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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.

DEVYN CONEY-JONES,

Defendant and Appellant.

A144050

(Solano County
Super. Ct. No. FCR304994)

Defendant Devyn Coney-Jones was convicted of one count of second degree robbery. He requested the trial court instruct the jury with CALCRIM No. 335 on accomplice testimony, but now argues the court erred by giving that instruction. We conclude that Coney-Jones's argument is barred by the invited error doctrine, and that his trial counsel was not ineffective for requesting the instruction. Accordingly, we affirm.

I. BACKGROUND

Coney-Jones, Montrece Howard, and Kimberly Trowbridge were charged with second degree robbery (Pen. Code, § 211) and false imprisonment by violence (Pen. Code, § 236).¹ The alleged victim was a juvenile. Coney-Jones was tried by a jury after Trowbridge and Howard entered into negotiated dispositions.

At trial, the juvenile victim testified that on December 12, 2013, he had a phone conversation with another juvenile, Randy S., whom the victim had known for six months. The two agreed to meet. That night, Randy sent the victim a text message

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

stating he was outside of the victim's house in Vacaville. Randy wanted the victim to meet him at the corner of an intersection near the house. The victim believed he would be meeting with Randy and the driver of a vehicle. The victim left his house and brought with him a mason jar containing approximately 10 grams of marijuana. His plan was to smoke some of the marijuana and exchange some for other drugs. Once outside, the victim saw a midnight blue Dodge four-door pickup truck. Randy was in the passenger seat. As the victim approached the truck, the driver told him "Get in kid, it's cold." The victim obliged and entered through the rear passenger door.

In order to buckle his seatbelt, the victim handed the jar of marijuana to Randy. At that point, two men entered the truck on either side of the victim and forced him to the middle seat. The truck started to drive away. The man to the victim's right punched him in the face and grabbed a chain off his neck. The man to the victim's left, who he identified at trial as Coney-Jones, held a gun to the victim's head and told him he would blow his "fucking balls off" if he made sudden movements. The men took additional items from the victim, including a silver ring, beaded rosary, black beanie, bedroom slippers, the jar of marijuana, and a one-hundred-dollar bill. After taking the victim's items, the two men threw him out of the truck and the truck sped away. The victim contacted a friend for a ride home. He then called the police and reported that he was robbed.

Officer Julie Bailey of the Vacaville police department testified that shortly after 1:00 a.m. on December 13, she heard a dispatch call to look for a blue Dodge pickup truck. A few minutes later, she observed a truck matching the description and followed it. A license plate check revealed the truck belonged to someone named Trowbridge. After following the vehicle for five or six miles, Bailey and other officers who joined the pursuit stopped the truck and ordered the occupants out. Five people exited the truck, including Coney-Jones, Randy, Trowbridge, and Howard. During a protective sweep of the truck, Bailey found a mason jar, spilled marijuana, necklace, silver ring, black slippers, and an air gun. Coney-Jones was placed in Bailey's patrol vehicle. Without being prompted, Coney-Jones said he was going to "do some time for this." Coney-Jones

also said he knew he was not supposed to go out. His mother had told him it was close to Christmas and it was important for him to stay out of trouble. Bailey took Coney-Jones from the patrol car to a transport van. As Bailey was moving Coney-Jones, she saw a one-hundred-dollar bill on the ground. Coney-Jones said the bill was his.

Donald McCoy, the lead investigating officer, testified that he went to the victim's home after the victim called the police, then took him to where the blue Dodge truck had been stopped. The victim identified the items that were taken from him. The victim also identified Randy, Trowbridge, and Howard, but was unable to identify Coney-Jones, though he recognized some of Coney-Jones's facial features and thought he might have been in the truck. McCoy later talked to Coney-Jones at the police station in a *Mirandized* interview. Coney-Jones said he would probably "do a year or two" for his actions. Coney-Jones indicated that he got caught up in something that was not his idea and said "karma is a bitch."

Trowbridge testified about the December 12 incident as part of her negotiated disposition. She explained that on December 12, she was with Coney-Jones and Howard at the house of Howard's aunt in Benicia. Trowbridge said the others were talking about "hitting and stripping and stuff like that." She came to understand that the group had planned to "go pick this kid up" and rob him. She later learned that the "kid" was the juvenile victim. At 7:30 or 8:00 p.m., the group departed in Trowbridge's truck, picked up Randy, then headed toward Vacaville. As they arrived near the victim's house, Coney-Jones and Howard left the truck. When the victim came outside, Trowbridge could see his breath because it was cold. She told the victim to get into the truck. After the victim entered the truck, Coney-Jones and Howard entered the backseat on either side of the victim. There was a lot of wrestling, and Trowbridge heard others in the truck say "give me your stuff" and "we're not fucking around." Trowbridge then heard a scream and slammed on the breaks. The victim exited the truck, and Trowbridge drove away. The police later pulled the truck over and ordered the occupants out.

Howard was called to testify about the incident, but essentially refused to answer any questions.² Officer McCoy testified that he met with Howard a week before trial with the prosecutor. During that meeting, Howard indicated the victim was a drug dealer and that being robbed is a part of being a drug dealer, so the victim needed to take it in stride. Howard also said he did not want to testify because he did not want to be imprisoned with snitches and sex offenders.

Two witnesses testified for Coney-Jones. Terri Jensen testified that she worked as a complaint specialist for the Department of Social Services. In 2011, Jensen investigated a complaint against Trowbridge and concluded she was operating an illegal daycare facility out of her home. The other defense witness was Antonia Mahdik. Mahdik testified that she had once been friends with Trowbridge but ended the friendship in 2013. Mahdik expressed a negative opinion of Trowbridge's reputation for truthfulness, saying "[t]here is nothing truthful that comes out of her mouth. It's all lies."

The jury convicted Coney-Jones of robbery but found him not guilty of false imprisonment. The trial court sentenced Coney-Jones to five years in state prison, but suspended execution of the sentence and placed him on probation for three years. Coney-Jones timely appealed.

II. DISCUSSION

Before trial, Coney-Jones proposed that the jury be instructed with CALCRIM No. 335, "Accomplice Testimony: No Dispute Whether Witness Is Accomplice." During trial, Coney-Jones filed an amended trial management packet and requested the same instruction. The prosecution requested CALCRIM No. 334, which applies when there is a dispute about whether a witness is an accomplice. Coney-Jones's counsel opposed that instruction.

² Howard began his testimony by saying he remembered being in Vacaville on December 12, but then said he did not remember being in Vacaville or robbing the victim, and also denied knowing Trowbridge. When pressed about statements he made to the prosecutor and investigating officer on an earlier occasion, Howard said, "I don't care. I robbed him. So what? You still get out of my face." Howard then claimed he had amnesia.

The trial court agreed with Coney-Jones and instructed the jury with CALCRIM No. 335 as follows:

“If the crimes of robbery and false imprisonment were committed, then Kimberly Trowbridge and Montrece Howard were accomplices to those crimes. You may not convict the defendant of robbery and false imprisonment based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if, one, the accomplice testimony is supported by other evidence that you believe; two, the supporting evidence is independent of the accomplice’s testimony; and three, that supporting evidence tends to connect the defendant to the commission of the crimes.”

Coney-Jones now argues the CALCRIM No. 335 instruction was erroneous because “[b]y labeling Trowbridge and Howard as accomplices as a matter of law, the trial court suggested to the jury that there must be a perpetrator to these accomplices. Since the only person appearing at trial was [Coney-Jones], the court effectively told the jury that he must be the perpetrator. The instruction lightened the prosecution’s burden of proof in contravention of [Coney-Jones’s] rights to a fair trial under the Sixth and Fourteenth Amendments.” Coney-Jones contends the trial court should not have instructed with CALCRIM No. 335, and at the very least, should have removed the word “accomplice” from the instruction. Removing “accomplice” from the instruction would have informed the jury that it could not base guilt solely on Trowbridge’s and Howard’s testimony, while avoiding the prejudicial effect of labeling the two as accomplices.

First of all, Coney-Jones’s argument is barred by the doctrine of invited error. “The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a ‘conscious and deliberate tactical choice’ to ‘request’ the instruction.” (*People v. Lucero* (2000) 23 Cal.4th 692, 723.) “If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice.” (*People v. Cooper* (1991) 53 Cal.3d 771, 831 (*Cooper*).)

‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ ” (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

Here, Coney-Jones’s trial counsel could have made a reasonable tactical decision to request CALCRIM No. 335 and to oppose the use of CALCRIM No. 334. CALCRIM No. 335 should be given when there is no dispute about whether a witness is an accomplice. (See *People v. Coffman* (2004) 34 Cal.4th 1, 103; Bench Notes to CALCRIM No. 335 (2016 rev.)) Here, there was no reasonable dispute as to whether Trowbridge and Howard were accomplices. Both were in Trowbridge’s truck when it was pulled over, police found the victim’s stolen items in the truck, and Trowbridge’s testimony implicated both she and Howard in the crime. Moreover, the thrust of Coney-Jones’s case and closing argument was that the accomplice witnesses were not credible and the jury should not believe Trowbridge’s testimony. By requesting the court to instruct on CALCRIM No. 335, counsel guaranteed that the jury had to treat that testimony with caution that required other evidence to convict. Had the trial court instructed the jury based on CALCRIM No. 334 as proposed by the prosecutor, the jury could have found Trowbridge was not an accomplice, and convicted Coney-Jones on her word alone without corroboration. (CALCRIM No. 334.) We also cannot conclude that counsel was ineffective for failing to urge the court to remove the word “accomplice” from CALCRIM No. 335. Coney-Jones has cited no authority suggesting the instruction is in any way infirm because it uses the word “accomplice.” “[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.” (*Engle v. Isaac* (1982) 456 U.S. 107, 134.)

People v. Hill (1967) 66 Cal.2d 536 (*Hill*), which Coney-Jones relies upon to argue CALCRIM No. 335 should have been modified to delete the word “accomplice” from the instruction, is inapposite. He says *Hill* directs courts to not instruct that a testifying witness is an accomplice in situations where the witness was a participant in the

crime with the defendant. According to Coney-Jones, labeling the witnesses as accomplices “effectively told the jury that there was another person involved in that very same offense, and under the circumstances of the case (where Coney-Jones was the only defendant), this suggested that the other person was [Coney-Jones].” Not so. Neither the circumstances nor the rule in *Hill* required a modification of CALCRIM No. 335.

Hill addressed a claim that the trial court erred when it did not instruct that the only defendant who testified in a three defendant trial was an accomplice as a matter of law. (*Hill, supra*, 66 Cal.2d at p. 555.) The court concluded that “[i]n the instant case it was not error to leave the jury determination of [the testifying defendant’s] role as an accomplice and thus avoid imputations of the guilt of [the other defendants] which might have flowed from the court’s direction that the confessing [defendant] was their accomplice as a matter of law.” (*Id.* at p. 556) *Hill* does not hold it is error for a court to instruct that a witness, who is not a defendant, is an accomplice as a matter of law. Nor would it make any sense for a court to decline to so instruct when the facts are undisputed.

The danger that Coney-Jones complains of arising from CALCRIM No. 335 is more theoretical than practical. The instruction advises the jury to view with caution any statement by an accomplice that tends to incriminate the defendant, and that an accomplice’s testimony requires supporting evidence that tends to connect the defendant to the crime. There is nothing in this record to suggest the jury did not heed these admonitions, and it is highly speculative that this instruction suggested to the jury Coney-Jones was involved in the crime. This is especially so in light of the instructions given on the presumption of innocence; the prosecution’s burden of proof beyond a reasonable doubt; and the admonition that the jury must not be biased against the defendant because he was arrested, charged with a crime, and brought to trial. We presume that juries understand and follow the judge’s instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Moreover, it is unclear when, if ever, a court would give an instruction identifying a witness as an accomplice if it could not do so in this case. Neither Trowbridge nor

Howard was a defendant. They were participants in the crime, and the question for the jury was whether Coney-Jones was also. To modify CALCRIM No. 335 as suggested by Coney-Jones to delete any reference to “accomplice” and substitute the names of the testifying witnesses in their place, would tell the jurors that their testimony should be viewed with caution and require corroboration without telling them why. Absent any such context, all the instruction would communicate to the jury was that the court was skeptical of Trowbridge’s and Howard’s testimony, and such an instruction would be close to impermissibly commenting on the credibility of a witness.

Coney-Jones also has not shown that inclusion of the word “accomplice” in CALCRIM No. 335 was prejudicial. Testimony from the victim, Trowbridge, and the arresting officers, along with Coney-Jones’s own utterances after being arrested, provided strong evidence that he committed robbery. Removal of the word “accomplice” from the jury instruction would not have rebutted this evidence or called it into doubt. Given the “overwhelming” evidence supporting the conviction, “there is no reasonable probability” that a modified version of CALCRIM No. 335 would have changed the verdict. (*Strickland v. Washington* (1984) 466 U.S. 668, 700; *People v. Stanley, supra*, 39 Cal.4th at p. 954.)

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Pollak, J.

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