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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

WAYNE ELIOT JACKSON,

Defendant and Appellant.

A114558

(Alameda County  
Super. Ct. No. C150738)

Defendant Wayne Eliot Jackson appeals following his convictions for attempted murder and possession of a firearm by a felon. He contends the trial court erred in giving certain jury instructions, in imposing a probation investigation fee, and in imposing a prison term for a great bodily injury enhancement. We modify the judgment to strike the enhancement and otherwise affirm.

PROCEDURAL BACKGROUND

On September 13, 2005, an information was filed in the Alameda County Superior Court charging defendant with attempted murder (Pen. Code, §§ 187, subd. (a), 664; count one)<sup>1</sup> and possession of a firearm by a felon (§ 12021, subd. (a)(1); count two).

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

The information alleged, in conjunction with count one, that defendant personally and intentionally discharged a firearm causing great bodily injury (§§ 12022.7, subd. (a), 12022.53, subds. (b), (c), & (d)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged a prior conviction that qualified as a strike (§ 667, subd. (a)(1)).

A jury found defendant guilty as charged and found the enhancement allegations true. The court found true the prior conviction allegation and sentenced defendant to a total prison term of 47 years to life.

#### FACTUAL BACKGROUND

On June 15, 2005, Homer Conway had a carpet cleaning job at a location in Oakland. As he set up his equipment, he heard gunshots, went to the porch, and determined that the shots originated from an apartment complex across the street. Conway saw someone chasing another person and heard two more shots. He saw the victim clutch at his torso with blood on his shirt; the victim had his back to the shooter at the time he was shot.

Lasherell Wiggins testified that she was with the victim, Troy Hobbs, when defendant shot him. They were both addicts and would frequent the apartment building to get high. The day of the shooting, defendant approached Hobbs, pointed a revolver at him, and stated “I’m tired of your mother fucking shit, bull shit.” As she fled, she heard five or six gunshots. Wiggins identified defendant to police after he was apprehended.

When the police arrived, a man told them that the shooter ran into Apartment 2. The police arrested defendant after ordering him and the occupants of Apartment 2 to come outside. Defendant said, “I did that shit. He beat my ass so I shot him.”

While placed in a patrol car, defendant said, “dude slapped my sister, that’s why I shot his ass.” Defendant also stated that the victim beat him. After a technician

performed a gunshot residue test on defendant, he said, “Man, you don’t need that shit. I fucking shot that nigga’. The mother fucker robbed me.”

During a police interview, defendant stated that Hobbs had robbed him the day before the shooting and twice on the day of the shooting. Hobbs also robbed defendant’s brother-in-law the day of the shooting. Defendant went to his mother’s house, retrieved his mother’s .38 revolver, and shot Hobbs when he returned to the apartment building.

Defendant’s niece testified that Hobbs robbed another of her uncles the day of the shooting or the day before. She saw defendant shoot Hobbs. At the time of the shooting, Hobbs was “coming at” defendant.

## DISCUSSION

### I. *CALCRIM 220*

The trial court instructed the jury on reasonable doubt using CALCRIM 220. Defendant maintains that language in CALCRIM 220 requiring the jury to “compare and consider all the evidence that was received throughout the entire trial” impermissibly shifted the burden of proof to the defense by allowing the jury to hold against defendant his failure to present sufficient evidence to prove his innocence. The argument defendant makes has been rejected in several recent published decisions. (*People v. Flores* (2007) 153 Cal.App.4th 1088; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500; *People v. Hernández-Rios* (2007) 151 Cal.App.4th 1154.)

CALCRIM 220 reads, “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 each element of a crime and special allegation 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.” (Italics added.)

The challenged language in CALCRIM 220 is similar to language in CALJIC 2.90 providing, “Reasonable doubt . . . is that state of the case which, after *the entire comparison and consideration of all the evidence*, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.” (Italics added.) The United States Supreme Court rejected a due process challenge to the adequacy of CALJIC 2.90 in part because “the entire comparison and consideration of all the evidence” language “explicitly told the jurors that their conclusion had to be based on the evidence in the case.” (*Victor v. Nebraska* (1994) 511 U.S. 1, 16.) The language in CALCRIM 220 is not different in that respect. (*People v. Hernández-Rios, supra*, 151 Cal.App.4th at p. 1157.) In addition, the trial court instructed the jury with CALCRIM 355, to the effect that a defendant “may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt.” (See *People v. Flores, supra*, 153 Cal.App.4th at p. 1093.)

There is no reasonable likelihood the jury applied CALCRIM 220 to shift the burden to defendant to prove the existence of reasonable doubt. We agree with the decisions in *People v. Flores, supra*, 153 Cal.App.4th at p. 1093, *People v. Westbrooks, supra*, 151 Cal.App.4th at pp. 1509-1510, and *People v. Hernández-Rios, supra*, 151 Cal.App.4th at p. 1157, rejecting the challenge defendant makes to CALCRIM 220.

## II. CALCRIM 371

The trial court instructed the jury with CALCRIM 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.” Defendant contends it was error for the court to give the instruction because there was no evidence he tried to create false evidence or obtain false testimony.

For the purpose of analysis, we will assume there was no evidentiary basis for the instruction. “It is error for a court to give an ‘abstract’ instruction, i.e., ‘one which is correct in law but irrelevant[,]’ ” but “ ‘[i]n most cases the giving of an abstract instruction is only a technical error which does not constitute ground for reversal.’ ” (*People v. Rowland* (1992) 4 Cal.4th 238, 282; see also *People v. Rollo* (1977) 20 Cal.3d 109, 122-123, disapproved on another ground in *People v. Castro* (1985) 38 Cal.3d 301, 308 [the giving of a correct but irrelevant instruction “is usually harmless, having little or no effect ‘other than to add to the bulk of the charge.’ [Citation.] There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant’s prejudice”].) Defendant claims reversal is required since the instruction misled jurors, inviting them to speculate that defendant colluded with others to present false testimony.

There is no reasonable likelihood the jury was misled by the inclusion of CALCRIM 371. (*People v. Rowland, supra*, 4 Cal.4th at p. 282; *People v. Cain* (1995) 10 Cal.4th 1, 36.) The jury was told, “Some of these instructions may not apply . . . depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.” (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) CALCRIM 371 on its

face only applies where a defendant “tried to create false evidence or obtain false testimony.” If, as defendant contends, there was no evidence that he did so, then there is no reason to believe the jury relied on the instruction in finding defendant guilty. Past decisions have treated the erroneous giving of CALJIC 2.04, the equivalent CALJIC instruction, as harmless error. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1225; *People v. Pride* (1992) 3 Cal.4th 195, 248-249; see also *People v. Crew* (2003) 31 Cal.4th 822, 849.)

There is no reasonable probability that defendant was prejudiced by the inclusion of CALCRIM 371 in the jury instructions. (*People v. Prettyman* (1996) 14 Cal.4th 248, 280.)

### III. CALCRIM 372

The trial court also gave the flight instruction, CALCRIM 372: “If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.” Defendant raises several claims of error.

First, defendant contends there was no evidentiary basis for the instruction. Assuming that is so for the purpose of analysis, the instruction was merely superfluous and there is no reasonable probability that it prejudiced defendant. Our previous analysis as to CALCRIM 371 is largely applicable here. (See *ante*, Part II.) Past decisions have treated the erroneous giving of CALJIC 2.52, the equivalent CALJIC instruction, as harmless error. (*People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183; *People v. Visciotti* (1992) 2 Cal.4th 1, 61.)

Second, defendant maintains that the instruction was improperly argumentative because there was no comparable instruction that a favorable inference could be made from the absence of flight. The California Supreme Court rejected this argument as to

CALJIC No. 2.52, reasoning, “[t]he instruction is not argumentative; it does not impermissibly direct the jury to make only one inference.” (*People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; see also *People v. Jackson, supra*, 13 Cal.4th at p. 1224.) Neither does CALCRIM 372 direct the jury to make only one inference. Instead, the instruction states, “If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct.” (CALCRIM 372.) The lack of a separate instruction on the absence of flight does not render the flight instruction argumentative. (See *People v. Staten* (2000) 24 Cal.4th 434, 459; *People v. Williams* (1997) 55 Cal.App.4th 648, 652-653.)

Third, according to defendant, “[t]he language in CALCRIM 372 stating that flight ‘immediately after the crime was committed’ may show that the defendant ‘was aware of his guilt’ presumes the existence of a crime and of the defendant’s guilt.” We reject any suggestion the jury would have understood the instruction as a judicial declaration that a crime occurred. There is no reasonable likelihood that the jury so understood the instruction since the trial, arguments, and other instructions clearly put the issue of defendant’s guilt before the jury. (See *People v. Cannady* (1972) 8 Cal.3d 379, 392.)

Finally, defendant contends CALCRIM 372 unconstitutionally lowered the prosecution’s burden of proof because evidence of flight is of little probative value in proving guilt. The instruction does not place undue significance on the fact of flight. Instead, it directs the jury “to decide the meaning and importance of that conduct.” (CALCRIM 372.) Instructing the jury that it may infer a defendant’s awareness of guilt from flight does not violate due process. (*People v. Hernández-Rios, supra*, 151 Cal.App.4th at pp. 1158-1159.) Defendant’s argument is without merit. (*Id.* at p. 1159; see also *People v. Jackson, supra*, 13 Cal.4th at p. 1226 [discussing CALJIC 2.52].)

#### IV. *Penal Code Section 1203.1b*

Defendant maintains that the trial court erroneously imposed a \$250 probation investigation fee without determining his ability to pay.

Section 1203.1b, subdivision (a), provides that if the probation officer determines a defendant has the ability to pay some or all of the reasonable cost of preparing a presentence probation report, “[t]he probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount.” Here, the probation report states, “[T]he Probation Officer has determined that the defendant has the ability to pay a probation investigation fee of \$250. The defendant has been advised of the amount(s) and of the right to have a Court hearing with counsel concerning his ability to pay pursuant to Section 1203.1b of the Penal Code.” The trial court imposed the \$250 fee at the sentencing hearing. Defendant did not request a hearing concerning his ability to pay or object to imposition of the fee.

Because he failed to object, defendant has forfeited his challenge to imposition of the probation investigation fee. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1068.) Citing *People v. Scott* (1994) 9 Cal.4th 331, defendant argues that he did not forfeit the claim because imposition of the fee resulted in an unauthorized sentence. *Valtakis* rejected this argument. “*Scott* clarified what claims may be beyond the waiver rule as *unauthorized*: ‘[A] sentence is generally “unauthorized” where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is “clear and correctable” independent of any factual issues presented by the record at sentencing.’ [*Scott*, at p. 354.] That is not the case here, for a probation fee *could* have been lawfully imposed had an ability to pay appeared, a clearly fact-bound determination. ‘In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner’ (*ibid.*), which is exactly the claim here: the

probation fees, otherwise permitted, were procedurally flawed (for absence of notice, a hearing or a finding) and factually flawed (for absence of evidence that the defendant had the ability to pay). The unauthorized-sentence exception does not apply.” (*Valtakis*, at p. 1072.) We agree with the reasoning in *Valtakis*.<sup>2</sup>

Defendant urges in the alternative that his counsel performed ineffectively in failing to object to imposition of the probation investigation fee. He asserts it is clear he did not have the ability to pay the \$250 fee because the probation report included defendant’s assertion that he had no assets and because defendant had no prospect of obtaining employment due to his long prison sentence. In order to demonstrate ineffective assistance of counsel, a defendant must show that counsel’s performance was inadequate when measured against the standard of “ ‘a reasonably competent attorney,’ ” and that counsel’s performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687.) When considering a claim of ineffective assistance of counsel on direct appeal, “competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney’s choice.” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.) Although the record provides reason to believe defendant did not have the ability to pay, it does not affirmatively exclude the possibility that trial counsel opted not to object to the fee because he knew something about defendant’s financial resources not reflected in the record. We must reject defendant’s claim on direct appeal.

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<sup>2</sup> We also agree with the conclusion in *Valtakis* that language in section 1203.1b, subdivision (a), requiring a “knowing and intelligent waiver” refers to waiver at the trial court level and does not abrogate the ordinary rules for waiver of issues on appeal. (*People v. Valtakis, supra*, 105 Cal.App.4th at pp. 1073-1076.)

V. *Great Bodily Injury Enhancement*

The parties agree the trial court erroneously imposed the great bodily injury enhancement (§ 12022.7, subd. (a)) because the court also imposed an enhancement for personal use of a firearm causing great bodily injury (§ 12022.53, subd. (d)). Section 12022.53, subdivision (f) provides, “Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. . . . An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).” We will direct that the abstract of judgment be amended to strike the three-year term imposed under section 12022.7, subdivision (a).

DISPOSITION

The judgment is modified to strike the three-year term imposed under section 12022.7, subdivision (a). As modified, the judgment is affirmed. The matter is remanded to the trial court with instructions to prepare a corrected abstract of judgment and to forward it to the Department of Corrections.

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STEVENS, J.\*

We concur:

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JONES, P. J.

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NEEDHAM, J.

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\* Retired Associate Justice of the Court of Appeal, First District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.