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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC ANTHONY BUENO,

Defendant and Appellant.

F067049

(Super. Ct. No. 1443938)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. John D. Freeland, Judge.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Detjen, J. and Franson, J.

Defendant Isaac Anthony Bueno pled nolo contendere to the charge of possession of a firearm by a felon (Pen. Code,¹ § 29800, subd. (a)(1); count II), was convicted of robbery (§ 211; count I), and was found to have personally used a firearm in the commission of said robbery (§ 12022.53, subd. (b)).² He was sentenced to 14 years in state prison. On appeal, defendant contends that the trial court’s issuance of CALCRIM No. 362 “required the jury to assume [his] guilt of the charged offense.” (Boldface & some capitalization omitted.) We find no instructional error and affirm the judgment.

STATEMENT OF FACTS

On the cold and rainy morning of April 13, 2012, Rene Vasquez was working the night shift at Quik Stop, a convenience store located at 1500 Crows Landing Road on the southeast corner of Crows Landing Road and Hatch Road in Modesto, California. At around 2:00 a.m., an Hispanic male in a black-hooded sweater and jeans entered the store, pointed a gun at Vasquez, and told him to “give ... the money ... or ... get shot.” Vasquez opened the cash register and handed the man the drawer, which contained approximately \$100 in bills and coins. The man left the store and fled in the direction of East Hatch Road. Vasquez activated the store’s alarm and called 911.

At 2:08 a.m., Deputy Joshua Sandoval was eating at the International House of Pancakes on the corner of Richland Avenue and Hatch Road—roughly one to two miles east of Quik Stop—when he received the armed robbery call. While he was driving westbound on Hatch Road en route to the store, he passed defendant, who was wearing a white T-shirt and black jeans and running eastbound next to a canal. Once Sandoval executed a U-turn, defendant sprinted to the front yard of a nearby residence, opened a

¹ Subsequent statutory citations refer to the Penal Code.

² Also, in a separate proceeding, the trial court determined that defendant was previously convicted of a felony, was incarcerated as a result of that conviction, and completed the prison term, but did not remain free of both prison custody and commission of a new felonious act for a five-year period (§ 667.5, subd. (b)).

gate, and entered the backyard. Sandoval exited his vehicle and pursued defendant on foot “for about three fences.” He detained defendant after the latter stumbled. Deputy Robert Berndt, Sandoval’s partner, arrived on the scene and asked defendant “where the gun was.” Defendant responded, “What gun?” Sandoval searched him and found a loaded .38-caliber revolver as well as a wad of cash and loose change amounting to \$120.50.

Deputy Gregory Buck found the stolen cash register drawer east of Quik Stop on the canal bank along Hatch Road. Due to the rain, the crime scene technician could not dust the item for fingerprints. At an in-field showup and at trial, Vasquez identified defendant as the perpetrator. He also identified the .38-caliber revolver as the weapon used in the robbery.

DISCUSSION

At the March 5, 2013, jury instruction conference, defendant objected to CALCRIM No. 362 on false statements and consciousness of guilt.³ The prosecutor offered to remove the word “false” from the instruction. The next day, the trial court ruled that CALCRIM No. 362 was proper:

“[CALCRIM No. 362] centers around the defendant’s statement to the deputy when he was asked, ‘Where’s the gun?’ [¶] And the defendant said, ‘What gun?’ [¶] And the Court believes it is a misleading statement. But the People had no objection to striking the word ‘false’ where it appears in this, and so that’s what the Court’s going to do.”

³ CALCRIM No. 362 reads:

“If [the] defendant ... made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt.... [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.”

Defendant still objected to the instruction.

Prior to closing arguments, the court instructed the jury:

“[CALCRIM No. 220:] The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. [¶] You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

“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. [¶] Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

“Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. [¶] The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

“In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. [¶] Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty. [¶] ... [¶]

“[CALCRIM No. 362:] If the defendant made a misleading statement before this trial relating to the charged crime[,] knowing the statement intended to mislead, that conduct may show that he was aware of his guilt of the crime, and you may consider it in determining his guilt.

“If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. [¶] However, evidence that the defendant made such a statement cannot prove guilt by itself.”

Defendant contends on appeal that CALCRIM No. 362 “created a presumption of guilt,” “lightened the prosecution’s burden of proof, violated [his] right to have a jury determine his guilt beyond a reasonable doubt, and violated his state and federal due process rights and right to a jury trial, necessitating reversal.” Our Supreme Court, however, has consistently rejected such claims with regard to CALCRIM No. 362’s

precursor: CALJIC No. 2.03 on falsehood and consciousness of guilt.⁴ (See, e.g., *People v. Lopez* (2013) 56 Cal.4th 1028, 1075; *People v. Tate* (2010) 49 Cal.4th 635, 698-699; *People v. Taylor* (2010) 48 Cal.4th 574, 630; *People v. McWhorter* (2009) 47 Cal.4th 318, 377; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1057; *People v. Stitely* (2005) 35 Cal.4th 514, 555; *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Holloway* (2004) 33 Cal.4th 96, 142; *People v. Crandell* (1988) 46 Cal.3d 833, 871.) “Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 ..., none is sufficient to undermine our Supreme Court’s approval of the language of the instructions.” (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.) We therefore decline defendant’s invitation to ignore the doctrine of stare decisis. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)⁵

DISPOSITION

The judgment is affirmed.

⁴ CALJIC No. 2.03 reads:

“If you find that before this trial ... defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove 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.”

⁵ Because we find no instructional error, we need not address defendant’s claim of prejudicial error.