Filed 1/24/19 P. v. Trefry CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH WILLIAM TREFRY, Defendant and Appellant.	A149863 (Napa County Super. Ct. No. CR169550)

During deliberations on 12 counts stemming from defendant's molestation of his minor daughter, the jury reported it was deadlocked on three of the counts. The trial court instructed the jury with CALCRIM No. 3551, the instruction on further deliberations when a jury is deadlocked. After further deliberations, the jury returned guilty verdicts on 10 counts, including two of the three on which the jurors had previously been deadlocked. Defendant claims the court committed instructional error because CALCRIM No. 3551 is impermissibly coercive. We disagree and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

As the issue in this case does not turn on the underlying facts, we briefly summarize them. Between November 17, 2013 and January 19, 2014, defendant committed multiple acts of oral copulation, sexual penetration, and lewd acts on his minor daughter, Jane Doe. Doe testified defendant touched her vagina with his "private part," put his finger inside her vagina, made her move her hand on his penis, and put his mouth on her vagina. When defendant was interviewed by a detective, he admitted molesting his daughter on several occasions.

Defendant was charged by information with one count of sodomy or sexual intercourse with a child under the age of 10 (Pen. Code,[1] § 288.7, subd. (a); count one), five counts of oral copulation on a child under the age of 10 (§ 288.7, subd. (b); counts two through six), one count of sexual penetration upon a child under the age of 10 (§ 288.7, subd. (b); count seven), and five counts of lewd act on a child under the age of 14 (§ 288, subd. (a); counts eight through twelve). As to counts eight through eleven, it was alleged defendant had substantial sexual conduct with a child under the age of 14. (§ 1203.066, subd. (a)(8).)

Following a trial, the jury convicted defendant on 11 counts, was unable to reach a verdict on count one, sodomy or sexual intercourse with a child under the age of 10, and found the allegations of substantial sexual conduct true.

The court subsequently sentenced defendant to a total term of 42 years to life.

Defendant timely appealed.

II. DISCUSSION

Defendant contends the trial court committed instructional error because CALCRIM No. 3551 is impermissibly coercive.

A. *Background*

Jury deliberations began in the afternoon after completion of the evidentiary portion of the trial. In the middle of the morning the next day, the jury notified the court it had reached verdicts on 9 of the 12 counts. The jury reported it could not reach verdicts on counts one (sodomy or sexual intercourse), two (oral copulation), and four (oral copulation).

Before the jury was brought into the courtroom, the court said: "My suggestion at this point is, because I'm concerned about the effect of [CALCRIM No.] 3551, but I think it might be useful, would be to do the following. When the jury comes in, to find out their status. I'll ask them about their status at this time. I'm going to read 3551 before I question them, all the way up to the last sentence. Obviously I'm not going to

[1] All statutory references are to the Penal Code unless otherwise indicated.

ask that.[2] [¶] I'm going to ask the foreperson, maybe someone from the other side, how they're split, considering what I've just read, as to whether they think further deliberation would be of value. If they do, I will ask them to go do it. If they're all adamant about the position, then I'll deal with that, we'll deal with that."

Defense counsel stated his "only possible variation would be polling—or, rather, asking the status before reading the instruction." In response, the court indicated the proposed instruction and procedure were "cautious" and "fair," and did not encourage the jury "to go towards the majority or that I want that." Defense counsel reiterated his "preference" was to poll the jury first. Counsel lodged an objection "to include in our record," then "submit[ted] the issue."

Once the jury convened in the courtroom, the court said it had received and would read into the record a "statement" from the foreperson. The jury note stated the jurors were not able to agree on "charges 1, 2, [and] 4," but had reached agreement on the other counts. The note also listed how the jury was numerically split on the three counts.

After taking the verdicts the jury had reached, the court explained to the jury: "Now, as to the other, I'm going to read an instruction to you and then I'm going to ask some questions on where you are right now. It's an instruction that I think will help you—or help us understand why I'm asking all the questions, in everybody's mind. Can everybody hear me? Okay."

The court then read CALCRIM No. 3551, as follows: "Sometimes juries who have difficulty reaching a verdict are able to resume deliberations and successfully reach a verdict on one or more counts. Please consider the following suggestions: [¶] Do not hesitate to reexamine your own views. Fair and effective jury deliberations require frank and forthright exchange of views. Each of you must decide the case for yourself and form your individual opinion after you have fully and completely considered all of the evidence with your fellow jurors. It is your duty, as jurors, to deliberate with goals of

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[2] The last sentence of CALCRIM No. 3551 reads: "Please continue your deliberations at this time. If you wish to communicate with me further, please do so in writing [using the form my bailiff has given you]."

reaching a verdict if you can do so, without surrendering your individual judgment. Do not change your position just because it differs from that of other jurors or just because you or other jurors want to reach a verdict. Both the People and Defendant are entitled to the individual judgment of each juror. . . . [¶] It is up to you to decide how to conduct your deliberations. You may want to consider new approaches in order for a fresh perspective. Let me know whether I can do anything to help, give additional instructions or clarify instructions I have given you."

The court continued, "So that's the purpose of [why] I'm going to ask a few questions." The court first inquired of the foreperson whether there was any confusion regarding the law which the court could explain. The foreperson responded, "No, sir, not that I can think of." The court then asked the entire jury, "Does anybody else on the panel disagree with that? I don't want to break into who's on which side because you did give me the count. You're not supposed to give me the count." After the foreperson apologized, the court stated it was not the first time "it's ever happened. But I don't want to put somebody in a position that's on a different side."

The court invited the jurors to nod or raise their hands if they needed clarification of the law, wanted readback, or had confusion. The court noted, however, "We can't change the facts and we can't change the testimony." To this, the foreperson responded, "Exactly. And that's, I think, our confusion. So I'm not sure that rereading or reclarifying the law would help." The court responded, "I did read an instruction that encourages you to do some more deliberating," and said the jury could have a "fresh start" and as much time as it needed.

The court next asked the foreperson whether it might help if "everybody" took "a little more time" and "a fresh look at it." The foreperson replied, "I'm getting a no." A further exchange ensued in which the court asked the jury if anyone thought "a fresh start might help, a little bit of time deliberating with obviously my encouragement to give it?" Juror No. 8 answered, "I mean, I think we can, but I don't know if it will change anything." The court asked the jury to "at least step in the room and let me know through the foreperson if any further deliberation is possible." The court also told the jury it did

not want to "encourage which way to go" and did not want "anybody to change a position that they think is a proper decision. But why don't I make sure."

Once the jury resumed deliberation, 25 minutes later it requested the audio recording of Jane Doe's interview with a detective and a readback of Doe's testimony. The foreperson later said the jury only wanted to hear a portion of Doe's interview. The requested portion of the interview was played for the jury. Several hours later, the jury reported it had reached a verdict on counts two and four, but it was still deadlocked on count one. The jurors agreed they could not resolve count one. Following the reading of the verdicts, defense counsel requested the jury be polled as to counts two and four. Each juror confirmed his or her verdict on those counts was guilty. The foreperson subsequently reported the jury was split nine to three in favor of guilt on count one.

B. *Forfeiture*

Before reaching the propriety of the court instructing the jury with CALCRIM No. 3551, we first address the Attorney General's assertion that defendant's claim of instructional error is forfeited. According to the Attorney General, defense counsel objected only to the trial court's proposed procedure of instructing the jury with CALCRIM No. 3551 *before* polling the jury about their split. Defense counsel, the Attorney General claims, neither objected to this instruction generally, nor on the grounds the instruction was coercive, as now claimed on appeal. The court, however, ultimately gave CALCRIM No. 3551 after the jury inadvertently disclosed in its note to the court how jurors were numerically split on the three counts. In short, the Attorney General maintains that because defense counsel made no objection to the instruction itself, and the jury's note mooted defense counsel's unrelated procedural objection, defendant's claim of instructional error is forfeited.

Contrary to the Attorney General's interpretation of the record, defendant argues his counsel "clearly and unequivocally objected to the reading of the instruction after the trial court had decided to give it, but before it actually was delivered."

We cannot agree, based on our review of the record, that defense counsel made a clear objection generally to CALCRIM No. 3551 because it is unclear whether counsel was objecting to the court's proposed procedure or to the instruction itself.

In any event, assuming defendant's claim of instructional error is not forfeited, we conclude the court correctly instructed the jury with CALCRIM No. 3551 once the jury indicated it was deadlocked on three counts.[3]

C. *Coercive Effect*

"The trial court's authority to give supplemental jury instructions to a deadlocked jury in a criminal case derives from Penal Code section 1140, which provides, 'Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' " (*People v. Whaley* (2007) 152 Cal.App.4th 968, 979 (*Whaley*).)

"The trial court is therefore required to determine in its 'sound discretion' whether there is a reasonable probability of agreement by the jury. (*People v. Miller* (1990) 50 Cal.3d 954, 994.) However, '[t]he court must exercise its power . . . without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citation.]' (*Ibid*.; see *People v. Carter* (1968) 68 Cal.2d 810, 817." (*Whaley*, *supra*, 152 Cal.App.4th at p. 980.)

In *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335 (*Bryant*), the California Supreme Court more recently addressed the issue of whether the trial court's actions and instructions to a deadlocked jury were improperly coercive. Referring to its prior decision in *People v. Gainer* (1997) 19 Cal.3d 835 (*Gainer*), the court "explained that 'coercive' actions are those involving 'a judicial attempt to inject illegitimate

[3] We also consider the merits of the propriety of the trial court instructing with CALCRIM No. 3551 to avert a claim of ineffective assistance of counsel.

considerations into the jury debates [and] . . . appeal to dissenting jurors to abandon their own independent judgment of the case against the accused,' by placing 'excessive pressure on the dissenting jurors to acquiesce in a verdict.' [Citation.] In assessing the effect of the trial court's actions, the question is 'whether the instructions tend[ed] to impose such pressure on jurors to reach a verdict that we are uncertain of the accuracy and integrity of the jury's stated conclusion. This determination of whether the instructions 'operate[d] to displace the independent judgment of the jury in favor of considerations of compromise and expediency' [citation] is perhaps best characterized as requiring a generalized assessment of the potential effect of a given instruction on the fact finding process, rather than as an attempted inquiry into the actual volitional quality of a particular jury verdict.' " (*Bryant*, at pp. 460–461.)

In *Whaley*, the court explained how the *Gainer* decision "addressed the instruction commonly called the ' "Allen charge" ' or the ' "dynamite charge" ' which was approved by the United States Supreme Court in *Allen v. United States* (1896) 164 U.S. 492 (*Allen*) and subsequently adopted in many states. The California Supreme Court found the 'first and most questionable feature' of the *Allen* charge was 'the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views.' " (*Whaley*, *supra*, 152 Cal.App.4th at p. 980, fns. omitted.)

"The *Gainer* court disapproved the *Allen* charge because the instruction violated the defendant's right to a jury decision based upon the evidence and arguments presented at trial. [Citation.] As the California Supreme Court later reiterated, the 'principal flaw in the *Allen* charge at issue in *Gainer* was that, by counseling minority jurors to consider the majority view, whatever it might be, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict.' [Citation.] Additionally, the court determined that the defendant's right under the California Constitution (Cal. Const., art. I, § 16) to a unanimous verdict of a jury of 12 persons was violated by the *Allen* charge, because it encouraged the minority jurors to acquiesce in the verdict reached by the majority without exercising their independent judgment." (*Whaley*, *supra*, 152 Cal.App.4th at p. 981.)

The California Supreme Court later explained, "The *Gainer* court identified two aspects of *Allen* instructions that introduced 'extraneous and improper considerations into the jury's debates,' and held that 'it was error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.' " (*People v. Butler* (2009) 46 Cal.4th 847, 883.)

In *People v. Moore* (2002) 96 Cal.App.4th 1105 (*Moore*), however, when the jury announced it was deadlocked, the trial court gave a supplemental instruction akin to CALCRIM No. 3551. As in the present case, the *Moore* instruction stated, " 'In the course of your further deliberations, you should *not hesitate to re-examine your own views* . . . .' " and " 'Your goal as jurors should be *to reach a fair and impartial verdict if you are able to do so* based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes to do so.' " (*Id.* at p. 1118, italics added.) The appellate court expressly approved the supplemental jury instruction given by the trial court, holding it was a valid instruction because "[t]he trial court did not direct the jurors that 'the case must at some time be decided.' To the contrary, the court instructed that the 'goal as jurors should be to reach a fair and impartial verdict *if you are able to do so* based solely on the evidence presented and without regard to the consequences of your verdict [or] regardless of how long it takes to do so.' " (*Id.* at p. 1121, italics added by *Moore*.) The court continued: "Nothing in the trial court's charge was designed to coerce the jury into returning a verdict. [Citation.] Instead, the charge simply reminded the jurors of their duty to attempt to reach an accommodation. [¶] Additionally, the court directed the jurors to consider carefully, weigh and evaluate all of the evidence presented at trial, to discuss their views, and to consider the views of their fellow jurors. Finally, the court instructed that it was their duty as jurors to deliberate with the goal of arriving at a verdict on the charge '*if you can do so without violence to your individual judgment*.' " (*Ibid.*, italics added by *Moore*.) The *Moore* court concluded, "In short, it is clear the trial court took great care in exercising its power

‘without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency. . . .’ ” (*Ibid*.)

Several years after *Moore*, the Court of Appeal in *Whaley* approved a supplemental instruction based on the instruction approved in *Moore*. Like *Moore*, the court found the supplemental instruction did not run afoul of the proscriptions in *Gainer*. Giving the supplemental instruction, according to *Whaley*, “did not implicitly approve a movement toward unanimity or otherwise send a message that the holdout juror was to cooperate with the majority.” (*Whaley, supra*, 152 Cal.App.4th at p. 984.)

Here, notwithstanding the holdings in *Moore* and *Whaley*, defendant claims CALCRIM No. 3351 contains two defects disapproved of in *Gainer*. First, he argues the language “Do not hesitate to reexamine your own views,” is equivalent to the discriminatory admonition in *Gainer*, which instructed minority jurors that “ ‘a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one.’ ” (*Gainer, supra,* 19 Cal.3d at p. 841.) Defendant maintains the entire process is directed toward pressuring minority jurors since it is easier to reach a verdict if the minority, rather than the majority, changes their minds.

Not so. In *Gainer*, the jury was instructed if “ ‘much the larger’ ” of the panel was for conviction, “ ‘a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, which makes no impression upon the minds of so many men or women equally honest, equally intelligent with himself or herself . . . .’ ” (*Gainer, supra*, 19 Cal.3d at p. 841.) In our matter, instructing jurors that they should not hesitate to reexamine their views is not akin to directing minority jurors to reevaluate their views in light of the views of the majority. The jury, moreover, was instructed “jury deliberations require frank and forthright exchange of views,” and “Do not change your position just because it differs from that of other jurors . . . .” Most importantly, the instruction emphasized defendant was entitled to each juror’s “individual judgment.” These admonitions, considered together, essentially instructed each juror to exercise his or her own individual and independent judgment. In short, the trial court did not encourage

jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them.

Second, defendant argues CALCRIM No. 3551 improperly instructs jurors it is their duty "to deliberate with the goal of reaching a verdict if you can do so without surrendering your individual judgement." He contends this language is likewise comparable to the disapproved admonition in *Gainer* instructing the jurors they " 'should consider that the case must sometime be decided.' " (*Gainer*, *supra*, 19 Cal.3d at p. 841.)

We disagree. In contrast to *Gainer*, the trial court here instructed the jury the goal was to reach a verdict "*if you can do so*, without surrendering your individual judgment." (Italics added.) Notably, the critical difference between the instruction given here and the one disapproved of in *Gainer* is the present instruction did not require the jury to reach a verdict. Additionally, nothing in the instruction stated or implied if the jury failed to agree, the case would necessarily be retried. And clearly the jury did not feel coerced or pressured into reaching verdicts on all the counts because even after the court gave CALCRIM No. 3551, the jury was still unable to reach a verdict on count one.

Lastly, defendant contends *Moore* was wrongly decided because it "applied a highly literalistic reading of *Gainer*" and "effectively held that, because the trial court in *Moore* did not use the exact words employed by the trial court in *Gainer* that no error had been committed." We do not agree with defendant's assessment of *Moore*. The court in *Moore* never stated or implied it was upholding the instruction because its language differed from the *Gainer* instruction, instead reaching its holding by examining the entirety of the instruction. (See *Moore*, *supra*, 96 Cal.App.4th at p. 1121.) We also note *Moore* has been upheld in *Whaley*, *supra*, 152 Cal.App.4th 968, 984 and *People v. Hinton* (2004) 121 Cal.App.4th 655, 661 [stating *Moore* provided "a model for how to instruct the jury following its initial deadlock"]).[4]

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[4] For the first time, in defendant's reply brief, he cites to *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, a contrary federal decision. As a state court, "we are not bound by decisions of the lower federal courts, even on federal questions." (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3; *People v. Brooks* (2017) 3 Cal.5th 1, 91–92.) In any

We see no reason to depart from *Moore* and the cases following it, and thus conclude the supplemental instruction in this matter, CALCRIM No. 3551, was not coercive. As in *Moore,* the jury here "was never directed that it was required to reach a verdict, nor were any constraints placed on any individual juror's responsibility to weigh and consider all the evidence presented at trial. The trial court also made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach an agreement. In short, it is clear the trial court took great care in exercising its power 'without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency. . . . Nothing in the trial court's comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict . . . .' " (*Moore, supra,* 96 Cal.App.4th at p. 1121.)

The trial court did not err in giving the further instruction about deliberations.

III. DISPOSITION

The judgment is affirmed.

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event, our Supreme Court has refused to follow the reasoning in *Jiminez,* stating it has "consistently rejected the federal rule that inquiries into the numerical division of the jurors are inherently coercive." (*People v. Bryant, Smith and Wheeler, supra,* 60 Cal.4th at pp. 462–463.)

Margulies, J.

We concur:

Humes, P. J.

Banke, J.

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