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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
JORGE OLIVEROS,
Defendant and Appellant.

A131345
(Contra Costa County
Super. Ct. No. 5-101012-3)

A jury convicted appellant Jorge Oliveros of reckless evasion of a peace officer (Veh. Code, § 2800.2, subd. (a))¹ and the trial court sentenced him to state prison. On appeal, appellant contends the court erred by instructing the jury with CALCRIM No. 372 — the instruction on flight — because “the sole charged offense was reckless evasion of a peace officer” and, as a result, the instruction permitted the jury to infer “consciousness of guilt of an element of the charged offense from any evidence of flight, which, in turn, reduced the prosecution’s burden of proof.” We disagree and affirm.²

¹ Unless otherwise noted, all further statutory references are to the Vehicle Code. Section 2800.2, subdivision (a) makes it a crime to flee or attempt to flee “from [a] pursuing peace officer” by driving “in a willful or wanton disregard for the safety of persons or property[.]” A defendant’s flight from a peace officer is done with “willful or wanton disregard” in violation of section 2800.2, subdivision (a) if, while fleeing, “either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.” (§ 2800.2, subd. (b).)

² While the appeal was pending, appellant filed a separate petition for writ of habeas corpus (A131859). We deny that petition by separate order filed this date.

FACTUAL AND PROCEDURAL BACKGROUND

The People charged appellant with unlawfully taking or driving a vehicle (§ 10851, subd. (a) (Count 1)), receiving stolen property (Pen. Code, § 496, subd. (d) (Count 2)), and reckless evasion of a police officer (§ 2800.2, subd. (a) (Count 3)). The People also alleged appellant had served prior prison terms (Pen. Code, § 667.5, subd. (b)) and was ineligible for probation (Pen. Code, § 1203, subd. (e)(4)). The court dismissed Counts 1 and 2 pursuant to Penal Code section 1118.

Prosecution Evidence

On the evening of July 21, 2010, Concord Police Officers Eduardo Montero and Jason Passama were in an unmarked gray Crown Victoria that was “obvious[ly] . . . a police car” at the Premier Inn in Concord when they noticed a motorcycle “backed into a parking spot.” According to Officer Montero, “many people will try to hide cars by backing into parking spots, if they don’t have a front [license] plate on. That way the police department can’t find the license plate, can’t use . . . computers to find out if they’re stolen. . . .” The officers determined the motorcycle was not registered and had been stolen about a week earlier.

Officer Passama went to the motel’s front office to see if the motorcycle’s owner was a registered guest. As he returned to the patrol car, he and Officer Montero saw a person — later identified as appellant — drive away on the motorcycle. The officers pursued appellant in their car. They lost track of appellant as he drove the motorcycle behind a truck and onto a pedestrian pathway. Oakland Police Officers Shawn Phalen and Matthew Forristall located appellant and drove after him in a marked patrol car with overhead lights and sirens activated. Officers Montero and Passama, who were behind Officers Phalen and Matthew, saw appellant turn onto Highway 242. At that point, Officers Montero and Passama activated the overhead lights on their car. Appellant did not stop. Instead, he kept driving and committed at least three Vehicle Code violations (§§ 22350, 21754, 21755).

Officer Phalen lost sight of the motorcycle; when he next saw it, it was “down in the dirt . . . on its side with a cloud of dust coming up from it, [on] the left side of the

roadway on the off-ramp.” Officer Phalen believed appellant was evading police because the motorcycle was stolen and because appellant “did not immediately yield [when the officers were] behind the motorcycle” with their cars’ lights and sirens activated. Instead, appellant drove “recklessly” and at a “high rate of speed” as the patrol cars pursued him. The officers pursued appellant for six tenths of a mile before he crashed.

A short time later, Officers Montero and Passama arrived where the motorcycle had crashed and saw it lying in the dirt. With the assistance of a canine unit, the officers searched for appellant in the “shrubbery and the dirt” near the crashed motorcycle. After Officer Montero had searched in the calf-high brush for about 30 minutes, he stepped on appellant, who was “hidden fairly well underneath the shrubs.” The officers arrested appellant. Officer Phalen searched him and found several sets of shaved keys “on four different key rings,” night vision goggles, and a plastic bag containing \$4,258 in cash.

Michael Baity was driving along Highway 242 when he saw the police chasing the motorcycle with lights and sirens activated. About 60 feet in front of Baity, the motorcycle hit the curb, ejecting the rider. The rider “kind of popped right back to his feet and went running.”

Defense Evidence

Appellant testified he buys and sells cars for a living. When he was arrested, he owned several vehicles he intended to sell, including the motorcycle; he had the keys to those vehicles in his pocket. He also had night vision goggles because he wanted to see any burglars breaking into his cars at night and over \$4,000 because he had just cashed an insurance check.

Appellant bought the motorcycle a few months before the incident but did not register it with the DMV. He did not have a license to drive the motorcycle. On the night of the incident, appellant was having dinner at a restaurant near the Premier Inn. Appellant had parked several of his vehicles — including the motorcycle — in the hotel’s parking lot and was driving the motorcycle to the restaurant. He did not see the police when he exited the hotel parking lot or when he turned onto Highway 242. As he was driving on Highway 242, he lost control of the motorcycle; it swerved across the highway

and hit the curb. Appellant lost consciousness when he hit the ground; when he regained consciousness, the police were arresting him. He did not remember crashing, getting up, or running into the bushes and hiding.

Jury Instructions

The People proposed instructing the jury with CALCRIM No. 372, which provides, “If the defendant fled [or tried to flee] (immediately after the crime was committed/ [or] after (he/she) was accused of committing the crime), that conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled [or tried to flee] cannot prove guilt by itself.”

Defense counsel asked that CALCRIM No. 372 “not be given.” Counsel explained, “I think that it’s basically subsumed by the evading charge. I think that it’s — they’re the exact same thing, and I don’t have any case law, I wasn’t able to look this up, but it would seem odd to me to give an instruction on flight and consciousness of guilt when that’s the basis of the charge against” appellant. The prosecutor responded, “I was thinking of flight after the crime, getting up and running into a bush and hiding.” The court replied, “Okay. You can argue that.” Defense counsel stated, “I understand that.”

The version of CALCRIM No. 372 the court delivered to jury omitted the parenthetical language “immediately after the crime was committed or after he was accused of committing the crime.” The court instructed the jury, “If the defendant fled or tried to flee that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee[,] it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.”

The court also instructed the jury on the elements of evading a police officer: (1) a peace officer was pursuing appellant; (2) appellant was driving a car and “willfully fled or tried to elude the officer, intending to evade the officer;” (3) during the pursuit, appellant drove with “willful or wanton disregard for the safety of persons or property;” (4) appellant saw or should have seen a “lighted red lamp visible from the front” of the

peace officer's "distinctively marked" car; and (5) the peace officer's car was "sounding a siren as reasonably necessary" and the peace officer was "wearing a distinctive uniform." The court also instructed the jury it had to find appellant guilty beyond a reasonable doubt and that the People were required to prove each element of the crime.

During closing argument, the prosecutor described how appellant evaded the police officers on his motorcycle and how he crashed. The prosecutor continued, "But he didn't stop there . . . the defendant would do just about anything to get away. It's pretty remarkable what Mr. Baity saw. He saw this crash, a flip over crash on a motorcycle, and a man get ejected. And he watched that man pop back up, helmet still on, and run. [¶] And you heard what direction he ran. . . . Not back to where the police were coming from. . . . Not [back to] where other cars were. Not back to businesses, to homes, but into the bushes." The prosecutor continued, "He la[y] down and hid there for half an hour with police calling out for him. And [he] didn't reveal himself until he was literally stepped on." The prosecutor explained, "Flight shows that someone knows that they [*sic*] have done something that can get them [*sic*] in trouble. You know that from your common sense. The law tells you that. After the defendant crashed he went to an extraordinary effort to flee. Got up, ran and hid in a bush for 30 minutes."

The jury convicted appellant of reckless evasion of a peace officer (§ 2800.2, subd. (a)). The court determined appellant had served two prior prison terms and sentenced him to state prison.

DISCUSSION

Appellant contends the court erred by delivering CALCRIM No. 372 because it "permitted the jury to infer an element of the evasion charge from evidence that did not necessarily support the finding of that fact beyond a reasonable doubt." According to appellant, the instruction permitted the jury to infer "consciousness of guilt of an element of the charged offense from any evidence of flight, which, in turn, reduced the prosecution's burden of proof." Appellant seems to argue that because willfully fleeing is an element of section 2800.2, subdivision (a), CALCRIM No. 372 effectively directed

the jury to find him guilty of violating section 2800.2, subdivision (a) based only on evidence of that one element of the offense.

We conclude the court did not err by instructing the jury with CALCRIM No. 372. The instruction did not “impermissibly reduce[] the prosecution’s burden” of proving each element of the section 2800.2, subdivision (a) offense beyond a reasonable doubt, nor did it direct the jury to find him guilty of violating section 2800.2. CALCRIM No. 372 merely provides that, if the jury concludes the defendant fled, the significance of such flight (if any) is up to the jury to determine. The instruction explicitly informed the jury that evidence of flight was insufficient to prove guilt. Moreover, the court instructed the jury that the prosecution was required to prove each element of the crime, and that it had to find appellant guilty beyond a reasonable doubt. Contrary to appellant’s contention, the instruction did not create an unconstitutional presumption of guilt with respect to the charge of willfully evading a police officer. (See generally, *People v. Mendoza* (2000) 24 Cal.4th 130, 181 [CALJIC No. 2.52, the predecessor instruction, does not “unconstitutionally lessen[] the prosecution’s burden of proof”]; *People v. Smithey* (1999) 20 Cal.4th 936, 983 [CALJIC No. 2.52 does not create unconstitutional permissive presumption of guilt].)

Appellant seems to suggest the jury misapplied CALCRIM No. 372. We disagree. We do not view CALCRIM No. 372 in isolation. “We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. [Citation.]” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332; *People v. Sanchez* (2001) 26 Cal.4th 834, 852 [“[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions”].) Here, the court instructed the jury on the elements of the offense, specifically that appellant was driving a car and “willfully fled from or tried to elude the officer, intending to evade the officer.” The court also instructed the jury that the prosecution was required to prove each element of the crime, and that it had to find appellant guilty beyond a reasonable doubt.

Moreover, during closing argument, the prosecutor distinguished between appellant's act of evading the police officers on his motorcycle and his flight on foot after the motorcycle crashed. The prosecutor explained, "Flight shows that someone knows that they [*sic*] have done something that can get them [*sic*] in trouble. You know that from your common sense. The law tells you that. After the defendant crashed he went to an extraordinary effort to flee. Got up, ran and hid in a bush for 30 minutes." Reading the jury instructions as a whole, it was clear to the jury under the prosecution theory of the case that the flight instruction pertained to appellant's conduct *after* crashing the motorcycle. (See *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711 [court "unpersuaded" by claim that flight instruction "undermine[d] the presumption of innocence by linking the mere fact of defendant's flight with the establishment of his guilt"].)

Even if the instruction was erroneous, appellant cannot demonstrate prejudice because it is not reasonably probable he would have obtained a more favorable result had the instruction not been given. (*People v. Silva* (1988) 45 Cal.3d 604, 628 ["any error in instructing on flight was harmless; on these facts it is not reasonably probable a result more favorable to defendant would have been reached absent such an error"].) The "evidence at trial" was not — as appellant contends — "close." Appellant did not stop when Officers Montero and Passama pursued him in a gray Crown Victoria that was "obvious[ly] . . . a police car[.]" Instead, he drove along a pedestrian pathway and onto Highway 242. Officers Phalen and Forristall pursued appellant in a marked patrol car, with lights and sirens activated and Officers Montero and Passama followed with their car's emergency lights activated. Appellant did not stop; instead, he drove "recklessly" and at a "high rate of speed" as the patrol cars pursued him. Officer Phalen testified he believed appellant was evading police in part because the motorcycle was stolen, and because appellant "did not immediately yield [when the officers were] behind the motorcycle" with their cars' lights and sirens activated. Instead, appellant passed other motorists, "driving recklessly and skidding[.]" After crashing his motorcycle, appellant somehow managed to get up, run away, and hide in the bushes.

Appellant contends the case was close in part because the police pursuit was short in duration and because the court dismissed other charges against appellant. We are not persuaded. Appellant's explanation for his conduct — that he did not see the police officers, that he legitimately possessed shaved keys, night vision goggles, and a large amount of cash, and that he did not remember running into the bushes after the crash — was not convincing. As discussed above, there was overwhelming evidence of appellant's guilt: in addition to running away after the crash, appellant committed several Vehicle Code violations while the police pursued him with lights and sirens activated. He accelerated to a higher rate of speed once on the freeway on-ramp and failed to yield. As a result, it is not reasonably probable appellant would have received a more favorable verdict had the court declined to give the flight instruction.

We reject appellant's contention that instructing the jury with CALCRIM No. 372 violated his due process rights and constituted reversible error under *Chapman v. California* (1967) 386 U.S. 18, 24. As discussed above, the instruction did not lessen the prosecution's burden of proof and appellant has not demonstrated the instructional error — if any — was "structural." (See, e.g., *People v. Hernández-Rios* (2007) 151 Cal.App.4th 1154, 1158 [CALCRIM No. 372 did not violate due process]; *People v. Flood* (1998) 18 Cal.4th 470, 503-504.) The instruction did not render appellant's trial "fundamentally unfair" or "prevent[] the trial from reliably serving its function as the means for determining [appellant's] guilt or innocence. Nor did the [instruction] affect the framework within which the trial proceeded." (*Flood*, at p. 504.)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Needham, J.