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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVION HICKS,

Defendant and Appellant.

B282282

(Los Angeles County  
Super. Ct. No. TA140515)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Teresa P. Magno, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.

## **INTRODUCTION**

A jury found defendant Davion Hicks guilty of assaulting his wife. On appeal, defendant contends the trial court erred when it instructed the jury on flight and consciousness of guilt. According to defendant, there was insufficient evidence to show he left the scene “because of his knowledge of guilt.”

Substantial evidence supports the trial court’s decision to give the flight instruction. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The facts are primarily taken from Gwendolyn Smith’s 911 telephone call and the trial testimony of a responding Sheriff’s deputy, who interviewed victim Lisa Hicks and witnesses Smith and her sister, Patricia Allen, the evening of the assault. Lisa did not testify at trial; and by that time, witnesses Smith and Allen no longer had independent recollections of many of the evening’s events.

Defendant, his wife Lisa, and their two children—a toddler and a newborn—were spending Easter night, March 27, 2016, with his grandmother, Gwendolyn Smith, in her home. Smith’s husband and two sisters also lived there. Everyone apparently had gone to bed when one of Smith’s sisters woke up her siblings because defendant and Lisa were arguing. Allen went into the living room and saw defendant and Lisa arguing, but she could not hear what they were saying. Hicks was on the floor near her children and defendant was standing over her looking “frustrated.” Allen walked up to defendant, “grabbed his chin,” asked him to look at her, and told him to calm down, which he did. A “few seconds later,” Smith came out of her bedroom and

began “yelling” at defendant. Allen returned to her bedroom to let Smith handle the disturbance.

Defendant protested he was just sleeping when Lisa kicked him; but Smith, who had flashbacks as a result of her own domestic violence experiences, demanded that defendant leave. Defendant did not leave, so Smith returned to the bedroom she shared with her husband, locked the door, and called 911.

The audio recording of Smith’s 911 call was played for the jurors, and they were given copies of the transcript. The dispatcher who answered the call told Smith, “Ma’am, I can’t hear you. You are yelling in the phone.” Apparently speaking to defendant, Smith shouted, “You [are] going to jail [expletive].” Through a series of questions, the dispatcher elicited the following from Smith: “You hear him. He is trying to break in on me now. [¶] . . . [¶] Hurry up officer. [¶] . . . [¶] He is trying to jump on me. My grandson. [¶] . . . [¶] My grandson is trying to jump on me. His name is Davion Hicks. [¶] . . . [¶] . . . He was in there arguing with [Lisa] [¶] . . . [¶] trying to jump on her. . . .”

When the dispatcher asked if defendant was hitting Lisa, Smith replied, “Yeah. [Defendant is] in the living room. I ran in the room because he is trying to jump on me now. . . . My sister came and told me he was in there fighting on [Lisa].”

When the dispatcher asked if defendant was “hitting [Lisa] now,” Smith responded, “Uh, no. He’s not hitting her now. He’s just crazy. He’s just crazy.” Smith added defendant was now “threatening me okay. He’s running up on me right now. I just want him to leave my house. That’s all I told him, ‘get out of my house.’ I just want him to leave here.”

Los Angeles County Sheriff’s deputies arrived within minutes, just after defendant left the home. Deputy Kaniewski

noted Lisa was visibly upset. He observed “redness on her left collarbone and around her neck area” and photographed the injury.

Deputy Kaniewski interviewed Allen at the scene. She told him she heard yelling and “the sound of a fight coming from the living room.” She went to the living room and saw Lisa lying on her back and defendant straddling her. Allen then saw defendant strike Lisa in the face six times. Defendant pulled Lisa to her feet by her hair, pushed her against the wall, placed both hands around her neck, and began to strangle her.

Deputy Kaniewski described the living room as “disheveled,” with items “toppled over” on the floor.<sup>1</sup> Based on his witness interviews and the appearance of the living room, the deputy concluded a domestic incident had occurred in the home that night.

At trial, counsel stipulated defendant was arrested September 23, 2016. There was no evidence as to defendant’s whereabouts for the six months between the crime and his arrest. Defendant presented no defense.

Defendant initially was charged with felony offenses. The trial court reduced them to misdemeanors. The jury convicted defendant of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))<sup>2</sup> and acquitted him of simple battery against a spouse (§ 243, subd. (e)(1)). The trial court suspended imposition of sentence and placed defendant on a 36-month summary probation, including the condition that he complete a domestic violence treatment program.

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<sup>1</sup> According to Allen, her house was usually kept “clean.”

<sup>2</sup> All further statutory references are to the Penal Code.

## DISCUSSION

### A. Flight Instruction: Legal Principles

Without defense objection, the trial court gave CALCRIM No. 372, the instruction on flight.<sup>3</sup> The flight instruction is proper “where there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a consciousness of guilt.” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1245; see also § 1127c.<sup>4</sup>) Defendant asserts the evidence that he left Smith’s home because he felt guilty was insufficient to justify the instruction. We review defendant’s claim of error under the de novo standard of review. (See *People v. Posey* (2004) 32 Cal.4th 193, 218.)

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<sup>3</sup> The trial court instructed the jury on flight, using 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 defendant fled or tried to flee cannot prove guilt by itself.”

<sup>4</sup> Section 1127c provides: “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.”

“In general, a flight instruction ‘is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.’ [Citation.] “[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.” [Citations.] . . . [T]he *circumstances* of departure from the crime scene may sometimes [warrant an inference of consciousness of guilt].” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

#### **B. Substantial Evidence of Consciousness of Guilt**

Defendant argues the evidence relevant to flight shows no more than that he left the home based on Smith’s ordering him to do so. This assertion ignores a reasonable inference from the evidence that defendant fled to avoid encountering the Sheriff’s deputies Smith summoned with her 911 call. In the excitement of the call, Smith told the 911 dispatcher that defendant was “crazy” and was trying to “break in on [her]”, i.e. gain access to her room. Smith could be heard yelling at defendant. That evidence supported a reasonable inference defendant was well aware Smith called 911 and left only when he realized law enforcement would soon arrive. A reasonable juror could conclude defendant’s departure from the scene and the six-month delay between the incident and his arrest were indicia of a consciousness of guilt. This evidence was sufficient to warrant the flight instruction.<sup>5</sup>

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<sup>5</sup> As the trial court did not err in giving CALCRIM No. 372, defendant’s claim of ineffective assistance of counsel also fails.

**DISPOSITION**

The judgment of conviction is affirmed.

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DUNNING, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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\* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.