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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEY E. ORTEGA,

Defendant and Appellant.

2d Crim. No. B243196
(Super. Ct. No. VA107803)
(Los Angeles County)

Joey Ortega appeals from the judgment entered after a jury convicted him of first degree murder (Pen. Code, §§ 187, subd. (a), 189)¹ and returned true findings that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)) and that appellant personally used a deadly weapon (§ 10222, subd. (b)(1)). In a bifurcated proceeding, the trial court found that appellant had suffered six prior prison terms within the meaning of section 667.5, subdivision (b). Appellant was sentenced to state prison for life without possibility of parole, plus one year for personal use of a deadly weapon and six years on the prior prison term enhancements. Appellant contends there is insufficient evidence to support the robbery-murder special circumstance and the trial court erred in excluding third-party culpability evidence. We affirm.

Facts and Procedural History

¹ All statutory references are to the Penal Code unless otherwise stated.

On February 21, 2003, Irma Castro, a secretary at 100% Realty in Huntington Park, was stabbed to death and found face down on the office floor. Castro's purse was missing and her new jacket was on the floor, stained with blood. The murder occurred within a 30 minute time frame.

Hugo Contreras, the owner of 100% Realty, left the office sometime between 10:50 a.m. and 11:00 a.m.. Castro was alone in the office and the front door was open.

Sometime between 11:00 a.m. and 11:15 a.m., United States Postal Carrier Gregory Sherman delivered mail to the office and was greeted by Castro. A man was seated at a desk where Castro was standing.

At approximately 11:30 a.m., Vilma Fuerte found Castro dead on the office floor and called 911. Los Angeles County Deputy Sheriff Frank Heredia responded to the 911 call at 11:33 a.m. and secured the crime scene. No civilians were allowed to enter the office.

Forensic criminalist Christina Gonzalez bagged Castro's jacket which was on the floor in front of a filing cabinet. The jacket had a blood smear on the right sleeve and blood stains on the front jacket panels. Castro normally kept her purse on the file cabinet or under her desk but the purse was missing.

Man With A Backpack

Ruben Soria, Hugo Contreras's stepfather, reported that a Hispanic man visited the office on February 19, 2003, two days before the murder. The man walked up to the office at 11:20 a.m. and put his backpack on a chair. Soria greeted the man and asked if he could help. The man asked, "What time is it?" and said "I'll be back later."

Sheriff's Detective Boyd Zumwalt, the lead investigator, reviewed a February 21, 2003 surveillance camera videotape from the liquor store across the street. The videotape showed that a man with a backpack left the store at 11:01 a.m.. Detective Zumwalt took still frames from the videotape and prepared a photo lineup.

Oscar Marroquin, Castro's coworker, was a suspect in the murder investigation and interviewed by Detective Zumwalt. On February 27, 2003, the mail

carrier (Sherman) was shown a six-pack photo lineup that included a photo of Marroquin. Sherman was unable to make an identification.

The case was unsolved for four years until Detective Zumwalt obtained appellant's DNA sample and photo.

On March 21, 2007, Soria was shown a six-pack photo lineup and circled two photos that looked like the Hispanic man with the backpack. One of the circled photos was appellant. On January 30, 2008, the mail carrier (Sherman) looked at the six-pack photo lineup, circled appellant's photo, and said the person "looked very familiar."

At an April 27, 2010 live lineup, Soria stated that the men in positions three and six looked similar to the Hispanic man he saw on February 19, 2003. The men were asked to repeat the phrase "What time is it?" Soria stated the man in position six (appellant) was similar to the man with the backpack based on height, voice, and build. The mail carrier (Sherman) selected appellant at the live lineup as the "most likely" but noted that he had gained weight. Soria identified appellant at the preliminary hearing and trial as the man with the backpack who visited the office before the murder. At the preliminary hearing, Sherman stated that appellant looked familiar.

DNA Tests

Criminalist Gonzalez conducted DNA tests on the jacket and determined that the blood stains on the front jacket panels had the same genetic profile and a male gender marker. Marroquin and Contreras were excluded as potential DNA donors but the genetic markers "matched" appellant's DNA profile.² Gonzalez opined that the combination of genetic marker types from the jacket blood stains was one in 2.82 quintillion (a number with 18 zeros) among unrelated individuals. Based on a world population of seven billion, the similarity between the genetic marker types from the jacket blood stains and appellant's DNA was a "rarity of . . . results."

² Over defense objection, Gonzalez opined that the DNA from the jacket blood stains "matched" appellant's genetic profile. At the conclusion of the trial, the trial court sustained the objection and instructed the jury to disregard the question about the DNA match and Gonzalez's answer.

The testimony of Doctor Irwin Golden, a forensic pathologist, was read to the jury. Doctor Golden testified that Castro suffered 24 stab wounds, inflicted by a five-inch long knife. Castro was stabbed in the heart, the lung, the liver, the kidney, the torso, hip and leg. Castro had defense wounds to the arms and hands and suffered a "cut-throat injury" to the neck, administered with enough force to cut down into the vertebrae. The slash to the neck almost decapitated Castro.

Appellant defended on the theory that someone else committed the murder, possibly Oscar Marroquin, Castro's coworker.

Robbery-Murder Special Circumstance

Appellant claims the evidence is insufficient to support the true finding on the robbery-murder special circumstance allegation. There is no direct evidence that appellant took Castro's purse, that anyone saw him with the purse, or that he formed the intent to permanently deprive Castro of her property. Intent, however, may be proven by circumstantial evidence. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) To establish the truth of the robbery-murder special circumstance allegation, the prosecution had to prove the murder was committed during the commission of a robbery or immediate flight from the robbery. (*People v. Clark* (2011) 52 Cal.4th 856, 947.) "In reviewing the sufficiency of evidence for a special circumstance, the question we ask is whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt. [Citation.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 678.)

The evidence shows that Castro took a black purse and a new jacket to work the day of the murder. Castro regularly kept the purse under her desk or on top of the file cabinet near the desk. The police found Castro's blood stained jacket on the floor in front of the file cabinet but the purse was missing.

Where the defendant kills the victim and the victim's property is no longer on the victim's person, the trier of fact may reasonably infer that the killing was for purposes of robbery. (*People v. Hughes* (2002) 27 Cal.4th 287, 357; *People v. Maury* (2003) 30 Cal.4th 342, 402.) Our courts have found sufficient evidence to support a

robbery-murder special circumstance finding where the murder victim had cash or car keys on his/her person, the victim was last seen in the company of the defendant, and the victim's property was not found on the victim or at the crime scene. (*People v. Nelson* (2011) 51 Cal.4th 198, 211-212 [car keys]; *People v. Maury*, *supra*, 30 Cal.4th at p. 402 [cash].)

Appellant argues that the purse may have been taken as an afterthought or taken by someone else after the office door was left open. That was for the jury to decide. "[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury. It is of no consequence that the jury believing other evidence, or drawing different inferences might have reached a contrary conclusion." [Citation.]" (*People v. Castro* (2006) 138 Cal.App.4th 137, 140.)

The day of the murder, the liquor store surveillance camera photographed appellant leaving the store at 11:01 a.m.. The real estate office was across the street. Sometime between 11:00 a.m. and 11:15 a.m., the mail carrier saw a man seated at a desk next to Castro. The purse was missing after Deputy Heredia responded to the 911 call (11:33 a.m.) and found Castro dead on the floor. Two days before the murder, appellant visited the office and said that he would be back. The jury impliedly found that appellant was casing the office to take property or commit a robbery.

Doctor Golden testified that Castro was poked and jabbed several times with a knife, from which the jury could infer that appellant threatened Castro with the knife before robbing her. There is no evidence that appellant had a motive or reason to kill Castro other than to facilitate the theft which would support the finding that the robbery was not incidental to the murder. (See e.g., *People v. Moore* (2011) 51 Cal.4th 386, 408.) Appellant's DNA was on the jacket front panels, supporting the inference that appellant looked for and took Castro's purse before leaving the office. (*People v. Clark* *supra*, 52 Cal.4th at p. 947.) Even " '[i]f a person commits a murder, *and after doing so, takes the victim's wallet*, the jury may reasonably infer that the murder was committed for

the purpose of obtaining the wallet, because murders are commonly committed to obtain money.' [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 357.)

CALJIC 8.81.17

Appellant complains that the jury was give a CALJIC 8.81.17 robbery-murder special circumstance instruction but not instructed what to do if it found the killing was committed for a purpose other than robbery.³ Appellant argues that CALJIC 8.81.17 should have been modified to state "in the event [the jury] found the killing of Ms. Castro was committed for a purpose other than robbery, . . . that the perpetrator had some other purpose."

Appellant forfeited the claimed error by not objecting or requesting that CALJIC 8.81.17 be modified, clarified, or amplified. (*People v. Dement* (2011) 53 Cal.4th 1, 45-46 [failure to request supplemental instruction clarifying CALJIC 8.81.17 forfeited instructional error]; *People v. Valdez* (2004) 32 Cal.4th 73, 113 [same].) CALJIC 8.81.17 fully instructs on the elements of a robbery-murder special circumstance. (*People v. Rountree* (2013) 56 Cal.4th 823, 854-855.) The trial court had no sua sponte duty to give an amplifying or pinpoint instruction. (*People v. Hughes* (2002) 27 Cal.4th 287, 361; *People v. Welch* (1999) 20 Cal.4th 701, 757.)

Appellant cites language in *People v. Bonin* (1989) 47 Cal.3d 808 and a federal court case (*James v. Borg* (9th Cir. 1994) 24 F.3d 20) that a felony-murder special circumstance conviction requires that the defendant commit the murder in order to advance an independent felonious purpose. A similar argument was rejected in *People v. Rountree, supra*, 56 Cal.4th at pages 854-855. The only intent required for a felony-murder-robbery special circumstance is the intent to commit the robbery before or during

³ The CALJIC 8.11.17 instruction stated: "To find that the special circumstance referred to in these instructions as murder in the commission of robbery is true, it must be proved: [¶] [1a.] The murder was committed while the defendant was engaged in the commission of a robbery and; [¶] 2. The murder was committed in order to carry out or advance the commission of the crime of robbing or to facilitate the escape therefrom or to avoid detection. In order words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder."

the killing. (*Id.*, at p. 854.) The jury was correctly instructed that "the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder." (CALJC 8.81.17.) It is presumed the jury understood and followed the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Third-Party Culpability Evidence

Appellant contends that the trial court erred in not permitting appellant to introduce third-party culpability evidence that Oscar Marroquin, Castro's coworker, may have committed the murder. In response to the prosecution's in limine motion to exclude the evidence, appellant argued that the evidence would show a sloppy police investigation that focused on Marroquin as the prime suspect and then appellant. The trial court ruled that the investigation of Marroquin as a suspect was not relevant but the fruit of the investigation, i.e., that Marroquin killed Castro, would be admissible third party culpability evidence. Defense counsel was asked to recite the evidence that would show Marroquin was the perpetrator.

Referencing the police reports and a search warrant affidavit, defense counsel argued that Marroquin resented Castro and that someone in Castro's family told the police that Marroquin and Castro were enemies. A police report noted that the surveillance video system in the real estate office was not working and may have been tampered with by a person who had knowledge of the surveillance camera system, possibly Marroquin.

The trial court found that the proffered evidence was hearsay and speculative, and "it's really a[n Evidence Code section] 352 analysis. . . ." Citing *People v. Hall* (1986) 41 Cal.3d 826, the court ruled: "You have an absolute right to show that somebody else did it, . . . [but it [c]an't just be speculation. Motive and opportunity is probably not enough. You have to [show] . . . somebody [else is the perpetrator] otherwise it will be deceptive and confusing to the jury. . . . [I]f you don't have the evidence, then you can't present it."

Defense counsel did not intend to call Marroquin as a witness but wanted to cross-examine Detective Zumwalt about the Marroquin investigation to show "the quality of investigation angle." Detective Zumwalt purportedly saw Marroquin nod his affirmatively during a polygraph examination and faint when asked, "You know you did it, are you sorry?" Counsel argued that Marroquin owned a white Toyota Camry station wagon and that an anonymous witness saw a similar car at the crime scene. Based on the anonymous tip, the police obtained a search warrant, searched Marroquin's car, and found a pair of jeans with a spot of Marroquin's blood on the jeans. Defense counsel sought to introduce testimony that a set of kitchen knives were found at Marroquin's home and Marroquin told the police that Castro was stabbed over two dozen times. While in jail, Marroquin allegedly coached his wife to say she was with him between 11:10 and 11:20 a.m. the day of the murder.

Defense counsel conceded that the police reports and search warrant affidavit contained "multiple layers of hearsay and anonymous witnesses [statements]. I can't interview witnesses [if] I don't know who they are. When the police testify in this case, I'll question them. If they reveal details I can follow up on, then I will do so."

The prosecution argued that the third-party culpability evidence, as outlined by counsel, was hearsay and speculative. "[T]here's no probative value. None of this in combination establishes that Mr. Marroquin killed anybody." The prosecution argued that the office owner, Contreras, would testify that Marroquin was not at the office the day of the murder and that the mail carrier (Sherman) did not identify Marroquin in a photo lineup but did point to appellant's photo. With respect to the office video surveillance system, there was no evidence that it was tampered with or that video footage was erased.

The prosecution asked the trial court to review the video of Marroquin's polygraph interview. "You [will] see that from beginning to end while the polygrapher's talking to him, [Marroquin] simply continues nodding. It's a form of active listening. Whenever asked, he denies that he ever killed anybody. . . . In fact, he was so distressed by being accused . . . [that] the polygrapher was even holding his head to prevent him

from nodding no, was telling him he couldn't say no. . . . I think the court needs to view that to determine whether or not it is probative of anything. . . ."

The trial court ruled that appellant could not introduce hearsay or speculative evidence and that any third-party culpability evidence must satisfy Evidence Code section 352. The court reviewed a video of Marroquin's police interview and found that "the only relevance of the nodding is to suggest that [Marroquin] is in agreement with the question I've seen the entire interview and this witness [Marroquin] in the face of relentless questioning . . . passed out den[ying] it. He completely denies it." Detective Zumwalt's testimony that Marroquin was nodding "in affirmative to an accusation of the killing of the victim . . . [is] inadmissible opinion. . . . [T]he clear evidence is the tape itself. . . ." The trial court ruled that "playing the entire tape would be an undue consumption of time and it would only serve to confuse the jury [I]t would have to be revealed that [Marroquin] was . . . amidst of a polygraph session. The interrogator continually [says] . . . that the witness failed the polygraph. Whether that's true or not, I don't know. . . . [T]hose are all issues that would be extremely confusing to the jury."

In *People v. Hall*, *supra*, 41 Cal.3d 826, our Supreme Court held that third-party culpability evidence is admissible if it is "capable of raising a reasonable doubt of defendant's guilt. . . . [E][vidence of mere motive or opportunity to commit the crime on another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Id.*, at p. 833.) The *Hall* court stated that "courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible [Evid. Code], § 350 unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion [Evid. Code], § 352." (*Id.*, at p. 834: see also *People v. Valdez*, *supra*, 32 Cal.4th at pp. 108-109, fn. 10.)

Under appellant's construction of the law, the police failure to investigate other suspects is admissible third-party culpability evidence, an argument that was rejected in *People v. Page* (2008) 44 Cal.4th 1, 36-38. Our Supreme Court has

repeatedly stated "that, to be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

Here the proffered evidence cast suspicion on Marroquin but did not show he was the perpetrator. The trial court reasonably concluded that the evidence described by defense counsel was speculative, more prejudicial than probative, and would confuse the jury. (Evid. Code, § 352.) "[T]he trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense." (*People v. Bradford, supra*, 15 Cal.4th at p. 325.)⁴ Appellant makes no showing that the trial court's ruling was arbitrary, capricious or so patently absurd that it resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Appellant's due process arguments are equally without merit. The application of ordinary rules of evidence, such as Evidence Code section 352 to exclude speculative or irrelevant evidence, does not violate a defendant's due process right to present a defense or right to a fair trial. (*People v. Page, supra*, 44 Cal.4th at p. 36; *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) "A specified application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. [Citation.] . . . '[Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for

⁴ The trial court ruled that appellant would be permitted to introduce "competent evidence" that Castro usually kept the office door locked when alone and that a man was sitting at Marroquin's desk when the mail was delivered. At trial, Detective Zumwalt testified that Marroquin was a suspect, that his car was searched on February 27, 2003, and that a pair of blue jeans were found in the vehicle. Defense counsel argued to the jury that Marroquin is "clearly a suspect" and the police "can't tell you what happened It's a total guess. . . . No purse, no knife, no actual evidence from this crime. . . ."

example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial' [citation]." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 327 [164 L.Ed.2d 503, 510-511].)

Assuming, arguendo, that the trial court erred in not receiving testimony about the investigation of Marroquin, the error was harmless. (*People v. Bradford, supra*, 15 Cal.4th at p. 1325 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 harmless error standard].) It is uncontroverted that the DNA evidence excluded Marroquin as the perpetrator and placed appellant at the murder scene. The liquor store surveillance camera photographed appellant leaving the store at 11:01 a.m.. The mail carrier saw a Hispanic man who looked like appellant in the real estate office, alone with Castro sometime between 11:00 a.m. and 11:15 a.m.. Castro was found stabbed to death at approximately 11:30 a.m.. The genetic markers from the jacket blood stains were highly unusual (one in 2.82 quintillion among unrelated individuals) and excluded everyone but appellant. Had the trial court admitted evidence that Marroquin was a suspect in the murder investigation, it is not reasonable probable that appellant would have received a more favorable result. (*People v. Bradford, supra*, 15 Cal.4th at p. 1325.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Raul A. Sahagun, Judge
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