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FILED - Central District
San Bernardino County Clerk

SEP 0 5 1997

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

REMITTITUR

FILED - West District
San Bernardino County Clerk

SEP 0 9 1997

By _____ Deputy

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	E018777
v.	)	(Super. Ct. No. FWV2293) FO10245
CHUCK EDWARD JOHNSON, Defendant and Appellant.	)	County of San Bernardino

I, STEPHEN M. KELLY, Clerk of the Court of Appeal, State of California, Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on June 26, 1997, and this opinion or decision has now become final.

Witness my hand and seal of the Court
this September 3, 1997.

Stephen M. Kelly, Clerk

By: Madeline Mozee
Deputy Clerk

cc: All parties (Copy of remittitur only, Rule 25(e), California Rules of Court).

8:30

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,	
Plaintiff and Respondent,	E018777
v.	(Super.Ct.No. FWV02293)
CHUCK EDWARD JOHNSON,	O P I N I O N
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Robert E. Law, Judge. (Retired Judge of the Municipal Court, sitting under assignment by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed

Corrine S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Robert M. Foster and Esteban Hernandez, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Defendant contends on appeal that the trial court's failure to instruct the jury, when requested to do so, in the language of former CALJIC No. 2.90, which provides

legal meaning for the phrase "abiding conviction," is reversible error under the circumstances of this case.

As explained below, we disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1993, Jennifer Rethorn and Darin Riggs lived with their three-year-old daughter, Brittany Riggs, in a four-bedroom house in Montclair. They rented out two extra bedrooms to two men. One of the renters was Steve Lopez, a close friend of Darin Riggs, and the other was defendant, who worked with Steve Lopez and who had recently been separated from his wife.

At about 7:30 a.m. on October 10, Brittany knocked on her parents' bedroom door and entered. Her father told her to go watch cartoons in the living room. Brittany's parents remained in bed. Just before 9 a.m., Brittany's parents were awakened by rustling and banging noises. Rethorn thought Brittany was getting into the bathroom cabinets, so she told Riggs to get up and get Brittany out of the bathroom. After Riggs left the bedroom, Rethorn quickly got dressed, and as she left the bedroom she saw her husband going towards the dinette. She heard him asking Steve Lopez if he had seen Brittany. Riggs and Lopez went out to the patio and back yard looking for Brittany, and Rethorn looked around the house. They were all yelling Brittany's name. Riggs stood under defendant's bedroom window and called out to him. Defendant came to the window and asked what was wrong. He told Riggs that he had seen Brittany on the couch 20 minutes earlier watching television.

Rethorn knocked at defendant's bedroom door. Defendant called out that he was busy and would be out in a minute. Lopez went out searching the neighborhood, came back, and then went out searching again.

Defendant came out of his bedroom about 10 minutes after the search began and repeated to Rethorn that he had seen Brittany on the living room couch. He said he had given her something to eat and had gone back to bed. Rethorn said she was going to call the police. Defendant began dialing 911, and Rethorn took the phone from him. Later, Riggs saw defendant sitting on the floor in the hall and crying with his hand in his face.

The police came and began searching. The last place they searched was defendant's room. In defendant's closet, an Officer Kelly found Brittany's body, which had been covered by clothing. The body was still warm, and her head was covered by a black plastic trash bag. The two police officers at the house rushed the child to an emergency room, but emergency personnel could not revive her.

On November 10, 1993, the District Attorney of San Bernardino County filed an information charging defendant in count 1 with the murder of Brittany Rethorn Riggs in violation of Penal Code section 187, subdivision (a). Defendant pleaded not guilty.

At defendant's trial, the physician who performed the autopsy on the victim expressed the opinion that she died by a combination of strangulation and smothering. The child also had bruises on her upper lip and her right shin, three contusions on her scalp, and a tear in her mouth. The contusions were caused by her head striking something or being struck against something. All of the injuries occurred before death and appeared to be an indication of struggle. There appeared to be redness at the

entrance to the victim's vagina, although when viewed under a microscope, no abnormality was found.

The jury found defendant guilty of first degree murder on November 14, 1995. On June 7, 1996, defendant's motion for a new trial was heard and denied. He was sentenced to state prison for a term of 25 years to life. Defendant filed a notice of appeal on July 23, 1996.

DISCUSSION

Defendant requested the court to read the earlier version of CALJIC No. 2.90, the instruction describing the reasonable doubt standard. The earlier version contained the phrases "and depending on moral evidence" and "to a moral certainty." (CALJIC No. 2.90 (5th ed. 1988).) The court denied his request and gave the 1994 revision of the instruction. Defendant contends that this was error because the requested instruction was neither constitutionally infirm nor an erroneous statement of the law.

Defendant seeks to develop a new facet to a now familiar argument that the trial court erred by instructing the jury with the revised version of CALJIC No. 2.90. He claims the court was obliged to give the earlier version of the instruction because it was specifically requested by him, and the California Supreme Court decision in *People* v. *Freeman* does not mandate the use of the 1994 revision in the face of a specific request for the earlier version. (*People* v. *Freeman* (1994) 8 Cal.4th 450.)

In *People* v. *Freeman*, our Supreme Court acknowledged the concerns stated by the United States Supreme Court in *Victor* v. *Nebraska* regarding CALJIC No. 2.90. (See CALJIC 2.90 (5th ed. 1988); *Victor* v. *Nebraska* (1994) 511 U.S. 1 [127 L.Ed.2d 583,

114 S.Ct. 1239; *People* v. *Freeman* (1994) 8 Cal.4th 450, 503.) The *Victor* court had stated that "[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." (*Victor* v. *Nebraska*, *supra*, 511 U.S. at p. ___ [127 L.Ed.2d at p. 595, 114 S.Ct. at p. 1247].)

In response to these remarks, the *Freeman* court declared: "It thus seems that trial courts might, in the future, safely delete the following phrases in the standard instruction: 'and depending on moral evidence,' and 'to a moral certainty.' [¶] Making these changes, and no others, would both avoid the perils that have caused appellate courts to caution trial courts against modifying the standard instruction, and satisfy the concerns the high court has expressed regarding that instruction. . . . [W]e cannot and do not require trial courts to change the standard language; rather, we note that it is permissible, and safer, to make the narrow changes suggested herein." (*Freeman*, *supra*, at p. 504, fn. omitted.) Defendant relies upon the last sentence of the above-quoted remarks from *Freeman*, which predate the revision of the jury instruction, to show that the trial court was obliged to give the earlier version of CALJIC No. 2.90 if requested by him.

We find that, even if requested to do so, the trial court is not obliged to give an obsolete version of CALJIC 2.90. The revision to the jury instruction was made in accordance with the suggestions in *People* v. *Freeman*, and the trial court did not err by faithfully following the direction of our Supreme Court. Moreover, defendant's argument that the revised instruction inadequately explains the reasonable doubt standard has been repeatedly rejected by the appellate courts. (See, e.g., *People* v. *Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572; *People* v. *Barillas* (1996) 49 Cal.App.4th 1012, 1022;

People v. *Carroll* (1996) 47 Cal.App.4th 892, 895-896; *People* v. *Hurtado* (1996) 47 Cal.App.4th 805, 815-816; *People* v. *Tran* (1996) 47 Cal.App.4th 253, 263; *People* v. *Light* (1996) 44 Cal.App.4th 879, 884-889; *People* v. *Torres* (1996) 43 Cal.App.4th 1073, 1078.)

Although it is true that, as defendant points out, the source of the language in revised CALJIC 2.90 was dicta in *People* v. *Freeman*, "'[t]he dicta of our Supreme Court are highly persuasive.' [Citation.] In *Freeman*, our Supreme Court took great care in suggesting changes to CALJIC No. 2.90 that would shore up its constitutionality, and concluded that these changes, while not required, were 'permissible.' [Citation.] We presume the court's suggestions were not inadvertent or ill considered. [Citation.] If there is to be any retreat from *Freeman*, it should come from the California Supreme Court, not us." (*People* v. *Hurtado*, *supra*, 47 Cal.App.4th at p. 816.)

Defendant attempts to bolster his argument by citing case law standing for the proposition that he is entitled to instructions pinpointing his theory of defense as long as the instructions are an accurate statement of the law. (*People* v. *Sears* (1970) 2 Cal.3d 180, 190.) He claims that under this principle he was entitled to have the jury instructed with the earlier version of CALJIC No. 2.90. We find that the requested version of CALJIC No. 2.90 cannot be considered a "pinpoint" instruction. The earlier version of the instruction does not direct the jury's attention to evidence that could cause a reasonable doubt to arise. (*Ibid.*; *People* v. *Pierce* (1979) 24 Cal.3d 199, 211.) It does not relate the reasonable doubt standard to particular elements of the crime charged, or pinpoint the essence of defendant's case. (*People* v. *Rincon-Pineda* (1975) 14 Cal.3d

864, 885.) Nor would the earlier version aid the jurors in understanding legal concepts they are applying, since the purpose of the revised version of CALJIC No. 2.90 is to improve and clarify the definition of reasonable doubt. (See *People* v. *Freeman*, *supra*, at p. 504.)

We therefore hold that the trial court did not err by refusing to give the requested earlier version of CALJIC No. 2.90 and by delivering the revised version of that instruction.

DISPOSITION

The judgment is affirmed.

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/s/ Richli
J.

We concur:

/s/ Ramirez
P. J.

/s/ Ward
J.