer"].)[4]

---

of section 198.5 indicates the statute was enacted to permit residential occupants to defend themselves from intruders without fear of legal repercussions, to give 'the benefit of the doubt in such cases to the resident, establishing a presumption that the very act of forcible entry entails a threat to the life and limb of the homeowner'"].)

[4] The court in *Brown* concluded, however, that section 198.5 did not apply because the victim's entry onto "the ordinary, unenclosed front porch at issue" was not "entry into defendant's residence for purposes of section 198.5." (*People v. Brown*, *supra*, 6 Cal.App.4th at p. 1497.)

B. *The Prosecutor Did Not Engage in Prejudicial Misconduct*

In her closing argument, counsel for Talian argued her client acted in self-defense after Ramirez broke into the apartment, high on methamphetamine and carrying a gun, and Talian "neutralized the threat . . . of an intruder." Talian contends it was improper for the prosecutor to respond in rebuttal by arguing there was no evidence Talian acted in self-defense, the court had not instructed the jury on self-defense, and the jury could not consider self-defense "in reaching its verdict." According to Talian, "Given the state of the evidence and the nature of the case, . . . the only way there could have been direct evidence of self[-]defense would have been via Mr. Talian's testimony." Talian argues the prosecutor's rebuttal argument indirectly commented on Talian's "decision not to testify based upon his exercise of his Fifth Amendment right to remain silent."

"'Under the Fifth Amendment of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence.'" (*People v. Tafoya* (2007) 42 Cal.4th 147, 184; see *Griffin v. California* (1965) 380 U.S. 609, 615 ["the Fifth Amendment . . . forbids . . . comment by the prosecution on the accused's silence"].) "Where it is 'reasonably probable' that the prosecutor's comments misled the jury 'into drawing an improper inference regarding defendant's silence,' the remarks will be deemed to constitute *Griffin* error." (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1020.) The *Griffin* rule "'does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses.'" (*People v. Thomas*

(2012) 54 Cal.4th 908, 945; see *People v. Carr* (2010) 190 Cal.App.4th 475, 483.) "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. Sanchez* (2014) 228 Cal.App.4th 1517, 1523; see *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1273 ["[i]n reviewing whether a prosecutor's comment constitutes *Griffin* error, appellate courts are called to determine 'whether there is a reasonable likelihood that the jurors misconstrued or misapplied the words in question'"].)

Here is what the prosecutor said in her rebuttal argument:

"[The prosecutor]: Ladies and gentlemen of the jury, the defense gave you this long argument about self-defense. The judge had read jury instructions to you about what law applies in this case. Those juror instructions come out of a book called CALCRIM, California Jury Instructions. This is volume one. There's a whole other volume. There's a lot of them. You're not getting them all. You've got the ones that are for this case.

"Self-defense is a great thing because—it goes back to what I said earlier. We value human life. We understand that sometimes a life has to be taken in order to save another life. To justify that act, it must be excused. There's justifiable homicide. It's what enables a soldier to take the life of another person when they're fighting; an officer in the line of his duty; or when somebody threatens your life or the life of another, to defend yourself. We justify that. We justify that as a justifiable homicide.

"And this jury instruction is a list of self-defense for your home and yourself. There are instructions when self-defense applies, when evidence has supported that.

"Guess what you do not have in this case, ladies and gentlemen of the jury? You do not have a self-defense instruction. They exist. When evidence supports a finding of—

"[Counsel for Talian]: Objection.

"The Court: Overruled.

"[The prosecutor]: — when evidence supports a finding of self-defense, you are given that instruction so that you can consider it and evaluate it and determine, was this a justifiable homicide? You're given it.

"You weren't given it in this case. Why? Because there was no evidence. There was no evidence presented in this trial at all of self-defense, that anybody feared for their life.

"[Counsel for Talian]: Your Honor, I'm going to object. This is comment on my client's constitutional right not to testify.

"The Court: The objection is overruled.

"[The prosecutor]: There was no evidence presented in this case, ladies and gentlemen of the jury. None. The defense got up here and argued and told you that you must consider self-defense, when nothing was presented in regards to it."

There is no reasonable likelihood the jurors understood the prosecutor's argument as an indirect comment on Talian's exercise of his constitutional right not to testify. The prosecutor was responding to counsel for Talian's argument that Talian acted in self-defense and arguing there was no evidence supporting or jury instruction authorizing the jury to consider it. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1266 ["'*Griffin*'s prohibition against "'direct or indirect comment upon the failure

of the defendant to take the witness stand,'" however, "'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, 756 ["[t]he prosecutor's remarks, viewed in context, can only be seen as a fair comment on the state of the evidence, comment falling outside the purview of *Griffin*"].) Indeed, it is hard to see how the prosecutor could have responded to counsel for Talian's self-defense argument without mentioning there was no evidence to support it, and it is very unlikely the jury would have understood the argument as a comment on Talian's right not to testify.

Moreover, as the People point out, "This was not a case where the defendant was the only person who could have possibly provided evidence of self-defense." In support of his self-defense theory, Talian could have introduced evidence, if there were any, of the condition of the interior and exterior of the apartment and its entry points, the nature of the injuries and wounds to Ramirez, or observations of witnesses who had seen Talian and Ramirez argue in the past or had knowledge of a dispute between them. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [no *Griffin* error where the "prosecutor did not allude to the lack of refutation or denial by the sole remaining witness, defendant, but rather to the lack of *evidence*, which might have been presented in the form of physical evidence or testimony other than that of defendant"]; *People v. Sanchez*, *supra*, 228 Cal.App.4th at p. 1526 [a prosecutor's comments may constitute *Griffin* error if the defendant is "the only witness who could have been called to refute alleged uncontradicted evidence," but not if "other evidence could have been produced to refute the uncontradicted evidence"]; accord, *People v. Young* (2005) 34 Cal.4th 1149, 1196.)

Talian also argues the prosecutor engaged in misconduct by suggesting in her rebuttal argument "a new theory" that Talian "invited Ramirez into the apartment for sex and then inexplicably bludgeoned him to death." Responding to counsel for Talian's argument that Talian was defending himself after Ramirez broke into his apartment and to a reference to "the elephant in the room," the prosecutor argued:

"I don't mean to embarrass anyone, and I don't mean to offend anyone, but this is the elephant in the room. The victim in this case, Mr. Ramirez, is naked. He's naked. So let me get this straight. If I'm to buy this theory the [counsel for Talian] gave to you, once Mr. Ramirez magically gets into this locked apartment, and he sees the defendant and he has a gun and they're struggling, and the defendant has to pick up a weapon and strike his head, when does he decide to get naked? Because that's a fact. The fact is this individual is naked from the waist down. He is full monty.

"When did that happen? This is the elephant in the room. Because not only is the victim naked, how is the defendant walking around? His business is showing. When did this happen? When did they decide to unclothe?

"That is an important element because that's a fact. . . . I mean, one can only logically assume that he got naked before he died because, if the defendant killed him and then took off his pants and his underwear, that's just kind of weird; and I don't see how that goes to self-defense at all.

"Now, how comfortable do you have to be with an individual to get undressed in front of them? I mean . . . the next thing we know, he's half naked in the garbage can. That's what we know. That is what the evidence shows.

"How does this play into this imaginative theory of self-defense? How do you account for that? He broke in and he thought, 'Oh, I should take my pants off because, if I take something, I don't want to be encumbered by pockets that I may have in my pants?'

"No. That makes no sense whatsoever. The victim, I could only assume, felt comfortable getting naked in that apartment, in front of that individual, and considering how we saw the defendant, we can only assume he felt comfortable letting his business be seen.

"Now, you heard no evidence that there was actual sexuality. And I can't tell you that there was. All I can tell you is Mr. Ramirez is naked and he's on the couch. That's where he died."

Later, the prosecutor, referring to Talian's "common law wife," stated, "Apparently, when [she] went away, the defendant went to play." Counsel for Talian stated, "Objection. There's no evidence of a sexual assault." The court stated, "I don't believe [the prosecutor] is arguing it's an assault. The jurors heard all of the evidence. They will decide what evidence has been shown by the People."

The trial court's ruling on the objection counsel for Talian made was correct. The prosecutor did not argue Talian sexually assaulted Ramirez before he killed him. She argued Ramirez's state of partial undress made Talian's self-defense argument (for which there was no substantial evidence and on which the trial court properly did not instruct the jury) factually implausible. (See *People v. Winbush* (2017) 2 Cal.5th 402, 484 ["'the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account'"]; *People v. Hillhouse* (2002)

27 Cal.4th 469, 502 [prosecutor may "vigorously attack the defense case and argument if that attack is based on the evidence"].) It was improper for the prosecutor to suggest there was a consensual sexual encounter between Talian and Ramirez and to argue "the defendant went to play" because there was no evidence in the record to support either statement. (See *People v. Thomas* (2011) 51 Cal.4th 449, 494 [a prosecutor "'may not assume or state facts not in evidence [citation] or mischaracterize the evidence"']; *People v. Benson* (1990) 52 Cal.3d 754, 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"].) Counsel for Talian, however, did not object on that ground. Counsel for Talian objected only on the ground there was no evidence of sexual assault.

Talian does correctly point out that the prosecutor committed misconduct in her closing argument by misstating the law regarding the element of malice for murder. The prosecutor stated: "Now, when a killing is proved to have been committed by the defendant and nothing further is shown, the presumption applies that it was malicious and an act of murder. . . . Human life is valuable. We value it. It is the most precious thing. And because it holds such a value, the way the law determines it is, if someone takes the life of another individual and you know nothing else except that that person took the life of another individual, we start at second degree murder. That is where we start. Because we presume, in taking that life, that it was malicious and an act of murder. That is what we presume because of the value that human life has. In other words, ladies and gentleman of the jury, if 'A' kills 'B,' and that is all you know, that 'A' killed 'B,' it is second degree murder."

No, it isn't. For murder, first degree or second degree, the law requires the People to prove beyond a reasonable doubt that the defendant killed with malice. (§ 187, subd. (a); see *People v. Cravens* (2012) 53 Cal.4th 500, 507 ["second degree murder . . . is 'the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder'"]; *People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1112 ["[a] conviction of second degree murder requires a finding of malice aforethought"]; *People v. Martinez* (2007) 154 Cal.App.4th 314, 332 ["second degree murder [is] a crime that requires a finding of malice"].) Malice is not presumed just because the defendant killed, and the prosecutor's statement to the contrary was misconduct. (See *People v. Huggins* (2006) 38 Cal.4th 175, 253, fn. 21 ["it is misconduct to misstate the law during argument"]; *People v. Boyette* (2002) 29 Cal.4th 381, 435 ["it is misconduct for the prosecutor to misstate the applicable law"]; *People v. Otero* (2012) 210 Cal.App.4th 865, 870-871 ["[i]t is misconduct for a prosecutor to misstate the law during argument," particularly "when [the] misstatement attempts 'to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements'"].)

As Talian acknowledges, however, his trial counsel did not object to this argument or ask the trial court to admonish the jury to disregard the prosecutor's statements. Therefore, Talian forfeited the argument on appeal. (See *People v. Williams* (2016) 1 Cal.5th 1166, 1188 ["defendant forfeits prosecutorial misconduct claims by failing to object and request an admonition"]; *People v. Clark* (2016) 63 Cal.4th 522, 577 ["[t]o preserve a claim of prosecutorial misconduct on appeal, 'the

defense must make a timely objection at trial and request an admonition'"]; *People v. O'Malley* (2016) 62 Cal.4th 944, 1010 ["[d]efendant failed to object to any of the statements he now asserts were misconduct, thus forfeiting each claim on appeal"].) And Talian does not argue his trial counsel provided ineffective assistance by failing to object to these misstatements of law by the prosecutor. (See *People v. Centeno* (2014) 60 Cal.4th 659, 674 ["'[a] defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel'"]; see, e.g., *People v. Jackson* (2016) 1 Cal.5th 269, 347 ["[r]ecognizing that defense counsel's failure to object to the prosecutor's statements at trial forfeited any claim of prosecutorial misconduct on appeal, [the defendant] argues that the failure to object constituted ineffective assistance of counsel"].)[5] Where, as here, "a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's

---

[5] Rather than objecting, counsel for Talian decided to address the issue in her closing argument. She argued to the jury: "So when [the prosecutor] says that there is a presumption that when 'A' kills 'B,' it's second degree [murder], not true. Not anywhere in this jury instruction, 520, that talks about the definition of murder, does it say that when 'A' kills 'B,' we presume it's murder. Not true. . . . What it says is that if you caused the death of another person with the state of mind called 'malice,' meaning you intended to kill them. So, for example, if Mr. Talian caused Mr. Ramirez's death and, in doing so, he intended to kill Mr. Ramirez, then that would be murder. You don't just ask if 'A' kills 'B.' That's not the question. The question is what was going on in Mr. Talian's mind."

attention by a timely objection. Otherwise no claim is preserved for appeal." (*People v. Morales* (2001) 25 Cal.4th 34, 43-44.)[6]

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J. MENETREZ, J.*

---

[6] Talian also points to the prosecutor's comments on rebuttal "noting that 'dead mean tell no tales,' implying that there was only one survivor of the struggle between Mr. Talian and Ramirez, and the one who was dead could not testify," which in turn was another "comment on [Talian's] decision not to testify based upon his exercise of his Fifth Amendment right to remain silent . . . ." Here is what the prosecutor said this time: "I don't mean to sound crude, and I don't mean to make light of things, but if you ever go to Disneyland and you go to the Pirates of the Caribbean ride, as you're on the boat and you're going under, one of the pirates says something that applies to this case. He says, 'Dead men tell no tales.' Richard Michael Ramirez is not going to get on that stand to tell you what's going on." Counsel for Talian, however, did not object to this comment, and again Talian does not argue on appeal his trial counsel was ineffective for not objecting.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.