Filed 10/12/16 P. v. Anderson CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DEVION KEITH ANDERSON, Defendant and Appellant.	B265538 (Los Angeles County Super. Ct. No. TA131363)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick Connolly, Judge. Affirmed.

Gail Harper, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Devion Keith Anderson appeals the judgment following his conviction for two counts of second degree murder. We reject his claims of error and affirm.

PROCEDURAL BACKGROUND

Appellant was charged with two of counts of murder of his girlfriend Maria Gonzalez and their unborn child, along with a multiple-murder special circumstance. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(3).)[1] A jury found him guilty of both counts but found not true an allegation that the murders were premeditated and found not true the multiple-murder special circumstance. He was sentenced to two consecutive terms of 15 years to life. He timely appealed.

FACTUAL BACKGROUND

At the time of the murder in December 2013, appellant lived at the home of his grandmother Joyce Quarles, along with his mother Tia Quarles and her significant other Millard Lacey, his younger brother William St. Julian, his cousin Deanne Williams, and his two-year-old sister Malia. Appellant adored Malia.[2]

He was in a relationship with victim Maria Gonzalez. She had a two-year-old daughter Aaliyah. Because Maria's family would not let her live with them, Tia took her in and she and her daughter lived at the home with appellant and his family. Tia and Maria were close, and Maria sometimes called her mom. Maria was always welcome at the house. Appellant was attentive to Aaliyah, and the trio acted like a normal family.

Appellant and Maria would get into conflicts, however. On one occasion, Maria struck or slapped appellant. In July 2013, Maria threatened to kill appellant with a knife, so appellant left the house. Maria called Tia, who was in Las Vegas at the time, and told her, "I'm going to fuck your son up." Maria told Tia she was angry because appellant had slept in a different room that night. She acted as if she was going to slash appellant's tires, and William tried unsuccessfully to disarm her. No one called the police, and she continued to live in the house, but the family hid all the knives and Tia told the family to

---

1 All undesignated statutory citations are to the Penal Code unless otherwise noted.

2 We refer to everyone by first name for convenience only.

look after Malia while Maria was around. Appellant also told Tia that Maria was stalking him on the Internet and she had a friend who could hack into Internet accounts. He also told her that Maria found out through hacking his phone and e-mail that he was talking to other girls.

Tia never called the police based on Maria being a danger, although she expressed concerns to Maria's social worker about her behavior with appellant, like when she would pace, act crazy, and call his phone a thousand times whenever he left the house. She never saw any interaction between appellant and Maria to suggest he would someday kill her.

Around 5:30 p.m. on December 23, 2013, the day of the murder, William arrived home with Deanne. He saw appellant in the backyard holding Maria's cell phone and using a shovel to "cover[]" dirt. William walked outside and asked what he was doing, and appellant responded he was burying the dog. His eyes were watering, and he looked sad, unlike himself, which William thought was odd. At the time, he did not mention any threats from Maria. He also did not complain of any injuries, and William did not notice any.

A few minutes later, William realized something was wrong. A family dog had been buried in the backyard years earlier, and both of the family's dogs were alive. Joyce was asleep, so he awakened her, told her something was wrong with appellant, and asked her to check on him. William also went to Deanne and told her he thought appellant was burying Maria, but she did not believe him. Joyce went to the backyard and found appellant standing next to the garage, staring into space and looking troubled. She asked if he was digging a garden, and he said, "I might be." He was sweating and possibly had been crying; he did not appear to be himself. He did not mention having any injuries. She went back to bed.

William awakened her again; she went back outside and again asked appellant what he was doing. She also asked where Maria was. Appellant said she was at her mother's. Joyce called Tia and told her to come home and check on appellant because something was wrong with him. William also sent a text to Tia, saying he thought

appellant dug a hole in the backyard. Tia tried to contact Maria by text and rushed home. She found appellant in the bathroom washing his face; it looked as though he had been crying. When she asked what was going on, he hung his head and said nothing. He was not acting like himself. She did not notice any injuries on him. A bit later she asked him again what was going on and where Maria was. He replied that she was at her mother's house, but Tia told him that was not true. He also said Maria had just left. He kept repeating himself, which was not normal for him. She went outside and saw the dirt was disturbed. She asked him what he had been doing, and he said he was digging up an old dog. She asked again where Maria was and whether she was in the backyard. He said no and that she had left. He appeared nervous.

Sometime after 7:00 p.m., Tia's cousin Miss O'Guynn Patterson received a phone call from Deanne, who was crying and told her something was not right. Miss arrived at the house and shined a cell phone light into the backyard, but did not see anything unusual. She went to appellant in a bedroom and asked him where Maria was. He said he did not know and nothing else. She asked whether he needed a moment, and he said yes. When she returned, she told him Tia was calling the police and he needed to tell them what was going on. He told her to get his mother.

With Miss, Tia, and Deanne in the bedroom, appellant explained what happened. His head was down, he was crying, and he was speaking softly and mumbling; he would not look at them. He said Maria discovered he had been talking to other girls. Maria had been stalking him online and, through a friend or friends, had hacked into his phone and e-mail. She tried to take his car keys and they argued outside, where either he pushed her down or they fell together. She injured her lip and nose.[3] She got up and threatened to call the police and have her ex-boyfriend jump him. She said she was going to hurt his family. She said she did not care that Joyce owned the house for 40 years, referring to a

---

[3] Tia testified at trial that he said they fell together. Miss testified he said he pushed her and she fell. Tia previously told officers she was not sure if appellant punched Maria, but they struggled over the keys and fell. Appellant did tell her, "I busted her lip, her nose, choked her, and drowned her in a bucket of water."

threat to burn down the house.[4] She also threatened to kill Malia, who was not in the house at the time. Appellant said he felt threatened and felt she was threatening the family, so he was protecting them.

Appellant eventually confessed to strangling Maria. Because he thought she was still breathing, he got a bucket of water and held her head in it, drowning her. Then he buried her in the yard. At that point he broke down and began to cry. Miss was shocked and Tia was surprised. Tia did not know appellant to be a violent person. At the time, he was 21 years old and eight inches taller than Maria, who was 18 years old.

Miss told appellant he needed to turn himself in. At Tia's request, Joyce called the police. She told the 911 operator that appellant was just sitting and crying. Appellant asked, "Why did you call 911? Now I'm going to jail for the rest of my life." He also said he was "going to take care of it." He left the house on foot. Tia called him twice, but he hung up both times. He eventually revealed his location. He turned himself in at the police station early the next morning.

Los Angeles County sheriff's deputies arrived at the house around 9:30 p.m. the night of the murder. Tia told them that appellant had killed Maria and buried her in the backyard. She let them into the yard to retrieve the body. Shortly after midnight, a deputy began to dig with a shovel found in the backyard. The dirt had been freshly turned and recently dug up. Firefighters soon arrived and assisted with uncovering Maria's body. As they dug, they found articles of red clothing and saw Maria's right toe. Her body was found rolled and wrapped in a bed sheet and two comforters. The grave was just under four feet deep and about five feet around. Maria was pronounced dead around 12:30 a.m. when her body was recovered.

Near the grave, a bucket was recovered containing seven centimeters of water, long individual hair fibers, and a strand of red fabric on the outer rim. There was also a

---

[4] Tia did not mention anything about Maria threatening to burn down the house to police. The first time she brought it up was at the preliminary hearing or trial. She also did not mention Maria's threats to the family or that appellant feared for his family's safety.

possible drag mark on the cement. Maria's purse was found on a shelf in the garage. Her cell phone and another cell phone were found under the dining room table in the house, and a moist pair of white socks were found in a trash bin in the backyard.

In an interview the next day, Tia said Maria kept threatening appellant that she had previously arranged for her ex-boyfriends to be jumped when they cheated on her.

An autopsy revealed Maria died of manual strangulation between 3:00 and 4:00 p.m. She lost consciousness within seconds, but it took several minutes of neck compression for her to die. She had a cut and bruise on her lower lip, a large bruise on her back, and abrasions on the backs of her hands, all of which were consistent with blunt force trauma. The facial injuries were consistent with striking concrete or being punched. She also had bruises on her left shoulder, right arm, and right chest. Whether she died from drowning could not be determined from the autopsy, and the autopsy report contained no evidence indicating drowning, although the coroner could not rule it out. She had some marijuana in her system and was about 14 weeks pregnant. The fetus had no apparent abnormalities and died due to a lack of oxygen and blood flow because Maria had died.

Tia had several conversations with her son while he was in custody, knowing those conversations were recorded. In one of them, appellant said he was unsure if Maria had gotten an abortion, noting she had missed clinic appointments possibly on purpose. He wanted her to get an abortion because he did not want to be "stuck with her." Once, she had returned home and appeared to be in pain, saying she had been to the clinic. In another conversation, appellant told Tia that Maria was "stupid" because she had been drinking margaritas all day, which Tia herself had seen. Appellant said Maria told him she was going to the clinic to see whether the baby was still alive, despite the alcohol. Appellant and Maria went to the physician's office but left because it was so crowded.

In his defense, appellant called his cousin Deanne Williams to testify. She grew up with him and they were as close as siblings. Two years before trial, she met Maria. Deanne was very close to Maria's daughter, taking care of her. Because Deanne did not look like the rest of the family, Maria thought she was appellant's ex-girlfriend, but

Deanne explained she was his cousin. She believed Maria was a jealous person. Maria would ask Deanne about appellant's ex-girlfriends, and Deanne said she only knew of one. She saw Maria and appellant argue about text messages in his cell phone. Maria would yell at him, and on three occasions, she struck him. He would ask Deanne to intervene because he did not want to put his hands on her. No one called the police on these occasions, even after Maria brandished the knife. She continued to live with the family. Maria and appellant always made up after these arguments.

Either alone or with Joyce, Deanne had taken Maria back to her own family five or six times, but Maria would always return; sometimes her mother would not even let her in the house. Maria told Deanne she was pregnant, but she did not appear pregnant on the day of the murder.

Deanne testified on the day of the murder she and William returned home around 5:30 or 6:00 p.m. When William told her about appellant, she did not believe him and thought he sounded crazy. Deanne, Miss, and Tia talked to appellant later that night. Speaking low and crying, he told them what happened. He said he and Maria were arguing in the backyard about a phone or text message and that Maria was fighting with him. He said Maria claimed she was going to burn down the house and kill his sister Malia, although Malia was not home at the time and Maria had never hurt anyone in the family. He said she threw his car keys into the grass. Nervous and scared, he stuttered slightly as he spoke. He admitted choking Maria and killing her. Deanne began to cry hysterically and did not hear what he said after that.

The police did not interview Deanne regarding the case, although there was testimony appellant's attorney instructed her not to speak with police.

DISCUSSION

A. Ineffective Assistance of Counsel

Appellant contends his trial counsel was ineffective for (1) failing to object to poststrangulation evidence of appellant's drowning of Maria, the burial and exhumation, him lying to his family, him fleeing the scene, and his comment from jail calling her

"stupid"; and (2) failing to object to the prosecutor's arguments in closing that this evidence demonstrated premeditation and deliberation. We disagree.[5]

To show ineffective assistance, a defendant must demonstrate "counsel's representation fell below an objective standard of reasonableness under prevailing professional norms [citation], and that a reasonable probability exists that, but for counsel's unprofessional errors, the result would have been different. [Citations.] The standard of review for ineffective assistance claims is well settled. In examining such claims, we accord great deference to counsel's reasonable tactical decisions. [Citations.] '"Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts."' (*People v. Farnam* (2002) 28 Cal.4th 107, 148.) Moreover, when the record does not reveal why counsel failed to act in the manner chosen, "an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 623 (*Cudjo*).)

Somewhat inexplicably, appellant focuses on his counsel's failure to object to the evidence cited above as it related to premeditation and deliberation. He was patently not prejudiced by his counsel's failure to object because the jury found the premeditation and deliberation allegation untrue. Nonetheless, this evidence was probative of both premeditation and intent to kill, so his counsel was not ineffective for failing to raise meritless objections. (See *Cudjo, supra*, 6 Cal.4th at p. 616 ["Because there was no

---

[5] During trial, defense counsel objected to the introduction of a 20-minute video of the exhumation of Maria's body, arguing the video was unduly prejudicial and cumulative. The prosecutor responded the video showed appellant's efforts to hide evidence. The court overruled the objection, and the prosecutor agreed to play only salient portions of the video. Defense counsel did not object to any other poststrangulation evidence or to the prosecutor's closing argument citing the drowning and other postmurder facts to show premeditation and deliberation.

sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance."].)[6]

As to the drowning evidence, although Maria's autopsy did not reveal evidence of drowning, the coroner could not rule it out, and appellant admitted to family members he thought she was still breathing, so he got the bucket of water and held her head in it. That strongly suggests not only an intent to kill her but also a deliberate plan to do so when he believed the strangling was insufficient. (See, e.g., *People v. Perez* (1992) 2 Cal.4th 1117, 1127 (*Perez*) [defendant's use of second knife to continue stabbing victim after first knife broke was probative of premeditation and deliberation because "[t]here is no indication . . . that it would have been readily apparent, at the time of the assault, that the victim was already dead. She was knocked to the ground and lay bleeding to death; defendant would not have known the precise moment of death or which [wound] would cause it," and the jury could infer postmortem wounds were inflicted to ensure victim was dead].)

Likewise, the postmurder evidence of appellant wrapping the body and burying it, the exhumation, him lying to family members about what happened, him fleeing the scene when the police were called, and him later calling Maria "stupid" were probative of both premeditation and intent to kill. (See *Perez, supra*, 2 Cal.4th at p. 1128 [jury could consider poststabbing facts to find premeditation, including "the search of dresser drawers, jewelry boxes, kitchen drawers and the changing of a Band-Aid on [defendant's] bloody hand," as well as his failure to immediately flee the scene]; *People v. Hills* (1947) 30 Cal.2d 694, 701 [evidence of means of disposing of victim's body, efforts made to prevent its discovery, and defendant's conduct "both prior to and immediately after the crime" support an inference of a deliberate intention to kill]; *People v. Wong* (1973) 35 Cal.App.3d 812, 831 ["[A]ny act proving or tending to prove an effort or desire on the

---

[6] Because this evidence was admissible to show intent and premeditation, we need not address appellant's additional argument that it was irrelevant to show identity or foundation.

part of a defendant to obliterate or remove evidence of a crime as by [defendant's] hiding of the decedent's body, if unexplained, warrants an inference of consciousness of guilt on his part and will be given probative force in connection with other facts as a relevant circumstance tending to show guilt."]; *People v. Wattie* (1967) 253 Cal.App.2d 403, 409 ["The necessary willfulness, deliberation and premeditation may be inferred from a variety of circumstances. Such circumstances include considerations of the method causing death, the means of disposing of the body and efforts to prevent its identification, the conduct of a defendant prior to and after the crime, the lack of provocation, the act of dragging a victim from one place to another where a murderous attack is continued, and the persistence in continuing an ultimately fatal attack."].)

Appellant claims this evidence was not relevant to his state of mind because there was no evidence of advanced planning and he buried Maria where his family might see him. Again, the jury found the premeditation allegation untrue, so the issue of advanced planning is moot. As to his intent to kill, the evidence showed his family was gone at the time of the murder except his grandmother, who was apparently asleep in the house. The jury could have inferred that he intended to kill Maria during the altercation in part because he was less likely to get caught. Further, when William and Joyce first saw appellant, they did not see any obvious sign that Maria had been killed, suggesting appellant was concealing his crime.

Appellant also cites *People v. Anderson* (1968) 70 Cal.2d 15 to argue his postmurder acts were not probative of his state of mind at the time of the murder. *Anderson* has no direct bearing here. In the course of reducing first degree premeditated murder to second degree murder, *Anderson* stated that evidence of defendant lying about his crime "may possibly bear on defendant's state of mind after the killing," but it was "irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing. Evasive conduct shows fear: it cannot support the double inference that defendant planned to hide his crime at the time he committed it and that therefore defendant committed the crime with premeditation and deliberation." (*Id.* at p. 32.) The Supreme Court later explained the limited reach of this statement: "While our comment

in *Anderson* thus warns against using evidence of a defendant's postcrime actions and statements as the sole support for upholding a finding of premeditated and deliberate murder, such postcrime actions and statements can support a finding that defendant committed a murder for which his specific mental state is established by his actions before and during the crime." (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) In the present case, the burial and other postcrime conduct would have supported an inference that appellant intended to murder Maria during their confrontation and then cover it up, given the evidence of their prior fights, his possible motive to kill her due to her unwanted pregnancy, Maria's threats to his family, and him strangling her and then drowning her when he believed she was still alive.

Thus, appellant's counsel was not ineffective for not objecting to the postcrime evidence or to the prosecutor's closing arguments based on this evidence.

B. Exclusion of Facebook Evidence

As part of appellant's provocation and heat of passion defense, defense counsel elicited Deanne's opinion that Maria was a jealous person. The prosecutor objected to the foundation for Deanne's opinion, and the court held a sidebar for defense counsel to present an offer of proof. Defense counsel cited several instances of Maria's behavior, including the following: "[O]n one occasion Maria set up a false Facebook page and then posed as someone else. Maria contacted [appellant]—and the profile picture was of a very attractive scantily clad, in underwear clad woman. And Maria engaged in conversations with [appellant] to lure him out to meet her. And then when he eventually agreed to meet this beautiful, attractive woman in her underwear, Maria told him and her that it was actually her." The court asked how this incident applied to any defense in the case, and defense counsel contended this was a form of stalking. The court disagreed this behavior constituted stalking and felt the evidence was "too attenuated," so the court excluded it.

Appellant contends the exclusion of this evidence violated his constitutional right to present his provocation defense.[7] "As a general matter, a defendant has no constitutional right to present all relevant evidence in his favor. [Citation.] In other words, ordinary evidentiary rules do not impermissibly infringe on the defendant's right to present a defense. [Citation.] Thus, courts may ordinarily exclude evidence after weighing its probative value against any unfair prejudicial effect. [Citation.] However, there are instances where due process, the right to a fair trial, and other constitutional guarantees trump the rules of evidence. 'For a defendant's constitutional rights to override the application of ordinary rules of evidence, "'the proffered evidence must have more than "slight-relevancy" to the issues presented. [Citation.] . . . [Citation.] The proffered evidence must be of some competent, substantial and significant value. [Citations.]' [Citation.]" [Citation.]' [Citation.] Although a trial court is vested with wide discretion in determining the relevance of evidence, 'a court "has no discretion to admit irrelevant evidence."'" (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1019.)

Here, the trial court did not deprive appellant of a defense by excluding the single incident involving Facebook. Appellant equates this evidence to stalking, statutorily defined as "willfully, maliciously, and repeatedly follow[ing] or willfully and maliciously harass[ing] another person" or making "a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family." (§ 646.9, subd. (a).) "Harass" is defined as "engag[ing] in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) The evidence of Maria's creation of a fictitious Facebook page does not meet these definitions. There is no indication she created the account with the intent to put appellant in reasonable fear of his safety, or that appellant was seriously alarmed or terrorized by it. Even if it could be considered stalking, the parties introduced a significant amount of

---

[7] Appellant has not challenged the exclusion of this evidence under state evidentiary rules.

other evidence of Maria's jealousy and threats, including monitoring appellant on the Internet and having a friend hack into appellant's cell phone, drawing a knife on him, and threatening him the night of the murder that she would burn down the house and kill his little sister. That evidence was far more probative of provocation and heat of passion than Maria's fictitious Facebook account. (See *People v. Beltran* (2013) 56 Cal.4th 935, 942 ["Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation."].) Thus, the exclusion of this single incident did not prohibit appellant from presenting his provocation defense to the jury.

C. Consecutive Sentences

Appellant contends the trial court violated his constitutional rights to a jury trial and due process and abused its discretion by sentencing him to consecutive terms for the two murders based on facts rejected by the jury. We disagree.

In imposing consecutive sentences, the trial court explained as follows: "[T]he simple fact of the matter is . . . [w]hat was done here shocked the consci[ence]. It was truly horrific. You had multiple opportunities to change the course of your action. And, this is a situation where not only do you strangle Maria, but you still believing that she was alive—although, the evidence presented could not show whether or not she was or was not at that time—but, you believing that she was still alive went over, filled a bucket with water, and put her head in it. Not only that. You then dig this hole. When confronted by your brother, when confronted by your grandmother, tell them lies. And then as soon as you know that they are not going to support you in this endeavor, you run.

"I can not [*sic*] speak highly enough of your family. I can't imagine the difficulty it was to testify against a brother, a son, a grandson, a family member. They're truly good people.

"But, Maria Gonzalez did not deserve this. You are supposed to protect the people in your life, the women in your life, the children in your life, from the monsters in the world. But, you were that monster.

"You had every opportunity, as I said, to stop this and you did not. You killed the mother of your unborn child and the motive for that was that unborn child."

Appellant's constitutional challenge to his consecutive sentencing is foreclosed by *Oregon v. Ice* (2009) 555 U.S. 160 and *People v. Black* (2007) 41 Cal.4th 799, which held the facts justifying the imposition of consecutive terms for multiple crimes need not be found by a jury. (*Oregon*, *supra*, at p. 168; *Black*, *supra*, at pp. 821-823; see *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1325.) As appellant acknowledges, we are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 457.) Nor was it improper for the court to rely on facts that might have been rejected by the jury to impose consecutive sentences. (*People v. Towne* (2008) 44 Cal.4th 63, 86 ["Facts relevant to sentencing need be proved only by a preponderance of the evidence, and '"an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."'"].)

We also reject appellant's contention that the aggravating facts cited by the trial court did not justify its decision to sentence him consecutively. (Cal. Rules of Court, rule 4.425(b).) A single aggravating factor can justify imposing consecutive sentences. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) The facts on which the court relied—appellant drowning Maria in a bucket of water when he believed she was still alive, burying her to conceal the murder, lying to his family, and then fleeing the scene—showed at the very least that the murders involved "acts disclosing a high degree of cruelty, viciousness, or callousness." (Cal. Rules of Court, rule 4.421(a)(1).) Even if the court erred in relying on the facts it cited, appellant suffered no prejudice. Naming separate victims in separate counts is alone sufficient to impose consecutive terms. (*People v. Caesar* (2008) 167 Cal.App.4th 1050, 1061, disapproved on other grounds by *People v. Superior Court* (*Sparks*) (2010) 48 Cal.4th 1, 18.) Although the court did not cite this reason for its sentencing decision, there is no reasonable probability the trial court would not do so if given the opportunity on remand, so resentencing is not warranted.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.