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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Appellant, v. SAMIR HANNA, Defendant and Respondent.	B293714 (Los Angeles County Super. Ct. No. GA046612)

APPEAL from an order of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Reversed with directions.

Jackie Lacey, District Attorney, Margo Baxter, Head Deputy District Attorney, Phyllis C. Asayama and Matthew Brown, Deputy District Attorneys, for Plaintiff and Appellant.

E. Thomas Dunn, Jr., for Defendant and Respondent.

The People appeal from a trial court order granting Samir Hanna's motion, pursuant to Penal Code section 1473.7, subdivision (a)(2) to vacate his conviction for sexually penetrating an unconscious person with a foreign object (Pen. Code, § 289, subd. (d)(3)).[1] We agree the trial court erred in granting the motion, and reverse.

BACKGROUND

A. The Offense Conduct

Physical Therapy Rehab Association in Pasadena employed Hanna as a physical therapy aide. In March 2001, Ms. J. began receiving treatments from Hanna at the clinic. She developed a rapport with Hanna and discussed with him aspects of her personal life.

Ms. J. came to the clinic for treatment on May 25, 2001, complaining of back pain. Hanna told her he would massage her. He gave her a gown and told her to leave on her underclothes. Ms. J. complied and laid facedown on a massage table. Hanna entered the room and began massaging Ms. J.; he said that sometimes back pain proceeded into the legs and buttocks. He asked permission to massage Ms. J.'s legs and asked her to spread her legs a little. He also had her "move to the edge of the table closest to him."

As the massage progressed, Ms. J. could feel pressure from Hanna's penis against her leg; she sensed he should not be that close. Hanna continued to massage her legs and moved to her buttocks. Hanna then put his hand inside Ms. J.'s underpants and inserted two of his fingers into her vagina. Ms. J. was

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

shocked and "pushed [her] body up away from the table." Hanna asked if everything was all right; she replied, "No." Hanna said, "Good session" and left the room.

B. Hanna's Conviction and Direct Appeal

The trial court convicted Hanna in 2002 on count 5 of the information, which charged misdemeanor battery[2] and on count 6, which charged sexually penetrating an unconscious person with a foreign object. As to each count, the court suspended imposition of sentence, placed Hanna on formal probation for three years, and ordered that he serve time in local custody.

In 2003, we held there was sufficient evidence as to count 6 that Hanna violated section 289, subdivision (d)(3). (*People v. Samir Hanna* (May 28, 2003, B161471) [nonpub. opn.] [2003 WL 21228113] (*Hanna I*).) That subdivision applies where the victim "[w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact." (§ 289, subd. (d)(3).) We found Hanna "gained Ms. J.'s trust over the course of prior physical therapy sessions and on the day in question had her assume a vulnerable position on the massage table, ostensibly for a massage. . . . Ms. J. was unaware that [Hanna] had accomplished an act of digital penetration until the crime had occurred. Thus, Ms. J. was unconscious of the nature of [Hanna's] act because she was not aware of the essential characteristics of that act due to [Hanna's] fraudulent

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[2] The information alleged as to count 5 that Hanna committed sexual battery in violation of section 243.4, former subdivision (d)(1). On July 11, 2002, on the trial court's motion, the court amended that count to allege instead a violation of section 242, and it convicted him on that count. The battery is not at issue in this appeal.

representation that he intended to give her a massage. [Citation.] And [Hanna] knew full well that from her facedown position Ms. J. could not see what he was doing and was unaware of the sexual assault he was about to perpetrate." We therefore affirmed the conviction. (*Hanna I*, *supra*, 2003 WL 21228113 at *2.)

Hanna's probation expired in December 2004.

C. Our Opinion in *People v. Lyu*

In *People v. Lyu* (2012) 203 Cal.App.4th 1293 (*Lyu*), this division overturned a defendant's conviction for sexual penetration of an unconscious victim in violation of section 289, subdivision (d)(2) for insufficient evidence. That subdivision applies when the victim "[w]as not aware, knowing, perceiving, or cognizant that the act occurred." (*Ibid.*; see *Lyu*, *supra*, at p. 1299.)

In *Lyu*, the victim went to a massage parlor for a massage. The defendant began massaging her while she was sitting in a chair, but the two eventually went to a back room where another massage was occurring. (*Lyu*, *supra,* 203 Cal.App.4th at pp. 1295-1296.) After undressing under a sheet, the victim laid facedown on a bed; she was still under the sheet. She had told the defendant her lower back was sore. (*Id.* at p. 1296.) The victim testified that she was lying facedown when the defendant, without warning, inserted one or two fingers into her vagina. She immediately hit at him and said, " ' "no." ' " She also testified that when she then turned over onto her back, the defendant abruptly put his mouth on her vagina. (*Id.* at pp. 1296, 1301.)

The *Lyu* court concluded there was not substantial evidence to support a conviction under section 289, subdivision (d)(2) for the digital penetration or under section 288a, subdivision (f)(2)

for the oral copulation. (*Lyu*, *supra*, 203 Cal.App.4th at p. 1301.) The court reasoned the victim was not " ' "unconscious[ ] of the nature of the act [as required by the statutory language]." ' She instantly knew, perceived, and was cognizant that the act occurred. The instant [the defendant] penetrated her with his finger, she protested, clearly aware of the nature of the act, as her striking [the defendant] and saying no demonstrates. When [the defendant] subsequently put his mouth on her vagina, she was instantly aware" of the defendant's act. (*Ibid*.)

D. Hanna's Writ Petition and Motion for a Declaration of Factual Innocence

In December 2013, Hanna filed a petition for a writ of error *coram vobis* on grounds not at issue in the present appeal.[3] In January 2014, we denied the writ. However, we added: "This denial is without prejudice to [Hanna's] seeking other relief that is appropriate. [¶] [Hanna] may wish to address the effect of [*Lyu*] on this case, if any." (*People v. Samir Hanna* (Jan. 22, 2014, B253275) (*Hanna III*).)

In November 2015, Hanna, relying on *Lyu*, filed a motion seeking a declaration of his factual innocence and vacation of his conviction on count 6 pursuant to sections 851.86 and 1385. In February 2016, the trial court denied the motion. Hanna appealed. We affirmed, concluding section 1203.4 was the exclusive method for a trial court to dismiss a conviction where the defendant had successfully completed probation. (*People v.*

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[3] Hanna had previously filed a petition for a writ of error *coram vobis* in 2011 on grounds not at issue in the present appeal. In August 2011, we denied the petition without prejudice to Hanna filing a petition in superior court. (*People v. Samir Hanna* (Aug. 25, 2011, B233950) (*Hanna II*).)

Samir Hanna (June 22, 2017, B271474) [nonpub. opn.] (*Hanna IV*).) We noted, however, that "in addition to section 1203.4, another statute may now provide an avenue of relief for Hanna. Effective January 1, 2017, section 1473.7 provides an explicit right for a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction based on '[n]ewly discovered evidence of actual innocence . . . that requires vacation of the conviction . . . as a matter of law or in the interests of justice.' (§ 1473.7, subd. (a)(2).)" (*Hanna IV*, *supra*, at pp. 16-17, fn. 14.) As Hanna suggested his conviction on count 6 had immigration consequences, we added that "as long as a conviction is vacated based on a defect in the underlying criminal proceedings, the immigration consequences of that conviction should be eliminated." (*Id.* at p. 17, fn. 14.) We further made clear that our denial of Hanna's appeal "should not be interpreted as precluding Hanna from filing a section 1203.4 or 1473.7 motion with the trial court." (*Id.* at p. 17.)

E. Hanna's Section 1473.7 Motion To Vacate His Conviction

On February 5, 2018, Hanna filed a section 1473.7, subdivision (a)(2) motion, relying on *Lyu*. He stated that he "came to the United States from Egypt 20 years ago," and relief under the section would help him "resist[ ] deportation." He argued that at the time of his trial, section 289, subdivision (d) "had not been construed in any appellate court opinion, and the meaning of the term 'unconscious,' as used in the statute, was undefined. The statute was finally construed in [*Lyu*], which made it clear that the term 'unconscious' refers to someone who is *not immediately aware* of the defendant's act. Given that explication of the statute, it is now clear that defendant did not

violate . . . section 289, subdivision (d), since the named victim was immediately aware of his act and provided an immediate response. As the Court of Appeal has recognized, this 'new' statutory construction constitutes evidence that, as a matter of law, [Hanna] was not guilty of the charge of which he was convicted."

At a September 27, 2018 hearing on the motion, the People argued section 1473.7 allowed relief only where there was "new evidence." The People argued that *Lyu* "does not constitute new evidence. Any kind of change in the law or interpretation of the law does not constitute new evidence."

In considering the parties' arguments, the trial court noted that footnote 14 in *Hanna IV* "effectively suggested to defense counsel that he bring a petition pursuant to [section] 1473.7 . . . in light of . . . the new law" set forth in *Lyu*. The court further commented that *Hanna IV* "seem[ed] to construe [*Lyu*] as qualifying as new evidence under [section] 1473.7." The court concluded: "I think the [appellate] court suggested I consider this as new evidence. And I do think the *Lyu* case is totally on point. It is a case that was decided by this division of our Second District Court of Appeal. And this is what I think this court is bound by. So given that the *Lyu* case is on point, our facts are exactly the same as that in the *Lyu* case, the court is going to grant the motion pursuant [to section] 1473.7 and vacate the [penetration] conviction."

The People thereafter filed a timely notice of appeal.

DISCUSSION

A. Section 1473.7 and the Standard of Review

Section 1473.7, subdivision (a)(2) provides in pertinent part that "[a] person who is no longer in criminal custody may file a

motion to vacate a conviction" on the basis that "[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice." A motion based on newly discovered evidence must be filed "without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section." (*Id.*, subd. (c).)

Section 1473.7, subdivision (e)(1) provides in part that "[t]he court shall grant the motion to vacate the conviction . . . if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." Thus, the defendant has the burden to demonstrate entitlement to relief under section 1473.7. (*People v. Perez* (2018) 19 Cal.App.5th 818, 829.)

"There is no published decision addressing the applicable standard of review of an order denying a motion to vacate a conviction under section 1473.7." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75.) In general, we review orders granting or denying motions to vacate convictions for abuse of discretion. (See *id.* at p. 76.) To the extent our decision rests on a question of statutory interpretation, however, our review is de novo. (Cf. *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.)

B. *Lyu* Was Not "Newly Discovered Evidence"

Although section 1473.7 does not define the phrase "newly discovered evidence," the phrase has been defined elsewhere in the Penal Code. (See *Estate of Thomas* (2004) 124 Cal.App.4th 711, 720 ["consistent usage implies consistent meaning: 'A word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a law, should be accorded the same

meaning in other parts or portions of the law' "]; accord, *Scottsdale Ins. Co. v. State Farm Mutual Automobile Ins. Co.* (2005) 130 Cal.App.4th 890, 899.) Those definitions consistently describe newly discovered evidence as testimony, writings and similar things described in Evidence Code section 140 (which defines "evidence"), discovered after trial or judgment, and that with reasonable diligence could not have been discovered earlier. (E.g., § 1181, subd. 8; § 1473, subd. (b)(3)(B); § 1473.6, subd. (b); see also Evid. Code, § 140.)

Hanna seeks to expand this definition by arguing *Lyu*'s interpretation of section 289, subdivision (d)(2) constituted newly discovered evidence. He asserts that "the advent of *Lyu*, and its revelation of the meaning of the charging statute, was a fact that changed everyone's understanding of the element of unconsciousness as used in . . . section 289, subdivision (d)." He argues this "fact" is "evidence" and urges that the word "evidence" should not be "define[d] . . . more narrowly." He cites no precedential authority in support of this novel proposition.

We disagree with Hanna's position, and interpret the term "[n]ewly discovered evidence" in section 1473.7, subdivision (a)(2) using its conventional, commonsense meaning. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82 ["Where a statutory term 'is not defined, it can be assumed that the Legislature was referring to the conventional definition of that term' "].) The publication of a new appellate opinion interpreting the language of a different (albeit related) Penal Code statute is not newly discovered evidence as that term is used in section 1473.7,

subdivision (a)(2).[4] Hanna did not put forward any newly discovered evidence, and therefore has failed to demonstrate eligibility for relief under section 1473.7.[5]

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[4] We acknowledge, as do the People, that *People v. Stuedemann* (2007) 156 Cal.App.4th 1 reached a different result than *Hanna I* under similar facts involving digital penetration during a massage that was charged under section 289, subdivision (d)(3). Hanna, however, does not cite *Steudemann* nor claim that it applies here. In any event, given that it was decided over a decade ago, *Steudemann* can hardly be called "newly discovered."

[5] In light of our analysis, there is no need to reach the additional arguments raised by the People that (1) "section 1473.7, by its own terms, does not allow retroactive application of new judicial rules to final judgments" and (2) "assuming a proper procedural vehicle, only the Supreme Court, not the Courts of Appeal, may establish new judicial rules that apply retroactively to final judgments."

DISPOSITION

The order granting Hanna's section 1473.7, subdivision (a)(2) motion is reversed, and the trial court is directed to enter a new order denying the motion.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.