SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

DANIEL SANCHEZ COVARRUBIAS,

Defendant and Appellant.

_____/

Case No. S075136
(Monterey Superior Court
No. SC942212(C))

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF MONTEREY

HONORABLE ROBERT MOODY, JUDGE, PRESIDING

APPELLANT'S THIRD SUPPLEMENTAL BRIEF

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Court of California

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE SHOULD BE REVERSED BECAUSE THE INSTRUCTIONS DID NOT REQUIRE THE JURY TO FIND THAT APPELLANT ACTUALLY KILLED OR INTENDED TO KILL

A. Before Returning A Multiple Murder Special Circumstance The Jury Must Find An Accomplice Was An Actual Killer Or Intended To Kill

The prosecutor relied on several theories of vicarious liability in alleging that appellant was guilty of first degree murder. (See AOB, pp. 1-5.) Even though the prosecutor also relied on a personal perpetrator theory of first degree murder (i.e., that appellant formed a premeditated and deliberate intent to kill) it is more likely that the jury relied on vicarious liability since they returned felony murder special circumstance verdicts (4 CT 968, 972, 975) and they failed to agree that appellant was guilty of conspiracy to commit murder. (4 CT 997; 56 RT 11046.)

Accordingly, the failure of the judge to instruct that the multiple murder special circumstance could not be found without finding that appellant was the actual killer or intended to kill[1] warrants reversal of the multiple murder special circumstance.

B. The Instructions Erroneously Permitted The Jurors To Return A Multiple Murder Special Circumstance Based On Reckless Disregard Of Human Life

The jurors were instructed that any special circumstance -- including multiple murder -- could not be found unless:

> ...you are satisfied beyond a reasonable doubt that such defendant [1] ***with the intent to kill*** aided, abetted, and counseled, commanded, induced, solicited, requested, or assisted any act during the commission of the murder in the first degree, ***or*** [2] ***with reckless indifference to human life and as a major participant*** aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of burglary or robbery which resulted in the death of a human.... [Emphasis and bracketed numbers added.] (53 RT 10457; 6 CT 1293.)[2]

As a result, the jurors were permitted to return the multiple murder special

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[1]Penal Code Section 190.2(c) provides as follows:

Every person, not the actual killer, who, **with the intent to kill,** aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4. [Emphasis added.]

[2] Nor did the specific definition of the multiple murder special circumstance require a jury finding that appellant was an actual killer or intended to kill. Per CALJIC 8.81.3 the judge instructed as follows:

"To find the special circumstance referred to in these instructions as multiple murder convictions, is true, it must be proved: The defendant has in this case been convicted of at least one crime of murder of the first degree and one or more crimes of the first degree or second degree." (6 CT 1295.)

circumstance without finding that appellant actually killed or intended to kill a human being.[3]

By giving this instruction the judge violated his obligation to instruct the jurors that they must find appellant actually killed a human being or intended to kill before returning the multiple murder special circumstance. (Penal Code Section 190.2(c); cf., CALCRIM No. 702.) Thus the judge failed to instruct on an essential element of a death eligibility special circumstance charge which violated the Due Process and Trial By Jury Clauses of the California Constitution (Article I, section 15) and the federal constitution. (6th and 14th Amendments; see also, *Ring v. Arizona* (2002) 536 U.S. 584.)

C. The Error Warrants Reversal Of The Multiple Murder Special Circumstance

1. Standard Of Prejudice: Could A Rational Juror Have Found That The Omitted Element Was Not Proved

Neder v. U.S. (1999) 527 U.S. 1 reviewing courts to "conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error--for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding--it should not find the error harmless." (*Neder, supra*, 527 U.S. at p. 19; see also *People v. Mil* (2012) 53 Cal.4th 400, 417.) In other words, the appellate court in assessing prejudice, must determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Ibid.*)

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[3]See e.g., 52 RT 10251 [DA tells jury that if appellant was not an actual killer then the multiple murder special circumstance requires a finding of "intent to kill **or** ... reckless indifference...."].

2. The Record Contains Substantial Evidence Upon Which A Rational Juror Could Have Found That Appellant Was Not An Actual Killer And Did Not Intend To Kill

There was substantial evidence upon which a rational juror could have concluded that appellant was not an actual killer and did not intend to kill. A rational juror could have simply disbelieved the accomplice testimony that appellant stated he intended to kill, doubted that appellant intended to kill due to his intoxication, and/or doubted that appellant was the type of person who would knowingly buy into a plan to steal from and murder an entire family. The jury heard no evidence that appellant was a violent person or otherwise predisposed to committing violent crimes. By all accounts appellant was a "nice" person who got along with everyone. (See e.g., 44 RT 8711-14.) When intoxicated, appellant was [4]"very happy, a dancer." (43 RT 8429; 8447.) Nor was he involved in selling or distributing drugs. (41 RT 8063.)

Moreover, the ability of a hypothetical rational juror to find that appellant neither actually killed nor intended to kill is demonstrated by the fact that the jurors who actually heard the evidence failed to find three special allegations all of which were predicated on the prosecutor's theory that appellant acted with violent intent.[5]

In sum, there is no assurance in the record that the jurors unanimously found either that appellant was an actual killer or that he acted with intent to kill. The jury

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[4] As to all Counts, the jurors unanimously found the use of a knife allegation untrue (4 CT 969-70; 973-74; 977-78; 981; 983; 985; 988; 991; 994). The jurors could not agree on a verdict as to the special allegation that appellant used a firearm. (56 RT 11019; 11021; 11026; 11032; 11036; 11047-48; 4 CT 970; 974; 978; 981; 983; 985-86; 988-89; 991-92; 994-95.) Furthermore, the jurors did not reach a verdict on the conspiracy to commit murder allegation. (4 CT 997; 56 RT 11046.)

[5] The numerical breakdown was 11 to 1 as to the use of a firearm allegation in Counts 1 and 2. (56 RT 11022; 11047-48.)

was able to return all of its verdicts based on theories of vicarious liability which did not require a finding that appellant personally shot the victims or intended to kill. (See AOB, pp. 172-78.) Moreover, the special verdicts that the jurors failed to return regarding conspiracy to commit murder and personal use of a firearm suggest that they did not unanimously agree on either the actual killer or intent to kill theories of guilt. Under these circumstances a rational juror could have concluded that appellant did not actually kill and did not intend to kill.

Accordingly the error warrants reversal.

CONCLUSION

For the foregoing reasons, as well as those set forth in the earlier briefing, the judgment should be reversed.

Dated: May 16, 2016

_____

Thomas Lundy
Attorney for Appellant
Daniel Sanchez Covarrubias

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.630(b)(2), I certify that the attached Appellant's Reply Brief uses 13 point Times New Roman font and contains 1320 p words in *WordPerfect* computerized format.

Dated: May 16, 2016

Thomas Lundy
Attorney for Appellant
Daniel Sanchez Covarrubias

PROOF OF SERVICE

I DECLARE THAT:

I am a resident of Sonoma County and employed in the County of Sonoma, State of California. I am over the age of eighteen and not a party to the within action. My business address is: 2777 Yulupa Avenue, PMB 179, Santa Rosa, CA 95405. On May 16, 2016, I served **APPELLANT'S THIRD SUPPLEMENTAL BRIEF** in People v. Covarrubias **Case No. S075136** on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon, fully prepaid, in the United States mail, at Santa Rosa, California, addressed as follows:

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and executed on May 16, 2016, at Santa Rosa, California.

_____
Thomas Lundy