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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.

JOHN CALDWELL,

Defendant and Appellant.

A145662

(Solano County
Super. Ct. No. VCR209662)

Despite alibi testimony, a jury convicted John Caldwell of robbery and burglary. Caldwell argues the trial court erred in instructing the jury they could infer his consciousness of guilt if they found the alibi evidence was fabricated with Caldwell’s acquiescence or authorization.¹ We conclude the instruction should not have been given on this record, but we also conclude the error was not prejudicial.

I. BACKGROUND

On December 10, 2010, Caldwell was charged by felony complaint with home invasion robbery (Pen. Code, § 211)² and first degree burglary (§ 459). It was alleged Caldwell personally used a handgun while committing the offenses within the meaning of

¹ “If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person’s actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.” (CALCRIM No. 371-C.)

² Undesignated statutory references are to the Penal Code.

former sections 12022.5, subdivision (a)(1) (as to both) and 12022.53, subdivision (b) (as to the robbery), as well as section 1203.06, subdivision (a)(1) (as to the burglary). As to both counts, it was alleged Caldwell personally inflicted great bodily injury on the victim within the meaning of former section 12022.7, subdivision (a); he had a prior conviction for robbery (§ 211) within the meanings of former sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (a)(1) and (b) through (i); and he served a prior prison term within the meaning of former section 667.5, subdivision (b).

Caldwell was arrested and first appeared in this matter in January 2014. Trial commenced in February 2015.

Prosecution evidence

Thomas Howe testified that on December 6, 2010, at about 11:00 p.m., he was in his garage watching television when Caldwell “walked in with his shirt up. . . . He . . . pointed a gun at me and says, ‘Give me your money.’ ” Howe asked, “Is this some kind of joke?” But he then noticed two people standing behind Caldwell. When Howe leaned over to look at them, Caldwell hit him on the head with his gun and again asked for money. Howe turned over \$715 in cash. Caldwell picked up a pack of cigarettes and backed out of the garage, quickly returned, aimed his gun at Howe, told him to turn out the lights, and finally left.

That same evening at 11:05 p.m., a 911 call about the robbery was received by Susan Hart, a dispatcher for the Vallejo Police Department. At the time of trial Hart had no independent memory of the call, but she testified about the call’s content based on a computer aided dispatch (CAD) log she wrote for the purpose of passing on important information to the police.³ In the log, Hart wrote, “RP [(reporting party)] John Karibu was just 242’d [(assaulted or battered)]. RP had a gun. Took his money. It had occurred 15 minutes ago.” Hart testified that the note should have read, “RP advised John Karibu

³ At the time of trial, the tape recording of the 911 call was unavailable. Posttrial, the court ordered the Vallejo Police Department to produce the 911 recording in connection with a motion for new trial. Defense counsel later confirmed receipt of the tape and said she would not proceed with a motion for a new trial.

just 242'd him.” Referring to her log, Hart said the caller “didn’t want to give me info. He kept saying that he would tell the officers when they got there.” Hart asked for a physical description of the perpetrator but the caller would not provide details. She noted the caller “sounded 5150 and kept changing names.” At trial, she explained that “5150 is Health and Safety Code, . . . meaning mentally unstable. . . . [W]e oftentimes use [‘5150’] as a reference for not acting right, discombobulated, crazy, if you will. . . . [¶] . . . [¶] . . . I was using it as a description as to why I didn’t have a lot of pertinent details for this specific incident.”

Vallejo Police Officer Rudy Quesada was promptly dispatched to Howe’s house to investigate. When he arrived, Howe was sitting on the front porch, bleeding from a three-inch laceration on the left side of his head that ultimately required stitches. Howe was very upset and angry. He told Quesada that Caldwell had robbed him. Howe could not provide, then or later at the hospital, certain details about the incident, such as a description of the gun or the perpetrator’s physical appearance except to say the perpetrator was a white male in his 20’s. Quesada wrote in his report Howe seemed confused about the specific questions Quesada asked him. Quesada testified that Howe “was just still upset. But one thing he was adamant about was who it was.” Howe provided a Moreland Street address where Caldwell lived or where Caldwell’s family used to live. Quesada went to the address, but the residence appeared unoccupied and abandoned.

Vallejo Police Officer Fabio Rodriguez visited Howe a few days after the incident and asked him to describe the incident. Howe again identified Caldwell as the perpetrator. Rodriguez showed Howe a single photograph, Caldwell’s Department of Motor Vehicles (DMV) picture. Howe confirmed that Caldwell was the robber. Rodriguez testified that multiple photographs are not usually used when a victim indicates he knows the perpetrator well. The photo was used to confirm that police were looking for the correct John Caldwell. Howe gave Rodriguez the Moreland Street address for Caldwell, which was also Caldwell’s address in his DMV record. Rodriguez also found the Moreland Street residence vacant.

Howe testified at trial that he was “100 percent” sure Caldwell was the intruder. During the incident, the garage interior was illuminated by a table lamp sitting on a bench next to Howe, and Caldwell stood five feet away from him. Although Caldwell’s face was initially covered by his shirt, Howe recognized him by “[t]he voice, the hairdo. And . . . [the shirt] slipped down. I’m not sure if it was once or twice. But it slipped down enough I knew who it was.” When the shirt slipped, he recognized Caldwell “[i]nstantly.” If the perpetrator had been a stranger, he would not have asked if the incident was a joke. The blow to Howe’s head made him feel like he was in “Never-never Land. Starry—like you’re aware of what’s going on, but you’re . . . in a daze. . . . Just in between awake and asleep. [¶] . . . [¶] . . . [D]idn’t lose consciousness. But just pretty close to it. . . . Almost to the point where you’re not even aware of what’s going on around you or anything like that.” He said Caldwell’s identity was nevertheless “[v]ery much” fresh in his memory at the time he identified him to the police. “You don’t forget that.” Also, “I didn’t become starry-eyed until after [I was] hit. So, you know, I remember up to that point.”

At the time of the robbery, Howe was 66 years old and disabled due to “head damage from a wreck.” Howe testified he suffered “[m]ajor” injuries in a 1995 accident: his skull was badly fractured; his eye socket and nose had to be reconstructed; and he could no longer work. Since the accident, he had memory problems “[j]ust with names. [¶] . . . [¶] . . . And it’s no problem. Names. You know. That. Yeah.” He remembered his family members’ names “[b]ut not in order. Because I got too many brothers and sisters.” He remembered strangers “[b]y the incidents. Not necessarily by the names.” Medical records pertaining to Howe were admitted in evidence. Howe indicated the blow he received during the robbery landed on the same part of his head that was injured in the accident, but he insisted the prior head trauma had no effect on his memory of the robbery.

Howe did not remember calling 911 and thought his aunt or brother might have done so. He was dazed from the blow after the robbery, and “[t]he other wreck happened way before. I had a lot of lead [*sic*] damage before this happened. [¶] . . . [¶] . . . So I

don't know how that . . . lengthened out through the, you know, the out-of-it that I was. I don't recall too much." When asked on cross-examination if he called 911 and reported a "John Karaglou" had just robbed him, he said, "Not that I remember. There is a possibility, because, like I say, I was in La-la land."

At a June 2014 preliminary hearing, Howe said the perpetrator was five feet eight inches tall and weighed about 150 pounds, and he did not recall any distinctive markings on the perpetrator's neck or arms. Quesada testified that Caldwell was five feet five inches tall and had green eyes, and photographs of Caldwell taken in 2014 showed tattoos on his neck and arms. Howe testified, "I wasn't looking at none of that. I was looking at his gun."

Howe testified at trial that he did business with Caldwell's uncle, Mike Karaglou, buying scavenged items for resale. Early in the morning on December 6, 2010, Howe went to see Karaglou at Caldwell's mother's house. Caldwell was present when Howe pulled a large wad of money out of his pocket to pay Karaglou; Howe thought Caldwell's mother and brother were also present. Howe did not tell Quesada or Rodriguez about this encounter during the December 2010 investigation. A death certificate showing Caldwell's mother died in June 2010 was admitted in evidence.

Howe said he was familiar with Caldwell because two of Howe's brothers had lived with Caldwell's aunts for years, "[s]o we knew the family. But I haven't met [Caldwell]. But I knew who he was." Howe initially testified he was familiar with a John Karaglou who was Mike Karaglou's brother or nephew. Howe then testified: "There's three different—there's three sets of—there's three half and half and half brothers. They all have three different fathers. And I get mixed up in that." Defense counsel asked if Howe gave the 911 operator the name of John Karaglou and he replied, "I could have got a name mixed up. But it was John—it was Caldwell." Howe testified on redirect and rebuttal that he did not know anyone named John Karaglou. Howe also said "a while" before trial Mike Karaglou told him to leave town and not testify. "He didn't tell me that like it was coming from him. It was through secondhand input of it."

Defense Evidence

The defense presented testimony from Caldwell's cousin, Amanda Peterson, and his sister-in-law, Melissa Wildman Caldwell (Wildman). Both said Caldwell had an uncle named Peter John Karaglou who went by the name "Johnny." Wildman testified to a "very strong family resemblance" among all the generations in the Karaglou and Caldwell extended family, and she specifically said Mike Karaglou, Peter John Karaglou, and Caldwell resembled one another. DMV photographs of Mike and Peter John Karaglou were published to the jury. Howe testified on rebuttal that he did not recognize the person depicted in Peter John Karaglou's DMV photograph.

Robert Shomer, who held a Ph.D. in experimental psychology, was presented as an expert in eyewitness identification. He testified that research showed a poor correlation between an eyewitness's confidence in his or her identification and the accuracy of the identification. He said eyewitness identification can be influenced by situational stress on the observer, the presence of a weapon, and similarities in people's appearances. "[S]tress actually causes you to . . . have vivid memories of the situation. However, it turns out that same stress level reduces accuracy for details. So you may never forget you were a victim of a crime . . . but . . . research has found that people are not as accurate about the details." The potential for error is great when people resemble each other: "[I]f we catch glimpses of somebody or a portion of that person, we can make an assumption about who we are seeing. And once we make that assumption, we begin to convince ourselves, and our memory distortion begins to follow in the wake of that. And then we are convinced." Shomer also described a phenomenon known as weapons focus: "if you have somebody holding a pen and you have somebody holding a gun, you're much more accurate at identifying the person holding the pen than you are identifying the person holding the gun in exactly the same lighting, in exactly the same distance, for exactly the same amount of duration."

Shomer opined that the following specific factors cast doubt on Howe's identification of Caldwell: "Naming one person [(“John Karibu” in the 911 call)] and then naming another person [(Caldwell to Quesada)]. Discrepancies in the description of

very obvious things like a unique eye color. A large sleeve tattoo, which should have been seen because weapons focus indicates that people will focus around that area. [¶] Then a very long time interval between the 9th and then . . . years later where the witness comes up with other things that they never reported initially [(seeing Caldwell on the morning of December 6)]. . . . [A] witness who has indicated he had a major brain injury. . . . [¶] . . . [¶] [T]he initial observation situation was very difficult. The person is in disguise. . . . A lot of the information about his face is concealed. The event occurs in a sudden, unexpected, stressful situation. Because if he thought it was a joke initially and had no stress, at some point in time when he gets hit over the head with a gun, . . . at that point it's sudden and stressful.”

Wildman testified that Caldwell was in Arizona with her on the day of the robbery. Shortly before Thanksgiving in 2010, she had driven to Vallejo to take Caldwell and Peterson to her home in Lake Havasu City, Arizona for the holiday. Wildman wanted Caldwell to be with family for his first holiday after his mother's death the prior June. In Arizona, Caldwell primarily stayed with Wildman but also stayed with his sister Jenny, who also lived in the area. Wildman saw Caldwell on a daily basis, and he was still in Arizona on December 6, 2010. However, she had no photographs, social media posts, or receipts to corroborate her testimony.

Wildman said she first approached defense counsel with her alibi testimony in November 2014, shortly before Caldwell's original trial date. She was “very close” to the Caldwell family and maintained regular contact with Caldwell's brother, Justin. She learned in February 2014 that Caldwell had been arrested. She did not learn until several months later that he was accused of a crime that occurred while he was in Arizona. She heard Jenny was going to be his alibi witness, so she “backed out of it after that.” She did not get along with Jenny, and “figured that [Jenny] could come here and tell the Court [Caldwell was in Arizona] as easy as I could.” “[A] couple months later Justin again called me and said . . . that Jenny at the last minute decided she couldn't [testify]” because she had an outstanding warrant in Northern California. “[T]hat's when I dove into it. . . . [¶] . . . [¶] . . . I know for a fact that he was there in Arizona. And if nobody

was going to come forward and say that, I was going to be sure that I did.” Neither Caldwell nor his attorney contacted Wildman prior to her contacting the defense attorney in November 2014. Wildman drove from Utah, her then-current residence, to testify at the trial.

Peterson confirmed that Wildman drove her and Caldwell to Arizona for Thanksgiving and Caldwell stayed behind when Peterson returned after a week. A prosecution investigator’s notes indicated Peterson said in an interview that she went to Arizona after Thanksgiving. Peterson denied the statement and said it was a mistake if that is what she said. Peterson did not learn that Caldwell was facing trial until November 2014, and that was when she when she first spoke to defense counsel. She said neither Caldwell nor any family members told her about the trial between February and November 2014.

The trial court took judicial notice of the following dates: Thanksgiving in 2010 was November 25, 2010; the robbery occurred on December 6, 2010; the felony complaint against Caldwell was filed December 10, 2010; Caldwell first appeared in court on January 31, 2014; he was in continual custody from January 30, 2014, until trial; and the original trial date was November 17, 2014.

Prosecution Rebuttal

Mike Rowe, a prosecution investigator, testified that Caldwell could have made phone calls and received visitors when he was in custody between January and November 2014.

The Fabricated Evidence Instruction

At the prosecution’s request, and over defense objection, the court instructed the jury pursuant to CALCRIM No. 371-C without any substantive modification: “[I]f someone other than the defendant tried to create false evidence, provide false testimony or conceal or destroy evidence, that conduct may show the defendant was aware of his guilt, but only if the defendant was present and knew about the conduct, or, if not present, authorized the other person’s actions. It’s up to you to decide the meaning and

importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.”

Argument

In closing argument, the prosecutor conceded “this is not the perfect case. . . . [¶] . . . Mr. Howe, he is a 71-year-old man. This incident happened back in 2010.” Regarding Howe’s possible confusion of Peter John Karaglou and Caldwell, he argued, “You’re going to take these [photographs] back into the jury room with you. . . . [Y]ou decide for yourself whether . . . either [Peter John Karaglou or Mike Karaglou] resemble[s] Mr. Caldwell enough to suggest that they were the perpetrators of the crime and that Mr. Howe somehow mistook him for them. Gentlemen who are born in ’62 and 1957.” Regarding the reference to “John Karibu” in the CAD log, he argued that Howe “was confused. Dazed and 5150. . . . [¶] . . . Let’s assume it was him [who made the 911 call]. . . . He just got whacked in the head by a pistol . . . [¶] . . . He’s confused. . . . And he explained, ‘I was at Mike Karaglou’s house earlier in the day. And then John Caldwell came later.’ And so he very well may have transposed some of the names in there. [¶] . . . [¶] But then once someone actually comes out and talks to him face to face and when he’s had a little time to calm down a bit . . . he is adamant. ‘Look. It was John Caldwell. I will tell you right where he lives. Down on Moreland Street.’ ” The prosecutor discounted Shomer’s testimony, noting that Howe and Caldwell were “acquaintances. Enough to where [Howe] knows his name. He knows where he lives. He saw him earlier in the day. He knows his uncle. Those are the kinds of things that are going to give a person an ability to ID somebody when they walk in.”

The prosecutor emphasized weaknesses in Caldwell’s alibi defense, specifically the absence of corroborating documentary evidence and additional witnesses. “[I]f it seems a little kind of thrown together to you, cobbled together at the very end, listen to that instinct a little bit. Use common sense. . . . Remember the timeline. This case began in January. He’s in custody . . . the whole time [¶] And neither of these two witnesses—their alibi witnesses were not contacted—there were no phone calls made to them until November [2014]. . . . [¶] . . . [¶] And all of a sudden, as trial date approaches

in November, . . . it's 'Okay. Boy, this thing is really going to go to trial. And the victim is apparently alive and will testify. We got ourselves a problem here. We're gonna need an alibi.' And so then you reach out to these people. . . . [¶] [Wildman] talked about . . . the family. First she said they were very close. Right? So they share a lot of information. . . . John Karaglou and Mike Karaglou . . . very much resemble Mr. Caldwell. [¶] . . . [¶] . . . Why did [Wildman] . . . seem[] to be so knowledgeable about where the defense was going with this? . . . She was too quick to volunteer that and be aware of exactly that. [¶] My point in all of this is that there were logical witnesses and evidence that were not called by the defense. There were selective witnesses that were called, and there was a reason for that.”

The prosecutor argued: “[I]t's unclear at this point without any corroborating evidence whether [Caldwell ended] up in Arizona at some point, or whether he stayed behind with his brother Justin. He may not have made that trip. In fact, we know he didn't because he couldn't have been in Lake Havasu at Thanksgiving which pre-dated this incident.”

The prosecutor then argued the fabricated evidence instruction, stating: “If someone other than the defendant tried to create false testimony or conceal or destroy evidence, that conduct may show the defendant was aware of his guilt, but only if the defendant was present and knew about that conduct, or if not present, authorized the other person's actions. [¶] Well, here a witness is testifying on his behalf in his presence. I am going to let you evaluate those alibi witnesses.” Later, the prosecutor argued, “[W]hy was Mr. Howe being told to leave town? Right? He is getting these calls. He got a call from Mike [Karaglou] . . . suggesting he should leave town. Now, folks, that's not because he knew too little, but because he knew too much about this case. So I will leave that to you to consider.”

Defense counsel emphasized the government's failure to produce the 911 recording and suggested the recording would have been harmful to the prosecution's case, noting the CAD log's references to “John Karibu” and “5150.” She raised questions about the reliability of Howe's identification of Caldwell: the circumstances of

the crime (a dimly lit location, stress, weapons focus, a shirt covering the perpetrator's face); the "5150" and "John Karibu" references in the CAD log; Quesada's description of Howe as confused; the resemblance between Peter John Karaglou and Caldwell; Howe's initial trial testimony he knew John Karaglou; Howe's history of serious head trauma; Howe's claim he saw Caldwell the morning of the robbery at the Moreland address and officers' description of that residence as unoccupied and abandoned; Howe's inability to provide accurate physical details about Caldwell; and the expert testimony about eyewitness identification. Defense counsel faulted the police for accepting Howe's identification of Caldwell as the perpetrator without testing the reliability of that identification by asking for a detailed description or presenting Howe with a multiple-photograph array. She argued the possibility that Peter John Karaglou committed the crime raised reasonable doubt about Caldwell's guilt.

As to the alibi evidence, defense counsel argued, "The district attorney said that we could bring in . . . like 25 people. We would be here three weeks if we brought in all of those people and we had to arrange to get all of these people from Arizona. That's . . . absurd. [¶] . . . The law says that neither side needs to produce all available witnesses. . . . The idea . . . that someone would have a receipt from a gas station from five years ago [is also] absurd. [¶] . . . [¶] . . . [T]here's nothing to dispute what [Wildman] is saying other than the fact that this unreliable witness [Howe] says that it was [Caldwell] with no other support. . . . [¶] . . . [¶] . . . It also seems unreasonable . . . to imply that Mr. Caldwell could email people and make arrangements from jail for witnesses to come in. . . . [¶] . . . If there was evidence of Mr. Caldwell calling witnesses saying, 'Hey, come in. testify on my behalf,' the district attorney would be arguing, ' . . . [I]t must be fabricated.' . . . [¶] . . . Both of these women testified. They were credible. . . . [¶] . . . [I]t's not my job to prove beyond a reasonable doubt that he was in Arizona. It's the prosecution's job to prove beyond a reasonable doubt that he was not in Arizona. And they cannot do that."

In rebuttal, the prosecutor claimed defense counsel wanted the jury to believe that "Mike Karaglou . . . called making these threats to protect . . . his brother [Peter John Karaglou]. . . . [¶] So Mike doesn't want Mr. Howe to testify in a case against [Caldwell]

. . . so that he will go after the right person, being his brother? That doesn't add up." The prosecutor argued the absence of corroborating evidence for Caldwell's alibi was the "biggest flaw" in the defense case. "In a day you can probably get in four, five, six witnesses. . . . If there are other witnesses in this case that could put him in Arizona, you would have a parade of witnesses outside this door ready to go until the Judge told you to stop. But there aren't because they don't exist." Finally, he questioned whether there was evidence that Caldwell had his neck and arm tattoos in 2010. "[I]f he didn't have the tattoos, Mr. Howe couldn't have seen them."

Verdict and Sentence

During deliberations, the jury asked for and received a readback of Howe's testimony about who he saw with Mike Karaglou on the morning of December 6, 2010. The jury returned verdicts of guilt on both counts and found true all allegations of firearm use and great bodily injury. After denying Caldwell's *Romero*⁴ motion, the court sentenced Caldwell in this case and on 2014 charges for possession of a firearm by a felon to a total sentence of 28 years eight months.⁵

II. DISCUSSION

The sole issue Caldwell raises on appeal is alleged reversible error in giving CALCRIM No. 371-C with respect to the alibi testimony. The People argue the instruction was proper and in any event did not prejudice Caldwell. We agree with Caldwell it was error to give the disputed instruction, but we find the error was not prejudicial.

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁵ The sentence included a five-year upper term for the robbery (§ 213, subd. (a)(2)) doubled to 10 for the prior strike (former § 1170.12) plus enhancements of 10 years for personal use of a firearm (former § 12022.53, subd. (b)), three years for infliction of great bodily injury (former § 12022.7, subd. (a)), five years for the prior conviction (§ 667, subd. (a)), and a stayed one-year enhancement for the prior prison term (former § 667.5, subd. (b)); a stayed sentence for burglary (§ 654); and an eight-month term for firearm possession (§ 29800, subd. (a)(1)).

If supported by substantial evidence, consciousness of guilt instructions are not impermissible pinpoint instructions favorable to the prosecution. (*People v. Crew* (2003) 31 Cal.4th 822, 848–849; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223–1224.) However, “before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citation.] Whether or not any given set of facts may constitute[, for example,] suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. . . . [T]here must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference. Furthermore, the determination of whether there is such evidence in the record is a matter which must be resolved *by the trial court before* such an instruction can be given to a jury.” (*People v. Hannon* (1977) 19 Cal.3d 588, 597–598 (*Hannon*) [error to modify CALJIC No. 2.06⁶ to instruct jury that it should determine if any evidence appeared in the record to support the instruction], disapproved on other grounds in *People v. Martinez* (2000) 22 Cal.4th 750, 762–763.) As relevant here, the evidence need not *conclusively* establish fabrication by others or defense authorization of the fabrication before the instruction may be given; “ ‘there need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference.’ ” (*People v. Alexander* (2010) 49 Cal.4th 846, 921, discussing CALJIC No. 2.05.⁷)

⁶ The unmodified version of CALJIC No. 2.06 provides: “If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] [by _____], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

⁷ CALJIC No. 2.05 provides: “If you find that an effort to procure false or fabricated evidence was made by another person for the defendant’s benefit, you may not consider that effort as tending to show the defendant’s consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the

A. *Evidence of Fabrication by Others*

In the context of an instruction allowing the jury to infer a defendant's consciousness of guilt, evidence is considered fabricated only if it is a willfully false or misleading statement about facts related to the crime.⁸ (*People v. Kimble, supra*, 44 Cal.3d at p. 496, fn. 11, citing *People v. Albertson* (1944) 23 Cal.2d 550, 581–582 (conc. opn. of Traynor, J.); *People v. Amador, supra*, 8 Cal.App.3d at pp. 791–792; *People v. Fritz* (2007) 153 Cal.App.4th 949, 957–958; *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1249–1250, citing *Amador*, at pp. 791–792.) In reviewing such instructions, appellate courts have found sufficient evidence of fabrication where (1) there is evidence of the falsification process itself; (2) a witness contradicts his or her own statement or admits a statement was false; (3) the defense evidence is so inherently implausible that fabrication may be inferred; or (4) the defense evidence is directly contradicted by prosecution evidence. (See, e.g., *People v. Gutierrez* (1978) 80 Cal.App.3d 829, 833, 836–837 [alibi witnesses coordinated their stories outside the courtroom; defendant's initial statement he was never with the victims and his later statement he had consensual sex with them]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102–103 [co-defendants exchanged correspondence referring to a fictitious third party perpetrator in an apparent attempt to coordinate their stories]; *People v. Alexander, supra*, 49 Cal.4th at p. 922 [alleged fabricators contacted witnesses asking them to testify in a particular way]; *People v. Hughes* (2002) 27 Cal.4th 287, 335 & fn. 6 [fingerprint evidence contradicted defendant's statement he was never in victim's

effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

⁸ Some of the relevant cases address whether *evidence* of fabrication or suppression is *admissible* at trial (see *People v. Kimble* (1988) 44 Cal.3d 480, 495–498) or is *sufficient* in combination with other prosecution evidence to sustain a conviction (see *People v. Amador* (1970) 8 Cal.App.3d 788, 791–792). The Supreme Court has explained, “If evidence of alleged suppression is inadmissible on . . . a record, it is, a fortiori, error to instruct a jury that it can infer a consciousness of guilt if it believes such improperly admitted evidence to be true.” (*Hannon, supra*, 19 Cal.3d at p. 600.) The converse, however, is not necessarily true (see fn. 8).

apartment]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 97–98 [defendant’s fabrication, while in prison awaiting trial, of fictional first person narratives purporting to show his innocence]; *People v. Bowman* (2011) 202 Cal.App.4th 353, 359–360, 366 [motel records contradicted defense witness’s testimony that she was with defendant in the motel at time of robbery].)⁹

Here, the prosecutor made two arguments to persuade jurors that Wildman and Peterson fabricated their alibi testimony. First, contact with the defense did not occur until the eve of the original trial date in November 2014. Second, their testimony was not corroborated with documentary evidence or additional witness testimony. In the prosecutor’s view, both circumstances suggested fabrication. If the alibi were genuine, he argued, the witnesses would have come forward or would have been contacted by the defense soon after Caldwell was arrested in January 2014, not 10 months later on the eve of trial. Also, the alibi would have been corroborated by additional evidence. The witnesses, however, provided a facially plausible explanation for the first alleged failing: Caldwell’s sister, Jenny, originally planned to testify but withdrew due to an outstanding warrant, at which time Wildman stepped forward and Peterson was contacted to corroborate part of Wildman’s testimony. No trial evidence suggested this explanation was inaccurate. While the jury might have concluded the witnesses did not adequately explain the lack of corroborating photographs, phone records, or emails, weakness in the

⁹ Some cases suggest that the instruction is supported by any defense evidence (e.g., a defendant’s pretrial statement or trial testimony or a defense witness’s testimony) that is inconsistent with the prosecution case for conviction. (See *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1095–1097, 1102–1104 [defendant’s testimony contradicted that of the victim]; *People v. Beyah, supra*, 170 Cal.App.4th at pp. 1244–1250 [defendant’s testimony contradicted that of arresting officers].) In our view, such an approach would be inconsistent with *Hannon, supra*, 19 Cal.3d 588 for reasons discussed *post*. Moreover, the cases cited in *Beyah* are distinguishable because they involve questions about the sufficiency of evidence to support a conviction, not the propriety of giving an instruction that would allow the jury to draw a negative inference against that defendant based on any irreconcilable conflict between the prosecution and defense cases. (See *People v. Showers* (1968) 68 Cal.2d 639, 643; *People v. Amador, supra*, 8 Cal.App.3d at pp. 791–792; *People v. Foster* (1953) 115 Cal.App.2d 866, 868–869.)

alibi evidence was not alone sufficient to support an inference of deliberate fabrication. Nor was the testimony about the trip to Arizona inherently implausible. The prosecutor himself acknowledged that plausibility when he argued the best false alibi evidence has “a little bit of truth.” Nor did any statements by the alibi witnesses (or by Caldwell himself) directly contradict the alibi testimony.

Finally, while inconsistent with Howe’s testimony, no alibi testimony details were specifically impeached by prosecution evidence. The mere fact alibi evidence is inconsistent with the ultimate fact the prosecutor seeks to prove—that the defendant committed the charged crimes—is not in our view sufficient to justify giving a fabrication instruction. (See *People v. Amador*, *supra*, 8 Cal.App.3d at pp. 791–792 [discussing sufficiency of evidence to convict and stating “no inference of consciousness of guilt can be drawn from the mere fact that the jury, in order to convict, must have disbelieved defendant’s [statement or testimony]”].) The purpose of the instruction is to allow the jury to infer consciousness of guilt from deliberate fabrication and to consider that inference in combination with other prosecution evidence to determine whether the defendant’s guilt was proved beyond a reasonable doubt. (See *id.* at p. 791 [defendant’s “false statements to the police . . . and false testimony from the stand . . . may be considered as part of the prosecution’s total case”].) Where the jury could find fabrication only if it already necessarily determined the defendant committed the charged crimes, the instruction would serve no useful purpose. The evidence of fabrication here was insufficient to warrant the instruction.

B. *Evidence of Defense Authorization*

Even if sufficient evidence justified an inference the alibi witnesses fabricated all or part of their testimony, there was insufficient evidence in this case that Caldwell authorized the fabrication. Courts have approved giving a fabrication-by-others (or suppression-by-others) instruction only where there is evidence the defendant directly or indirectly contacted the fabricators. (See, e.g., *People v. Crew*, *supra*, 31 Cal.4th at p. 848 [evidence defendant indirectly sent message to witness before trial]; *People v. Clark* (2016) 63 Cal.4th 522, 604–606 [other person’s letters seeking to suppress

evidence were found in defendant's cell bearing defendant's handwriting and fingerprints].) Here, the prosecutor produced only evidence that Caldwell had the *opportunity* to contact witnesses before trial, but evidence of mere opportunity to authorize fabrication is insufficient to justify giving the instruction. (See *People v. Williams* (1997) 16 Cal.4th 153, 200–201 [“defendant’s ‘mere opportunity’ to authorize a third person to attempt to influence a witness ‘has no value as circumstantial evidence’ that the defendant did so”].) Similarly, neither a familial relationship between the defendant and fabricator nor the fabricator’s personal interest in assisting the defendant is sufficient to warrant the instruction. (See *People v. Perez* (1959) 169 Cal.App.2d 473, 477–478 [familial relationship alone insufficient to support giving instruction], cited & distinguished in *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1590; see also *People v. Terry* (1962) 57 Cal.2d 538, 565–567 [error to admit evidence of possible threat against witness by defendant’s sister-in-law absent connection to defendant].) The prosecutor here also argued the timing of the alibi witnesses’ contact with the defense supported an inference that Caldwell authorized the fabrication, but we disagree for the reasons already stated.

C. *Harmless Error*

In assessing whether instructional error not implicating a constitutional right is prejudicial, we determine if it is reasonably probable that a verdict more favorable to the defendant might have resulted if the error had not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836, *Hannon, supra*, 19 Cal.3d at p. 603.) The People argue such instructional error can *never* be prejudicial because of the way CALCRIM No. 371-C is worded: the plain language permits the jury to infer consciousness of guilt *only if* it finds that someone other than defendant tried to create false evidence or provide false testimony and *only if* it finds that the defendant was present and knew about the conduct or, if not present, authorized the other person’s actions. They argue that if, as Caldwell contends, there was insufficient evidence of fabrication, knowledge or authorization, the jury would have simply regarded the instruction as superfluous.

The People cite three California Supreme Court cases in support of their argument. In *People v. Nunez and Satele* (2013) 57 Cal.4th 1, one of the appellants argued a CALJIC No. 2.05 instruction should have been expressly limited to his codefendant because there was no evidence he authorized any fabrication of evidence. (*Nunez*, at pp. 48–49.) Assuming instructional error for purposes of argument, the high court found the error harmless, in part, because the “instruction explained that the jury could not consider a third party’s efforts to procure false evidence as indicating a defendant’s consciousness of guilt unless the jury also found that the defendant had authorized that effort; it also clarified that such authorization was insufficient to prove a defendant’s guilt, but the jury was to determine the weight and significance of the evidence. These instructions told the jury to infer that a particular defendant had a consciousness of guilt only if that defendant had engaged in the described conduct. Thus, if—as defendant Satele contends—the prosecution presented no evidence that he tried to procure false testimony or to fabricate evidence, and no evidence that he authorized anyone else to do so, we presume that the jury concluded that the instructions did not apply to him and it should not infer a consciousness of his guilt.” (*Id.* at p. 49, citing *People v. Jackson*, *supra*, 13 Cal.4th at p. 1225 [“ ‘[a]t worst, there was no evidence to support the instruction and . . . it was superfluous’ ”].)

The Supreme Court took a similar approach in *People v. Pride* to a claimed error in giving CALJIC No. 2.04,¹⁰ which addressed a defendant’s personal fabrication of evidence. (*People v. Pride* (1992) 3 Cal.4th 195, 248–249.) In a subsequent case, the court held one of four consciousness-of-guilt instructions provided to the jury was erroneously given, but the error was harmless in part because the jury would have considered the instruction unsupported by evidence and superfluous. (*People v. Jackson*,

¹⁰ “If you find that a defendant [attempted to] [or] [did] persuade a witness to testify falsely or [attempted to [or] [did]] fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.” (CALJIC No. 2.04.)

supra, 13 Cal.4th at p. 1225, citing *Pride*, at p. 249; see *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469–1470 & fn. 4, 1472 [erroneous use of CALJIC No. 2.62¹¹ had never been found to be reversible error].)

We disagree, however, with the People’s broad assertion that an erroneous of CALCRIM No. 371-C can *never* be prejudicial error. In *Hannon*, an eyewitness identification case, the court reversed a conviction based solely on erroneous use of CALJIC No. 2.06. (*Hannon, supra*, 19 Cal.3d at pp. 592–593, 596–597.) The prosecutor produced evidence that, after a defense alibi witness spoke with defense counsel, the witness refused to talk to a prosecution investigator. The prosecutor urged the jury to infer that defense counsel ordered the witness not to speak to the prosecution team, which he characterized as suppression of evidence, and based on that inference to further infer consciousness of guilt on the part of the defendant. (*Id.* at pp. 594–597.) The *Hannon* court held the instruction was improper because no evidence “established that defendant’s attorney instructed [the witness] not to speak to a representative of the People” (*id.* at p. 598), and the record thus “fail[ed] to supply the necessary nexus between defendant and the alleged suppression of evidence” (*id.* at p. 599).¹² Finding the error prejudicial, the court noted that when the prosecution argues a defendant has

¹¹ “In this case defendant has testified to certain matters. [¶] If you find that [a] [the] defendant failed to explain or deny any evidence against [him] [her] introduced by the prosecution which [he] [she] can reasonably be expected to deny or explain because of facts within [his] [her] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him] [her] does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he] [she] would need to deny or to explain evidence against [him,] [her,] it would be unreasonable to draw an inference unfavorable to [him] [her] because of [his] [her] failure to deny or explain this evidence.” (CALJIC No. 2.62.)

¹² The *Hannon* court also held a defense attorney’s instruction to a witness not to talk to the prosecution team would not in any event constitute suppression of evidence. (*Hannon, supra*, 19 Cal.3d at p. 600, 602.)

consciously attempted to suppress adverse evidence, the contention “if not entirely refuted, may not only destroy the credibility of the witness but at the same time utterly emasculate whatever doubt the defense has been able to establish on the question of guilt.” (*Id.* at pp. 602–603.) The court found it a close case and “an impermissible impact may have resulted in the minds of the jurors.” (*Id.* at p. 603.) Thus, under the facts presented,¹³ it appeared reasonably probable a verdict more favorable to the defendant might have resulted absent the error. (*Ibid.*) *Hannon* has been regularly cited as good authority on the propriety of giving consciousness-of-guilt instructions (see, e.g., *People v. Ramirez* (2006) 39 Cal.4th 398, 456; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 102–103; *People v. Valdez* (2004) 32 Cal.4th 73, 137).

Under the circumstances of the case before us, we find no prejudicial error. While the evidence was not overwhelming, the only contested issue at trial was the perpetrator’s identity. The victim, Howe, had known Caldwell’s family for many years and knew Caldwell. He saw him earlier on the day of the offense. When the shirt the perpetrator attempted to use to cover his face slipped, Howe testified that he recognized Caldwell “[i]nstantly.” His identification of Caldwell at trial was unequivocal. The defense vigorously challenged the reliability of that identification, emphasizing Howe’s head injuries (both predating the offense and those suffered during it), his confusion when talking to police, and his failure to tell investigating officers he saw Caldwell the morning of the robbery. The jurors certainly could have rejected Howe’s identification of Caldwell as the person who robbed and assaulted him, but they clearly did not—and could not have found Caldwell guilty otherwise. That determination necessarily rejected the alibi testimony entirely. The fabrication instruction was superfluous. (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1225.)

¹³ *Hannon* involved a stranger’s identification of the defendant as the assailant in an armed robbery. While one victim positively identified Hannon as the person responsible, the second victim was unable to make any identification. (*Hannon*, *supra*, 19 Cal.3d at p. 593.)

Moreover, this jury was told that an adverse inference of consciousness of guilt was only permissible if they first found “someone other than [Caldwell] tried to . . . provide false testimony” and then “only if [he] was present and knew about the conduct, or, if not present, authorized the other person’s actions. It’s up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.” The jury was further told that some instructions might not apply, depending upon their determination of the facts, and they should follow the instructions that applied to the facts as they found them. (CALCRIM No. 200.)¹⁴ We presume the jury understood and followed the instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

III. DISPOSITION

The judgment is affirmed.

¹⁴ “While such an instruction does not render an otherwise improper instruction proper, it may be considered in assessing the prejudicial effect of an improper instruction.” (*People v. Saddler* (1979) 24 Cal.3d 671, 684.)

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

SIMONS, J.

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