

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLEON GILLIAM,

Defendant and Appellant.

D059506

(Super. Ct. No. SCE299097)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

INTRODUCTION

A jury convicted Cleon Gilliam of second degree robbery (Pen. Code,¹ § 211). In addition, Gilliam admitted having four prior prison convictions (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)(1)), and four prior strike convictions

¹ Further statutory references are also to the Penal Code unless otherwise stated.

(§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). The trial court dismissed three of the prior strike conviction findings and sentenced Gilliam to an aggregate term of 19 years in prison.

Gilliam appeals, contending we must reverse his conviction because the trial court violated his right to due process of law by giving instructions on flight, motive, and permissible inferences from possession of stolen property, and by failing to give an instruction on the necessarily included offense of grand theft person. We conclude these contentions lack merit and affirm the judgment.

BACKGROUND

Prosecution Evidence

In March 2010 a tall, dark-skinned African-American man with short hair walked into the store of a La Mesa gas station and approached the counter. He wore a black windbreaker-type jacket with a hood and had a white towel covering the lower portion of his face. He had his right hand in his pocket, possibly simulating possession of a weapon.

He told the cashier on duty, Adriana Torres, to open the cash register. She refused. After he again ordered her to open it and she again refused, he walked around the counter to the register. She then got the register key and tried to open it, but had some difficulty because she was very scared. He pulled the drawer open, grabbed the cash inside it, told her to get on the floor, and left the store.

Torres immediately called 911 and walked to the door of the store to see where the man went. He walked across the street toward a restaurant, got into a silver Chrysler minivan, and drove away. According to Torres, he did not have an unusual gait and he did not use a cane.²

Torres told responding La Mesa Police Officers Daniel Paugh and Tina Scott about the robbery and described the robber, the minivan, and the minivan's direction of travel. Paugh testified Torres was quite upset. Scott testified Torres was "very scared. She was speaking quickly and nervously, and she was jittery." On cross-examination, Scott further testified Torres was crying and needed some time to calm down before she could talk. The store manager, whom Torres summoned to the store after the robbery, similarly testified Torres was scared and shaking. Torres initially testified she was nervous, intimidated and afraid during the robbery, but "not to the point where [she] feared [for her] life." On cross-examination, however, she acknowledged the robbery was a stressful, scary, traumatic event.

While en route to the gas station, officer Claudia McDaniel saw a minivan matching the description and direction of travel of the robber's minivan. The driver was not speeding, driving evasively, or driving erratically. McDaniel followed the minivan until the driver pulled it into and parked in the driveway of a residence. The driver, who was Gilliam, got out and started walking to the residence. He was wearing a black nylon-

² It appears from remarks made on the record at trial Gilliam used a cane to ambulate.

like hooded jacket with a red fleece lining. There was a black baseball cap sitting in the hood of the jacket; however, Torres testified the robber was not wearing a baseball cap.

McDaniel and another officer detained Gilliam and patted him down for weapons. Gilliam cooperated with them and did not have any weapons. Although McDaniel noted from the pat down that Gilliam had a prosthetic leg, neither she nor the officer assisting her noted him having a cane or walking stick. The officers searched the minivan and found a white towel on the front passenger seat and \$401 in cash in a pocket door on the center aisle side of the passenger seat. Gilliam also had two \$10 bills in his right front pants pocket. The denominations found in the minivan and on Gilliam were similar to denominations taken from the store. Gilliam told McDaniel the money belonged to him and he wanted it to go to his mom.

McDaniel placed Gilliam in her patrol car and Paugh transported Torres to Gilliam's location for a curbside lineup. As soon as Paugh approached Gilliam's location, Torres said, "Oh, my God. Oh, my God. That's him. That's him." Paugh drove closer. When the patrol car was within about 20 yards of Gilliam, Paugh asked Torres to look again. She said, "Yes, that's him." At trial, Torres testified she recognized Gilliam and Gilliam's minivan right away. She also testified the jacket Gilliam wore was the same jacket the robber wore and the white towel found in the minivan looked like the towel the robber used to cover his face.

According to the store's accounting reports, when the robbery occurred, the cash register had \$547.62 in it. After the robbery, it had \$107.62 in it, indicating the robber took \$440 from the cash drawer, although he dropped \$20 on the floor of the store as he left.

Defense Evidence

Dr. Thomas MacSpieden, an eyewitness identification expert, testified that eyewitness identification is generally not reliable and there is no correlation between an eyewitness's certainty and the accuracy of the eyewitness's identification. Among the factors potentially affecting the accuracy of eyewitness identification are stress, the distance between the suspect and the eyewitness, differences in the race of the suspect and the eyewitness, and the amount of time the eyewitness has to look at the suspect.

Gilliam's mother and son both testified that Gilliam's mother sent Gilliam a money order for approximately \$400 a few days before the robbery. The trial court admitted a copy of the money order into evidence.

DISCUSSION

I

CALCRIM No. 372 Flight Instruction

A

At the jury instruction conference, defense counsel objected to the trial court giving a flight instruction, arguing there was no evidence of flight because there was no speeding or aberrational driving. The trial court responded, "There may be no flight by

your client. The question is: was there flight by the perpetrator? ¶ . . . ¶ If they conclude that the perpetrator leaving the scene in the car constitutes flight from the crime that's just been committed, and they conclude that your client was in fact the perpetrator, then the question is whether or not they can consider that flight as an element to potentially show guilt." Based on this analysis and a finding that there was sufficient evidence to support the instruction, the trial court determined it had to give a flight instruction notwithstanding defense counsel's objection.

The trial court used CALCRIM No. 372 (CALCRIM 372), the standard jury instruction on flight. This instruction informed the jury, "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 cannot by itself prove guilt."

B

In any criminal trial where the prosecution relies on evidence of a defendant's flight to prove guilt, the trial court must "instruct the jury substantially as follows: ¶ The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." (§ 1127c.)

Notwithstanding this statutory mandate, Gilliam raises numerous challenges to the trial court's decision to give the CALCRIM 372 instruction. As we explain below, we conclude there is no merit to any of these contentions.

1

Relying on *People v. Anjell* (1979) 100 Cal.App.3d 189 (*Anjell*) and its progeny, Gilliam first contends a trial court may not give a flight instruction where the identity of the perpetrator is the main issue in the case. The California Supreme Court, however, has expressly disapproved *Anjell* on this point and held, "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.] '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.'" (*People v. Mason* (1991) 52 Cal.3d 909, 943 & fn. 13, modified on another point as recognized in *People v. Solomon* (2010) 49 Cal.4th 792, 839; see also *People v. Elliott* (2012) 53 Cal.4th 535, 584 [no error in giving flight instruction where the sole question for the jury was whether defendant was the perpetrator and there was no evidence of defendant's flight apart from his identification as the perpetrator].) We are bound by the court's holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

7

Gilliam next contends there was insufficient evidence of flight to justify the instruction. " 'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." ' [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citations.] 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." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

In this case, the evidence shows Gilliam immediately left the store after the robbery, dropping one of the stolen \$20 bills in his haste. Then, notwithstanding his prosthetic leg and lack of a cane for support, he walked quickly to his minivan, which he had parked in front of a different business, and drove away. As a jury could reasonably find from these circumstances Gilliam fled the scene to avoid being spotted or arrested, there was sufficient evidence to justify the trial court's decision to give the instruction.

Gilliam further contends the instruction undermines the presumption of innocence and lessens the prosecution's burden of proof because it presupposes a crime was committed. As Gilliam acknowledges, this precise issue was raised and rejected in *People v. Paysinger* (2009) 174 Cal.App.4th 26, 30-31 (*Paysinger*). He asserts, however,

Paysinger was wrongly decided as the appellate court's analysis was flawed. We disagree.

The *Paysinger* court began its analysis by recognizing, as we do, that appellate courts review jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood a challenged instruction in the manner claimed. (*Paysinger, supra*, 174 Cal.App.4th at p. 30; see also *People v. Solomon, supra*, 49 Cal.4th at p. 822 [a defendant challenging an instruction as being subject to misinterpretation by the jury must demonstrate a reasonable likelihood the jury understood the instruction in the way the defendant claims].) The court then concluded the word "if" in the instruction's opening clause " 'If the defendant fled or tried to flee immediately after the crime was committed,' " logically makes the entire clause conditional. Therefore, the court concluded it was "highly unlikely a reasonable juror would have understood the instruction as dictating that 'the crime was committed.' " (*Paysinger, supra*, at p. 30.)

The court noted the language of other jury instructions supported its determination, including "(1) 'You must decide what the facts are'; (2) 'It is up to all of you and you alone to decide what happened'; (3) 'A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt[]'; and (4) 'Remember that you may not convict a defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant's guilt[] of that crime has been proved beyond a reasonable doubt.' " (*Paysinger, supra*, 174 Cal.App.4th at p. 30.) The court additionally noted there was no

dispute in that case whether a crime occurred. The only issue was whether the defendant was one of the perpetrators. Consequently, the court concluded it was not reasonably likely the jury would have interpreted the CALCRIM 372 instruction in a manner that undermined the presumption of innocence or lessened the prosecutor's burden of proof. (*Paysinger, supra*, at p. 31.)

We agree with the *Paysinger* court's analysis and conclude it is fully applicable in this case. We, therefore, reject Gilliam's assertion the opening clause of the instruction rendered the instruction constitutionally infirm.

4

Gilliam finally contends the instruction impermissibly varies in significant respects from the sample flight instruction contained in section 1127c. Each of Gilliam's arguments on this point matches nearly verbatim arguments raised and rejected in *Paysinger, supra*, 174 Cal.App.4th at pages 31-32.

First, like the defendant in *Paysinger*, Gilliam observes CALCRIM 372 informs the jury flight may show awareness of guilt before informing the jury flight alone is not sufficient to prove guilt, while section 1127c conveys these concepts in the opposite order. (*Paysinger, supra*, 174 Cal.App.4th at p. 31.) Also like the defendant in *Paysinger*, Gilliam contends "this difference makes the CALCRIM [372] instruction constitutionally deficient because the first sentence of the instruction 'strongly suggests . . . that evidence of flight is in fact sufficient to show guilt.'" (*Ibid.*) Like the *Paysinger* court, we are not persuaded by this contention because "[t]he first sentence of

CALCRIM [372] suggests no such thing, and in any event the final sentence of the instruction positively refutes any such suggestion." (*Ibid.*)

Moreover, like the defendant in *Paysinger*, Gilliam complains the sample instruction in section 1127c informs the jury flight is merely a factor the jury may consider in deciding a defendant's guilt or innocence while the CALCRIM 372 instruction goes further and invites the jury to infer guilt from flight by informing the jury flight may show a defendant's awareness of guilt. (*Paysinger, supra*, 174 Cal.App.4th at p. 31.) Like the *Paysinger* court, we are not persuaded this distinction, if substantively meaningful, renders the instruction unconstitutional. As the *Paysinger* court explained, "It has long been accepted that if flight is significant at all, it is significant because it may reflect consciousness of guilt, which in turn tends to support a finding of guilt." (*Ibid.*) Accordingly, we conclude the discrepancies between the CALCRIM 372 instruction and the sample instruction in section 1127c do not render the former unconstitutional.

II

CALCRIM No. 370 Motive Instruction

A

Over defense counsel's general objection, the trial court instructed the jury with CALCRIM No. 370 (CALCRIM 370). This instruction informed the jury, "The People are not required to prove that the defendant had a motive to commit any crime charged. [¶] In reaching your verdict, you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

B

1

Gilliam contends this instruction violated his fundamental rights because it misled the jury and reduced the prosecution's burden of proof by suggesting motive alone could establish guilt. The California Supreme Court has previously rejected these arguments. (*People v. Howard* (2008) 42 Cal.4th 1000, 1024; see also *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192-1193; *People v. Anderson* (2007) 152 Cal.App.4th 919, 942-943 (*Anderson*).) We are bound by the court's holding. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

2

Gilliam additionally contends there was insufficient evidence to support the trial court's decision to give the instruction. We disagree. In a case such as this, where there is no question a crime occurred, but there is a question about whether the defendant was the perpetrator, it is important for the jury to understand the prosecutor does not have to prove the defendant's motive in order to prove the defendant committed the crime. It is likewise important in a case such as this, where a defendant has an alternate, innocent explanation for the source of what appears to be the proceeds of the crime, for the jury to understand the absence of a motive is a factor tending to show the defendant is not guilty. Thus, we conclude there was sufficient evidentiary support in this case for the instruction.

Even if the motive instruction had no application to the facts of this case, "such an error is usually harmless, having little or no effect 'other than to add to the bulk of the charge.' [Citation.] There is ground for concern only when an abstract or irrelevant

instruction creates a substantial risk of misleading the jury to the defendant's prejudice." (*People v. Rollo* (1977) 20 Cal.3d 109, 123, superseded by constitutional amendment on another ground as stated in *People v. Castro* (1985) 38 Cal.3d 301, 307-308, 312-313.) As the motive instruction permitted, but did not require, the jury to consider the presence or absence of motive in this case, we conclude it did not create as substantial risk of misleading the jury and, therefore, did not prejudice Gilliam. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 238.)

III

CALCRIM No. 376 Instruction

A

Over defense counsel's general objection, the trial court instructed the jury with CALCRIM No. 376 (CALCRIM 376). This instruction informed the jury, "If you conclude that the defendant knew he possessed property, and you conclude that the property had in fact been stolen, you may not convict the defendant of robbery based on that fact alone. However, if you also find that the supporting evidence tends to prove guilt, you may conclude that the evidence is sufficient to prove he committed robbery. That supporting evidence need only be slight, need not be enough by itself to prove guilt. You may consider how, where and when a defendant possessed the property, along with any other relevant circumstances tending to prove guilt. [¶] Remember, you may not convict the defendant of any crime unless you are convinced that each fact essential to that conclusion of guilt has been proved beyond a reasonable doubt."

Gilliam contends this instruction violated his right to due process of law because it does not contain a requirement that the possession of stolen property be unexplained. He asserts such a requirement is mandated by *People v. McFarland* (1962) 58 Cal.2d 748 (*McFarland*) and *Barnes v. United States* (1973) 412 U.S. 837. As explained in *Anderson, supra*, 152 Cal.App.4th 919, a case which Gilliam does not address in his briefs, neither *McFarland* nor *Barnes* supports Gilliam's position.

"In *McFarland*, the court stated the following rule: 'Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt, an inference of guilt is permissible and it is for the jury to determine whether or not the inference should be drawn in the light of all the evidence.' [Citation.] However, before stating the foregoing rule, the state high court in *McFarland* acknowledged the more general rule that possession of recently stolen property together with other corroborating evidence is sufficient to infer guilt. [Citation.] The court went on to state that a failure to explain or a false explanation of such possession is one type of corroborating evidence. In other words, the court in *McFarland* did not say that possession must be unexplained to be relevant but that the lack of an explanation for possession is one type of corroborating evidence sufficient to support a conviction." (*Anderson, supra*, 152 Cal.App.4th at p. 948.)

Similarly, "[i]n *Barnes*, the jury was instructed that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." [Citation.] The United States Supreme Court found no problem in this instruction, which permitted an inference of guilt from unexplained possession. In other words, as in *McFarland*, possession of recently stolen property coupled with a lack of explanation is sufficient to support conviction. However, the court did not say this was the only acceptable type of corroborating evidence." (*Anderson, supra*, 152 Cal.App.4th at p. 948.)

We agree with the *Anderson* court's analysis. As neither *Barnes* nor *McFarland* requires that a defendant's possession of recently stolen property be unexplained before a trial court may give an instruction such as CALCRIM 376, Gilliam has not established CALCRIM 376 is constitutionally deficient for failing to contain such requirement. Accordingly, Gilliam has not established the trial court erred on this ground by giving the instruction. (*Anderson, supra*, 152 Cal.App.4th at p. 948; see also *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1575-1576; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1173-1174 [involving CALCRIM 376 predecessor, CALJIC No. 2.15].)

2

Nonetheless, Gilliam additionally contends the instruction's "supporting evidence need only be slight" language lowered the prosecution's burden of proof and deprived

him of his rights to due process of law and to have each element of a charged offense proven beyond a reasonable doubt. We disagree.

CALCRIM 376, like its predecessor CALJIC No. 2.15, "is an instruction generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.] In the presence of at least some corroborating evidence, it permits—but does not require—jurors to infer from possession of stolen property guilt of a related offense such as robbery or burglary." (*People v. Gamache* (2010) 48 Cal.4th 347, 375.)

Moreover, the California Supreme Court has previously held CALJIC No. 2.15 "does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution's burden of establishing guilt beyond a reasonable doubt [citations]." (*People v. Gamache, supra*, 48 Cal.4th at p. 376.) On this point, the relevant language in CALCRIM 376 and CALJIC No. 2.15 is "linguistically synonymous" and "constitutionally indistinguishable." (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1036.) We are, therefore, bound to follow and apply the above Supreme Court CALJIC No. 2.15 holdings to CALCRIM 376 (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455) and must reject Gilliam's assertions since they are contrary to them.

IV

Cumulative Error

Gilliam contends the cumulative effect of the above claim instructional errors prejudiced him and warrants reversal of his convictions. However, as we have concluded

there is no merit to any of the above claimed errors, there is no cumulative effect for us to consider. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

V

Failure To Instruct on Grand Theft as a Lesser Included Offense

A

Near the end of the jury instruction conference, the trial court asked defense counsel if he was going to request that the jury be instructed on any lesser included offenses. Defense counsel responded, "I'd have to think about it." The trial court suggested grand theft person, although "a stretch," might be a potential lesser included offense based on some initial testimony from Torres suggesting she was more startled or shocked by the incident than afraid. The trial court stated it did not believe there was sufficient evidence to require it to sua sponte instruct on the lesser offense. The trial court also noted such an instruction might conflict with Gilliam's defense. The trial court, therefore, left it up to defense counsel to request the instruction if he wanted it. Defense counsel stated at the sentencing hearing he decided not to request the instruction because it was inconsistent with Gilliam's mistaken identification defense.

B

Defendant nevertheless contends on appeal the trial court was obliged to instruct the jury on grand theft person as a lesser include offense of robbery and the trial court's failure to do so deprived him of his right to have a jury decide all evidentiary issues. We conclude any error was harmless.

The trial court must instruct the jury on a lesser included offense "if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense." (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) "Theft in any degree is a lesser included offense to robbery, since all of its elements are included in robbery. The difference is that robbery includes the added element of force or fear." (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1256.)

However, "[t]he failure to instruct on a lesser included offense in a noncapital case does not require reversal 'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.' [Citation.] 'Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.'" (*People v. Thomas, supra*, 53 Cal.4th at p. 814, fn. omitted.)

Although Torres gave arguably conflicting testimony about the quantum of fear she experienced from the incident, she consistently testified the incident frightened her. In addition, three people who had an opportunity to observe and speak with her near in time to the incident—the two responding officers and the store manager—all testified she was visibly upset and shaking. In fact, one of the responding police officers testified

Torres was crying and needed time to compose herself before she could answer the officer's questions.

Moreover, Gilliam never disputed Torres experienced fear from the incident. Instead, during his cross-examination of prosecution witnesses and in his closing argument, defense counsel intentionally emphasized how badly the incident rattled Torres to support Gilliam's mistaken identification defense. Accordingly, we conclude there is no reasonable possibility any error in failing to instruct the jury on the lesser included offense of grand theft person affected the trial result.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

McINTYRE, J.