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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP ANASTACIO ULLOA, Defendant and Appellant.	B293764 (Los Angeles County Super. Ct. No. KA114281)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho Jr., Judge. Affirmed and remanded.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, E. Carlos Dominguez, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Phillip Anastacio Ulloa guilty of lewd act upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a)[1] [count 1].)

Ulloa admitted the allegations that he had suffered a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)), and had suffered a prior serious felony conviction (§ 667, subd. (a)(1)).[2] Ulloa moved to have the prior strike stricken under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529–530 (*Romero*), and the trial court denied the motion.

The trial court sentenced Ulloa to 17 years in state prison, consisting of the middle term of 6 years, doubled to 12 years pursuant to the three strikes law, plus 5 years for the prior serious felony conviction.

On appeal, Ulloa argues that (1) the trial court erred in instructing the jury under CALCRIM No. 1190 that the testimony of the complaining witness was sufficient for conviction under section 288, subdivision (a); and (2) the case must be remanded to the trial court to allow it to exercise its discretion to strike his 5-year prior serious felony conviction

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

[2] The allegation that Ulloa had served a prior prison term (§ 667.5, subd. (b)) was stricken with the prosecution's consent.

enhancement pursuant to Senate Bill No. 1393 (SB 1393). (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) § 1.)

We agree with Ulloa that the case must be remanded to the trial court to consider exercising its discretion under SB 1393. In all other respects, the judgment is affirmed.

DISCUSSION[3]

CALCRIM No. 1190

Ulloa first contends that the trial court erred by instructing the jury under CALCRIM No. 1190 that the complaining witness's testimony was sufficient to convict him of lewd act upon a child. Ulloa argues that the instruction unconstitutionally lowered the prosecution's burden of proof by signaling to the jury that the victim's testimony did not need to be treated with the same caution as other evidence, when juxtaposed to CALCRIM No. 301, which instructs that uncorroborated testimony is sufficient to prove a fact in contention, but should be viewed with caution.

At trial, the court instructed the jury under CALCRIM No. 301 that: "The testimony of only one witness can prove

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[3] Ulloa does not contend that the evidence was insufficient to support his conviction. Because the underlying facts of Ulloa's conviction are not necessary to our resolution of his contentions on appeal, we do not include them here.

any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." It further instructed the jury under CALCRIM No. 1190 that: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone."

The defense did not object to either instruction. Ulloa concedes that CALCRIM No. 1190 properly states the law when viewed in isolation, but argues that, when given in conjunction with CALCRIM No. 301, it misstates the prosecution's burden of proof by suggesting that the testimony of a complaining witness need not be viewed with the same caution as other testimony. Ulloa asserts that it was not necessary for him to object to preserve the issue for appeal because the instructions collectively misstated the prosecution's burden and because his substantial rights were affected under section 1259.

The People counter that CALCRIM No. 1190 correctly states the law, and that "failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*).) We agree.

Because we must examine the issue on the merits to determine if Ulloa's substantial rights were affected, we will review Ulloa's claims to determine the existence and effect of the asserted error. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) As Ulloa concedes, CALCRIM No. 1190 properly states the law. (See *People v. Gammage* (1992) 2 Cal.4th 693, 700 (*Gammage*) [discussing CALJIC

No. 10.60, CALCRIM No. 1190's counterpart][4]; Evid. Code, § 411 [except where additional evidence required by statute, direct evidence of one witness entitled to full credibility is sufficient for proof of any fact].) Although Ulloa acknowledges that our Supreme Court held that a comparable pair of instructions were properly given in *Gammage*, *supra*, 2 Cal.4th 693, he "respectfully urges that *Gammage* was wrongly decided" and contends—based on references to Justice Mosk's concurring opinion in that case, a few out of state authorities on sex-crime complainant testimony that Ulloa asserts have a "better view," and select statistics purporting to show trends in conviction rates for some rape and child sexual assault cases—that the rationale in *Gammage* "has been eroded to the extent that its holding is no longer justified."

Even if we were inclined to agree with Ulloa—we are not—the Courts of Appeal are not vested with the power to declare that our Supreme Court's authority is either incorrect or outdated. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales, Inc.*) ["all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"].) We decline Ulloa's invitation to ignore Supreme Court

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[4] Former CALJIC No. 10.60 (5th ed. 1988) states: "It is not essential to a conviction of a charge of [rape] [unlawful sexual intercourse] that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence."

precedent in favor of fashioning a new rule rooted in out-of-state cases and statistics. We are bound by *Gammage* if it is applicable to the case before us. We conclude that it is.

In *Gammage*, the trial court instructed, pursuant to CALJIC No. 2.27: "'Testimony as to any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.' [Citations.]" (*Gammage*, *supra*, 2 Cal.4th at p. 696, italics & fn. omitted.) The trial court also instructed, pursuant to CALJIC No. 10.60: "'It is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence.' [Citation.]" (*Gammage*, *supra*, at pp. 696–697, fn. omitted.)

The California Supreme Court held it was proper to give the two instructions together in sex offense cases, stating: "Although the two instructions overlap to some extent, each has a different focus. CALJIC No. 2.27 focuses on how the jury should evaluate a fact . . . proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the fact-finding process. CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged

crimes. [¶] Because of this difference in focus of the instructions, we disagree with defendant . . . that, in combination, the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference. 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. Neither eviscerates or modifies the other." (*Gammage*, *supra*, 2 Cal.4th at pp. 700–701.)

The *Gammage* court expressly rejected the assertion that an instruction that dictates a substantive rule of law creates a preferential credibility standard for a complaining witness. (*Gammage*, *supra*, 2 Cal.4th at p. 701.) It held when such an instruction is coupled with a cautionary instruction that guides the jury's review of the evidence, "'a balance is struck which protects the rights of both the defendant and the complaining witness.'" (*Ibid.*, quoting *People v. Hollis* (1991) 235 Cal.App.3d 1521, 1526.) The pairing of the instructions neither dilutes the "beyond a reasonable doubt" standard nor leads to an unfair trial. (*Id.* at p. 701.) "The instructions in combination are no less correct, and no less fair to both sides, than either is individually." (*Ibid.*)

By their plain language, it can be seen that CALJIC Nos. 2.27 and 10.60 are substantively comparable to CALCRIM Nos. 301 and 1190, respectively. Ulloa does not argue otherwise. The Supreme Court's conclusions in

Gammage are therefore dispositive of Ulloa's argument and binding upon us. (*Auto Equity Sales, Inc.*, *supra*, 57 Cal.2d at p. 455.) We conclude that the trial court did not err in instructing the jury under CALCRIM No. 1190, and we find no violation of Ulloa's rights to due process and a fair trial.

Moreover, "[i]n assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled." (*People v. Tate* (2010) 49 Cal.4th 635, 696.) ""'[W]e must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]"' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.) Here, jurors were instructed to "[p]ay careful attention to all . . . instructions and consider them together" (CALCRIM No. 200 [Duties of Judge and Jury]) and to "judge the testimony of each witness by the same standards, . . . [¶] . . . consider[ing] anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." (CALCRIM No. 226 [Witnesses].)

Ulloa's contention that the jury would not have understood the need to view the victim's testimony with the same caution as other witnesses is further refuted by the trial court's instruction (which could only refer to the victim) that, "You have heard testimony from a child who is age 10 or younger. As with any other witness, you must decide whether the child gave truthful and accurate testimony." (CALCRIM No. 330 [Testimony of Child 10 Years of Age or

Younger].) The jury was also instructed that the People must prove Ulloa guilty beyond a reasonable doubt. (CALCRIM No. 220 [Reasonable Doubt].) Taking these instructions into account, we cannot conclude it is reasonably likely jurors interpreted CALCRIM No. 1190 in the way Ulloa now contends.[5]

Finally, as the People argue, because the issue did not affect Ulloa's fundamental rights, the impetus was on him to request a clarification or modification of the instruction. (*Lee*, *supra*, 51 Cal.4th at p. 638.) His failure to do so forfeits the issue on appeal. (*Ibid.*)

Senate Bill No. 1393

SB 1393, signed into law on September 30, 2018, amends sections 667 and 1385 to provide the trial court with discretion to strike five-year enhancements pursuant to section 667, subdivision (a)(1), in the interests of justice. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) §§ 1, 2.) The new law took effect on January 1, 2019, after Ulloa had been sentenced, and is retroactively applicable to Ulloa because his appeal was not yet final on the law's effective date.

The People agree that SB 1393 is retroactive and applies to Ulloa, but argue that in his case remand would be futile. Specifically, the People argue that the trial court's

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[5] In light of our ruling, we do not address respondent's arguments that, even if the trial court erred in its instructions, any such error was harmless.

statements at sentencing and its sentencing decisions clearly indicated that it would not have stricken the section 667, subdivision (a)(1) enhancement even if it had the power to do so, such that remand is not required. (*People v. Jones* (2019) 32 Cal.App.5th 267, 273, quoting *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand pursuant to SB 1393 not required where "'the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement' even if it had the discretion"].)

The People note that in denying Ulloa's motion to strike his prior strike conviction pursuant to *Romero*, the trial court stated that Ulloa had a "fairly significant criminal history," and remarked that "the static-99 report, which categorized [Ulloa] as an above average risk of recidivism for this type of behavior, . . . is rarely seen." The trial court also found that Ulloa's positive character references did not outweigh the impact on the child victim, whom he abused regularly when she was in his care and who would be dealing with the repercussions of his actions for the rest of her life. The trial court concluded, "I would be remiss in my responsibilities to strike the prior and treat the defendant as though he did not have his significant criminal history."

In support of their argument, the People also cite the trial court's tentative ruling, in which it indicated that it would impose the high term. The People concede that mitigating factors presented by the family caused the trial court to reconsider and impose the middle term, but argue

that if the trial court had wished to further reduce Ulloa's sentence it could have imposed the low term.

With respect to the trial court's comments regarding Ulloa's *Romero* motion, we note that in refusing to strike the prior strike conviction the trial court may have believed that it had appropriately punished Ulloa with respect to the aggravating factors it commented upon. Moreover, the trial court's decision to impose the middle term demonstrates that the court was willing to show some leniency. Although there is no indication that the trial court would exercise its discretion to further reduce Ulloa's sentence, there is also no "clear indication" that it would decline to do so. Thus, we cannot conclude remand would be futile.

Accordingly, we remand the matter for the trial court to consider whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement.

DISPOSITION

We remand for the limited purpose of allowing the trial court to consider exercising its discretion to strike the five-year section 667, subdivision (a)(1) enhancement under SB 1393. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

Baker, Acting P. J.

KIM, J.