

No. S146939

COPY SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LEE SAMUEL CAPERS,

Defendant and Appellant.

San Bernardino County
Case No. FBA-02684

SUPREME COURT
FILED

NOV 06 2014

APPELLANT'S OPENING BRIEF

Frank A. McGuire Clerk

Deputy

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

HONORABLE JOHN M. TOMBERLIN

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
State Bar No. 62784
Supervising Deputy State Public Defender

1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
silten@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)¹ This appeal is taken from a judgment which finally disposes of all of the issues between the parties.

INTRODUCTION

The crimes in this case occurred on or about November 10, 1998. Though the police suspected that they had been committed by appellant, appellant's half-brother, Anthony Leatham (aka "Eagle"), Carlos Loomis (aka "Bam-Bam") and Ruben Romero (aka "Wino"), the police had no physical or eyewitness evidence tying any one of the four suspects to the crimes. The case lay dormant until January 5, 2001, at which time

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

appellant, who had previously told the police on at least five occasions that he was not involved in the crimes, contacted them and gave them the first of a series of statements in which he said that he had participated in the crimes with Bam-Bam, Wino, and a third person, a “youngster,” whose name he did not know.

Based on his statements to the police, appellant was charged with and ultimately convicted of the murders of Nathaniel and Consuelo Young. None of the other suspects were ever charged, presumably because appellant’s statements against them were unreliable and could not be independently corroborated, as required by law. (Pen. Code, § 1111.)

The arguments raised herein concern the reliability and trustworthiness of appellant’s uncorroborated statements to the police and Lisa and Martin Blake, and the extent of his involvement, if any, in the charged crimes.

Specifically, appellant argues that the judgment must be reversed because the evidence against him rests on his uncorroborated statements to the police and the Martins, statements which he demonstrates are untrustworthy and unreliable.

At trial, defense counsel also sought to prove through one Amber Renteria that the robbery and burning of the victims was committed by Loomis and Romero. Renteria had told the police early on in their investigation that she had overheard Loomis say that he and Romero had robbed and burned down a store on Main Street. Renteria later recanted what she told the police about Loomis and Romero and, when called as a defense witness at trial, claimed the “Fifth” on the ground that she faced unspecified possible accessory liability under Penal Code section 32. However, as shown by the record, she faced no possible liability as an

accessory because the applicable three-year statute of limitations had run at the time she was called as a witness. Though she had recanted her earlier statements implicating Loomis and Romero, defense counsel was hopeful that she would repeat her earlier statements implicating them if she was forced to take the witness stand and to testify under oath. Appellant argues that the erroneous ruling with respect to Renteria's claimed Fifth Amendment privilege requires, at the very least, reversal of the death sentence.

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STATEMENT OF THE CASE

On March 19, 2004, an amended information was filed in the San Bernardino County Superior Court charging appellant with Count 1, a violation of section 187 (first degree murder of Nathaniel Young); Count 2, a violation of section 187 (first degree murder of Consuelo Young); Counts 3 and 4, violations of section 211 (second degree robbery of Consuelo Young and Nathaniel Young, respectively); Count 5, a violation of section 451, subdivision (a) (arson causing great bodily injury to Consuelo Young); Count 6, a violation of section 12021, subdivision (a)(1) (possession of a firearm by a felon); and Count 7, a violation of section 4502, subdivision (a) (possession of a weapon in a penal institution). The information further alleged the following special circumstances as to Counts 1 and 2: multiple murder (§ 190.2, subd. (a)(3)); that appellant committed the murders while engaged in the commission of robbery (§ 190.2, subd. (a)(17)(A)); kidnapping (§ 190.2, subd. (a)(17)(B)); and burglary (§ 190.2, subd. (a)(17)(G)). As to Counts 1, 3 and 4, it was alleged that appellant personally used a deadly weapon, to wit, a handgun, within the meaning of section 12022.53, subd. (b). As to Counts 3, 4 and 5, it was alleged that they were serious felonies within the meaning of section 1192.7, subd. (c), and violent felonies within the meaning of section 667.5, subdivision (c). As to Count 7, the information alleged 10 prior felony convictions. (2CT 384-390.)²

On March 19, 2004, appellant pleaded not guilty and not guilty by reason of insanity to the charges and denied all of the additional allegations. (2CT 392.)

² “CT” refers to the clerk’s transcript on appeal; and “RT” refers to the reporter’s transcript on appeal.

On October 15, 2004, appellant's counsel indicated to the court that appellant requested "the opportunity" to withdraw his plea of not guilty by reason of insanity, and the trial court granted appellant's request based on defense counsel's representation. (2CT 406; 2RT 137.) On December 3, 2004, at the request of the prosecution, appellant personally withdrew his plea of not guilty by reason of insanity. (2CT 408.)

On January 10, 2006, appellant's motion to represent himself was filed. (2CT 450-453.) He withdrew the motion in open court on February 2, 2006. (2CT 455.)

On April 25, 2006, appellant's case came on for trial. (3CT 502.)

On May 1, 2006, jury selection began. (3CT 511.) Also on May 1, 2006, appellant's motion to bifurcate the priors was granted. (3CT 512.) Jury selection was completed on May 15, 2006. (31CT 8875-8876.)

On May 17, 2006, the prosecution began presenting its case. (31CT 8877.)

On June 1, 2006, the prosecution rested. The defense rested "on the state of the evidence." (31CT 8904; 8RT 1790.) The judge dismissed Count 6 under upon the prosecution's motion under section 1385. Appellant's section 1118.1 motion for a judgment of acquittal as to Count 5, a violation of section 451, subdivision (a) (arson causing great bodily injury), was heard and the court reserved ruling on the motion. (31CT 8909.)

On June 5, 2006, the court granted appellant's section 1118.1 motion by amending the information to allege a violation of section 451, subdivision (d) (arson of property). (31CT 8934.) The prosecution filed a second amended information. Appellant was re-arraigned on the amended information and pleaded not guilty to all counts and denied all of the

additional allegations. (*Ibid.*) The prosecution's motion to strike the kidnapping special circumstance allegations alleged in Counts 1 and 2 was granted. (31CT 8935.)

On June 7, 2006, the jury began its deliberations. (31CT 8941.)

On June 12, 2006, the jury found appellant guilty of Count 1, a violation of section 187 (first degree murder of Nathaniel Young); Count 2, a violation of section 187 (first degree murder of Consuelo Young); Counts 3 and 4, violations of section 211 (second degree robbery of Consuelo Young and Nathaniel Young, respectively); Count 5, a violation of section 451, subdivision (d) (arson of property); and Count 6, a violation of section 4502, subdivision (a) (possession of a weapon in a penal institution). The jury found the multiple murder (§ 190.2, subd. (a)(3)), robbery (§ 190.2, subd. (a)(17)), and burglary (§ 190.2, subd. (a)(17)(G)) special circumstance allegations to be true. As to Counts 1, 3 and 4, the jury found that appellant personally used a deadly weapon, to wit, a handgun, within the meaning of section 12022.53, subdivision (b). (31CT 8978-8991.)

On June 14, 2006, appellant was tried on the priors by the trial court. The court found appellant's five prior section 211 (robbery) convictions to be true, and his five prior section 422 convictions (criminal threats) to be not true. (31CT 9019.)

On June 26, 2006, the penalty phase commenced. The prosecution called several witnesses and rested. (31CT 9030-9031.)

On June 28, 2006, appellant presented the testimony of only one witness, who testified for about four minutes, and rested. (31CT 9033.)

On June 29, 2006, the jury began its penalty phase deliberations. (31CT 9039.) On that same date, the jury returned a verdict of death. (31CT 9040.)

On September 22, 2006, appellant's case came on for sentencing. The court denied the automatic motion to modify the verdict to life without the possibility of parole (§ 190.4, subd. (e)). (32CT 9119.) The court sentenced appellant to death on Counts 1 and 2, violations of section 187 (first degree murder) with special circumstances (multiple murder, robbery and burglary). As to Count 6, a violation of section 4502, subdivision (a) (possession of a weapon in a penal institution), the court imposed the indeterminate sentence of 25 years to life pursuant to the provisions of section 1170.12. As to Count 3, a violation of section 211 (robbery), the court imposed the upper term of five years plus an additional 10 years for use of a firearm (§ 12022.53). As to Count 4, also a violation of section 211, the court imposed one-third of the middle term (one year) plus an additional 25 years to life for use of a firearm (§ 12022.53). As to Count 5, a violation of section 451, subdivision (d) (arson of property), the court imposed a sentence of eight months, one-third the middle term. The court stayed the sentences on Counts 3, 4 and 5 pursuant to section 654. The court imposed restitution fines in the amounts of \$10,000 and \$1994.24. (32CT 9120-9121, 9141-9146.)

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STATEMENT OF FACTS

A. The Guilt Phase

1. The Homicides

On November 9, 1998, Margaret Carter, the comptroller at the Marine Logistics Base in Barstow, became concerned when Nathaniel Young did not show up for work as scheduled because it was unlike him not to do so. Because she knew he had a brother in Hawaii and had also mentioned something about taking a trip to Arizona, she did not do anything about Nathaniel's absence. (5RT 1045-1048.)

When Nathaniel did not show up for work the following day, Carter called Nathaniel's home and left a message on his answering machine. She went to a meeting at work and asked the head of one of the branches what to do. He suggested that she call the police and request that they perform a welfare check, so when Carter got back to her office, she called the Barstow Police Department and requested they perform a welfare check on Nathaniel. (5RT 1048-1049.)

At that point, Carter received a call from two of her co-workers, Loretta Becknall and Nancy Derryberry, who had gone to the business owned by Nathaniel, T's Galore 'N More, and were concerned because there appeared to have been a fire in the shop. Carter told the women to return to the base, and she spoke with them about what they had observed at the shop. Carter called the Barstow Police Department again. She then called the provost marshal's office on base and spoke to an employee named Bonnie Hulse, who was an investigative assistant for the Criminal Investigation Division of the Marine Corps, and reported that she had a missing employee and had requested a welfare check from the police but

was told she needed to notify the provost marshal, who has jurisdiction on a military base. (5RT 1049-1052.)

Loretta Becknall and Nancy Derryberry went to T's Galore 'N More on November 10, 1998, between 9:00 and 10:00 a.m. Becknall was concerned because Nathaniel had not come into work and no one was able to get in touch with him. Becknall and Derryberry looked into the windows at the shop but could not see inside because of dark smoke and soot. They considered going around to the back of the business but decided against it. Instead, they returned to the base and reported what they had observed to Carter. (5RT 1055-1058.)

Bonnie Hulse testified that on November 10, she received a call from Carter, who reported that two of her co-workers had driven past Nathaniel's store and reported that it appeared as though there had been a fire. Carter wanted to file a missing person's report. Hulse checked with military investigators, who told her that they could only take a report for military personnel and their families. Hulse called the Barstow Police Department, and was referred to the Sheriff's Department. She called the Sheriff's Department, who told her to call the police since Nathaniel lived in Barstow. She called the Barstow Fire Department and reported a fire at a business but was told there had been no report of a fire at the shop's location. She had a feeling that the bodies of Nathaniel and his wife would be found inside the shop, because if his wife had not called in for Nathaniel, Hulse suspected they were together. After making her calls, she heard on her scanner that two bodies had been found. (5RT 1060-1062.)

Salvatore Carrao, the Barstow Fire Department division chief, and fire engineer Steve Ross went to T's Galore 'N More on November 10, 1998. There they observed a large quantity of black soot that had started to

cool and run down the windows. (5RT 1064-1065.) They checked the front door, but it did not open. They went around back to look for evidence of entry or fire, and were able to push open the closed, but unlocked, back door. (5RT 1065-1066.) As Carrao opened the door, he was able to smell that there had been a fire and he observed a body. He saw no signs of an active fire, and after looking around some more, he observed another body. He radioed for law enforcement and his supervisor. (5RT 1067.)

Carrao told Ross there were dead people inside, and Ross opened the door. He observed no fire damage to the building, just smoke. As he entered the store, his foot slipped on a greasy substance, so he decided not to go any further. (5RT 1067-1068.) Carrao and Ross made sure no one else entered the building until the police arrived, about 10 minutes later. (5RT 1071.)

Barstow Police Department Sergeant Andrew Espinoza responded to the scene at T's Galore 'N More at 11:52 a.m. on November 10. Other officers were already on the scene, and there was yellow crime scene tape as well. (5RT 1087-1090.) Espinoza was briefed by other officers, and crossed the crime scene tape to get to the back of the business. (5RT 1091-1092.) He examined the back door but found no signs of a forced entry. He did not enter the business, but rather peered inside and saw work tables, chairs and papers. He also saw two bodies, one was that of a man laying face down, whose body had been burned, and the other was a clump of ashes, soot and bone fragments. (5RT 1094-1096.) Two golf clubs were propped up on the man's body. (5RT 1099.)

Espinoza was assigned to protect the scene and assist the forensic specialist in conducting the crime scene investigation. (5RT 1101-1102.) The police had an evidence technician there. The Sheriff's Department was

also called to assist with processing the scene. The police technician, Diane Sluder, was new to the job and the scene was complicated. (5RT 1102-1103.) Espinoza briefed Sluder, and directed her to take photographs of the entire exterior of the business. She also took a few photographs of the interior from the vantage point of the back door. (5RT 1103-1104.) While Sluder was taking photographs, Espinoza searched the exterior area around the back parking lot and building itself for evidence. There were some flattened cardboard boxes with tire tread marks in the parking lot that were later collected as evidence. (5RT 1105.)

A locksmith unlocked the front door around 2:30 p.m., and Espinoza and criminalist Randy Beasley entered the building. (5RT 1106-1107.) The store's interior consisted of a display area with t-shirts on one side and a work area with desks and computers on the other. The building was divided in half with a false interior wall running from east to west. (5RT 1107-1108.) There was a display counter that held a cash register. The work area looked like a business office, with a draftsman type table. There was a storage room with doors that were bolted and secured with a metal bar. There was a bathroom off the storage room. (5RT 1111-1112.) Beasley found a wallet next to a purse that belonged to Consuelo. There was a wallet inside the purse but there was no money. The wallet found next to the purse belonged to Nathaniel. There was no money in his wallet, and credit cards appeared to be missing. (5RT 1127-1129.) Beasley also found five .45 caliber bullets and one bullet casing. (5RT 1134-1135.) Beasley observed a trash can containing blood, water and a bloody mop. He opined that someone tried to clean up the blood, but did not do a very good job. (5RT 1139.) Beasley saw a pair of women's panties that had been found in