

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TACARE DESEAN PAYSINGER, Defendant and Appellant.	C059448 (Super. Ct. No. 07F09069)
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APPEAL from a judgment of the Superior Court of Sacramento County, Troy L. Nunley, Judge. Affirmed as modified.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Convicted of second degree robbery and placed on five years' probation, defendant Tacare Desean Paysinger appeals,

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts IB, II and III of the Discussion.

arguing: (1) the flight instruction the trial court gave (CALCRIM No. 372) was unconstitutional and not supported by substantial evidence; (2) his conviction must be reduced to grand theft because that was all the actual perpetrator (codefendant Pham) was convicted of; and (3) the weapons and gang conditions of his probation are unconstitutionally vague and/or overbroad.

In the published portion of our opinion, we reject defendant's challenge to the constitutionality of CALCRIM No. 372. In the unpublished portion of our opinion, we agree with some of defendant's arguments regarding his probation conditions and will modify those conditions accordingly; otherwise, we reject defendant's arguments and will therefore affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On a late afternoon in September 2007, Mary Harris was in her car, which was parked near the Gottschalks store at El Camino and Watt Avenues in Sacramento. As she was waiting for a call on her cell phone, she saw two men about 20 feet away "kind of wandering in the general direction of [her] car." One of the men was an African-American, about 17 or 18 years old, wearing a dark "hoodie." The African-American man moved toward the passenger side of her car while she lost sight of the other man. As she reached to start the car, a man whom Harris believed to be the other man she had seen walking toward her car appeared at her window with his hand under his shirt and said, "give me your purse, bitch." Harris "kind of froze for just a second," and

the man said, "give me your [purse] or I'll kill you," as he tapped a gun on the car window. Harris handed him her purse, and he turned and ran back in the direction from which he had come.

A witness in a nearby pickup truck saw the two men walking together, then heard, faintly, "give me your purse." He then saw two men running away, one holding a purse.

Another witness saw defendant, wearing a dark hooded sweatshirt, walking in the parking lot. She later saw defendant and another man, whom she identified as codefendant Pham, running; defendant was holding a purse, which he shoved under his shirt. They ran around the other side of a van, and when the van drove away, the men were gone, so she assumed they had jumped inside. As the witness was later driving away from the mall, she spotted the van again. The witness called 911 and followed the van. As she did so, she saw defendant and Pham pulling items out of the purse. The witness continued following the van on El Camino Avenue and then on Fulton Avenue until the van pulled into a parking lot and was surrounded by police cars. Two people, one of whom was a Black male wearing a black hooded sweatshirt, jumped out of the van and ran toward a nearby business called Goore's.

An employee of Goore's saw a person with a black "hoodie" in the store. After hearing from a coworker that the person had gone into the bathroom, the employee checked the bathroom and found the hoodie hidden under the trash bag in the trash can.

Upon receiving information that a Black male had left Goore's and gone to a nearby Burger King, the police found defendant there and arrested him.

Defendant, Pham, and another individual were charged with robbery, and it was alleged that a handgun was used in the commission of the crime. Defendant and Pham were tried together using separate juries. Pham's jury found him not guilty of robbery but guilty of the lesser offense of grand theft. The jury also found the firearm allegation was not true. Defendant's jury found him guilty of second degree robbery and found the firearm allegation was true. The trial court suspended imposition of sentence and placed defendant on five years' probation subject to various conditions. Defendant filed a timely notice of appeal.

DISCUSSION

I

CALCRIM No. 372 -- The Flight Instruction

The trial court instructed the jury with CALCRIM No. 372, as follows: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. [¶] If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. [¶] However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

On appeal, defendant contends "CALCRIM No. 372 is unconstitutional because it deprives a defendant of the presumption of innocence and the rights to a jury trial

and proof beyond a reasonable doubt." He also contends the instruction should not have been given because there was no substantial evidence to support it. We reject both arguments.

A

Constitutionality Of CALCRIM No. 372

Defendant first contends CALCRIM No. 372 "undermines the presumption of innocence, relieves the prosecution of the burden to prove the offense beyond a reasonable doubt and deprives the defendant of a jury verdict . . . because the instruction presumes 'the crime was committed[.]'" According to defendant, "[t]he conditional term 'if' applies only to the fact of flight, and the permissive term 'may' applies only to the inference to be drawn from the fact. These terms do not apply to the glaring assertion that 'the crime was committed.'"

On review, we examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt. (See *People v. Frye* (1998) 18 Cal.4th 894, 958.)

Viewing CALCRIM No. 372 in this light, we reject defendant's argument. Even viewing the instruction in isolation, the word "if" in the operative clause -- "If the defendant fled or tried to flee immediately after the crime was committed" -- does not logically modify *only* the phrase "the defendant fled or tried to flee," as defendant contends.

Rather, "if" modifies the entire phrase, including the words "after the crime was committed." Thus, it is highly unlikely a reasonable juror would have understood the instruction as dictating that "the crime was committed." (See *People v. Daener* (1950) 96 Cal.App.2d 827, 833 [flight instruction "did not presuppose the commission of the crime charged"].)

This conclusion is supported by the other instructions, which told the jury the following things (among others):

(1) "You must decide what the facts are"; (2) "It is up to all of you and you alone to decide what happened"; (3) "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[]"; and (4) "Remember that you may not convict a defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant's guilt[] of that crime has been proved beyond a reasonable doubt."

Also, the trial record demonstrates that there was no real question about whether a crime was committed when Harris's purse was taken. The only real question in defendant's case was whether defendant was a participant in the taking. Under these circumstances, we conclude it is not reasonably likely the jury misunderstood the phrase "the crime was committed" in CALCRIM No. 372 in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt.

Defendant argues at some length about how the language of CALCRIM No. 372 differs from the language in Penal Code

section 1127c, which provides for the giving of a flight instruction when appropriate.¹ The purpose of this exercise is not entirely clear. Nevertheless, to the extent defendant intends to suggest the CALCRIM instruction is unconstitutional or otherwise unlawful because of these differences, we disagree.

Defendant first points out that CALCRIM No. 372 tells the jury that flight may show awareness of guilt before telling the jury that flight alone is not sufficient to prove guilt, while Penal Code section 1127c communicates those ideas in the opposite order. To the extent defendant suggests this difference makes the CALCRIM instruction constitutionally deficient because the first sentence of the instruction "strongly suggests . . . that evidence of flight is in fact sufficient to show guilt," we are not persuaded. The first sentence of CALCRIM No. 372 suggests no such thing, and in any event the final sentence of the instruction positively refutes any such suggestion. In reviewing an instruction for

¹ Penal Code section 1127c reads as follows:

"In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

"No further instruction on the subject of flight need be given."

constitutionality, we do not view it in isolation from the other instructions the court gave and we certainly do not view one part of an instruction in isolation from another part. Viewed as a whole and in light of the other instructions, CALCRIM No. 372 is not unconstitutional.

Next, defendant complains that while Penal Code section 1127c "in no way tells the jury how it should interpret flight, if proved, nor what conclusion it may draw from the fact of flight," CALCRIM No. 372 "tells the jury flight may prove guilt." Defendant, however, makes no effort to explain why this difference is significant. It has long been accepted that if flight is significant at all, it is significant because it may reflect consciousness of guilt, which in turn tends to support a finding of guilt. (See, e.g., *People v. Hutchinson* (1969) 71 Cal.2d 342, 346.) That CALCRIM No. 372 tells the jury this does not in any way make the instruction unconstitutional.

Finally, defendant complains that while Penal Code section 1127c "addresses flight 'after the commission of a crime[,]' " "CALCRIM No. 372 addresses flight 'after the crime was committed.'" By this argument, however, defendant simply repeats the contention that the CALCRIM instruction unconstitutionally presumes the crime was committed, which we have rejected already. Accordingly, we do not address the argument further.

In summary, defendant has failed to show any constitutional defect in the flight instruction given here.

B

Substantial Evidence Supported The Flight Instruction

Defendant contends there was no substantial evidence to support giving the flight instruction because “[w]hile [he] was seen running, there was no evidence he ran away from police” and “[t]he evidence did not show [he] ran or left the area in order to avoid detection or arrest.” This argument is frivolous. “A flight instruction is proper whenever evidence of the circumstances of [a] defendant’s departure from the crime scene . . . logically permits an inference that his movement was motivated by guilty knowledge.” (*People v. Abilez* (2007) 41 Cal.4th 472, 522, quoting *People v. Turner* (1990) 50 Cal.3d 668, 694.) Here, a witness testified she saw defendant run across the parking lot while shoving a purse under his shirt before jumping in a van that drove away. This evidence (which defendant largely fails to acknowledge) was sufficient to support the flight instruction.

II

Defendant’s Robbery Conviction Was Proper Despite The Fact That The Actual Perpetrator Was Convicted Of Only Grand Theft

Noting that his codefendant, Pham, was acquitted of robbery and convicted of only the lesser offense of grand theft, defendant argues that his robbery conviction must be reduced to grand theft because “Pham was the direct perpetrator of the taking of Harris’s purse,” defendant’s “mental state was no more culpable than Pham’s,” and “[t]here was no defense to Pham’s commission of the offense which did not apply to [defendant].”

In support of his argument, defendant relies entirely on *People v. McCoy* (2001) 25 Cal.4th 1111. As we will explain, his reliance is misplaced.

In *McCoy*, the California Supreme Court “granted review to decide whether an aider and abettor may be guilty of greater homicide-related offenses than those the actual perpetrator committed.” (*People v. McCoy, supra*, 25 Cal.4th at p. 1114.) The court determined that “the answer, sometimes, is yes” “[b]ecause defenses or extenuating circumstances may exist that are personal to the actual perpetrator and do not apply to the aider and abettor.” (*Ibid.*) Using the characters of Shakespeare’s Othello as an example, the court explained that “Othello might be guilty of manslaughter, rather than murder, on a heat of passion theory” for killing Desdemona in a fit of jealousy, but if Iago “acted with malice” in inducing and encouraging Othello to act, “he would be guilty of murder even if Othello, who did the actual killing, was not.” (*McCoy*, at p. 1122; see *id.* at p. 1121.) Consistent with this example, the court concluded “that when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person’s guilt is determined by the combined acts of all the participants as well as that person’s own mens rea. If that person’s mens rea is more culpable than another’s, that person’s guilt may be greater even if the other might be deemed the actual perpetrator.” (*Id.* at p. 1122.) In a footnote immediately following this conclusion, the court stated that “[b]ecause we cannot anticipate all possible nonhomicide crimes

or circumstances, we express no view on whether or how these principles apply outside the homicide context." (*Id.* at p. 1122, fn. 3.)

As we have noted, relying *solely* on *McCoy*, defendant argues that his conviction for robbery must be reduced to grand theft because "[n]o evidence in the record allows for an inference [that his] mental state or act of being present was more culpable than Pham's" and therefore he "may not be guilty of an offense greater than Pham." In the absence of a compelling argument to the contrary, however -- which is lacking here -- we cannot apply the principles expressed in *McCoy* to the circumstances of this case. The court in *McCoy* did not purport to decide -- even for purposes of homicide-related offenses, let alone for purposes of all offenses -- that an aider and abettor can be convicted of a greater offense than the actual perpetrator only if the aider and abettor had a more culpable mental state. Rather, the court decided only that convictions of different homicide-related offenses may be justifiable where the actual perpetrator and the aider and abettor had differing mental states. That principle has no bearing here. The difference between the crime of which defendant was convicted (robbery) and the crime of which Pham was convicted (grand theft) has nothing to do with differing mental states, but has to do with whether the taking involved the use of force or fear. (See *People v. Melton* (1988) 44 Cal.3d 713, 746 ["Theft is a lesser included offense of robbery, which includes the additional element of force or

fear"].) More importantly, the real question here is one *McCoy* did not address at all -- whether inconsistent verdicts of two codefendants in a robbery/theft case can be allowed to stand.

Other Supreme Court authority defendant does not cite answers that question. The same year it decided *McCoy*, the court decided *People v. Palmer* (2001) 24 Cal.4th 856, in which the court noted that "[t]he law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence." (*Id.* at p. 860.) The court further noted that, under California law, "'The fact that certain defendants may escape conviction for their crimes is not any legal or logical reason why another defendant, where substantial evidence has been introduced to sustain his conviction, should be exonerated and be permitted to escape punishment for his crime.'" [Citation.] Accordingly, 'The general rule is that acquittal of one codefendant normally will not require acquittal of another.'" (*Id.* at p. 861.)

Applying those principles here, the fact that Pham's jury acquitted him of robbery did not require defendant's acquittal of that crime also. Thus, defendant's argument that his conviction must be reduced to grand theft fails.

III

Probation Conditions

The trial court placed defendant on probation subject to various conditions, including: (1) that he "not own or possess

any dangerous or deadly weapons nor remain in any building or vehicle where any person has such a weapon, nor remain in the presence of any armed person"; and (2) that he not "associate with any known or reputed gang members" or "be in places frequented by known gang members." On appeal, defendant contends both conditions are unconstitutionally vague and the first condition is also unconstitutionally overbroad. We address the challenges to the two conditions in turn.

A

Weapons Condition

Defendant contends the weapons condition "is unconstitutionally vague because it contains no knowledge requirement" and is unconstitutionally overbroad "because the term 'dangerous or deadly weapon' is not narrowly tailored and prohibits constitutionally protected conduct." The People concede the former point but not the latter.

"A probation condition is subject to the 'void for vagueness' doctrine, and thus 'must be sufficiently precise for the probationer to know what is required of him'" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) We agree with the parties that the condition forbidding defendant from "remain[ing] in any building or vehicle where any person has . . . a [dangerous or deadly] weapon" or "remain[ing] in the presence of any armed person" is unconstitutionally vague to the extent it does not require defendant to know of the presence of the offending weapon or weapons. Accordingly, we will modify the condition to impose an explicit knowledge

requirement in order to render the condition constitutional.
(See *In re Sheena K.* (2007) 40 Cal.4th 875, 892.)

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Defendant contends the term "'dangerous or deadly weapon'" "is not closely tailored to the purpose of the condition -- to prohibit possession of or proximity to persons with inherently dangerous or deadly weapons." Although his argument is not entirely clear, defendant appears to be arguing that the condition must be limited to weapons that are "inherently" dangerous or deadly -- that is, objects that are dangerous or deadly in the ordinary use for which they are designed -- as opposed to ordinary objects that might simply be *used* as a dangerous or deadly weapon. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029; *People v. Graham* (1969) 71 Cal.2d 303, 327.)

The People contend the term "dangerous or deadly weapon" is not constitutionally overbroad because the term "is commonly understood to mean any instrument likely to produce death or great bodily injury." They argue that if the term is understood as encompassing "inherently dangerous or deadly weapons, such as a gun, and . . . ordinary items like a pencil, capable of inflicting great bodily injury [that are possessed] with the intent of using them as a weapon," the term is not overbroad.

We agree with the People. Under California law, "There are two categories of 'dangerous or deadly weapons.' First, there are those instrumentalities which are weapons in the strict sense of the word, such as guns, dirks, etc. Second, there are those instrumentalities which are not weapons in the strict sense of the word, but which *may* be used as such, such as razors, pocket knives, hat pins, canes, hammers, hatchets, and other sharp or heavy objects. These are not weapons in the strict sense of the word and are not 'dangerous or deadly' to others in the ordinary use for which they are designed. As such they may not be said as a matter of law to be dangerous or deadly weapons. The instrumentalities falling in the first classification are weapons in the strict sense of the word and are 'dangerous or deadly' to others in the *ordinary use* for which they are designed and may be said as a matter of law to be dangerous or deadly weapons. [Citation.] When it appears that an instrumentality other than one falling within the first category is *capable* of being used in a dangerous or deadly manner, *and* it may be *fairly inferred* from the evidence that its possessor *intended* on a particular occasion to use it as a weapon should the circumstances require, its character as a dangerous or deadly weapon may be established, at least for the purposes of that occasion." (*People v. Reid* (1982) 133 Cal.App.3d 354, 365.)

Under this well-established meaning of the term "dangerous or deadly weapon," defendant is not prohibited from owning, possessing, or remaining in the presence of any person who

possesses an ordinary object that may be used as a dangerous or deadly weapon *unless* defendant intends, or is aware of the other person's intent, to use the object as a weapon. Construed in this manner, the term "dangerous or deadly weapon" in defendant's probation condition is closely tailored to the purpose of the condition and therefore is not unconstitutionally overbroad.

B

The Gang Condition

Relying on this court's decision in *In re Vincent G.* (2008) 162 Cal.App.4th 238, defendant contends the gang condition "is unconstitutionally vague because it does not contain a sufficient knowledge requirement and does not define the term 'gang.'" The People agree.

In *In re Vincent G.*, this court modified gang probation conditions similar to the condition at issue here in order to remedy vagueness problems arising from the lack of a personal knowledge requirement and the lack of a definition of the word "gang." (*In re Vincent G.*, *supra*, 162 Cal.App.4th at pp. 244-248.) We agree with the parties that a similar modification is required here.

DISPOSITION

The weapons condition on defendant's probation is modified as follows: "Defendant shall not own or possess any dangerous or deadly weapons nor remain in any building or vehicle where he knows any person has such a weapon, nor remain in the presence of any person he knows is armed with such a weapon."

The gang condition on defendant's probation is modified as follows: "Defendant shall not associate with any person whom he knows, or whom his probation officer informs him, is a gang member. Defendant shall not be in places frequented by persons whom he knows, or whom his probation officer informs him, are gang members. For purposes of this condition, the word 'gang' means a criminal street gang as defined in Penal Code section 186.22, subdivisions (e) and (f)."

As modified, the judgment is affirmed.

_____ ROBIE _____, J.

We concur:

_____ SIMS _____, Acting P. J.

_____ BUTZ _____, J.