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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ROMAN JOHNSON, JR.,

Defendant and Appellant.

F062479

(Super. Ct. No. 1250214)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. John D. Freeland, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Michael Johnson operated a board-and-care home. He was convicted of theft from, and forcible oral copulation of, one dependent adult, and rape of a second

dependent adult. He now argues that the court gave two erroneous instructions to the jury. We affirm.

FACTUAL AND PROCEDURAL HISTORIES

The Stanislaus County District Attorney filed an information charging Johnson with three counts: (1) theft by a caretaker from a dependent adult identified in the record as Jane Doe No. 1 (Pen. Code, § 368, subd.(e));¹ (2) forcible oral copulation of Jane Doe No. 1 (§ 288a, subd. (c)(2)); and (3) rape of a second victim, Jane Doe No. 2 (§ 261, subd. (a)(2)).

Jane Doe No. 1 and Jane Doe No. 2 lived in a board-and-care home operated by Ronald Spencer. Jane Doe No. 1 was 48 years old at the time of trial and had depended on Supplemental Security Income (SSI) most of her life. Jane Doe No. 2 had cerebral palsy, also received SSI, and had lived in assisted living arrangements all her life. At trial, she testified by answering counsel's questions in writing.

Johnson met Spencer in 1987 when Johnson was in high school and Spencer was his barber. From his graduation from high school in 1987 onward, Johnson lived off and on with Spencer, Jane Doe No. 1, and Jane Doe No. 2 at the care home, which was located at three different ranches over the years in the Modesto area. Spencer became ill with diabetes and Johnson bought his barber shop from him. In 2004, Spencer died, and Johnson took over operation of the care home as well.

Jane Doe No. 1 testified that Johnson physically and sexually abused her. She said, "I have this mental problem. I would have fits and I wouldn't stop, and he would get pissed off and he would hit me or yell at me." He would come into her room, lie down on the bed, and say, "Can you suck on me?" or "I want you to put your mouth on my penis." Then he would put his penis in her mouth and ejaculate. This happened on several occasions. Jane Doe No. 1 did not want him to do it, but she submitted to his

¹Subsequent statutory references are to the Penal Code unless indicated otherwise.

requests and did not call for help because she was afraid he would hurt her. Jane Doe No. 1 testified that she reported these events to Spencer, but he did not believe her. She also told Spencer's sister, Lynn Collins.

Jane Doe No. 2 testified that Johnson raped her. She said he had sexual intercourse with her without her consent more than 10 times. She was afraid of him because he yelled at her and hit her. Johnson would go into the bedroom he shared with Spencer and call to Jane Doe No. 2 to come in. She knew what would happen, but she went in anyway because she was afraid. Johnson told her not to tell anyone. She told Spencer, but he did nothing to stop it. She also told Collins later, after it was over.

Johnson took care of both women's SSI money. While living under the care of Johnson and Spencer, Jane Doe No. 1 received an inheritance of about \$50,000 from an aunt. Jane Doe No. 1 spent part of the money to buy a van equipped with a wheelchair lift and hand controls for Spencer after Spencer lost his legs to diabetes. Later, on November 4, 2002, Johnson took Jane Doe No. 1 to a bank and told a bank employee that she was his fiancée. Using a cashier's check for \$27,051.69 made out to Jane Doe No. 1 and endorsed by her, Johnson opened a certificate of deposit (CD) account with \$25,000 and a savings account with \$2,051.69. Both accounts were in the names of both Johnson and Jane Doe No. 1. Johnson did all the talking during these transactions. Bank employees tried to talk to Jane Doe No. 1, but she would not look them in the face or speak to them.

Johnson took out five loans from the bank using the CD account as collateral. The amounts of the loans ranged between \$5,000 and \$10,000. Some of the proceeds went to pay off earlier loans; most of the remainder went into Johnson's personal or business accounts at the bank. Jane Doe No. 1 had no access to those accounts. When the CD account was closed, the money was deposited into the same two accounts of Johnson's. When asked what happened to the inheritance money that remained after the van purchase, Jane Doe No. 1 testified that Johnson took it from her.

Johnson testified and denied that he forced Jane Doe No. 1 to copulate him orally or that he had sex with Jane Doe No. 2. He said the loans against the CD account were used to pay necessary household expenses, to buy a motor scooter that he used to commute to work at the barber shop, and for other things he could not recall. He testified that “[t]he money was usually just all lumped together” because “[t]hat’s the way families do it” A police officer testified that Johnson told him \$20,000 of the money deposited in the CD account came from the sale of some mules from the ranch. Only \$5,000 belonged to Jane Doe No. 1. Johnson said he allowed her to place that money in the account so she could take advantage of a higher interest rate than would have been available if she had had a separate account.

The jury found Johnson guilty as charged. The court imposed consecutive sentences of six years each for counts two and three, plus a consecutive term of one year (equal to one-third of the middle term) for count one, for a total of 13 years.

DISCUSSION

I. CALCRIM No. 1190

In accordance with CALCRIM No. 1190, the court instructed the jury: “Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone.” Shortly before, the court had instructed the jury with CALCRIM No. 301: “The testimony of only one witness can prove any fact. [¶] Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.”

Johnson argues:

“By propping up the testimony of a complaining witness in a sex offense case with extra support, ... CALCRIM No. 1190 improperly lightens the prosecution’s burden of proof, when the proper principle has already been provided to the jury through CALCRIM No. 301, in contravention of a defendant’s Fourteenth Amendment right to due process of law.”

As Johnson acknowledges, this argument was rejected by the Supreme Court in *People v. Gammage* (1992) 2 Cal.4th 693, 700-701 (*Gammage*). Discussing the CALJIC equivalents of these two instructions (CALJIC Nos. 2.27 and 10.60), the court stated, “The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement.” The instructions do not modify each other and do not single out the testimony of a complaining witness or give it undue prominence. (*People v. Gammage, supra*, at p. 701.) We cannot, of course, reject a Supreme Court holding directly on point. We presume Johnson has raised this argument solely for the purpose of preserving it for later review.

In any event, we disagree with Johnson’s position. In *Gammage*, the Supreme Court stated that the instruction specific to sex offenses was important because jurors influenced by discarded legal notions might believe that a victim’s testimony can establish rape only if corroborated. Even though California authority dating back to 1912 rejects a corroboration requirement and upholds an instruction that no corroboration is necessary (*People v. Akey* (1912) 163 Cal. 54), “there remains a continuing vitality in instructing juries that there is no legal requirement of corroboration.” (*Gammage, supra*, 2 Cal.4th at p. 701.)

Johnson argues that “by the time of this trial in 2011 there was no reason to believe that any juror carried to this trial the baggage of long-since-discredited archaic ideas about inherent suspicion surrounding rape charges” Yet, a mandatory, sua sponte pattern instruction directing juries to view rape victims’ testimony with caution persisted in California until rejected by our Supreme Court in 1975. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 870-871, 877, 882.) We see no reason to conclude that the public’s attitude on this subject has changed since our Supreme Court issued its 1992 opinion in *Gammage*.

II. *CALCRIM No. 226*

The court instructed the jury with CALCRIM No. 226, part of which states:

“If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.”

Johnson argues that the first sentence of this instruction is erroneous because it “tells the jurors they ‘should’ disbelieve everything a witness coming within the scope of the instruction has said,” while the instruction’s predecessor, CALJIC No. 2.21.2, only says the jury “may” disbelieve all the testimony of a witness who tells a lie. Emphasizing the word “ignore,” Johnson argues that the second sentence of the instruction is erroneous because it “short-circuits the ongoing contrasting and comparing of various sources of evidence in which a jury should engage before reaching ultimate conclusions about the facts but urging an early discard of some portions of the evidence in the case.” Finally, Johnson contends that both sentences should not be used in a case in which the defendant testifies. He says, “[a] criminal defendant always in theory has a motive to lie,” so the jury is likely to view that instruction as singling out the defendant as a witness to whom the instruction likely applies.

Johnson’s arguments are meritless for three reasons. First, the instruction does not have the effects Johnson attributes to it. It does not say the jury should disbelieve all the testimony of a witness who tells a lie. It says the jury “should consider” disbelieving all the witness’s testimony. This is no different in substance from an instruction that says the jury “may” choose to disbelieve all the testimony of that witness, and it is perfectly correct. A jury would be making a mistake if it never *considered* disbelieving all the testimony of a witness whom it found told a lie about something significant in the case. The instruction also does not interfere with the jury’s duty to consider all the evidence before reaching any settled conclusions. The second sentence simply states the logical

alternative to the first: If the jury decides not to reject all the testimony of a lying witness, then it should reject the false parts and accept the true parts. This has nothing to do with refraining or not refraining from reaching conclusions prematurely.

Second, in *People v. Warner* (2008) 166 Cal.App.4th 653, 656-659, we rejected arguments expressed in nearly the same words as Johnson’s arguments, making substantially the same observations we have just made again now. (Johnson’s appellate counsel was Warner’s appellate counsel.) Johnson acknowledges the holding of *Warner*. Nothing has changed and *Warner* is still correct.

Third, as Johnson also acknowledges, the Supreme Court rejected similar arguments directed against the former CALJIC No. 2.21, a predecessor of CALCRIM No. 226, in *People v. Beardslee* (1991) 53 Cal.3d 68, 94-95, and *People v. Lang* (1989) 49 Cal.3d 991, 1023. The court held that the instruction ““does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute.”” (*Beardslee, supra*, at p. 95.) The same is true of the challenged portion of CALCRIM No. 226.

DISPOSITION

The judgment is affirmed.

Wiseman, Acting P.J.

WE CONCUR:

Poochigian, J.

Franson, J.