

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 22 2008

FREEMAN D. GRIFFIN,

Petitioner-Appellant,

v.

KATHY PROSPER, Warden,

Respondent-Appellee.

No. 07-15405

D.C. No. CV-06-3261-MHP

MEMORANDUM*

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted January 15, 2008
San Francisco, California

Before: **WALLACE** and **SCHROEDER**, Circuit Judges, and **BENITEZ**,**
District Judge.

This is an appeal from the denial of a Petition for Writ of Habeas Corpus brought under 28 U.S.C. § 2254. The only issue certified for appeal is whether the prosecutor committed *Griffin* error when he remarked that the defendant did not

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Roger T. Benitez, District Judge for the Southern District of California, sitting by designation.

testify and there was “no evidence that he didn’t do it.” The prosecutor’s remark was a fair response to the defense counsel’s suggestion that the defendant’s not guilty plea was evidence that he did not commit the crime. *See U.S. v. Robinson*, 485 U.S. 25, 32 (1988). Furthermore, the remark was not “manifestly intended to call attention to the defendant’s failure to testify,” or “of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.” *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006) (citing *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987) (internal quotation marks omitted)). Therefore the California court’s decision affirming the conviction was not contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d).

Griffin also raises a sufficiency of the evidence argument with respect to his convictions under Cal. Pen. Code § 667.5(b). Because this issue was not certified, we construe this argument as a motion to expand the certificate of appealability and address it only to the extent we deem appropriate. *See* Ninth Circuit Rule 22-1(e); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1245 (9th Cir. 2005). Griffin raised the same sufficiency of the evidence argument before the district court; the court explicitly denied certification on the issue, and we do not deem it appropriate to expand the certificate of appealability.

AFFIRMED.