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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TORIANO ADARYL YOUNG,

Defendant and Appellant.

A105773

(Contra Costa County  
Super. Ct. No. 9912064)

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON JAMAL PAYNE,

Defendant and Appellant.

A106261

(Contra Costa County  
Super. Ct. No. 9912064)

**I.**

**INTRODUCTION**

Appellants Toriano Adaryl Young (Young) and Jason Jamal Payne (Payne) appeal from their criminal convictions for the murder of Jonathan Washington, with enhancements, conspiracy to commit murder, three counts of second degree robbery, sale of controlled substances, and street terrorism. In addition, Young appeals his additional separate convictions for being an accessory to murder, and conspiracy to commit the crime of accessory. Together they jointly allege the following prejudicial errors at trial: (1) the giving of improper “pinpoint” instructions to the jury on suppression of evidence (CALJIC No. 2.06) and flight (CALJIC No. 2.52); (2) using the reasonable doubt

instruction in CALJIC No. 2.90, which denied appellants their right of due process; (3) prosecutorial misconduct during closing argument; and (4) the imposition of a two-year criminal street gang enhancement (Pen. Code, § 186.22(b)(1)).<sup>1</sup> Young separately claims an additional error in the trial court's alleged failure to investigate adequately possible juror misconduct.

Except for striking the street gang enhancement, which error is conceded by respondent, we affirm the convictions, and remand the consolidated cases back to the trial court for resentencing.

## II.

### PROCEDURAL BACKGROUND

A nine-count indictment by a Contra Costa County grand jury was filed on September 1, 1999, charging both appellants as follows:

Count One: Murder of Jonathan Washington (§ 187), with enhancements alleging the use of a firearm to commit the murder (§ 12022.53, subds. (b)-(e));

Count Two: Conspiracy to commit murder, robbery, and the sale of controlled substances (§ 182, subd. (a)(1));

Count Three: Street terrorism, in that appellants were members of a criminal street gang with knowledge that its members engaged in a pattern of criminal street gang activity and that appellants knowingly assisted this activity by committing murder, robbery and the sale of controlled substances (§ 186.22, subd. (a));

Count Four: Attempted second degree robbery of Jonathan Washington (§§ 211, 212.5, subd. (c), & 664), with enhancements alleging the use of a firearm to commit the attempted robbery (§ 12022.53, subds. (b)-(e));

Count Five: Second degree robbery of Shawn Morris (§§ 211, 212.5, subd. (c), & 664), with enhancements alleging the use of a firearm to commit the attempted robbery (§ 12022.53, subds. (b)-(e)); and

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

Count Six: Second degree robbery of Robert Moore (§§ 211, 212.5, subd. (c), & 664), with enhancements alleging the use of a firearm to commit the attempted robbery (§ 12022.53, subds. (b)-(e)).

The indictment also charged Young with the following separate crimes:

Count Seven: Felony possession of a firearm (§ 12021, subd. (a)(1));

Count Eight: Being an accessory after the fact by harboring, concealing and aiding Payne (§ 32); and

Count Nine: Conspiracy to commit the crime of being an accessory (§ 182, subd. (a)(1)).

Lastly, the indictment alleged the further enhancement that appellants committed the crimes in the indictments with the specific intent to benefit, promote, further or assist a criminal street gang (§ 186.22, subd. (b)(1)).

A jury trial commenced on December 4, 2000, and continued thereafter until January 31, 2001, at which time the trial court declared a mistrial after being informed by the jury that it was unable to agree on a verdict and that further deliberations would not result in a verdict.

A second jury trial commenced on May 2, 2001, and continued thereafter until May 10, when a second mistrial was declared by the trial judge. This mistrial was occasioned by the medical condition of one of the defense counsel.

A third jury trial commenced on July 23, 2001, and continued for 26 days until September 20, at which time a verdict was returned finding Young guilty of all crimes charged in the indictment, in addition to the criminal street gang enhancements alleged as to some of the counts. However, the jury found the arming allegations “not true” as to Young. Similarly, as to Payne, the jury found him guilty of the crimes charged in the indictment, found true all of the street gang enhancements, and all of the arming enhancements except as to one count of second degree robbery.

Postconviction motions for new trial were made separately by appellants raising issues not material to this appeal. Defense counsel also requested access to certain information that had been brought to the court’s attention by the prosecutor, and which

records the court had ordered sealed. Young subsequently filed a written motion seeking to unseal the court records, indicating that the matter under seal concerned possible misconduct by the prosecution's lead investigator in the case, Detective Mark Harrison, and a member of the jury, identified as Juror No. 12, who allegedly had a dating relationship. On December 5, 2003, the trial court denied all posttrial defense motions.

A sentencing hearing took place on February 6, 2004, at which the court sentenced Payne to serve a total of 47 years 8 months to life, and Young was sentenced to serve a total of 27 years 8 months to life in state prison. This appeal followed.

### **III.**

#### **LEGAL DISCUSSION**

Appellants do not challenge on appeal any of the factual findings made by the jury which resulted in their convictions. The jury instruction issues raised by appellants involve questions of law, and do not rest on the evidence adduced at trial. Accordingly, except for references to the trial transcripts material to the prosecutorial and juror misconduct claims, we will dispense with the usual narrative of the underlying facts in this case.

#### **A.**

##### **Jury Instruction Challenges**

Appellants together claim that the giving to the jury of CALJIC Nos. 2.06 and 2.52 was error because they are improper "pinpoint" instructions. As given to the jury,<sup>2</sup> CALJIC No. 2.06, known as the "suppression of evidence" instruction, states:

"CALJIC No. 2.06. Efforts To Suppress Evidence

"If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness or by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt.

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<sup>2</sup> Appellants do not claim that the trial judge gave a version of the challenged instructions other than as appears in the published version of these instructions in CALJIC.

However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

As given to the jury, CALJIC No. 2.52, known as the “flight” instruction, states:

“CALJIC No. 2.52. Flight After Crime

“The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.”

Citing *People v. Wright* (1988) 45 Cal.3d 1126 (*Wright*), appellants claim both instructions constitute impermissible “pinpoint” instructions “because they direct the jury’s attention to specific evidence and tell the jury they can look to that evidence to dispel reasonable doubt.” In *Wright*, the defendant proffered an instruction that listed certain specific items of evidence and told the jury that it could consider this enumerated evidence in determining whether the defendant was guilty beyond a reasonable doubt. (*Id.* at p. 1138.) In upholding the trial court’s refusal of the instruction, the court noted that a criminal defendant has a right to instructions that pinpoint a theory of defense but not to an instruction highlighting specific evidence supporting that defense. (*Id.* at p. 1137.)

As appellants forthrightly concede, the California Supreme Court has generally approved instructions such as CALJIC Nos. 2.06 and 2.52. (See, e.g., *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Kelly* (1992) 1 Cal.4th 495, 531-532.)

Respondent also points out that this same challenge was made to CALJIC Nos. 2.06 and 2.52, and was rejected in *People v. Boyette* (2002) 29 Cal.4th 381 (*Boyette*). In *Boyette*, the court noted that it had already rejected the same argument in *People v. Jackson* (1996) 13 Cal.4th 1164, 1224. It then went on to distinguish these “consciousness of guilt” instructions from impermissible pinpoint instructions:

“ [E]ach of [these] instructions made 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. [Citations.] We therefore conclude that these consciousness-of-guilt instructions did not improperly endorse the prosecution's theory or lessen its burden of proof, and thus were not improper pinpoint instructions." (*Boyette, supra*, 29 Cal.4th at pp. 438-439, quoting from *People v. Jackson, supra*, 13 Cal.4th at p. 1224.)

Accordingly, we likewise reject the challenge here to CALJIC Nos. 2.06 and 2.52, and conclude that it was not error to give the instructions under the facts of this case.

Appellant next contends it was error to give CALJIC No. 2.90, the standard instruction on reasonable doubt, because that instruction did not ensure they would be convicted only upon proof beyond a reasonable doubt, and therefore, their right of federal due process was violated.<sup>3</sup> They contend that California's current version of the reasonable doubt instruction, which indisputably was given in their trial, and which deleted the use of "depending on moral evidence," and "to a moral certainty," as suggested by the Supreme Court in *People v. Freeman* (1994) 8 Cal.4th 450, 502-503, has never been unconditionally approved by the high court.

While the Supreme Court may not as yet have had occasion to review a challenge to the 1994 version of the reasonable doubt instruction containing that court's suggested deletions, intermediate appellate courts have approved the instruction in innumerable decisions. So voluminous is the list of cases rejecting this identical argument, that our colleagues in the Third District took the unusual step of partially publishing an opinion solely in an attempt to drive a stake through the heart of this baseless claim:

"Before summarizing the case and addressing the other claims of error, we seek to put out of its misery a contention routinely raised in criminal appeals filed in this district,

<sup>3</sup> As in the case of their challenge to CALJIC Nos. 2.06 and 2.52, appellants argue that the failure to object at trial to these instructions did not constitute a waiver of the issues. Respondent chooses not to rely on waiver, and discusses these challenges on their merits, as do we.

and apparently in every other district of the Court of Appeal. [¶] In a well-worn argument that has become the soup du jour of appellate advocacy in criminal cases, defendant Jimmy Ray Hearon claims the definition of reasonable doubt given to the jury in accordance with . . . CALJIC No. 2.90 is ‘defective in that it gave the jury no guidance as to the level of certainty to which it must be persuaded before it could reliably determine that the prosecution had met its burden of proof beyond a reasonable doubt.’

[¶] The contention has no merit. (*People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207-1209 . . . ; *Lisenbee v. Henry* (9th Cir.1999) 166 F.3d 997, 999-1000; see *Victor v. Nebraska* (1994) 511 U.S. 1; *People v. Freeman*[, *supra*,] 8 Cal.4th [at pp.] 504-505.)

“Consequently, it consistently has been rejected by every appellate district. (E.g., *People v. Aguilar, supra*, 58 Cal.App.4th at pp. 1207-1209 [First Appellate District]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572 . . . [Second Appellate District]; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022 . . . [Second Appellate District]; *People v. Jackson* (1999) 71 Cal.App.4th 108 . . . [Third Appellate District]<sup>[4]</sup>; *People v. Carroll* (1996) 47 Cal.App.4th 892, 895-896 . . . [, disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3] [Fourth Appellate District]; *People v. Light* (1996) 44 Cal.App.4th 879, 884-889 . . . [Fifth Appellate District]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 815-816 . . . [Sixth Appellate District]; *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263 . . . [Sixth Appellate District].) The claim of error also has been rejected by the United States District Court for the Eastern District of California and the United States Court of Appeals, Ninth Circuit. (*Lisenbee v. Henry, supra*, 166 F.3d 997.)

“We regard the issue as conclusively settled adversely to defendant’s position. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1366, fn. 1 . . . [, overruled on another ground by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3].) [¶] The time has come for appellate attorneys to take this frivolous contention off their menus.” (*People v.*

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<sup>[4]</sup> Review granted on July 14, 1999, S078718, and subsequently dismissed on October 20, 1999.

*Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287, fn. & Reporter’s Note omitted.) We reject appellants’ challenge in this case as well.

**B.**

**Prosecutorial Misconduct**

Both sides agree that a major witness in the case was the lead investigator, Detective Mark Harrison. Understandably then, his credibility as a witness was under withering attack by the defense at trial. Incidents of alleged on-duty misconduct by Detective Harrison were used in cross-examination based upon information produced in response to a pretrial *Pitchess* motion.<sup>5</sup>

The prosecutor commented on this attempt to discredit Harrison in closing argument, when counsel stated: “It’s actually quite an advantage to be able to go through the personnel records, employment records, of a witness, a major witness in a prosecution case and see exactly what marks there are in his background.”

This statement drew a comment from defense counsel that the prosecutor “knows full well we don’t have access to those records,” which was then overruled by the court explaining, “[w]ell, I’m not going to go into that with you. I’ve made rulings in the past. . . . Go ahead.”

The prosecutor then continued: “I suspect this argument will take awhile, because it sounds like it’s going to go back and forth. [¶] But, at any rate, it is a nice advantage to have those records brought to court, have the judge pick out what is relevant, give it over to the defense and find out exactly what the black marks are.” Appellants claim that these comments were misconduct because they accused defense counsel of having an unfair advantage, and of using underhanded and opportunistic tactics.

First, we agree with respondent’s contention that the issue of misconduct was waived because the objection raised on appeal was never presented to the trial court, and no request was made to have the jury admonished to disregard the prosecutor’s remarks. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*)). Appellants counter that waiver does not attach because it would have been futile to have done so in light of the

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<sup>5</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

judge's ruling on the first objection defense counsel made. (*People v. Chatman* (2006) 38 Cal.4th 344, 380.) We disagree with appellants' rebuttal position.

The "objection" made by defense counsel stated no legal grounds, and was only a statement implying that the prosecutor's comment was contrary to the facts. While the court uttered the word "overruled," the court's "reasoning" understandably was not addressed to a legal objection, since there was none. Instead, the judge apparently tried to deflect counsel's comment by simply referring to past rulings, presumably those dealing with appellants' *Pitchess* motion.

Given the fact that appellant failed to make a proper legal objection, or to clarify the matter at sidebar or outside the presence of the jury, we can hardly agree that an effort to object on the grounds of prosecutorial misconduct, and to seek an admonition would have been futile. Furthermore, to the extent defense counsel's comment could be interpreted as an objection asserting the argument lacked factual support, appellants admit that "substantial" evidence relating to Detective Harrison's on-duty behavior was actually produced to the defense in response to a *Pitchess* motion. Therefore, overruling counsel's "objection" was proper, since the prosecutor's statement was not a misstatement of the facts.

To the extent appellants now complain that the comments were improper argument because they cast defense counsel in an unfavorable light, that objection was not made below, was not futile based on the court's comment in response to counsel's earlier statement, and should have been made if appellants wished to preserve the issue for appellate review.

Even if properly preserved, the comments made by the prosecutor fall far short of constituting misconduct. Both sides agree that the legal standard for prosecutorial misconduct is whether the prosecutor used " ' ' 'deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*Samayoa, supra*, 15 Cal.4th at p. 841.) While the point of the prosecutor's brief comments is not easily apparent, we disagree with appellants that they necessarily implied that defense counsel had been engaged in improper conduct by using Harrison's personnel records for

impeachment, even if made sarcastically as asserted by appellants. At most the comments appear to have been an obtuse attempt to defuse the effectiveness of defense counsel's impeachment of Harrison by pointing out that defense counsel had documents and time with which to prepare for the questioning. We hardly see this as being either deceptive argument or the use of reprehensible tactics by the prosecutor.

### C.

#### **Claim of Juror Misconduct**

The verdicts against appellants were reached by the jury on September 20, 2001. On November 9, 2001, the prosecutor went to the trial judge and asked to make a statement concerning certain posttrial information the prosecutor had learned about the case. The prosecutor stated that he had heard in late September, after the trial ended and the jury had been discharged, that Detective Harrison and one of the jurors (Juror No. 12) had entered into a social relationship. The prosecutor explained his understanding that the relationship began after the jury had been discharged, and he did not know if it was ongoing as of that date. After it was brought to his attention, he discussed it with Harrison, who confirmed the existence of the social relationship.

The judge and the prosecutor then discussed whether it was a matter that should be disclosed to defense counsel. Although the prosecutor expressed the view that there was no need to do so because the relationship began after the jury had been discharged and thus, there were no "legal ramifications" arising from it, the judge wanted some additional time to consider the issue. For the time being, the judge ordered that the conversation be transcribed but the copies delivered sealed to the court.

All counsel was called in by the court for a hearing on November 16. The judge indicated he had decided to make the transcript of the prosecutor's disclosure available to defense counsel, and that he would investigate the matter by interviewing Juror No. 12, and by separately questioning Harrison. At this point, the court stated that the transcripts would only be made available to counsel and not to appellants, and that defense counsel were not to discuss the matter with appellants for the time being.

A further hearing was held on December 27, 2001, and the judge began by asking defense counsel to confer with appellants to determine if either wished to be present while Juror No. 12 and “one of the witnesses” were being interviewed. This would include telling them what the hearing was about. Defense counsel discussed the matter with their respective clients and then reported to the court that appellants wished to be present when Harrison was interviewed, but not for the interview of Juror No. 12. Appearance waivers were taken by the court from appellants.

Juror No. 12 then was interviewed on the record and under oath. She confirmed that she first had contact with Harrison after the verdicts were rendered and the jury had been discharged. She first spoke to him when about six of the former jurors, the prosecutor, and Harrison went to lunch at the Claim Jumper restaurant in Concord immediately following the verdicts, the polling of the jurors, and the jury’s discharge. Juror No. 12 gave her telephone number to Harrison, who called her a couple of days after the lunch. She had also exchanged telephone numbers with the court reporter who had attended the lunch as well. Since then Juror No. 12 continued to see Harrison about once a week.

The juror confirmed that during the course of the trial there was no indication that Harrison might have been interested in her; no smiling, opening of doors, “nothing like that.” Nothing about his conduct indicated to Juror No. 12 that Harrison might have been interested in her until after the jury’s discharge. They did not pass notes during the trial.

As to their meeting, Juror No. 12 explained that during the lunch she learned that she and Harrison had attended the same high school. She did not remember him from school. The judge sustained objections to efforts to determine if the resulting relationship was sexual, or other details about the relationship, but did allow Juror No. 12 to confirm she had an on-going dating relationship with Harrison.

Juror No. 12 also stated that she spoke with Harrison after she received a letter informing her of the scheduling of this hearing. He told her the reason for the hearing and for her not to worry about it because they had met after the trial was finished and she

did not do anything wrong. She did not discuss with Harrison what she should do if she were contacted by an investigator about the trial.

Harrison was next questioned under oath. He confirmed that he first spoke to Juror No. 12 at the Claim Jumper lunch after the trial had concluded. Before that he had no contact with her during the trial including no verbal or “nonverbal communication . . . no messages, no indirect messages, no subliminal messages.” He confirmed that he asked Juror No. 12 for her telephone number at the lunch, he called her socially a week or so after that, and he had continued to see her once a week since then. While they went to the same high school and were a few classes apart, Harrison did not know her while they were in school, and he had no contact with her before their meeting at lunch after trial.

At the conclusion of the questioning, the matter of whether Harrison was married or legally separated from his wife became a topic for discussion. Young’s counsel wanted to subpoena the wife to determine if the two were indeed separated, while the prosecutor suggested instead that the court’s family law file be reviewed by the judge. The matter was not resolved. The court ordered the transcript of the hearing sealed, but copies made available to counsel who could review it and discuss it with appellants.

Another hearing with the court took place on April 26, 2002. Young’s counsel asked the court to have Harrison’s family law file made available so his marital status could be explored by counsel. Counsel also asked that the other members of the jury be interviewed as well as the source from whom the prosecutor first learned about the social relationship.

The court refused these requests finding that Juror No. 12’s answers were truthful, and that she did not have any contact with Harrison during the trial. The matter was continued to allow defense counsel to complete their investigation and argument concerning the issue.

At another hearing on July 19, 2002, Young’s counsel sought confirmation from the prosecutor as to who else might have told him about the relationship between Juror No. 12 and Harrison, to enable the defense to investigate the matter further. Counsel also wanted the transcripts of the questioning unsealed. The court indicated a desire to have

the prosecutor file a declaration under seal setting forth the circumstances by which he learned of the relationship.

Appellants claim they were denied due process because they were refused an opportunity to examine the other jurors about the Harrison/Juror No. 12 relationship and because the prosecutor never disclosed the source of his knowledge about it.<sup>6</sup> We disagree.

We are fully cognizant that contact between a witness and a juror *during trial* may constitute juror misconduct. (*People v. Hardy* (1992) 2 Cal.4th 86, 173-175; *Caliendo v. Warden, California Men's Colony* (9th Cir. 2004) 365 F.3d 691, 697-699.) Where information is brought to the trial court's attention indicating the possibility of such misconduct, the court has the discretion to conduct an inquiry into the incident, but should only do so where the information brought to the court's attention demonstrates a " 'strong possibility' " that prejudicial misconduct has occurred. (*People v. Hardy, supra*, at p. 174, quoting *People v. Hedgecock* (1990) 51 Cal.3d 395, 415, 419.)

The trial court in this instance did not abuse its discretion in the manner in which it proceeded, nor did appellants suffer a denial of due process. Once the matter was brought to the judge's attention, a hearing was conducted during which both the involved juror and witness were examined about their contact. It is absolutely clear that their contact began only *after the trial was completed, the verdicts rendered, and the jury discharged*. The court found the juror, in particular, believable on this point, and appellants have not come forward with any information to suggest otherwise. Based on this evidence, there was no need whatsoever for the court to round up the other 11 former jurors, bring them into court, and interrogate them about this posttrial contact. Similarly,

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<sup>6</sup> A declaration was ultimately filed by the prosecutor indicating that he heard about the relationship from Harrison's partner, Detective Dahlstrom, and from another deputy district attorney, Jose Marin, who overheard Harrison discuss the issue with Detective Dahlstrom. Thus, appellants now contend that the delay in filing this declaration had deprived appellants the opportunity to discuss with these individuals why they felt it important to convey the information to the prosecutor.

the source of the information learned by the prosecutor was irrelevant, and it was not an abuse of discretion for the trial court not to pursue it further.

**IV.**

**DISPOSITION**

The two-year sentencing enhancement based on the street gang allegation (§ 186.22, subd. (b)(1)) is stricken, and the case remanded to the trial court for resentencing. In all other respects the judgments are affirmed.

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Ruvolo, P.J.

We concur:

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Reardon, J.

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Sepulveda, J.