

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC WILLIAM JOHNSON,

Defendant and Appellant.

A111525

(Alameda County
Super. Ct. No. H38736A)

Eric William Johnson appeals from a judgment of conviction upon a jury verdict finding him guilty of second degree burglary (Pen. Code, § 459). He contends that the trial court erred in failing to give CALJIC No. 2.71, the cautionary instruction on admissions of the accused. He also argues that the trial court erred in giving CALJIC No. 2.15 on possession of recently stolen property, and that the matter must be remanded to correct the amount of the probation supervision fee on the probation minute order. We modify the judgment to correct the amount of the probation supervision fee but otherwise affirm.

I. FACTS

At approximately 2:15 a.m. on October 30, 2004, Officer Jon Mills responded to a dispatch call regarding two males breaking into a container trailer at a construction site at 3214 Arden Road in Hayward. Officer Robert Farro arrived on the scene at the same time as Mills. Mills proceeded to check the fence line on Baumberg Avenue while Farro went in the opposite direction on Arden Road. Farro stopped a pickup truck as it was coming out of the driveway of the construction site. He radioed Mills who immediately

responded to assist. They approached the truck and contacted the two male occupants. Farro identified the driver as Don Lucas Caban, while Mills spoke with defendant, who was in the front passenger seat. Both men were wearing orange Caltrans-type vests turned inside-out. Mills, who is also a licensed contractor, testified that wearing the vests in that manner prevented the reflection of light from the vests, and that vests were not generally worn on a construction site but were used for highway work. Mills also observed construction equipment, tools, and boxes in the bed of the truck. Most of the equipment and tools bore the name of Rex Moore Construction.

Defendant told Mills that he was at the construction site to watch over the equipment to make sure it was not stolen. Defendant also said that he was working for "Fred," who authorized him to watch the equipment. He was not able to provide Fred's last name or a telephone number for Fred. In response to Mills's inquiry as to why defendant was wearing the vest, defendant said that it was to make him look more official. Regarding the equipment in the truck, defendant told Mills that he was watching it for Rex, a coworker. Defendant was unable to provide Rex's telephone number or address. Further, he was unable to name any of the tools in the truck.

Mills ordered defendant out of the truck and patsearched him for weapons. Defendant had a large wad of keys on a wire that was attached to his belt. He also had several little knives, a flashlight, and a headband flashlight.

Dispatch located Duane Olson, the general construction superintendent for the construction, who responded to the scene. Mills gave him the tools that were found in the truck for safekeeping. Mills and Olson then inspected the trailer on the site. Mills noticed that the door to the trailer was ajar and the locking device was almost sawed off. The inside of the trailer was in complete disarray. It appeared as if someone had rummaged through the entire trailer. Olson testified that he did not know defendant and had not given him permission to take any items off of the construction site.

Steven Rex Moore testified that he owns Rex Moore Electrical Contractors and Engineers, Inc., which was doing work at the construction site at 3214 Arden Road on October 30, 2004. Moore identifies himself to others as Steven, and his middle name

appears only in the company name. He did not know defendant and had not authorized him to work at the construction site.

Jeremy Anzelone was assigned as the foreman for Rex Moore Electrical at the site. Anzelone testified that he locked the company's tools and equipment up in a job trailer at the end of the workday on October 29, 2004. To secure the trailer, he used a padlock within a lockbox. Anzelone did not know defendant, and did not authorize him to remove any of the equipment or tools in the trailer.

Defendant denied any involvement in the burglary. He testified that he met Caban that evening for the first time and that they left for the construction site at about 12:30 a.m. to 1:00 a.m. Defendant thought that Caban was a supervisor at the site and that he was hiring. When they arrived at the construction site, Caban got out of the truck and went around the side of the building. They were at the construction site for about five minutes; they did not load any property at the site into the truck. Defendant denied telling Mills that the tools in the truck belonged to Fred or Rex. He also denied that Mills asked about his keys, for any telephone numbers, or about his knowledge of tools. He further testified that he was familiar with tools and that he was not sweaty when he spoke with Mills. On cross-examination, he was unable to account for the hour to an hour and a half that he was with Caban in the truck even though the construction site was only three to four miles from where he met Caban.

II. DISCUSSION

Defendant contends that the trial court erred in failing to instruct sua sponte pursuant to CALJIC No. 2.71, the cautionary instruction on admissions of the accused. CALJIC No. 2.71 provides: “An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]” An admission is “any extrajudicial statement—whether

inculpatory or exculpatory—‘which tends to prove [a defendant’s] guilt when considered with the rest of the evidence.’ ” (*People v. Mendoza* (1987) 192 Cal.App.3d 667, 676; *People v. Brackett* (1991) 229 Cal.App.3d 13, 19-20.) When evidence of a defendant’s oral admissions is admitted, the jury must be instructed to view them with caution. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346; *People v. Beagle* (1972) 6 Cal.3d 441, 455.)

Because defendant’s exculpatory statements to Mills constituted evidence of a consciousness of guilt, we conclude—and the Attorney General concedes—that the court should have given CALJIC No. 2.71. Defendant, however, was not prejudiced by the error.

“The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.” (*People v. Beagle, supra*, 6 Cal.3d at p. 456.) Here, there is no reasonable probability that the jury would have reached a more favorable verdict if the court had given the instruction. (*Ibid.*) The jury was instructed on determining the believability of witnesses pursuant to CALJIC No. 2.20, discrepancies in testimony under CALJIC No. 2.21.1, that testimony willfully false in one material part is to be distrusted in others pursuant to CALJIC No. 2.21.2, weighing conflicting testimony under CALJIC No. 2.22, and sufficiency of the testimony of one witness pursuant to CALJIC No. 2.27. “These instructions adequately informed the jury of its duty to determine the believability of the witness and of each part of his testimony and the weight to which the testimony was entitled.” (*People v. Shoals* (1992) 8 Cal.App.4th 475, 499.) In deciding the case, the jury was required to find whether it believed defendant or Mills. Defense counsel in closing argument sought to discredit Mills by pointing out differences in his testimony at the preliminary hearing, by noting that Mills had been up for 27 hours when he testified at trial and thus responded “I don’t know” to several questions, and by highlighting Mills’s failure to tape his conversation with defendant and to take any fingerprints at the scene. Understandably defense counsel simply ignored Mills’s version of the incident, the strong circumstantial evidence of defendant’s guilt, and the implausibility of defendant’s story. The undisputed facts were that Farro found defendant and Caban as

they were exiting from the driveway of the construction site in a pickup truck after receiving a dispatch call regarding two males breaking into a trailer at the site. The back of the truck contained tools and equipment stolen from a trailer. The lock on the trailer had recently been broken, and defendant was unable to account for the time he was with Caban in the truck. Moreover, on its face, defendant's explanation for being at the construction site lacked credibility. On this record, the instructional error was harmless.

Defendant next contends that trial court erred in instructing the jury with CALJIC No. 2.15. He argues that the instruction denied him due process because it reduced the prosecution's burden of proof in that it permitted the jury to infer that he committed a burglary based on conscious possession of recently stolen property and "slight" corroborating evidence.

The court gave CALJIC No. 2.15 to the jury as follows: "If you find the defendant was in conscious possession of recently stolen extorted property, the fact of that possession is not by itself sufficient to bring an inference that the defendant is guilty of the crime of burglary. Before guilt may be inferred, there must be corroborating evidence tending to prove the defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt. [¶] As corroboration, you may consider the attributes of the possession, time, place, and manner that the defendant had an opportunity to commit the crime charged, the defendant's conduct, his or her false or contradictory statements, if any, or other statements he or she may have made with reference to the property, or a false account of how he or she acquired possession of the stolen property, or any other evidence which tends to connect the defendant with the crime charged."

CALJIC No. 2.15 has repeatedly been upheld by the courts. (See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 131; *People v. Holt* (1997) 15 Cal.4th 619, 677.) Indeed, the instruction is "designed 'partly as a prophylactic in favor of the accused,' since it admonishes the jury of 'the well-established principle that evidence of possession of recently stolen property, standing alone, will not support a conviction for a theft crime; there must be some other corroborating evidence.'" (*People v. Snyder* (2003)

112 Cal.App.4th 1200, 1225.) In *Snyder*, the court addressed the issue of whether the instruction impermissibly lightened the prosecution's burden of proof in a felony murder case because it could be interpreted to permit the jury to convict a defendant of first degree felony murder and impose the special circumstance finding in connection with that offense on the basis of only slight corroborative evidence. (*Id.* at p. 1226.) The court concluded that the instruction did not reduce the prosecution's burden of proof or create an improper presumption of guilt from the mere fact of possession of stolen property. "Rather, the instruction 'relates a contrary proposition: a burglary [or robbery] may not be presumed from mere possession unless the commission of the offense is corroborated.' [Citation.] The inference permitted by CALJIC No. 2.15 is permissive, not mandatory. Because a jury may accept or reject a permissive inference 'based on its evaluation of the evidence, [it] therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt.' [Citation.] Requiring only 'slight' corroborative evidence in support of a permissive inference, such as that created by possession of stolen property, does not change the prosecution's burden of proving every element of the offense, or otherwise violate the [accused's] right to due process unless the conclusion suggested is not one that reason or common sense could justify in light of the proven facts before the jury." (*Ibid.*) We agree with the *Snyder* court's reasoning. CALJIC No. 2.15 did not lessen the prosecution's burden of proof; defendant was not denied due process.

Finally, defendant claims that there is an error in the judgment because the court ordered a \$200 probation supervision fee during the sentencing hearing but the probation minute order specifies a fee of \$200 per month. The Attorney General concedes that the record suggests the court did not intend a \$200 monthly fee but asserts that the proper remedy is for defendant to file a motion in the trial court.

In the interest of judicial economy, we will correct the error. The reporter's transcript indicates that the court imposed a probation supervision fee of \$200. "[A] discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error." (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

Accordingly, we correct the error by modifying the judgment to reflect a probation supervision fee of \$200.

III. DISPOSITION

The judgment (probation minute order) is modified to reflect a total probation supervision fee of \$200. As so modified, the judgment is affirmed.

RIVERA, J.

We concur:

REARDON, Acting P. J.

SEPULVEDA, J.