

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DOUGLAS WILLIAM WARNER,

Defendant and Appellant.

F051027

(Super. Ct. No. 1085516)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Hurl W. Johnson, Judge.

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

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

Douglas William Warner commenced a romantic relationship with his next-door neighbor while she was engaged in bitter child custody litigation with her husband, who later accused him of abusing the couple's child. His arrest at his apartment in front of his friends infuriated him. The court dismissed the charges against him for lack of evidence,

but he felt depressed and distraught at losing his chance to have his day in court. Weeks later, he killed her husband with a shotgun blast to the chest.

After trial by jury, the court imposed an aggregate sentence of 50-to-life (a 25-to-life term for first degree murder (Pen. Code, § 187, subd. (a)¹) consecutive to a 25-to-life term for personal and intentional discharge of a firearm proximately causing great bodily injury or death (§ 12022.53, subd. (d)) and imposed and stayed a consecutive four-year (middle) term for personal use of a firearm (§§ 654, 12022.5, subd. (a)). On appeal, Warner argued (1) that CALCRIM No. 226 impermissibly lightened the prosecution's burden of proof and (2) that the court should have stricken, not imposed and stayed, the lesser firearm use enhancement.

On Warner's appeal in 2007, we disagreed with him on the first issue, agreed with him on the second issue, ordered the enhancement stricken, and otherwise affirmed the judgment, after which the California Supreme Court ordered a grant-and-hold (Cal. Rules of Court, rule 8.512(d)(2)) pending consideration and disposition of the following issue in *People v. Gonzalez* (S149898): "When separate firearm enhancements under Penal Code section 12022.5 and subdivisions (b), (c), and/or (d) of section 12022.53 are found true and the longest enhancement is imposed, should the lesser enhancements be stricken, stayed or simply not imposed at all?" (*People v. Warner* (2007) 155 Cal.App.4th 57 (*Warner*), review granted November 28, 2007, S157246.)

After the filing of the opinion in *People v. Gonzalez* (2008) 43 Cal.4th 1118 (*Gonzalez*), the Supreme Court ordered a transfer without decision (Cal. Rules of Court, rule 8.528(d)) for reconsideration of the cause in light of *Gonzalez*. Having done so, we now affirm the judgment in full.

¹ Later statutory references are to the Penal Code except where otherwise noted.

DISCUSSION

1. CALCRIM No. 226

Warner argues that the last paragraph of CALCRIM No. 226 impermissibly lightens the prosecution's burden of proof not only by using the word "should" (as opposed to the "relatively more neutral" word "may" in CALJIC No. 2.21.2) so as to create a pernicious permissive inference but also by short-circuiting the jury's process of contrasting and comparing the evidence with the word "ignore" so as to allow "an early discard of some portions of the evidence." The Attorney General argues the contrary.

Both words that Warner challenges appear in the last paragraph of CALCRIM No. 226 (Witnesses). Modified to delete paragraphs irrelevant to the evidence, the court gave the instruction as follows:

"You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

"In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

"How well could the witness see, hear, or otherwise perceive the things about which the witness testified?

"How well was the witness able to remember and describe what happened?

"What was the witness's behavior while testifying?

"Did the witness understand the questions and answer them directly?

"Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?

“What was the witness’s attitude about the case or about testifying?

“Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?

“How reasonable is the testimony when you consider all the other evidence in the case?

“Did other evidence prove or disprove any fact about which the witness testified?

“Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

“If you do not believe a witness’s testimony that he or she no longer remembers something, that testimony is inconsistent with the witness’s earlier statement on that subject.

“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 that you think is true and *ignore* the rest.” (Italics added.)

Warner argues that the words “should” and “ignore” in the last paragraph of CALCRIM No. 226 “invited the jury here even more forcefully than does CALJIC No. 2.21.2 [(Witness Willfully False)] to reject all of [his] testimony”:

“A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You *may* reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.” (CALJIC No. 2.21.2; italics added.)

Warner candidly acknowledges the California Supreme Court’s consistent rejection of similar challenges to the analogous CALJIC witness instruction, CALJIC No. 2.21.2. (See, e.g., *People v. Beardslee* (1991) 53 Cal.3d 68, 94; *People v. Lang* (1989) 49 Cal.3d 991, 1023-1024.) Nonetheless, he contends that CALCRIM No. 226

encourages the jury, even more than CALJIC No. 2.21.2 does, to reject a defendant's entire testimony and that on the record here of "clear conflict in the evidence as to [his] state of mind" and of his credibility as "the essential component of the defense case" CALCRIM No. 226 impermissibly lightens the prosecution's burden of proof.

Warner aptly characterizes the record. In his own defense, he testified that he could recall only some of the events of the fatal day but remembered firing three shots into the floor in front of his next-door neighbor's husband, who arrogantly responded, "You know you could have done it." At that moment, he testified, "Everything just exploded." He remembered pulling the trigger, driving to the police station, and turning himself in. A defense psychiatrist diagnosed him as suffering from post traumatic stress disorder, which can cause a dissociative depressive state characterized by significant memory loss and interference with the ability to make rational judgments.

Nonetheless, our comparison of CALCRIM No. 226 and CALJIC No. 2.21.2 persuades us that both are facially neutral instructions that apply to all witnesses who testify at trial and that focus no more on the defendant's testimony than on that of any other witness. (See *People v. Allison* (1989) 48 Cal.3d 879, 895.) CALCRIM No. 226 states that the jury "should *consider* not believing" – *not* that the jury *should not believe* – anything in the testimony of a witness who lied about something significant. (CALCRIM No. 226; italics added.) The authorization in CALJIC No. 2.21.2 that the jury "*may* reject the *whole testimony* of a witness who willfully has testified falsely as to a material point" is analogous. (CALJIC No. 2.21.2; italics added.) So is the part of CALCRIM No. 226 informing the jury that "if you think the witness *lied about some things, but told the truth about others*, you may simply accept the part that you think is true and *ignore the rest*." (CALCRIM No. 226; italics added.)

Since Warner fails to persuade us that semantic differences between CALCRIM No. 226 and CALJIC No. 2.21.2 are even material, let alone prejudicial, we reject his challenge to the former by deferring to a long line of California Supreme Court cases

rebuffing analogous challenges to the latter. (See, e.g., *People v. Carey* (2007) 41 Cal.4th 109, 130-131; *People v. Maury* (2003) 30 Cal.4th 342, 428-429; *People v. Millwee* (1999) 18 Cal.4th 96, 158-161.)

2. Personal Firearm Use Enhancement

Warner argues that the court should have stricken, not imposed and stayed, the section 12022.5, subdivision (a) enhancement. The Attorney General argues the contrary.

People v. Bracamonte (2003) 106 Cal.App.4th 704 (*Bracamonte*) answered “yes” to the question of first impression whether a court must strike a section 12022.5, subdivision (a) enhancement after imposition of a section 12022.53, subdivision (d) enhancement. (*Bracamonte, supra*, at pp. 709-713.) In reliance on *Bracamonte*, our 2007 opinion agreed with Warner but noted: “The issue whether, after true findings on personal firearm use allegations under subdivision (a) and subdivision (d) and after imposition of the enhancement with the longest term of imprisonment, the sentencing court should strike, stay, or simply not impose the lesser enhancement is pending before the California Supreme Court. (*People v. Gonzalez*, review granted Jan. 31, 2007, S149898.)”

Gonzalez expressly disapproved *Bracamonte* and held that “after a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements and any section 12022.5 firearm enhancements that were found true for the same crime must be imposed and then stayed.” (*Gonzalez, supra*, 43 Cal.4th at pp. 1123, 1130, fn. 8.) Here, the trial court did just that, imposing a 25-to-life term for personal and intentional discharge of a firearm proximately causing great bodily injury or death (§ 12022.53, subd. (d)) and imposing and staying a consecutive four-year (middle) term for personal use of a firearm (§§ 654, 12022.5, subd. (a)).

DISPOSITION

The judgment is affirmed.

Gomes, J.

WE CONCUR:

Vartabedian, Acting P.J.

Levy, J.