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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE STRINGFELLOW,

Defendant and Appellant.

C067141

(Super. Ct. No.
07F04222)

Defendant Robert Lee Stringfellow was convicted of five counts of second degree burglary, two counts of possession of a completed check with intent to defraud, and two counts of identity theft. The trial court sustained two strike allegations and sentenced defendant to 25 years to life in prison.

Defendant contends on appeal that the trial court erred in instructing the jury with CALCRIM No. 372 (defendant's flight as evidence of awareness of guilt), because (1) there is no

substantial evidence that defendant fled, (2) the instruction is improper where identity is the main issue, and (3) CALCRIM No. 372 violates due process because it presumes the crime was committed, it misleads the jury into presuming the crime was committed, and it varies significantly from Penal Code section 1127c.

Defendant's contentions lack merit. We will affirm the judgment.

BACKGROUND

Between May and June 2006, a check payable to defendant in the amount of \$3,000 was deposited to defendant's account at Washington Mutual Bank. The check was made on Leandro Valdivia's credit card account, but Valdivia did not write the check or authorize the payment to defendant.

Around that same time, Sharyn Johnson wrote checks to Mervyn's, Macy's and AT&T and put the checks in her home mailbox for postal pickup. Two checks, originally made out for around \$10, were subsequently altered without Johnson's permission to indicate that they were payable to defendant in the amounts of \$810 and \$1,000.03.

Karen Daly learned in September 2006 that a check for \$1,807 had been written, without her authorization, to defendant on her credit account. That same month, Malia Arnold discovered that a "convenience" check -- a check linked to her credit card account -- had been written in the amount of \$2,000, payable to defendant, with the notation "car purchase." Arnold did not

write the check. The checks on the Arnold and Daly accounts were deposited to defendant's account at Patelco Credit Union.

James Parker noticed in October 2006 that some of his mail was missing and that other mail addressed to him was on the street by his house. He subsequently learned that a \$1,400 check had been written to defendant on Parker's credit card account. Parker did not know defendant and did not authorize the check. On October 19, 2006, defendant tried to deposit the check at Patelco's branch on Howe Avenue. The teller sent an instant message to the branch manager, Edward Polkenhorn, after noticing a flag on defendant's account. Polkenhorn grabbed the check and went to the back of the branch to make inquiries, calling 911 and Patelco's internal audit unit in San Francisco. Polkenhorn's inquiries took 20 to 30 minutes. Defendant waited in the teller line for much of that time, but about five minutes before the police arrived, defendant left the check at the credit union and drove off. The following day, defendant returned to the Howe Avenue branch. Patelco permitted him to deposit the check so that it could confirm that the check was invalid.

A postal inspector testified that the signatures on the fraudulent checks matched the signature on defendant's driver's license and signature card.

DISCUSSION

Over defendant's objection, the trial court instructed the jury with CALCRIM No. 372 as follows: "If the defendant fled immediately after the crime was committed, that conduct may show

that he was aware of his guilt. If you conclude that the defendant fled, 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.”

Defendant contends the trial court erred in giving the flight instruction in this case. We address each of defendant’s contentions in turn.

I

Defendant contends the flight instruction should not have been given because there was insufficient evidence that he fled.

An instruction in substantially the form of CALCRIM No. 372 must be given whenever the prosecution relies on evidence of flight to show a consciousness of guilt. (Pen. Code, § 1127c.) “[A] flight instruction is correctly given ‘where there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a consciousness of guilt.’ [Citation.]” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) “If there is evidence identifying the person who fled as the defendant, and if such evidence ‘is relied upon as tending to show guilt,’ then it is proper to instruct on flight. [Citation.]” (*People v. Mason* (1991) 52 Cal.3d 909, 943.) “To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence. [Citation.]” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328, original italics.)

Defendant points out that although he left Patelco's branch on Howe Avenue on October 19 after waiting 20 to 30 minutes, he returned the next day to deposit the check. Thus, he argues, there is no substantial evidence that he fled, and the flight instruction was unwarranted. We disagree.

Defendant went to Patelco's Howe Avenue branch to deposit a fraudulent \$1,400 check. The check was taken by the branch manager when the teller noticed defendant's account was flagged, and, after waiting nearly 20 to 30 minutes, defendant left the branch and drove off, leaving the check behind. He returned the next day, where he was allowed to deposit the check so that it could be verified as invalid.

Defendant waited a substantial time before leaving. While this could support an inference that impatience, rather than guilt, motivated his departure, the inference is undercut by the fact that defendant left the \$1,400 check behind. There is no indication that defendant asked for the check, reinforcing the inference that he left in order to avoid apprehension, which would have occurred if he had remained another five minutes. Regarding defendant's return to the branch the next day, the jury could reasonably conclude that defendant, who was not apprehended in the time following his departure, felt he could return and deposit the check without fear of being caught. We conclude that substantial evidence supports the flight instruction.

II

Defendant next contends that the flight instruction is improper when the identity of the perpetrator is the main issue in the case.

Because the defense theory was that persons other than defendant had access to his account, defendant cites cases holding that when identity is in issue, the flight instruction is improper. (*People v. Jackson* (1986) 187 Cal.App.3d 499, 511; *People v. Mask* (1986) 188 Cal.App.3d 450, 455-456; *People v. Malgren* (1983) 139 Cal.App.3d 234, 242; *People v. Salazar* (1980) 108 Cal.App.3d 992, 997-998; *People v. Anjell* (1979) 100 Cal.App.3d 189, 199.) He asserts that when "identity is the only issue at trial to the extent that placing defendant at the scene is akin to establishing his guilt as charged, there is no consciousness of guilt to be inferred from flight because the finding of flight itself presumes a finding of guilt."

In more recent cases, however, the California Supreme Court has held otherwise. (*People v. Jones* (1991) 53 Cal.3d 1115, 1144-1145; *People v. Mason, supra*, 52 Cal.3d at p. 943, fn. 13; *People v. Pensinger, supra*, 52 Cal.3d at p. 1245; see also *People v. Cruz* (1995) 38 Cal.App.4th 427, 435.) According to the Supreme Court, "[i]f there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. [Citation.] 'The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt."

[Citation.] The jury's need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.' [Citation.]" (*People v. Mason, supra*, 52 Cal.3d at p. 943.)

Here, Polkenhorn testified that defendant was the person who left the branch before his attempted \$1,400 deposit was resolved. The trial court did not err in giving the flight instruction.

III

Defendant also contends that CALCRIM No. 372 violates his due process rights because the instruction presumes the crime was committed, it induces a jury to presume the crime was committed, and it varies significantly from the wording of Penal Code section 1127c.

Defendant admits, however, that this court rejected these same contentions in *People v. Paysinger* (2009) 174 Cal.App.4th 26, 30-32. Defendant's argument adds nothing new and he

provides us with no reason to depart from this court's prior decision. Accordingly, we reject his due process contentions.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

ROBIE, Acting P. J.

BUTZ, J.