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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. REUBEN JONATHAN LEYVA, Defendant and Appellant.	2d Crim. No. B284368 (Super. Ct. No. 17CR00454) (Santa Barbara County)

Reuben Jonathan Leyva appeals a judgment after a jury convicted him of first degree burglary with the victim present during the offense. (Pen. Code,[1] §§ 459, 667.5, subd. (c)(21).) He admitted a prior prison term allegation. (§ 667.5, subd. (b).) The trial court sentenced him to five years in state prison.

Leyva contends the trial court erred when it (1) instructed the jury to consider a witness's certainty as a factor in

[1] Further unspecified statutory references are to the Penal Code.

evaluating the accuracy of the witness's identification, and (2) denied a midtrial continuance to allow the defense to investigate corroborating evidence. We affirm.

FACTS AND PROCEDURAL HISTORY

One day at 9:30 a.m., Kathleen Bahena was in her house when she saw a burglar enter her dining room. Bahena yelled at the burglar and threw objects at him until he left the house through the backyard. Bahena followed the burglar to the front of the house and saw him leave on a bicycle. She noticed the burglar was wearing a black backpack and the bicycle had a rear basket.

Bahena called 911. She described the burglar as a white, older male riding a bicycle. She told an officer that the burglar was wearing a beanie, a dark colored jacket, dark colored pants, and a black backpack.

About seven minutes later, an officer saw Leyva riding a bicycle on a street that was about a seven-minute bike ride away from Bahena's house. Leyva was wearing a beanie, a black jacket, and black pants. He had a black backpack inside the rear basket.

An officer drove Bahena to Leyva's location for an in-field line up. She identified Leyva as the burglar. She said it "took all of three seconds" to recognize him, and that his beanie, jacket, and bicycle were "distinctive." She also identified Leyva as the burglar at trial.

Defense Case

At trial, Leyva called an expert witness to testify about the accuracy of witness identifications. He opined that a single-person line-up is not reliable and is "inherently

suggestive." He testified that a witness's confidence in the identification is "no longer a good indicator of accuracy."

Leyva testified he was on his way to an IRS appointment when the police arrested him for the burglary. He said he called the IRS earlier that morning to schedule a 10:35 a.m. appointment the same day. He presented evidence of his cell phone call logs, which showed he called the IRS around 8:00 a.m. Leyva's landlord also testified that Leyva told him about the appointment.

DISCUSSION

Eyewitness Identification Instruction

Leyva contends the trial court erred when it provided the jury with CALCRIM No. 315, which instructs the jury to consider multiple factors including: "How certain was the witness when he or she made an identification?" Leyva argues the instruction violated his due process right because recent studies and his expert's testimony demonstrated that the instruction "ratified" the "misperception" that a witness's certainty correlates with accuracy. We disagree.

Leyva forfeited the contention because he did not object or request a modification of CALCRIM No. 315 at trial. (*People v. Sánchez* (2016) 63 Cal.4th 411, 461 (*Sánchez*).) If Leyva wanted the trial court to modify the instruction to omit the witness certainty factor, he should have requested it. (*Ibid.*) The trial court has no sua sponte duty to modify the standard CALCRIM No. 315 instruction. (*Ibid.*; *People v. Ward* (2005) 36 Cal.4th 186, 213-214 (*Ward*).) Failure to object or request a modification forfeits the contention. (*Sánchez*, at p. 461; *Ward*, at pp. 213-214.)

But even if the contention had not been forfeited, we would reject it. Our Supreme Court in *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232 (*Johnson*) and *Sánchez*, *supra*, 63 Cal.4th 411, 462 approved a similar instruction on the witness certainty factor when it approved CALJIC 2.92. Like CALCRIM No. 315, CALJIC 2.92 instructs the jury to consider "the extent to which the witness is either certain or uncertain of the identification." When the Supreme Court approved CALJIC 2.92, it rejected contentions similar to those Leyva raises. In *Johnson*, the Supreme Court rejected the argument that the instruction would confuse the jury in light of the defense expert's testimony that a witness's certainty does not positively correlate with the accuracy of the identification. (*Johnson*, at pp. 1231-1232.) In *Sánchez*, the Supreme Court rejected the argument that the instruction contradicted scientific studies which found a "weak correlation" between witness certainty and the accuracy of the identification. (*Sánchez*, at pp. 461-462.) We are bound to follow the Supreme Court's decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Leyva argues that *Johnson* and *Sánchez* are not controlling because those cases did not consider whether the instruction violates a defendant's right to due process. But we presume that the Supreme Court would not have approved the instruction if it violated due process. Moreover, at least one appellate court has rejected the same due process argument. (See *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562.)

Leyva also argues that *Sánchez* is not controlling because that case involved both certain and uncertain witness identifications. (*Sánchez*, *supra*, 63 Cal.4th at p. 462.) Because the case involved uncertain identifications, the court reasoned

that "it is not clear [that the] defendant would want the modification." (*Ibid.)* Nor was it "clear" that out-of-state authorities, which have disapproved instructions that include the witness certainty factor, "would prohibit telling the jury it may consider [the] factor" when both certain and uncertain identifications are involved. (*Ibid*.) The court stated that "[a]ny reexamination of our previous holdings in light of developments in other jurisdictions should await a case involving only certain identifications." (*Ibid*.)

Leyva contends that this court should now reexamine whether the jury instruction is appropriate in the context of his case, which involves only a certain identification. But the rationale in *Sánchez* still applies. *Sánchez* found no error in the instruction because it was presented in a neutral manner and instructs the jury to only consider witness certainty as one of many factors that the jury could, but was not required to consider in evaluating the accuracy of the identification. (*Sánchez*, *supra*, 63 Cal.4th at p. 462.) It does not "suggest that certainty equals accuracy." (*Ibid*.)

In any event, the instruction does not prejudice Leyva because there is overwhelming evidence which supports Bahena's identification. Leyva matched the description of the burglar: he was wearing a beanie and dark jacket and pants, had a black backpack, and was riding a bicycle with a rear basket. Moreover, the police stopped him seven minutes after the 911 call at a location that was a seven-minute bike ride from Bahena's house. Under these facts, it is not reasonably probable that Leyva would have received a more favorable result even if the trial court erred when it instructed the jury. (*Ward*, *supra*, 36 Cal.4th at p. 214; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Trial Continuance

Leyva contends the trial court erred when it denied his request for a midtrial continuance to obtain corroborating evidence of his IRS appointment. We disagree.

At trial, Leyva testified he was on his way to an IRS appointment when the police stopped him for the burglary. Leyva's phone call history showed that he called the IRS at 8:00 a.m. on the day of the burglary. The defense presented the call log as evidence. On the fifth and penultimate day of trial, the defense investigator requested the IRS's appointment log to confirm Leyva's appointment. The IRS liaison said that it required a signed release from Leyva. The investigator then submitted a signed release, but did not get the requested information the same day. The next day, Leyva requested a trial continuance until he could obtain the IRS appointment log. The trial court denied the request, finding no "good cause to continue the matter."

We review the trial court's decision to deny the continuance for an abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.) A trial continuance "shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) A showing of good cause requires that counsel and the defendant have prepared for trial with due diligence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) In determining whether there was good cause, the trial court must consider the benefit to the moving party, the likelihood the benefit will result, the burden on other witnesses, the jury and the court, and """above all, whether substantial justice will be accomplished or defeated by""" granting the motion. (*Samayoa*, at p. 840.)

The trial court acted within its discretion when it denied the continuance because the defense did not exercise due diligence. The defense could have obtained the IRS appointment logs before trial. The defense investigator testified that he contacted the IRS two months before trial to obtain an audio recording of Leyva scheduling his appointment. At that time, the investigator could have also requested the appointment logs, but did not. Leyva argues that he exercised due diligence in light of the late production of his cell phone, which the police seized during booking, and returned during trial. But, the late production of the cell phone did not prevent him from seeking verification of his appointment.

Moreover, the continuance would have burdened the court and the jury. The request for the continuance was on the last day of trial after both parties had presented their evidence. The defense did not know when it would obtain the IRS appointment logs it requested. The trial court properly denied the midtrial request for a continuance.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

James K. Voysey, Judge

Superior Court County of Santa Barbara

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