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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM THOMAS HUSSEY,

Defendant and Appellant.

E052750

(Super.Ct.No. FVI902343)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jules E. Fleuret, Judge. Affirmed as modified.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant William Thomas Hussey appeals from his conviction of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)) and elder abuse causing death (§ 368, subd. (b)(1), (b)(3)(B)). He contends the trial court erred in refusing his counsel's request to modify the flight instruction to inform the jury that flight was circumstantial evidence of guilt, and as such, was subject to all the restrictions on the use of circumstantial evidence. We find that any error was harmless. Defendant also contends, and the People agree, that the parole revocation fine imposed under section 1202.45 must be changed to match the restitution fine imposed under section 1202.4. We will order the minute order and abstract of judgment to be amended accordingly.

## II. FACTS AND PROCEDURAL BACKGROUND

In October 2009, defendant was living with his mother, Mary Hussey, in Hesperia. Mary was over 70 years old and had suffered a stroke that left her unable to completely care for herself; she also had trouble speaking clearly. Defendant's son, A.H. (eight years old at the time of trial), and defendant's mentally ill brother, Alan, also lived there. A friend, Steven Collett, was living in an RV parked at the side of Mary's house. The house doors were generally left unlocked and Collett could enter the house as he pleased.

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<sup>1</sup> All further statutory references are to the Penal Code.

A.H. testified that on Friday, October 16, 2009, defendant became upset and yelled at Mary about her dogs. While they were arguing, A.H. saw defendant put his hand over Mary's nose and mouth three times so she could not breathe. Defendant broke Mary's eyeglasses and her phone. Defendant followed Mary into her bedroom and hit her while she cried out for help. A.H. saw Mary lying on the floor near the window. Defendant told A.H. not to tell anyone.

At trial, A.H. testified that he did not see defendant hitting Mary, but he thought he might have told his mother, Christine Decker, he had seen that. A.H. told Decker he had seen defendant "hitting [Mary] again and again and again and that he wouldn't stop." A.H. also told Decker he had heard Mary calling for help, and he had seen defendant "hitting her, beating her, and he couldn't understand why [defendant] didn't stop." A.H. told Decker defendant was responsible for Mary's death. A.H. said defendant was striking Mary in the face.

Defendant told Collett that he, Alan, and A.H. were going fishing, and the three left the house around 10:15 or 10:30 a.m. on Saturday, October 17, 2009. A.H. saw Mary asleep on the couch. Defendant told A.H. to say goodbye to her because it was going to be the last time he saw her. Mary woke up before they left, and A.H. gave her a hug and said goodbye. He did not see any injuries on her. He got in the car and waited for defendant, who was still in the house. He did not see his grandmother again. A.H. had previously told a deputy that the last time he had seen Mary was on Friday night. At trial, he testified that he did not remember saying that. He said his recollection of what had

happened was fresher shortly after the events happened. A.H. did not remember telling his mother that defendant had killed Mary.

Deputy Michael Cleary testified that he had interviewed A.H. in August 2010. A.H. told the deputy that defendant had beaten Mary. A.H. had seen defendant put his hand over Mary's nose and mouth three times for several seconds so she could not breathe, and he had seen defendant break Mary's glasses by throwing them against the wall. A.H. saw Mary lying on the floor of her bedroom with one arm reaching up toward the window. Defendant told him not to tell anyone. A.H. told the deputy he saw the whole thing happening. A.H. also told the deputy he had never seen any injuries on Mary.

On Saturday, instead of going fishing, defendant drove to Decker's home in Pahrump, Nevada. Defendant had not told Decker they were coming, and she had not seen A.H. in a year. Defendant asked her to keep A.H. for about a week. She agreed, and defendant left with Alan. Defendant told Decker he wanted to see his ex-wife, Vicki Huckaba, and his daughter and stepson, Michael Stevens. Decker called them on defendant's cell phone. Defendant told Decker he was going to a casino to meet Stevens, and defendant left with Alan. Defendant told her his mother had given him a credit card with a \$10,000 limit to use for food and gas. Decker did not hear from him again until the next day, October 18.

Stevens<sup>2</sup> testified that defendant had been a father figure to him since Stevens was three years old. In October 2009, defendant and Stevens had a “pretty good” relationship, although they had not seen one another for seven or eight years. Defendant invited Stevens to meet him for dinner at a casino. While they were there, defendant gave Stevens Mary’s credit card to use to buy gas. Defendant told Stevens he had to return to California to “take care of a body.” He said he had just killed someone, and it was the hardest thing to do—it had taken 10 minutes and three tries. Stevens testified he did not ask defendant any questions but just wanted to get away from him. Defendant seemed to be “like dead serious.” Twice when Stevens was about 13 years old, defendant told him defendant “was involved in a lot of bad things, and he killed someone,” but defendant did not elaborate, and Stevens had not asked him any questions, although Stevens did not believe defendant. Stevens left and dropped off methamphetamine for several friends. Stevens later asked his sister to telephone Mary to see if everything was all right. Stevens testified he did not know who Collett was. Defendant asked Stevens for some methamphetamine, but Stevens did not provide him any, because defendant wanted to use a credit card to buy items to exchange for the drug, and Stevens “strictly t[ook] cash.”

Defendant’s ex-wife, Vicki Huckaba, testified that defendant had telephoned her on October 17, 2009, and asked if she wanted to party. He said he had a credit card that

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<sup>2</sup> At the time of trial, Stevens was in custody for a parole violation—being an ex-felon in possession of a firearm and possession of a machine gun, and he had prior felony convictions for burglary and grand larceny. He was in custody on a parole violation at the time of defendant’s trial.

had \$30,000 on it. Huckaba was concerned when she learned that defendant had Alan with him “[b]ecause Alan had a mental problem, and Mary would never allow him to go with [defendant] anywhere like that alone.” Defendant’s relationship with Stevens had been “stressed” in the past. Stevens told her that defendant was “acting funny” and had said he killed someone and had to go back to get rid of the body. Huckaba tried to call Mary but no one answered. She contacted defendant’s brother, Brian Hussey. Brian tried unsuccessfully to call Mary on her cell phone, and he then contacted the police and requested them to do a welfare check on her.

Collett testified that defendant told him he was going to go to yard sales with Mary and Alan on Friday, October 16, 2009, but they never did so. Defendant seemed upset and asked Collett to purchase drugs for him. When Collett returned with the drugs, defendant did not want him to enter the house, but Collett went in anyway. He saw Mary come out of her bedroom with a black eye, and he asked defendant what had happened. Defendant said he had accidentally elbowed her. Defendant did not seem upset, and Mary did not say anything. Later that evening, defendant again told Collett he could not come into the house, and still later, Collett found that the doors were locked. Defendant came out to the RV and asked Collett to copy down information from Mary’s credit card and identification card. Collett wrote the information on a napkin and gave it to defendant.

Collett went into Mary’s house through the garage door on Saturday to use the bathroom and get a drink of water. He did not see or hear anyone inside, and he noticed that all the doors down the hallway were closed, although they were normally left open.

Defendant's brother, Clayton Hussey, stopped by Mary's house that evening but found the house dark and all the doors locked, which was unusual. It appeared that no one was home.

Deputy Jason Schroeder interviewed Collett. Collett said that on October 16, 2009, defendant had become upset about Mary's dog and continued to be upset all that day. At one point Hussey stood in the doorway and tried to block Collett from entering Mary's house, but Collett walked around him. He said Mary had a bruise on her face and her glasses were broken; she "had a look on her face like 'Help me.'" Hussey stated, "It's not how it looks," and explained he had accidentally elbowed her when they were walking down the hall. Collett asked Hussey to go with him to get drugs so as to "cool off." Hussey told Collett to get the drugs and come back. Before Collett left, Mary walked back toward her bedroom, and defendant followed her into the bedroom and shut the door. Alan and A.H. were both in the living room. Collett went out to get the drugs and then returned to the house. He did not see Mary again. Hussey had come out to the RV and asked Collett for a piece of paper and a pen, which Collett gave him. Hussey had Mary's identification card and credit card, and he asked Collett to write down information from them and "hang on to it." Collett gave the deputy a note that contained Mary's information.

Deputy Schroeder was contacted to conduct a welfare check on Mary on Sunday. He went to the Mary's front door, where he saw a note that read, "mom is at the stores will be back at 200?" No one answered when the deputy knocked, and the door was locked. The deputy knocked at Collett's door, and Collett helped the deputy enter the house.

Deputy Schroeder found dentures on the floor in the hallway. One of the bedroom doors was locked, but the deputy opened it with a screwdriver. He found Mary lying below the window, partially underneath a chair. She was gasping for air and had a faint pulse, but she was motionless and unresponsive. She was transported to the hospital, where she died a week later from the combined effect of “blunt force, head and chest injuries.” The autopsy revealed multiple fractured ribs, including displaced fractures, on both sides; a fractured arm; and extensive bruising to her upper arm typically associated with being hit, squeezed, or gripped strongly. Bruises to her face and gums were consistent having a hand placed over her mouth to suffocate her or stop her from shouting.

The deputy searched the house but did not find any drugs or drug paraphernalia. The window screen to Mary’s bedroom was off.

On Sunday morning, Clayton went to Mary’s house and saw a deputy sheriff’s vehicle there. After the deputies left, he was watering her plants when he saw defendant drive, turn around, and drive back. They made eye contact, and defendant stopped in front of the house without pulling into the driveway. Clayton yelled something like, ““What did you do to mom? The police are looking for you hard.”” Defendant did not say anything, but drove off.

Defendant telephoned Decker on October 18 and said that if he was not in Pahrump within three hours, to call a mutual friend, “because it meant he had been arrested and she would know why.” He called again to say that his credit card had been declined, and he needed to wait for someone to give him gas. Defendant started crying

and said his mother had died while he was gone, and he would tell Decker how when he got there. Defendant was arrested later on October 18. Mary's credit card and ID were found in his van.

#### **A. Defense Evidence**

Defendant testified in his own behalf.<sup>3</sup> He denied being upset with Mary on October 16, 2009, and he denied murdering her. He said she had given him her credit card and ID card to use.

He testified that on October 16, 2009, he and Mary had gone to yard sales and then had picked up A.H. from school. When they returned home, defendant found Alan in Collett's RV getting high with Collett. Defendant became upset and told Collett he needed to leave. Collett begged to stay two more days, and Mary agreed, but asked defendant to make sure the drugs were off the property. Defendant stated Collett had been living in the RV for about a week and was supposed to be fixing things around the house and on the RV. Collett came into the house at all hours of the day, and defendant began to feel Collett was abusing their friendship.

When defendant and Mary returned that day, they found the yard gates open, and one of the dogs appeared to be missing. Alan and Collett blamed each other for leaving the gates open.

Defendant acknowledged he had put his hand over Mary's mouth. He explained that he heard her yell for help and found her on the floor in the bedroom. He could not

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<sup>3</sup> Defendant was impeached with two felony convictions in 1995.

understand what she was saying, so he put his hand on her mouth to quiet her as one would quiet a child. He denied covering her mouth and nose so she could not breathe. He also denied being angry with her on October 16, 2009, and he denied breaking her glasses or her phone.

Mary gave him her credit card and identification card on October 16, 2009. She let him use her credit card when he needed, and he kept receipts and reimbursed her. He put the cards in a cigarette pack and left them in the van overnight. He denied showing the cards to Collett or asking Collett to copy information from the cards.

Saturday morning he decided to take A.H. to Pahrump to see his mother. He saw Mary asleep on the couch, and she appeared to be uninjured. He and A.H. wanted to surprise Decker, so they did not call to tell her they were coming. He also stated he did not have Decker's or Huckaba's telephone numbers. He had not seen Stevens for about 15 years, and they had had a terrible relationship in the past. He denied asking Stevens to purchase methamphetamine for him. He did use the credit card to purchase gas, milk, and cigarettes for Stevens.

Defendant started to drive back to Hesperia at about midnight and stopped a couple of times on the way to sleep in the back of his van. He dropped off Alan near their house to turn in some aluminum cans and then unintentionally drove past his house because he did not recognize a truck parked in the driveway. When he turned around and went back to the house, Clayton yelled that defendant had killed their mother, and the police were looking for him. Defendant was shocked, so he went to pick up Alan. He did not get out of the car to find out what had happened. Instead, he got on the freeway

to drive back to Nevada, planning to get his daughter to help him. He had a friend telephone Decker, and in a second conversation with her he told her he had run out of gas and Mary was dead.

He had left the note on the door of Mary's house a few days earlier and had forgotten it was there. Defendant denied using drugs with Collett and testified he had been off drugs for nine years.

### **B. Verdicts and Sentence**

The jury found defendant guilty of first degree murder (§ 187, subd. (a)) and elder abuse (§ 368, subd. (b)(1)). The trial court sentenced him to an indeterminate term of 25 years to life for the murder. The trial court also imposed the aggravated term of four years for elder abuse and seven years for the enhancement under section 368, subdivision (b)(3)(B), but stayed that sentence and enhancement under section 654.

## **III. DISCUSSION**

### **A. Flight Instruction**

Defendant contends the trial court erred in refusing his counsel's request to modify the flight instruction to inform the jury that flight was circumstantial evidence of guilt, and as such, was subject to all the restrictions on the use of circumstantial evidence.

#### *1. Additional Background*

Defendant's trial counsel requested the court to instruct the jury with a modified version of the flight instruction, as follows: "If the defendant fled or tried to flee immediately after a crime was committed, that conduct may be circumstantial evidence which may show that he was aware of his guilt to any charged offense or lesser included

offense. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. Evidence that the defendant fled, or tried to flee, cannot prove guilt by itself.’”

The trial court found that the proposed instruction was confusing in that no lesser included offense was charged, and argumentative because the standard jury instruction on circumstantial evidence was adequate. The trial court instead instructed the jury with the standard flight instruction (CALCRIM No. 372) as follows, “If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show you that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.” The trial court also instructed the jury with CALCRIM No. 223 on the definitions of direct and circumstantial evidence, with CALCRIM No. 224 on the limitations on the use of circumstantial evidence, and with CALCRIM No. 220 on reasonable doubt. In refusing defendant’s requested instruction, the trial court stated that the standard jury instructions were sufficient to allow defendant’s counsel to argue about the proper use of flight evidence. However, defense counsel never raised the issue in argument.

## *2. Standard of Review*

On review, we “examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in such a way that undermined the presumption of innocence or tended to

relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.)

### 3. Analysis

Section 1127c provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall 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." That statute and case law recognize that flight is circumstantial evidence of guilt. (E.g., *People v. Williams* (1988) 44 Cal.3d 1127, 1143, fn. 9; *People v. Jackson* (2005) 129 Cal.App.4th 129, 166, fn. 120).

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) However, when standard instructions fully and adequately advise the jury upon a particular issue, the trial court does not err in refusing to give a requested pinpoint instruction. (*Id.* at p. 1144.) Here, even if we accept that defendant's proffered instruction was a correct statement of the law, the authorities he cites do not support a conclusion that it was error to fail to identify specific evidence as circumstantial.

We presume the jury understood and followed the instructions given. (*People v. Brady* (2010) 50 Cal.4th 547, 583.) Having been instructed on the definition of circumstantial evidence and the duty to accept inferences pointing to the defendant's

innocence, the jury did not need an instruction as to whether specific evidence presented at trial was direct or circumstantial. The trial court was not required to spell out for the jury whether particular evidence was direct or circumstantial.

To the extent defendant contends CALCRIM No. 372 was invalid because it failed to track the precise language of section 1127c, we reject that contention. In *People v. Paysinger*, the court held that CALCRIM No. 372 was constitutional. (*People v. Paysinger, supra*, 174 Cal.App.4th at pp. 31-32.) We agree with that decision.

Moreover, even if we presume for purposes of argument that error occurred, any such error was harmless. Defendant contends that error in refusing a requested pinpoint instruction is structural error requiring reversal without an examination of prejudice. “An error is “structural,” and thus subject to automatic reversal, only in a “very limited class of cases,”” such as the complete denial of counsel, a biased decision maker, racial discrimination in jury selection, denial of self-representation at trial, denial of a public trial, and a defective reasonable-doubt instruction. [Citation.]” (*People v. Mil* (2012) 53 Cal.4th 400, 410.) Any error in failing to give a requested pinpoint instruction plainly did not rise to that level.

Defendant argues, in the alternative, that error in refusing his requested instruction was federal constitutional error evaluated under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.) However, it is well established that in evaluating whether a trial court’s failure to give a modified version of a standard jury instruction was prejudicial, this court determines whether, “after an examination of the entire cause, including the evidence” it appears “reasonably probable”

the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Lasko* (2000) 23 Cal.4th 101, 111; *People v. Watson* (1956) 46 Cal.2d 818, 836.) On the record before us, no such reasonable probability exists. A.H. saw defendant put his hand over Mary’s mouth and nose several times during an argument and saw defendant hit her. The autopsy revealed bruises to Mary’s face and gums that were consistent with a person’s hand being put over her nose and mouth to block her breathing. Defendant refused to let Collett into the house and locked all the doors when he left for Nevada, although Collett had previously had full access to the house. Defendant left a note on the front door saying that Mary was at the store, even though she was still in the house. Most significantly, defendant told Stevens he had to go back to California to “take care of a body.” He said he had just killed someone and it had taken him 10 minutes and three tries to do so. Defendant had Mary’s identification and credit card. In light of the overwhelming evidence, any error in failing to give the requested instruction was harmless. (*People v. Watson, supra*, at p. 836.)

## **B. Fines**

Defendant contends the parole revocation fine imposed under section 1202.45 must be changed to match the restitution fine imposed under section 1202.4, and the minute order and abstract of judgment must be amended accordingly.

### *1. Additional Background*

At the sentencing hearing, the trial court imposed a restitution fine in the amount of \$1,000 under section 1202.4 and a parole revocation fine of \$10,000 under section 1202.45. The trial court stayed the parole revocation fine pending successful completion

of parole. The minute order and the abstract of judgment reflect that the trial court imposed a restitution fine of \$10,000 under section 1202.4 and a parole revocation fine of \$10,000 under section 1202.45.

Under section 1202.45, if the “sentence includes a period of parole,” the court must impose a parole revocation fine “in the same amount as that imposed pursuant to subdivision (b) of section 1202.4.” The court has “*no* choice and *must* impose a parole revocation fine equal to the restitution fine whenever the ‘sentence includes a period of parole.’” (*People v. Smith* (2001) 24 Cal.4th 849, 853.) Error in imposing such fines “presents a pure question of law with only *one* answer,” and “such error is obvious and correctable without reference to any factual issues in the record or remanding for further findings.” (*Ibid.*)

The People concede the trial court erred by not setting the parole revocation fine in the same amount as the restitution fine. The People further concede that the oral pronouncement of a \$1,000 restitution fine should control (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) We agree with the People’s concession, and we will order the minute order and abstract of judgment to be amended accordingly.

IV. DISPOSITION

The minute order for the sentencing hearing and the abstract of judgment shall be amended to reflect a parole revocation fine and restitution fine in the amount of \$1,000, and the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

KING

J.