Filed 10/7/19 P. v. Boyd CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. AHJEEB BOYD, Defendant and Appellant.	B288876 (Los Angeles County Super. Ct. No. BA427109)

APPEAL from a judgment of the Superior Court for Los Angeles County, Richard S. Kemalyan, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ahjeeb Boyd appeals from a judgment sentencing him to prison for life without the possibility of parole after a jury found him guilty of first degree murder (Pen. Code,[1] § 187, subd. (a)) and found that he committed the murder while engaged in the commission of rape. He contends (1) there was insufficient evidence to support the murder conviction; (2) the jury was improperly instructed that he could be convicted of first degree murder on a natural and probable consequences theory; and (3) the jury was given erroneous instructions on unanimity. Finding sufficient evidence to support the verdict and no prejudicial error in the instructions, we affirm the judgment.

BACKGROUND

Jill S. moved from Colorado to Orange County in 1988 or 1989, shortly after she graduated from high school, to attend fashion school. In the late summer or early fall of 1991 she transferred to the Fashion Institute of Design & Merchandising in downtown Los Angeles, and moved into an apartment on Figueroa Street near the campus.

On the evening of Saturday, September 28, 1991, Jill went to a concert at the Strand in Hermosa Beach. She invited her friend, Nathaniel Davis, whom she had been dating, to meet her there. After the concert, which ended at around 10:30 or 11:00 p.m., she and Davis decided to go to a dance club. They eventually ended up at the Golden Tail, a high-end night club in El Segundo; they each drove their own car there. When they arrived, they discovered that Davis would not be

---

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

allowed in the club because he was not dressed appropriately (he was wearing jeans, which were not allowed). Jill, who was wearing a black short jumpsuit with a lacy vest, a white blouse, black stockings, and high-heeled shoes, decided to stay, and Davis went home.

Linda Ford, a cashier at the Golden Tail, noticed a young white woman with red hair[2] come into the club alone. She asked the woman if she was by herself. When the woman said she was, Ford told her to be careful when she was leaving, and to ask security to walk her to her car. Later that night, sometime between 1:00 a.m. and 2:00 a.m., Ford saw the woman with red hair sitting at a table, talking to a man. Ford did not see her after that. The club closed at 2:00 a.m.

That same night, the 110 freeway was closed in both directions for construction.[3] Traffic going northbound was detoured onto surface streets at Slauson Avenue to get around the closure. At around 5:30 a.m. on Sunday, September 29, 1991, a construction worker on the freeway construction saw a car on the frontage road fully engulfed in flames. The fire department was called, and extinguished the flames.

The car was parked, facing southbound, on Flower Street, near 45th Street. A body was inside the car; it had been burned beyond recognition. The body appeared to be a young woman. Her torso was in the front passenger seat, and she was leaning with her head on the

---

[2] Jill tinted her hair bright red.

[3] The California Department of Transportation (Caltrans) was constructing the new H.O.V. lanes for the 110 freeway, and closed the freeway every Saturday night from midnight to early Sunday morning beginning in April 1991 for the next year.

driver's seat. The only parts of her body that were not extensively burned were the parts that were in direct contact with the car, i.e., parts of the left side of her body and head. There was a little bit of red hair on her left side, and a red substance that appeared to be blood coming from her nose or mouth and on her left buttock/flank. She was not wearing any clothing, but there was a blood-stained white T-shirt, with a tag indicating its size was extra-large, that had been placed over her.[4] There was a burned matchbook between her legs.

There was extensive damage to the interior of the car. Based on the burn pattern, an arson investigator who responded to the call concluded it was a hot-burning fire, and that an accelerant had been used. The car was identified as belonging to Jill's father's company in Colorado; Jill's father had given it to her to use in California. The body ultimately was identified as Jill from dental records.

An autopsy of Jill's body was conducted on October 1, 1991, by Dr. Burr Hartman, who was a fellow training with the Los Angeles County Coroner's Office; Dr. Eugene Carpenter, Jr. was supervising Dr. Hartman during the autopsy. Dr. Hartman was unavailable to testify at trial, so a video of his preliminary hearing testimony was played for the jury. He testified that he found contusions on Jill's left arm and an

---

[4] The coroner's investigator at the scene testified that the woman had been wearing the shirt, but it had been pulled or rolled up around her neck. However, an expert arson investigator testified that, based upon the photographs of the scene, he concluded she was not wearing the shirt because the fire damage to the shirt did not conform to the damage patterns on Jill's body. In addition, the shirt was not pulled over Jill's head and her arms were not in the sleeves.

extensive subdural hematoma, both of which he believed could have resulted from trauma before the fire, but were likely from the fire itself. He also found there was no soot in Jill's airway, and results from blood tests showed less than ten percent carbon monoxide. The absence of soot and the carbon dioxide level were consistent with death prior to the burn injuries, or alternatively, an acute laryngospasm from flash burns (i.e., a flash fire caused the larynx to spasm so Jill was not able to take in any breaths). Because Jill was found not to be wearing clothing, vaginal and rectal swabs were taken. Dr. Hartman stated in his autopsy report that the cause of death was extensive thermal burns, but the report also stated there was a possibility that death was caused by suffocation prior to the fire.

Dr. Carpenter, who supervised Dr. Hartman's autopsy of Jill, testified at trial. He mostly concurred with Dr. Hartman's findings, with two significant exceptions. First, he testified that although he agreed at the time of the autopsy that the subdural hemorrhages probably were caused by the fire, he now believes, based upon scientific literature, that they were not because those kinds of hemorrhages are not associated with burn injuries. Instead, he believes the subdural hemorrhages, which were on the top of Jill's head, were caused by blunt-force trauma. He testified that the hemorrhaging was significant enough to be associated with unconsciousness, but not significant enough to have caused death. Second, although the autopsy report assigns the primary cause of death as thermal burns, he has since concluded that Jill probably died by suffocation before the fire (most likely by some kind of smothering, as with a cloth or pillow applied with

pressure over her face), but there remains a possibility that she was set on fire in a flash fire and died as a result of thermal burns. He believes there was a high probability that she was dead prior to the fire, but he could not be entirely certain.

The T-shirt recovered from the fire was tested by the Los Angeles City Fire Department's fire prevention bureau research department in 1991. The test showed copious amounts of an accelerant, which was determined to be gasoline.[5] The vaginal and rectal swabs were not tested for DNA at the time because DNA testing was in the very early stages in 1991.

More than twenty years later, in February 2012, the vaginal and rectal swabs were sent for DNA testing as part of the Los Angeles Police Department's efforts to clear its significant backlog in testing sexual assault kits. A single-source-male profile was obtained from the vaginal swab, and a partial profile was obtained from the rectal swab. The profile from the vaginal swab was a full profile, with information at all 15 locations that were examined. The partial profile from the rectal swab was consistent with the profile from the vaginal swab.

As a result of an investigative lead from a database, Detective Roger Allen obtained a search warrant to obtain a DNA sample from defendant. Using that DNA sample, a DNA profile was obtained for

---

[5] The T-shirt apparently went missing after the testing by the Fire Department; therefore no tests were done on what appeared to be blood stains on it, nor was there any attempt to obtain possible DNA evidence from it.

defendant, which was compared to the DNA profile from the vaginal and rectal swabs. The profiles matched exactly.

Defendant was charged by information with one count of first degree murder. (§ 187, subd. (a).) The information also alleged that defendant committed the murder while engaged in the commission of rape and sodomy. (§ 190.2, subd. (a)(17).)

At trial, the prosecution presented evidence that defendant had a known address in 1991 of 532 West Vernon Avenue, which was three buildings from a Shell gas station on the corner of Figueroa Street and West Vernon Avenue, and 352 yards from where Jill's car was found on Flower Street and 45th Street. The car was 3.7 miles from Jill's apartment building on Figueroa Street.

Among the witnesses who testified at trial were Guy Holloman, a criminalist from the Los Angeles Police Department's crime lab, and two expert witnesses, Dr. Elliot Schulman, a physician with a background in sexual assault exams, and Detective Edward Michael Nordskog, a certified arson investigator.

Holloman examined the microscope slide the coroner had prepared from the vaginal sample he took, and counted more than 250 sperm on the slide (he stopped counting at 250, because that is the highest classification for quantity of sperm); most of the sperm had their tails intact. He testified that the number and quality of sperm he observed are consistent with cases where the sexual assault is reported and the sample is collected in a timely fashion, i.e., within no more than a day.

Dr. Schulman testified that the amount of sperm found in the vagina in a sexual assault exam depends upon a number of factors,

including whether the woman remained in a prone position or stood up and how much she activity she engaged in after the assault; when the woman stands upright and engages in activities (such as walking), the sperm drains out of the vagina. He also testified that the tail on sperm flows off as the sperm dies, and that, because the vagina is a somewhat hostile environment for sperm, the sperm starts to deteriorate the longer it remains in the vagina. He stated that a high volume of sperm with tails found in the vagina therefore suggests there was a recent ejaculation in the vagina.

Detective Nordskog, a certified arson investigator from the Los Angeles County Sheriff's Department, reviewed the photographs taken at the crime scene, the reports from the Los Angeles Police Department and Los Angeles Fire Department, and the coroner's report. He testified that Jill likely was incapacitated before the fire was set because a lot of Jill's hair on her left side survived the fire; had she moved her head during the fire, that hair would have caught fire immediately. In fact, he opined that Jill was killed before the fire and that her body and car were set on fire to destroy evidence of the crime.

Detective Nordskog based his opinion on the following facts. The car was found in a remote, somewhat hidden area. An accelerant was used. The location of the match book used to ignite the fire indicates that the target of the fire was Jill's body, and specifically her vaginal area. Jill's hips were in the passenger seat but her head was on the driver's seat, indicating that she was lying down at the start of the fire. There were significant amounts of blood on the driver's seat where her head was, as well as blood coming from her nose and on her lower

back/buttocks, which means she was bleeding before the fire, since that volume of blood could not have been produced by the fire. The extra-large T-shirt that was found on Jill—which appeared to have significant blood stains on it—was placed in the car, presumably to be destroyed in the fire.

Finally, Detective Nordskog testified that, based upon the extent of the damage to Jill's body and to the interior of the car, the fire had to have burned for at least 20 minutes, and possibly up to an hour.

The jury found defendant guilty of first degree murder, and found to be true the allegation that defendant committed the murder while he was engaged in the commission of the crime of rape. The jury found the allegation that defendant committed the murder while he was engaged in the commission of the crime of sodomy not to be true. The trial court sentenced defendant to a term of life in prison without the possibility of parole. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

Defendant raises three contentions on appeal. First, he contends there was insufficient evidence to support the jury's verdict that he committed first degree murder because there was no substantial evidence establishing how Jill died or that he was responsible for her death. Second, he contends the recently-enacted Senate Bill No. 1437 (SB 1437)—which he argues applies retroactively—"effectively abrogated the natural and probable consequences theory of murder liability," and therefore the trial court's instruction that the jury could find defendant guilty of murder under the natural and probable

consequences theory of implied malice was erroneous. Third, he contends the trial court gave erroneous and conflicting instructions on unanimity by giving the jury CALCRIM No. 521, which instructed that the jury did not need to agree on the same theory of first-degree murder (felony murder or willful, deliberate, and premeditated murder), as well as CALCRIM No. 3500, which instructed that the prosecution had presented evidence of more than one act and the jury could not find the defendant guilty of murder unless all the jurors agreed on the act defendant committed. We find no merit to any of his contentions.

A. *Sufficiency of the Evidence*

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . [is] . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; see also *People v. Davis* (1995) 10 Cal.4th 463, 509.) The court "must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." (*People v. Pierce* (1979) 24 Cal.3d 199, 210.) Reversal for insufficient evidence "is unwarranted unless it

appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*).)

In his opening brief, defendant concedes there was sufficient evidence to conclude that he raped Jill near the time of her death. He contends, however, that that is not enough to prove beyond a reasonable doubt that he committed first degree murder. He argues there was no substantial evidence that Jill was alive when the car was set on fire, that defendant had any desire to kill her, or that her death was deliberate, therefore there was no substantial evidence of a deliberate, willful, and premeditated killing. He also argues that a conviction under the felony murder theory cannot be upheld because there was no substantial evidence to connect the rape with Jill's murder. We disagree.

1. *Evidence of Premeditated and Deliberate Murder*

A killing that is willful, deliberate, and premeditated is murder in the first degree. (§ 189, subd. (a).) "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) However, "[t]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived

at quickly. . . .' [Citation.]" (*Ibid.*; accord, *Bolin*, *supra*, 18 Cal.4th at p. 332.)

In *Bolin*, the Supreme Court observed that it had identified in *People v. Anderson* (1968) 70 Cal.2d 15 "three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing." (*Bolin*, *supra*, 18 Cal.4th at p. 331.) However, the Court explained that "'*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]'" (*Bolin*, *supra*, 18 Cal.4th at pp. 331-332.)

In the present case, the evidence that Jill's murder was the result of preexisting reflection rather than unconsidered or rash impulse was substantial.

First, as defendant concedes, there was substantial evidence that defendant raped Jill: his sperm (and only his sperm) was found in her vaginal cavity and she had blunt-force trauma to her head, indicating that the sexual activity was not consensual.

Second, there was evidence that Jill was killed shortly after defendant raped her. The quantity and quality of sperm found on the slide from the vaginal sample indicate that it had been recently deposited. The jury could infer from the quantity and quality that it is unlikely that Jill stood up and/or engaged in any physical activity after

the rape. Indeed, she still was completely undressed when she was set on fire. Thus, the jury reasonably could infer that it was the rapist—i.e., defendant—who killed her.

Third, there was evidence that Jill died by suffocation. Jill's position in the car and the fact that the hair on the left side of her head, which was leaning against the driver's seat, had not burned indicate that she was already dead at the time the car was set on fire. Both medical examiners at the autopsy agreed that if she was dead before she was set on fire, the cause of death was suffocation. In addition, Dr. Carpenter testified that the suffocation most likely was by some kind of smothering, as with a cloth or pillow applied with pressure over her face. As the Supreme Court has observed, this form of killing, which requires the offender to apply pressure over the victim's face for a prolonged period "'is in its nature a deliberate act' . . . [and] affords ample time for the offender to consider the nature of his deadly act." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1020 (*Hovarter*), quoting *People v. Bonillas* (1989) 48 Cal.3d 757, 792.) Thus, "'[a] rational finder of fact could infer that [this manner of killing] demonstrated a deliberate plan to kill her.'" (*Hovarter*, *supra*, 44 Cal.4th at p. 1020, quoting *People v. Davis, supra,* 10 Cal.4th at p. 510.)

Finally, there was evidence that the rapist—i.e., defendant—sought to avoid detection for his crimes. The interior of Jill's car was intentionally set on fire, with Jill's body inside. A large quantity of gasoline was used to accelerate the fire. At least one window was left open to provide sufficient oxygen to allow the fire to consume everything inside the car, including a blood-stained and gasoline-soaked

T-shirt. The location of the matches used to ignite the fire indicate that Jill's vaginal area was targeted. And defendant chose an deserted location that was close enough to a gas station and his home to allow him to set the fire and quickly escape. From this evidence, the jury reasonably could conclude that defendant's motive in murdering Jill "'was to avoid detection for the sexual and other physical abuses he had committed against her.'" (*Hovarter*, *supra*, 44 Cal.4th at p. 1019; see also *ibid.* ["The motive of eliminating possible witnesses in cases involving abduction and rape is often inferable from the circumstances of such crimes"].) The jury also reasonably could conclude that the murder was planned. (*Ibid.* ["Defendant's choice, moreover, of committing his crimes in isolated or secluded settings further suggests a premeditated plan designed to avoid detection"].)

In short, there was more than sufficient evidence for a reasonable jury to find that defendant's killing of Jill was willful, deliberate, and premeditated.

2. *Evidence Supporting Felony Murder*

Much of this same evidence also supports a finding of guilt under a felony murder theory. Contrary to defendant's contention that "there was no evidence showing, beyond a reasonable doubt, that [defendant] is the person who caused [Jill's] death," the record includes sufficient evidence to support a finding that defendant was responsible for Jill's death. As noted above, defendant concedes substantial evidence supports the jury's finding that he raped Jill. The quantity and quality of the sperm found in Jill's vaginal sample indicate that she had not

stood up or engaged in any physical activity after she was raped. She was still completely undressed when she was killed. Finally, the car she was in was set on fire close to where defendant lived. From this evidence, the jury reasonably could infer that defendant killed Jill after raping her.

B. *Effect of SB 1437*

Defendant contends the trial court erred by instructing the jury that defendant could be convicted of murder under the natural and probable consequences theory of implied malice because SB 1437 abrogated that theory of murder liability. He is mistaken. The changes brought by SB 1437 have no application here.

"Senate Bill 1437 was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Section 188, both before and after the amendments resulting from SB 1437, stated that the malice required for a finding of murder "may be express or implied." (§ 188, subd. (a).) SB 1437 did not alter the definition of implied malice. It merely made slight changes to the

language and organization of statute, and added the following provision: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 2.)

SB 1437 also made slight changes to the language and organization of section 189, and added two new provisions, only one of which is relevant to this case. That provision states: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a)[6] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.)

It is clear from the changes that were made to sections 188 and 189, as well as the stated purpose of SB 1437, that SB 1437 was not intended to change the law of murder as it applied to the actual killer. In the present case, defendant was tried as the actual killer of Jill.

---

6 Section 189, subdivision (a) provides, in relevant part, "All murder . . . that is committed in the perpetration of, or attempt to perpetrate, . . . rape . . . is murder of the first degree."

Thus, the trial court properly instructed the jury on the natural and probable consequences theory of implied malice under CALCRIM Nos. 240 and 520.

C. *Unanimity Instructions*

The jury was instructed with CALCRIM No. 521, which stated, in relevant part: "The defendant has been prosecuted for first degree murder under two theories. First, the murder was willful, deliberate and premeditated and, second, the murder was committed under what is known as felony murder. Each theory of first degree murder has different requirements, and I will instruct you on both. You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder, but all of you do not need to agree on the same theory."

The jury also was instructed with CALCRIM Nos. 3500 and 3501 as follows: "The defendant is charged with murder. The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed. [¶] As previously indicated, the defendant is charged with murder. The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless: . . . 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; or 2. You all agree that the

People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

On appeal, defendant contends these instructions were misleading and confusing, and therefore violated due process, because they told the members of the jury that they did not have to agree on the theory of murder, but had to unanimously agree on the act or acts that formed the basis for felony murder. Defendant is correct that these instructions are somewhat confusing, in that the need for unanimity on the act or acts that were committed appears to negate the instruction that the jury need not agree on the theory of first degree murder. But any possible error was harmless beyond a reasonable doubt in light of the jury's express finding that defendant committed the murder of Jill while he was engaged in the commission of the crime of rape.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J. CURREY, J.