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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. FERNANDO ARRIAGA, Defendant and Appellant.	2d Crim. No. B233706 (Super. Ct. No. VA110148) (Los Angeles County)

Fernando Arriaga appeals from the judgment entered after a jury convicted him of first degree murder. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury found true an allegation that he had personally used a deadly weapon (a knife). (§ 12022, subd. (b)(1).) Appellant admitted the truth of a prior prison term allegation. (§ 667.5, subd. (b).) The trial court sentenced him to 25 years to life for the murder plus one year for the deadly weapon enhancement. For the prior prison term enhancement, the court imposed a one-year prison term but stayed the sentence.

Appellant admits killing the victim after an argument, but he contends that the evidence is insufficient to support a verdict of first degree murder. In addition, appellant contends that the trial court abused its discretion in admitting the victim's statements about her relationship with appellant.

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

As the People concede, the trial court erroneously stayed the sentence for the prior prison term enhancement. We order it stricken and affirm the judgment as modified.

Facts

Appellant and the victim, Maria Del Carmen Ramirez, had a romantic relationship and were living together. They broke up in February or March 2009, and appellant moved out of Ramirez's apartment.

On April 10, 2009, appellant killed Ramirez inside her apartment. After the killing, Ramirez telephoned the police. The police entered the apartment and saw Ramirez's body on the floor under a blanket. A "fixed-blade knife" was on top of the blanket. Ramirez was naked from the waist down.

At first, appellant denied killing Ramirez. He told the police that he had found her body on the floor. Appellant later confessed to the killing during a recorded interview. He said that, for several hours, he and Ramirez had been drinking together at her apartment. They argued, and Ramirez did something to appellant that got him so angry that he killed her. The transcript of the interview does not indicate what Ramirez did to appellant. Appellant stated, "[W]hat I have here, this I have here, she did that to me. She did that to me." The officer who conducted the interview testified that appellant's only injury was a scratch or cut on the ring finger of his right hand. Later in the interview, appellant said that Ramirez had not scratched him.

Appellant told the officer that he had found an elastic band in the laundry room and had used it to strangle Ramirez until she became unconscious. But he realized that the elastic band was not going to kill her: "[W]ith the elastic band, I could see that with the band I couldn't do anything." Appellant stopped strangling Ramirez and hit her in the face with his fist. "[B]ecause I was so mad, I took all my anger out on her by hitting her." Appellant then got a knife from a drawer and cut Ramirez's throat. Appellant denied stabbing Ramirez or having sex with her. He admitted removing her clothing below the waist, but did not know why he had committed this act.

Dr. David Whiteman, a forensic pathologist, opined that the cause of Ramirez's death was "multiple traumatic injuries." Ramirez's head had "a number of bruises and

lacerations," and her nose was broken. She sustained internal bruises to her chest, and one rib was fractured. "There was a slicing wound to the neck which cut some major blood vessels, which led to a loss of blood." This wound was "completely, independently fatal." In addition, Ramirez had "a stab wound to her rectum." The wound was about two inches long and three inches deep. All of Ramirez's injuries were inflicted while she was still alive. Dr. Whiteman did not find "any defensive wounds on the victim's body." Ramirez's blood-alcohol level was between .21 and .24 per cent.

Sufficiency of the Evidence

Appellant contends that the evidence is insufficient to support the jury's first degree murder verdict: "First, there was insufficient evidence the murder was deliberate and premeditated. Second, there was insufficient evidence of malice aforethought, because the prosecution failed to meet its burden of proving beyond a reasonable doubt that the killing was *not* committed in a heat of passion or upon a sudden quarrel."[2]

"[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence that is reasonable, credible and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We must " ' "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' [Citation.]" (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) "[I]t is not within our province to reweigh the evidence or redetermine issues of credibility. [Citation.]" (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412.) '[A]ll conflicts in the evidence . . . must be resolved in favor of the judgment. [Citations.]" (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329.)

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[2] The second argument is based on *Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508]. There, the Supreme Court held "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (***Id***., 421 U.S. at p. 704.) In appropriate circumstances, a heat-of-passion homicide will be reduced to voluntary manslaughter. (*People v. Moye* (2009) 47 Cal.4th 537, 561-562.)

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

"In the context of first degree murder, ' "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." [Citation.]' [Citation.] 'The 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 . . . ." [Citations.]' [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

A case on point is *People v. Lewis* (2009) 46 Cal.4th 1255. There, "[t]he manner in which [the victim] was killed supported a finding of deliberation and premeditation, because [she] had been strangled to the point of unconsciousness and was not breathing vigorously *before* her throat was cut . . . . Moreover, even if the initial strangulation was spontaneous, the additional act of slashing her throat 'is indicative of a reasoned decision to kill.' [Citation.]" (***Id***., at p. 1293.) Here, appellant strangled Ramirez to the point of unconsciousness. He stopped when he concluded that his attempt to kill her by strangulation was not succeeding. Appellant got a knife from a drawer and cut Ramirez's throat. This wound was "completely, independently fatal." As in *Lewis*, "even if the initial strangulation was spontaneous, the additional act of slashing her throat 'is indicative of a reasoned decision to kill.' " (***Ibid***.; see also *People v. Horning* (2004) 34 Cal.4th 871, 902-903 ["The manner of killing . . . shows a calculated design to ensure death rather than an unconsidered explosion of violence"].) "Thus, a rational trier of fact could have been persuaded beyond a reasonable doubt that the killing was willful, deliberate, and premeditated. [Citation.]" (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1293.)

Since the People proved the elements of deliberation and premeditation, we reject appellant's contention that "the prosecution failed to meet its burden of proving beyond a

reasonable doubt that the killing was *not* committed in a heat of passion or upon a sudden quarrel." Furthermore, the heat of passion theory did not apply here because there was no evidence of adequate provocation. " 'Heat of passion' will reduce murder to voluntary manslaughter only if there is adequate provocation. The victim's conduct 'must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]' [Citation.]" (*People v. Moye*, *supra*, 47 Cal.4th at pp. 561-562.)

In any event, the evidence is sufficient to support the first degree murder conviction under a felony-murder theory. (§ 189.) The jury could have reasonably concluded that appellant killed Ramirez in the perpetration of the felony offense of sexual penetration by a foreign object. (§ 289, subd. (a)(1)(A).) While Ramirez was still alive, appellant removed her clothes below the waist and stabbed her with a knife in the rectum. " 'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (***Id.***, subd. (k)(1).)

Hearsay Evidence

Appellant argues that the trial court erroneously admitted Ramirez's statements about her relationship with appellant. At trial, defense counsel objected that Ramirez's statements were inadmissible hearsay. Hearsay is evidence of an extrajudicial statement "offered to prove the truth of the matter stated." (Evid.Code, § 1200, subd. (a).) Ramirez told Rafael Ramirez, her brother, that "she had ended the relationship with [appellant], and that she didn't want anything to do with him." She told Alma Lopez that "she did not want to be with [appellant] anymore," and "that on many occasions she [had asked] him to move out of the house, [but] he didn't want to." Ramirez told Mirna Roque that she had "broken the relationship" with appellant and "had to push him" out of her apartment. "[S]he didn't want to see him anymore." When Ramirez was living with appellant, she told Roque that she was scared of him. After the breakup, Roque heard Ramirez

speaking to appellant over the telephone. Ramirez told appellant "to stop calling her, it was over." Ramirez said, "Please leave me alone."[3]

The prosecutor argued that Ramirez's hearsay statements were admissible under the state-of-mind exception to the hearsay rule. (Evid. Code, § 1250, hereafter "section 1250.") Section 1250, subdivision (a) provides: "[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." Section 1250, subdivision (b) "does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

The prosecutor argued that Ramirez's state of mind was relevant "to show that she would not have . . . consented to any sexual activities with the defendant on the night in question." Her statements showed that she "was indeed done with [appellant] as far as any kind of romantic relationship." Based on the statements, it is reasonable to infer that Ramirez "would not have taken her pants and underwear off willingly in an encounter with [appellant]. That she would not be meeting with [him] for some kind of romantic liaison." "[Ramirez] had a knife wound to her rectum . . . , and based on those facts it is extremely relevant that [she] indeed would not have consented to any kind of sexual relationship with [appellant]."

Defense counsel protested, "[T]here is no evidence that they had any sexual relationship at all [on the date that Ramirez was killed]." Counsel argued that Ramirez's state of mind was not relevant evidence.

The trial court admitted Ramirez's statements pursuant to section 1250. We review its ruling for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067,

[3] Ramirez's statements to appellant over the telephone were clearly not hearsay since they were not offered to prove the truth of any matter asserted.

1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (***Ibid***.)

The prosecutor was wrong in arguing that Ramirez's statements were admissible "to show that she would not have . . . consented to any sexual activities with the defendant on the night in question." Consent was not an issue. There was no evidence that Ramirez had voluntarily removed her clothing below the waist or had voluntarily engaged in sexual relations with appellant. Appellant told the police that he had removed Ramirez's clothing but had not had sex with her.

Nevertheless, Ramirez's statements were admissible to refute appellant's statement to the police that she had voluntarily spent several hours drinking with him at her apartment on the day she was killed. Ramirez's statements made clear that she wanted no further contact with appellant. Her statements were also admissible to show that appellant had a motive to kill her because she had terminated their relationship and wanted to cut off all contact with him. "[T]he People 'were entitled to present evidence tending to establish motive. Without persuasive evidence . . . regarding motive, the jurors might believe there was nothing in the relationship . . . which would precipitate a murder.' [Citation.]" (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 888-889; see also *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 594 [state-of-mind evidence admissible because it "explained how [the victim] was feeling about Simpson, tended to explain her conduct in rebuffing Simpson, and this in turn logically tended to show Simpson's motive to murder her"].)

In any event, even if the trial court had abused its discretion in admitting Ramirez's statements, "it is not reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 837.) "The evidence against [appellant] was overwhelming; he was convicted by the words out of his own mouth." (*United States v. Carbone* (1st Cir. 1986) 798 F.2d 21, 29.)

Stay of Sentence on Prior Prison Term

For appellant's prior prison term enhancement (§ 667.5, subd. (b)), the trial court imposed a one-year prison term and then stayed the sentence. Appellant contends, and the People concede, that this was error. "Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]" (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Remand is unnecessary here. In light of the 25 years to life sentence, we are confident that the trial court would strike the enhancement. We do so ourselves. (Pen. Code,§ 1260.)

Disposition

The stayed sentence on the prior prison term enhancement (§ 667.5, subd. (b)) is vacated and the enhancement is stricken. The judgment, as modified, is affirmed. The trial court shall prepare an amended abstract of judgment and transmit a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Robert J. Higa, Jr., Judge

Superior Court County of Los Angeles

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