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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADOLFO ALFARO,

Defendant and Appellant.

G047281

(Super. Ct. No. 10SF0408)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan J. Beale and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Adolfo Alfaro appeals from the judgment following his conviction on 10 counts of engaging “in sexual intercourse or sodomy with a child . . . 10 years of age or younger” (Pen. Code, § 288.7, subd. (a)) and 2 counts of engaging “in oral copulation or sexual penetration . . . with a child . . . 10 years of age or younger.” (Pen. Code, § 288.7, subd. (b).) All of these counts were based on acts Alfaro perpetrated on his stepdaughter, Jane Doe, between October of 2008 and March of 2010. He was sentenced to a term of 90 years to life. We affirm that judgment.

Alfaro argues the trial court erred by failing to administer what he refers to as the “standard oath” to Jane Doe, who was over the age of 10 and free of any substantial cognitive impairments, before allowing her to testify at trial. He claims that absent administration of that required oath, Jane Doe’s testimony was not admissible as evidence.

However, contrary to Alfaro’s theory, Evidence Code section 710 (section 710) does not require administration of any “standard” oath. What it requires is that prior to giving testimony witnesses “take an oath or make an affirmation or declaration in the form provided by law.” Code of Civil Procedure section 2094, which is relied upon in both civil and criminal matters, controls the content of such oaths, affirmations or declarations, and expressly allows the court to *either* rely on standard language *or* devise its own. That is what the court did here. As a consequence, Jane Doe’s testimony was properly admitted as evidence.

Alfaro also requests that we independently review a sealed record of documents subpoenaed from Capistrano School District, to determine whether the trial court abused its discretion in determining those documents contained no evidence of moral turpitude which could have been relied upon to impeach Jane Doe’s testimony at trial. We have done so and find no error in the court’s ruling.

FACTS

Because Alfaro's appeal is grounded on a claim of procedural error, and raises no issues related to the substance of the evidence, we need not summarize the evidence admitted at trial in any significant detail. For our purposes, it is enough to note that the crimes charged against Alfaro were based on evidence he sexually molested Jane Doe, his stepdaughter, on repeated occasions over the course of approximately a year and a half. These incidents usually took place in the bedroom of the family's apartment on Saturdays and Sundays, while Jane Doe's mother was at work.

Much of the evidence supporting the convictions came from Jane Doe herself, who first disclosed that she was being molested to her aunt and then later described the molestation to law enforcement and child welfare personnel. Although Alfaro initially denied in an interview with a law enforcement officer that he had done "anything bad" with Jane Doe, he later acknowledged he had on one occasion rubbed Jane Doe's buttocks with his somewhat erect penis. He claimed, however, that he had not ejaculated because he was uncomfortable and "couldn't . . . concentrate on what I was doing because I knew it wasn't right." He portrayed Jane Doe as having been the aggressor in that incident.

Although Jane Doe was under the age of 10 when the series of molestations occurred, she was 11 years old at the time of trial. When the court learned Jane Doe would be testifying, it informed the parties it was concerned about the content of the oath to be administered to her. The court explained that the standard oath it administered to witnesses provided "'Do you solemnly state that the evidence you are about to give in the case now pending before this court shall be the truth, the whole truth and nothing but the truth, so help you God[?]" and then inquired whether, in light of Jane Doe's age, either party objected to the court administering an alternative oath that merely asked her if she

“promise[d] that everything you tell here today will be the truth, the whole truth and nothing but the truth[?]”

After Alfaro’s counsel responded that she would be more comfortable with the more formal oath option, the prosecutor requested that the less formal option be administered. The prosecutor explained she believed the “verbiage” in the first option would be “over [Jane Doe’s] level” and “it would be embarrassing and uncomfortable for her to have that first one and not understand it, especially at the inception of her testimony in a case like this.” The court then asked Alfaro’s counsel to explain why she believed the more formal language of the first oath was preferable and whether she believed the two oaths actually asked “anything different.” Counsel acknowledged she did not believe the two oaths were substantively different, but countered, “if there’s nothing different then I don’t know what’s wrong with giving the first one.” The prosecutor reiterated that her concern was simply that the more formal verbiage of the first option would prove difficult for the already “very nervous and upset” Jane Doe. The court took the issue under submission.

When the prosecutor informed the court that Jane Doe would be the next witness, the court announced its intention to administer the less formal oath to her. The court stated it also intended to ask Jane Doe “some clarifying questions . . . to make sure she understands the nature of her testimony; that is, that it is important to tell the truth.” The court explained that Code of Civil Procedure section 2094, subdivision (b) permits the court “to administer such oath in a manner that is calculated to awaken the person’s conscience and impress the person with the duty to tell the truth. [¶] There are a series of appellate court cases that allow questioning of a child witness under that circumstance. There is no requirement that they be administered the specific words, but rather the court must be satisfied that they understand the nature of their duty to tell the truth and that

there will be consequences if not.” The court then inquired if either side wished to be heard concerning that decision. Neither did.

When Jane Doe came to the stand, she was administered the less formal oath, i.e.: “Do you promise that everything you tell here today will be the truth, the whole truth and nothing but the truth?” She responded “Yes.” The court then explained to her the need to speak into the microphone and the court reporter’s obligation to write down everything said. After Jane Doe acknowledged her understanding of those things, the court asked questions about her understanding of the need to testify truthfully.

After Jane Doe demonstrated she knew the difference between the truth and a lie by correctly identifying a hypothetical claim that the judge’s robe was purple as a lie the court asked her: “If I told you that I was wearing a robe that was purple . . . [¶] . . . [¶] [w]ould that be a good thing or a bad thing?” Jane Doe answered “Bad thing.” When the court then asked “[w]hat happens if you tell a lie,” Jane Doe answered “I don’t know.” The court then asked Jane Doe “[i]s it bad to tell a lie?” and she answered “[n]o.” When the court asked her again, “[i]t’s not bad to tell a lie?” Jane Doe again answered “[n]o.”

The court then switched its focus to the courtroom setting specifically, asking Jane Doe “[w]hat if you tell a lie in this room, is that good or bad?” Jane Doe answered “[b]ad.” The court followed that with “[i]n this room you have to tell the truth. Do you understand that?” Jane Doe responded “[y]es.” The court then stated, “If you tell a lie in this courtroom that’s very, very bad.” Jane Doe agreed she understood that. Finally, the court asked her “Do you promise to tell only the truth?” and Jane Doe responded “[y]es.”

DISCUSSION

1. The Oath Administered to Jane Doe was Sufficient.

Alfaro's primary contention on appeal is the court erred by not administering the "standard oath" to Jane Doe, as required by section 710, and instead merely extracting from her a promise to "tell the truth." As Alfaro points out, section 710 expressly authorizes the admission of testimony grounded on such a bare promise only in cases where the witness is either "under the age of 10 or a dependent person with a substantial cognitive impairment." In this case, however, Jane was 11 years old at the time of her testimony and apparently free of substantial cognitive impairment.

We agree Jane Doe did not fit within the group of witnesses who were exempt from the regular oath requirement set forth in section 710. Moreover, we also agree that unsworn testimony does not qualify as "evidence" within the meaning of the Evidence Code. (*In re Heather H.* (1988) 200 Cal.App.3d 91, 95.) Having said that, however, we nonetheless reject Alfaro's assertion of error.

The flaw in Alfaro's argument is his apparent belief that section 710 generally requires witnesses to take a *standard* oath before testifying in court. It does not. Section 710 merely requires that before testifying, witnesses "take *an* oath or make *an* affirmation or declaration *in the form provided by law . . .*" (§ 710, italics added.) And as Alfaro acknowledges, the court below determined that Code of Civil Procedure section 2094 is the statute which governs the form of such oaths, affirmations or declarations for purposes of this case. Significantly, Alfaro does not quibble with that reliance, and for good reason: as noted in *Gonzales v. Superior Court* (1935) 3 Cal.2d 260, 263, "[b]y the express provisions of the Penal Code, certain portions of the Code of Civil Procedure are made applicable to criminal actions." One of those express provisions is Penal Code section 1102, which states "[t]he rules of evidence in civil

actions are applicable also to criminal actions, except as otherwise provided in this Code.”

Moreover, as the trial court recognized, Code of Civil Procedure section 2094 also does not impose any requirement that oaths, affirmations or declarations take a “standard” form. Instead, the statute provides the court with several *options*. First, subdivision (a) of the statute allows the court to ask a witness one of two questions: Either ““Do you solemnly state that the evidence you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth, so help you God?”” or ““Do you solemnly state, under penalty of perjury, that the evidence that you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth?”” (*Id.*, § 2094, subd. (a).) And then subdivision (b) of the statute expressly authorizes the court to also *formulate its own alternative*: “In the alternative to the forms prescribed in subdivision (a), the court may administer an oath, affirmation, or declaration in an action or a proceeding in a manner that is calculated to awaken the person’s conscience and impress the person’s mind with the duty to tell the truth. The court shall satisfy itself that the person testifying understands that his or her testimony is being given under penalty of perjury.” (*Id.*, § 2094, subd. (b).)

It is that last option the court took advantage of here. Because of Jane Doe’s young age, the court wished to administer an oath in language she was likely to understand and which would be least intimidating to her. And significantly, that less formal oath was then followed by a series of questions designed to both educate Jane Doe about the importance of telling the truth in court and ensure she understood it. We conclude that such a procedure, if administered in compliance with Code of Civil Procedure section 2094, subdivision (b), qualifies as an oath, affirmation or declaration “in the form provided by law” as that phrase is used in section 710.

Alfaro contends, however, that even assuming Code of Civil Procedure section 2094, subdivision (b), authorized the court to formulate an alternative oath, affirmation or declaration for Jane Doe in this case, the oath it actually administered did not meet the requirements of that subdivision. Specifically, Alfaro claims the alternative oath “wholly lacked language informing Jane Doe she could be punished with real consequences (perjury) for failing to tell the truth in the courtroom, despite the requirement of [Code of Civil Procedure] section 2094, subdivision (b).” We are unpersuaded.

First, we note Alfaro made no such complaint below, where the error, if any, could have been easily rectified. While his counsel did express a preference for the more formal oath initially suggested by the court as one of the two available alternatives, counsel then frankly admitted she could not identify any substantive difference between that formal oath and the less formal one the court ultimately relied upon. Rather than identifying any problem with the less formal oath proposed, counsel’s position was simply “if there’s nothing different then I don’t know what’s wrong with giving the first one.” The failure to raise this specific objection below operates as a waiver. (See *In re Heather H.*, *supra*, 200 Cal.App.3d at p. 95 [acknowledging that objections to unsworn testimony are subject to waiver].)

But we also reject the contention on the merits. When the witness in question is an ordinary 11-year-old child, the court could not reasonably “satisfy itself that the [witness] understands that his or her testimony is being given under penalty of perjury” (Code Civ. Pro., § 2094, subd. (b)), by literally explaining the law of perjury to that child. Moreover, as the Attorney General points out, Alfaro’s suggestion the court should have instructed Jane Doe about perjury as a “real consequence[.]” of failing to tell the truth in court simply ignores reality – if for no other reason than that a prosecution for perjury is almost certainly *not going to be* a “real consequence” for any 11-year-old

witness. In reality, such an instruction would have served no purpose other than to likely terrify an already nervous child witness.

Instead, what the court did here was fulfill the statutory requirement that it “satisfy itself” concerning Jane Doe’s understanding of the special obligation of a witness to tell the truth in court, by engaging her in a colloquy – one designed to ensure Jane Doe recognized that lying in court was different, and very much worse, than lying in other contexts. And Jane Doe’s responses to the court’s questions made clear she did understand that. While Jane Doe freely admitted (twice) that she did not think lying was bad *in general*, she answered otherwise when asked specifically about lying *in the courtroom*. She immediately identified such a lie as “bad,” and then agreed it was actually “very very bad.” She then reiterated her promise to tell only the truth in her testimony. We conclude this colloquy was sufficient to satisfy the requirements of Code of Civil Procedure section 2094, subdivision (b), which in turn satisfied the requirement of section 710 that a witness take an oath, affirmation or declaration in the form required by law, prior to giving testimony.

2. The Trial Court did not Abuse its Discretion in Determining Content of School District Records Should Remain Sealed.

Alfaro’s second contention on appeal is that this court should independently review a sealed record of documents subpoenaed from the Capistrano Unified School District, to determine whether the trial court abused its discretion in determining those documents contained no “evidence of conduct involving moral turpitude that could have been used as impeachment evidence against Jane Doe.” (Capitalization and bold omitted.) The Attorney General concurs that such an independent review is appropriate.

We have conducted that review and find no abuse of the trial court’s discretion.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.