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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.

DONNELL DWHITE CROWELL,

Defendant and Appellant.

E053905

(Super.Ct.No. RIF10006202)

OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.

Affirmed.

Gregory Marshall, 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, Peter Quon, Jr., and Kyle Niki Shaffer, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Donnell Dwhite Crowell is serving an 11-year prison sentence after a jury convicted him of carjacking (Pen. Code, § 215)<sup>1</sup>, robbery (Pen. Code, § 211), and vehicle theft (Veh. Code, § 10851, subd. (a)). He contends the trial court improperly instructed the jury with CALCRIM No. 371 because there was no evidence that he attempted to falsify evidence, and the error was prejudicial. As discussed *post*, we conclude there was no error because enough evidence was presented from which the jury could infer that defendant attempted to procure false testimony as to his whereabouts during the crimes.

#### **FACTS AND PROCEDURE**

Just after dark (sometime after 6:00 p.m.) on December 2, 2010, John Curtis and his son Robert pulled up to a darkened home to make a delivery for a medical marijuana dispensary. Beginning around 4:00 or 4:30 p.m., Robert had been receiving telephone calls from a blocked number from a person identifying himself as “Darnell.” Darnell stated he wanted to purchase a half-pound of medical marijuana and gave information about a doctor’s prescription. In the last phone call, Darnell asked, “Is that you pulling up right now?” Robert replied, “Yes.” John stayed in their black pickup truck to attempt to verify the prescription information while Robert got out and walked toward the front door. Two men emerged from the bushes and one of them pointed a gun at Robert and told him to get on the ground. Robert lay face down on the ground. One of the men took

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<sup>1</sup> All section references are to the Penal Code unless otherwise indicated.

\$275 and a cell phone from Robert's pocket. As the man with the gun turned to go to the truck, the other man fled.

The man with the gun approached John, who was still in the truck. The man ordered John to get out of the truck and lay on the ground. When John did so, the man drove away in John's truck. Robert ran to a nearby house to ask the resident to call the police.

The following day, police used phone records to track the calls from "Darnell" to Robert's cell phone, which led them to defendant. The arresting officer called John and asked him if he would be able to identify the man with the gun. John said he would be able to. Police then transported John for an "infield show-up" to where he had detained defendant and asked John whether he recognized defendant. John, who was "shaken up," immediately identified defendant as the man with the gun, saying, "That's him. That's him. No joke." At trial, John testified that he was "110 percent confident" that he had correctly identified defendant as the man who had robbed him.

Semaj Harris testified that he had been arrested and charged with robbery and carjacking for his participation in the events of December 2, 2010. He later pled guilty to being an accessory after the fact and agreed to testify truthfully at defendant's trial. In exchange, Harris received felony probation and 90 days of custody. Harris testified that on the afternoon of December 2, 2010, he and two or three other people were hanging out in a park with defendant. He heard defendant make several cell phone calls to someone to order medical marijuana. Harris saw defendant's letter of recommendation from his doctor. He thought defendant was going to purchase the marijuana because he had a

large wad of money. Defendant told Harris he needed an address so that the marijuana dispensary could make a delivery to him. The dispensary would not deliver to the park. Harris gave defendant his old address, which was a home around the corner from the park, and defendant gave that address over the phone. Harris drove himself and defendant to his old address in defendant's car. Both men got out of defendant's car when the delivery men said they were almost there. Both men waited in the bushes. Harris thought this was weird and it raised a red flag, but he did not say anything to defendant. He realized they were going to rob the delivery men when defendant called them to ask if it was them pulling up to the house, and Harris saw defendant's gun. They came out of the bushes as the driver walked to the front door of the house. Defendant pointed his gun at the driver and told him to hand everything over. The driver did so, and as defendant was headed over to the delivery men's truck, Harris ran away and got in defendant's car. Harris testified that he ran because he "was already nervous of what was going on." Harris saw defendant pass him driving the delivery men's truck. Harris drove home. He was arrested on January 24, 2011.

Defendant's mother testified that he was at home with her at the time of the carjacking, and that she had mentioned it to the sheriff's deputies when they searched her home the following day. One of the deputies who conducted the search testified that defendant's mother never mentioned she could provide an alibi for her son, and that if she had done so he would have written it in his report.

Defendant's girlfriend, Antoinette Hill, testified that she was with him earlier in the day on December 2, 2010. When she called him around 6:00 o'clock that evening, he

said he was with a friend, so they hung up. Hill initially denied having stolen money from her father to place in defendant's jail account. She admitted to having done so after the People played a tape of a telephone conversation, dated January 23, 2011, in which she told defendant that she had gotten the money to put in his account by stealing it from her father. Hill admitted that she told a district attorney investigator that she could not speak to him or answer any questions until she had talked to defendant's mother first. Hill also admitted that she had thought there were holes in defendant's story regarding December 2, 2010, and that she had told him repeatedly in calls to him at the jail that something was not adding up.

Hill testified that in a December 24, 2010, telephone call from jail, defendant told her he had been with his friend Gage at the time of the crimes and asked her to text him to see if he would be an alibi witness. The People then played a tape of a telephone conversation between her and defendant December 25, 2010, in which they discussed her efforts to get Gage to be an alibi witness. The following is excerpted from the transcript of the tape that was played for the jury:

Hill: "He's not going to say he knows you. [¶] . . . [¶] Anyways long story short he aint gonna say it's him he is playing dumb like he don't know you."

Defendant: "If your not willing to vouch for your partner, then fuck it man."

Hill: "Man, you don't even have fuckin' associate. [¶] . . . [¶] Hell no cuz the cousins sometimes won't even a cousin won't even give you a fuckin ali- alibi. Hello. That's what I was telling you that he was like he needs the alibi or something.

[¶] . . . [¶] Yeah she is saying the same thing I said you only worry about an alibi when

they have something when you did some shit and they have evidence that's when you worry about your alibi.”

Defendant: “Second when they acts you when the police askes you ok if you didn't do this then where were you at around this time ok I was with my partner. Oh ok do you have his number yes it's in my phone if they call him and he like oh yea I don't know that nigga then what then what am I supposed to do especially when the mother fucker points you out like you did it like oh yea that nigga did it. You see what I mean that's their evidence that's the only evidence they have they do have evidence do you understand now.”

Defendant testified that on the day of the carjacking, he and Harris began shooting hoops in a park near his home around 4:30 p.m. Harris asked to use defendant's cell phone, which was sitting on a bench near the basketball court, and made a number of phone calls on it over time. At some point, Harris asked defendant for the prescription number on his medical marijuana authorization. Around 6:00 p.m., Harris left the park with defendant's phone, without asking. Harris returned to the park about an hour later, driving a black pickup truck. Harris gave defendant his cell phone back. Defendant then left the park. Defendant stated that his friend Gage was at the park during this time, along with a kid named Donnell, a girl named Ki-Ki, and “a couple of people that I really haven't met before.” Defendant testified that his mother was mistaken when she said he was at home on the afternoon of December 2, 2010. Defendant testified that he had previously been convicted of selling marijuana and of theft offenses involving department stores.

On May 6, 2011, the jury found defendant guilty of carjacking, robbery and vehicle theft, but not guilty of receiving stolen property. (§ 496d, subd. (a).) The jury also found not true the allegation that defendant had used a firearm to commit the carjacking. Defendant admitted to the trial court that he had suffered a prior felony conviction that resulted in a prison term. (§ 667.5, subd. (b).)

On June 24, 2011, the trial court sentenced defendant to 11 years in prison as follows: the upper term of nine years for the carjacking, one year for the robbery, and one year for the prison prior. The court stayed the sentence on the vehicle theft conviction under section 654. This appeal followed.

### **DISCUSSION**

Defendant argues the trial court committed reversible error when it granted the People's request to instruct the jury with CALCRIM No. 371 regarding the falsification of evidence and consciousness of guilt.

The trial court instructed the jury with the following version of CALCRIM No. 371: "If the defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than the defendant tried to provide false testimony, 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. It is up to you to decide the meaning

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

Defendant contends this instruction should not have been given because there was no evidence of an attempt to obtain false testimony, specifically regarding defendant’s efforts to have his girlfriend, Ms. Hill, contact a person named Gage and ask him to testify that he had been playing basketball with defendant at the park at the time the crimes were committed. The People respond that the instruction was proper because the jury could reasonably conclude that defendant’s mother and girlfriend had testified falsely at defendant’s direction.

CALCRIM No. 371 is properly given where there is some evidence in the record that, if believed by the jury, sufficiently supports an inference of consciousness of guilt. (See *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 102 [concerning CALJIC Nos. 2.04 & 2.06].) The instruction makes “clear to the jury that certain types of deceptive or evasive behavior on a defendant’s part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant’s guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citation.]” (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224, abrogated in part on another point as stated in *McGee v. Kirkland* (C.D.Cal. 2009) 726 F.Supp.2d 1073, 1080.) The inference of guilt suggested by CALCRIM No. 371 is a permissive one. (Cf. *People v. Rankin* (1992) 9 Cal.App.4th 430, 436.) The instruction applies “to

situations where a defendant attempts to induce a witness to lie for him in a judicial proceeding or otherwise tries to fabricate evidence when a trial or prosecution is pending.’ ” (*Jackson*, at p. 1225.) Where there is no evidence to support the instruction, “at worst” it is “superfluous,” and, where the evidence of guilt is strong, reversal is not warranted. (*People v. Pride* (1992) 3 Cal.4th 195, 249; see also *Jackson*, at p. 1225.)

Here, defendant used a two-pronged approach to provide himself with an alibi that resulted in contradictory testimony as to his whereabouts at the time of the carjacking and robbery. First, as evidenced by taped conversations played in court, defendant encouraged his girlfriend from jail to contact a friend named Gage, whom he claimed would testify that he was with defendant playing basketball at the park. The jury could reasonably believe from hearing that tape that defendant hoped Gage would provide him with an alibi, not necessarily because Gage was with defendant at the park, but because Gage was his “partner,” whom defendant believed as a matter of course he should be able to depend upon to provide an alibi: “If your not willing to vouch for your partner, then fuck it man,” and, “when the police asks you ok if you didn’t do this then where were you at around this time ok I was with my partner. Oh ok do you have his number yes it’s in my phone.” This is not the only possible inference the jury could have made from the taped conversation, but it is a permissible one. Second, defendant’s mother testified that defendant was home with her at the time of the carjacking and robbery, which contradicted even defendant’s own testimony. The testimony was made even more untrustworthy because a sheriff’s deputy who interviewed defendant’s mother at home the day after the carjacking testified in rebuttal that she did not share this important piece

of alibi information with him. Thus, defendant's mother did not provide defendant with an alibi until after it appeared Gage would not. Finally, the jury was entitled to believe that both defendant's mother and his girlfriend were willing to lie to provide him with an alibi because Ms. Hill refused to speak with an investigator for the district attorney until she had first spoken with defendant's mother.

To conclude, the jury could reasonably conclude from the above evidence that defendant attempted to arrange for false testimony, as set forth in CALCRIM No. 371. This instruction told the jury that it may infer consciousness of guilt only if it found defendant attempted to procure false testimony. It was for the jury to determine whether defendant attempted to do so, and enough evidence was presented to allow the jury to so find. We see no error in the trial court's decision to instruct the jury with CALCRIM No. 371.

**DISPOSITION**

The judgment of conviction is affirmed.

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RAMIREZ  
P. J.

We concur:

RICHLI  
J.

KING  
J.